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[FORTHCOMING: International Studies Review]

Borders Rules

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Abstract:

International political borders have historically performed one overriding function: the delimitation of a state's territorial jurisdiction, but today they are sites of intense security scrutiny and law enforcement. Traditionally they were created to secure peace through territorial independence of political units. Today borders face new pressures from heightened human mobility, economic interdependence (legal and illicit), and perceived challenges from a host of nonstate threats. Research has only begun to reveal what some of these changes mean for the governance of interstate borders. The problems surrounding international borders today go well-beyond traditional delineation and delimitation. These problems call for active forms of governance to manage human mobility and interdependence. However, human rights norms sometimes rest uneasily alongside unilateral border governance. A research agenda which documents and explains new border developments, and critically assesses emerging rules and practices in light of international human rights, is an essential direction for international studies research.

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Borders Rules

International borders are one of the central institutions defining states and organizing international politics. They are traditionally at the core of interstate relations and security. They are also and increasingly central to domestic politics and exposed to a range of challenges by non-state actors. And yet, far too little systematic research has investigated the causes and consequences of new challenges to interstate borders. International relations scholars often continue to center on interstate border conflicts. International legal scholars are sensitive to issues of border governance, but their research tends to fall into specific issues, such as migration law, refugee law, and national security law. I argue that international borders must be understood much more holistically, as not only sites where national jurisdictions are delimited, but also as spaces requiring and eliciting a range of governance institutions. Moreover, much more research is needed to understand the conditions that have rendered interstate borders such a sensitive political and security issue, and to respond to these conditions appropriately.

This essay is motivated by a suspicion that the tools and information academic researchers bring to the study of interstate borders needs updating and integrating across disciplines it is also motivated by a suspicion that the world has changed in some important ways that ought to be made explicit in addressing border issues. As a broad review of developments, the goal is to provide some background to “traditional” conceptions of international borders in law and politics, and then to suggest empirical developments that should cause us to rethink some of our assumptions about border governance. This is especially true when borders have become increasingly salient and political pressures appear to be pushing toward their securitization. Broadly, my goal is to encourage a move away from understanding borders exclusively as jurisdictional divisions and toward a view of borders as institutions of governance.

When we do so, it becomes clearer that pressures for border security do not always sit easily alongside other values that have been central to the post war order. Universal human rights is a potential example. It is not impossible to have both, but this requires a clear sense of the stakes, the nature of political demands, and the constraints – and silences – of international human rights law.

Almost everyone reading this essay will be familiar with part of its contents. But it is important to take a broad view of global change, border salience, current day management strategies and normative tensions in border rules in order to suggest innovative and policy relevant research agendas. Historically, international law and politics have centered on border delimitation and territorial jurisdiction. Borders have often been dismissed as peripheral spaces. However, in 2016, almost 25 percent of the world's population – some 1.87 billion human beings – live within 100 kilometers of an international land border.¹ Globalization has converted many border zones into crucial conduits of trade and contact;² it has also raised the salience of some as regions of social conflict. As Herzog (2014:392) describes them, “Frontier regions were no longer isolated and unproductive spaces at the margins of national life; they now had vital functions in a globalising world.” We need to think afresh about how borders are, and ought to be, governed. To do so, we also need to understand much more than we currently do about how the world has evolved and how political demands for security have pushed an agenda of heightened border vigilance.

¹ Calculated using the Landscan database. Approximate 99 million (1.32%) live within 5 kms, 200 million (2.7%) within 10 kms, and more than 600 million (8.05%) live within 30 kms of an international land border. These figures all exclude coastlines.

² Preliminary research on the number of border crossings (where major roads cross an international border) using 1995 and 2016 maps indicate a probable tripling of international ports of entry on land in this time-period. Author's database, based on the intersection of international borders and major highways (Simmons 2017).

Part I begins with a brief historical review of the role that international borders have played in state consolidation and interstate coordination, and the international rules upon which legitimate borders have long been based. These rules have grounded the state system in sovereign territorial jurisdiction. International law supports bordered territoriality in treaty and custom; in multilateral forums and in bilateral relations.

Today's world is quite different from the one in which territorial sovereignty originally developed. Population growth, transportation and mobility, non-state border identities and the rise of illicit markets that have made border security more urgent in many parts of the world. Part II shows that by some measures, international borders have become salient in discussion of international and national security. Sensing new threats, opportunities and responsibilities, most states have established a clear physical presence at their borders and especially their border crossings. Active bordering seems to imply state presence - *being there* in some fashion.

Part III turns to the essay's major theme: how are contemporary borders actually governed? Border rules have exploded in their social purposes and their complexity. I propose three clusters of concerns: determining borders, securing of borders, and filtering at near or beyond borders.³ There is no one source for these rules; they must be inferred from multiple institutions and state (and sub-state, occasionally even non-state) practice.

Today, border governance encounters heightened normative complexity as well, a theme taken up in Part IV. Before the late Twentieth Century, border governance was scarcely cognizant of, much less constrained by human rights norms. This section notes that border security can sometimes clash with respect for universal human rights, and calls for much more

³ There are many other potential state purposes at the border that I set aside in the article that need not involve border crossing, for example regional development, environmental protection, cooperative land management, resource sharing, etc.

research into the conditions under which such clashes become violations. More speculatively, we should consider whether governing the border in today's complex world is a state's unilateral right, pure and simple, or whether there are important moral if not legal obligations on the border as well that can or should constrain border governance practices.

Finally, this essay calls for a dedicated and integrated research agenda on the evolution, politics, and governance of international borders. How have border functions changed over time? What accounts for the growing concern for border security in international forums such as the United Nations, and the growing border presence of states in many parts of the world? Why walls and fences: are they simply a response to growing human mobility or are they deeply and emotionally connected to nationalism and populism? Can borders be governed cooperatively? Where and how has this been possible, and with what consequences? Finally, is it possible to have it all – border security on the one hand and universal human rights on the other? Empirically, have hardened borders led to actual rights violations on the ground? If so, what if anything are national leaders, the international community and rights advocates prepared to do about it? Before venturing answers, researchers must focus attention on understanding borders and boundaries in international, national and local life. This essay contributes to that effort.

I. Traditional Rules: Territoriality, Statehood and International Law

International relations are hard to imagine without state borders, and borders rules are hard to fathom without border agreements. Independent political entities require understandings about where the authority of one ruler ends and that of another begins (Baudet 2012). According to some sources, one of the oldest such agreements was literally set in stone, between the city-

states of Lagash and Umma in Mesopotamia (Nussbaum 1954:1-2). A host of ancient and medieval border agreements were concluded well before the formation of the modern state system.⁴ The Treaties of Westphalia (1648) were largely territorial agreements that nurtured the connection between physical space and political jurisdiction (Osiander 2001). Territorial delineation and nation-statehood were largely co-constitutive processes; and interstate borders defined, reflected and helped to solidify national identities (Atzili and Kadercan 2017).⁵ Modern nation-states depend on territorial control which supplies the essential resources for the consolidation of state power (Wilson and Donnan 1998:9). By the early twentieth century, control of territory became a part of what it meant to be a state.⁶

The history of the acquisition of territory and the creation of political boundaries both reflects and reinforces power relations between and within political entities. Powerful political entities made out very well with rules of territorial acquisition based on conquest and occupation (Hurrell 2003). Powerful elites also exerted and bolstered their power by using clear-cut territorial jurisdictions to consolidate their control over peripheral areas.⁷ Bordering has historically been extraordinarily violent, but at the same time *rule-governed*, “closely defining unit, area, and conditions of impenetrability” (Herz 1957:480). International law established both rules of territorial acquisition and practices of boundary delineation (Hurrell 2003, Sumner 2004, Jennings and Kohen 2017). Maps helped with this project of nation-state consolidation (Baud

⁴ To name a few: Byzantium and Bulgaria (716), the Kingdom of Valencia (1244), France and Aragon (Treaty of Corbeil, 1258), Mecklenburg and Pomerania (Treaty of Stralsund, 1354), Persia and Ottoman Turkey (Treaty of Zuhab, 1639), and the Mughals and Ahom kingdom (Treaty of Asurar Ali, 1639).

⁵ Hein Goemans notes that sentimental territorial attachments have rationalist roots in the provisions of collective goods for specific groups (Goemans 2006).

⁶ Montevideo Convention on the Rights and Duties of States. Entered into force December 26, 1934. Article 1(b): “The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.” Available at: <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf>.

⁷ This point is stressed in the historical research of Baud and Van Schendel (1997). See page 215.

and Van Schendel 1997:215).⁸ They also belied the fact that exclusive territorial jurisdiction was viciously acquired, often with the use of violent forms of conquest and control, blessed by international law at the time.

The traditional international law of borders is nothing if not conservative, in as much as they attempt to preserve what is agreed upon by states and reinforce existing practices. International customs and agreements attempt to reduce uncertainty and instability at least in part by recognizing and reinforcing power relations. Informal rules of territorial settlement in the 19th century relied on conservative balance of power considerations (Kacowicz 1994). Norms of border fixity, based on the idea that imperial administrative boundaries could provide continuity and stability for newly independent nation states, guided boundary making with the retreat of Spain from Latin America, the British in Central Asia, and elsewhere (*uti possedetis*).⁹ *Pacta sunt servanda*, or the principle that agreements should be observed, provided a broad grounding principle for territorial agreements, just as for other treaty agreements. Even contemporary international jurisprudence emphasizes stability, fixity and the role of treaties in dispute settlement (Sumner 2004). Territorial integrity and the inviolability of state borders was written into two of the international “constitutional” documents of the twentieth century, the Covenant of the League of Nations¹⁰ and the United Nations Charter.¹¹ By the mid-twentieth century, it

⁸ Some intriguing experimental data exist to show that territorial maps help to cue people about their homeland and contribute to the willingness to sacrifice to protect it. (Goemans and Leonard 2018).

⁹ A significant literature has developed challenging the idea that administrative boundaries have historically made good international borders between independent states. See for example the Afghan border (Mahmud 2010); See also the more general claim that fixed borders can destabilize weak states (Atzili 2012).

¹⁰ Covenant of the League of Nations, Article 10: “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.” Available at http://avalon.law.yale.edu/20th_century/leagcov.asp. (Accessed 5 August 2018.)

¹¹ Charter of the United Nations, Article 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Available at http://avalon.law.yale.edu/20th_century/unchart.asp. (Accessed 5 August 2018.)

constituted a core norm of international relations (Zacher 2001). Themes of order and stability run through the international law of borders.

These rules have arguably proved “functional,” at least in a loose sense. Territorial disputes pose huge risks of interstate war (Vasquez 2001), but research suggests that clear legal and historical precedents produce stable borders and enhance the prospects for peace (Carter and Goemans 2011, Prorok and Huth 2014, Schultz 2014, Abramson and Carter 2016). Most international boundaries have been settled peacefully, as required by international law.¹² Moreover, settled borders produce joint gains, including peace, increased bilateral trade, and investment (Simmons 2005, Lee and Mitchell 2012, Schultz 2015, Clay and Owsiak 2016).

These conservative rules have helped to settle – or avoid – potential disputes associated with some major global political shifts. The number of independent states doubled over the nineteenth century, exploded with post World War 2 decolonization, and leapt again with the breakdown of the former Soviet Union in the 1990s. Consequently, the number of land borders shared between states proliferated as well (Figure 1). And yet conservative rules based on precedents and treaty agreements seem to have been surprisingly operative. A study of border settlement over the past two centuries suggests that in about two third of the attempts to settle, states generally rely on peaceful negotiations, but about 12% of the time have resorted to the use of force (Owsiak, et al.). By one count, about 90 percent of state borders today are defined by *de jure* international agreements (Owsiak, et al.).

¹² Charter of the United Nations, Article 2(3): “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and, justice, are not endangered.” Available at http://avalon.law.yale.edu/20th_century/unchart.asp. (Accessed 5 August 2018.)

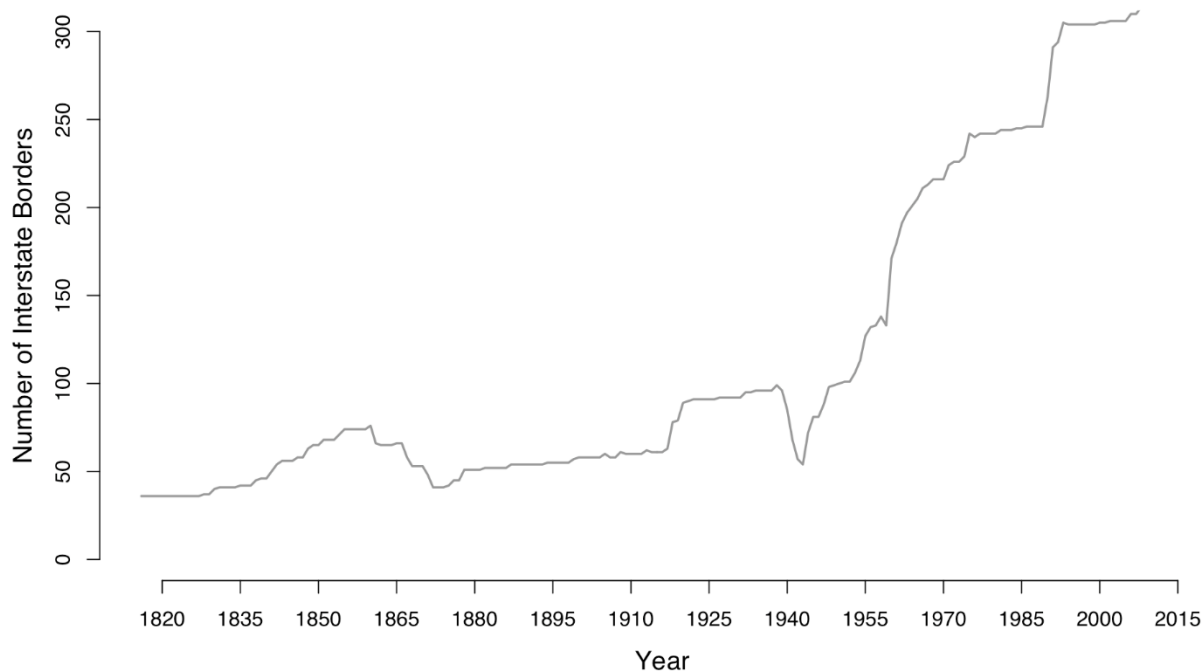


Figure 1: The Proliferation of Interstate Borders, 1815-2015. Total number of interstate land borders in ‘direct contiguity,’ generated from the Correlates of War Dataset. Available at <http://www.correlatesofwar.org/data-sets>.

Yet, from the perspective of modern security concerns, not all seems calm at international borders around the world (Schultz 2015). A look at the business of the world’s principle security directorate provides evidence that suggests a growing concern with international borders, with a sharp upward trend beginning in 2010 (Figure 2). This trend does not correspond with any new imperial shifts, major wars or new states. If so many of the world’s border disputes have been peacefully solved – if the state system was so stable – why have international borders skyrocketed as an international security concern?

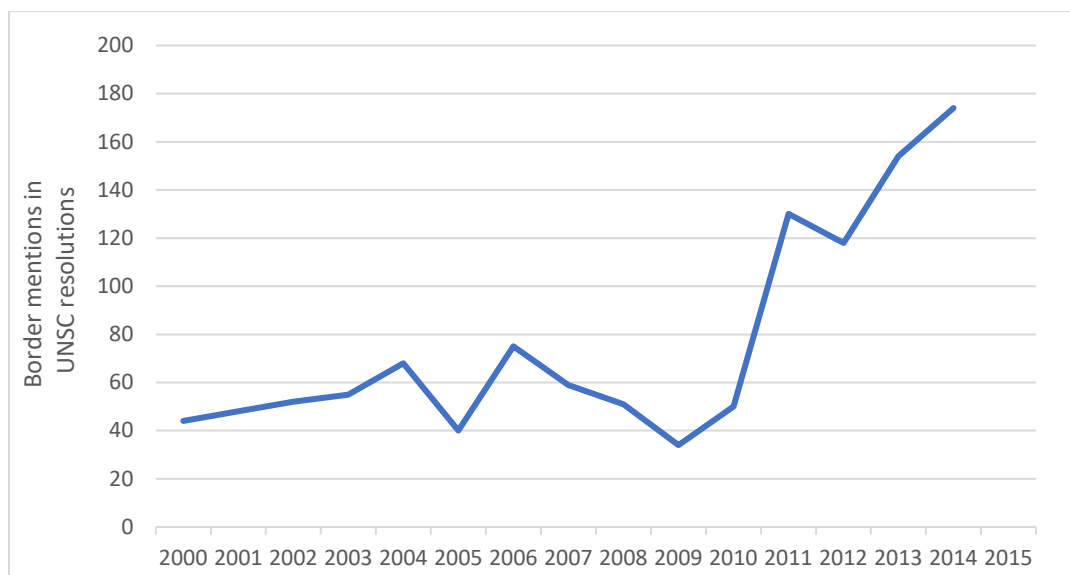


Figure 2: International Borders as Security Concerns. Number of mentions of the word stem “border-“ in the decisions and resolutions of the Security Council, by fiscal years, 2000/2001-2014/2015. Years 2001/2002 and 2002/2003 are estimated because the document are not searchable. No documents are searchable prior to 2000. Original documents are located at <http://www.un.org/en/sc/documents/volumes/>. (Accessed 10 July 2018).

This heightened concern in international for a has scarcely been noted by scholars. This is an important opening for theoretical innovation and empirical research. One reason may be that *interstate* settlement alone is typically not the most serious problem; rather, various challenges to state authority increasingly permeate border zones. More research should be done to document the precise nature of such concerns, including the strategic decisions and locations of rebel movements, refugee camps, and transnational organized crime groups. Are such threats on the rise? If so, what has sparked their growing threat? Alternatively, are border zones themselves perceived to be spaces that generate security threats? If empirical research reveals the threats are more perceptual than real, what accounts for a growing sense of insecurity emanating from border zones? The next section explores some contextual changes that may provide clues.

II. Border Control as a Growing International Concern

One possibility is that borders have gained salience because more people live and work near them. In the mid-17th century, the *world's* entire population was less than that of today's European Union. Moreover, an analysis of more than 900 world-wide border crossings on land in existence in 1995 shows that *population density* within a 5 km² radius of these entry points has increased dramatically, from about 211.6 persons per square kilometer in 1990 to 275.5 in 2010.¹³

Another related possibility is that border control salience has been heightened by immigration, which in turn contributes to a sense of ontological insecurity (Mitzen 2006). Globally, immigrants – people living in countries other than that of their birth – equal between 3 and 3.25% of the world's population.¹⁴ They account for multiple international crossings, returns and remittances.¹⁵ About 1.3 billion people arrived as international tourists in 2017 (raising possibilities for visa overstays), about triple the number in 1995.¹⁶ 25.4 million people were forced to flee from their countries and living abroad as refugees in 2017; another 3.1 million were official asylum seekers.¹⁷ Some of these internationally mobile human beings are welcome; others are not.

¹³ Calculations based on data from author's database of border crossings and population from Landscan: <https://landscan.ornl.gov/>.

¹⁴ United Nations (UN), http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf. (Accessed 5 August 2018.)

¹⁵ Remittances are sensitive to global economic conditions but while trade and investment were modest at best since 2007, World Bank estimates remittance have probably grown some 30% to almost \$600 billion in inflation adjusted dollars. World Bank (WB), <http://pubdocs.worldbank.org/en/992371492706371662/MigrationandDevelopmentBrief27.pdf>. (Accessed 5 August 2018.)

¹⁶ United Nations World Tourist Organization (UNWTO), <https://www.statista.com/statistics/209349/forecast-number-of-international-tourist-arrivals-worldwide-by-region/>. (Accessed 5 August 2018.)

¹⁷ United Nations High Commissioner for Refugees (UNHCR), <http://www.unhcr.org/en-us/statistics/unherstats/5b27be547/unhcr-global-trends-2017.html>. (Accessed 5 August 2018.)

Borders may be experienced as a source of economic threat as well. Economic globalization has both exposed local producers to unprecedented degrees of competition, but has also whipsawed local fortunes in uncontrollable ways. After decades of global market integration, 2007-2017 was a rare decade in post-World War II history during which voluntary, productive international economic relationships stalled. International trade has hovered around \$15 trillion for the past decade – a degree of stagnation unknown in generations.¹⁸ International investment has never regained its pre-recession global high and in fact slid in 2017 by 23% to \$1.43 trillion.¹⁹ Fear of contracting economic opportunities may both result from and contribute to the impulse to regulate, filter and sometimes even to villainize international trade.

Legal border economies are only the tip of a dynamic iceberg. Illicit activities in and around border regions are significant – and possibly growing – as well. One reason is the trend to ban a growing number of products and services by international legal agreement (Efrat 2012). But a host of local demand and legal changes from gun laws (Dube, et al. 2013) to narcotics enforcement help to explain crime in the border zones. International drug trafficking has long been a problem, but according to the United Nations Office on Drugs and Crime (UNODC), “Both the range of drugs and drug markets are expanding and diversifying as never before....”²⁰ Globalization seems to have contributed to illicit trade, as smugglers see opportunities at international borders to profit from a widening range of smuggled goods.²¹

¹⁸ World Trade Organization (WTO), https://www.wto.org/english/res_e/statis_e/wts2017_e/WTO_Chapter_02_e.pdf (accessed July 6, 2018).

¹⁹ United National Conference on Trade and Development (UNCTAD): http://unctad.org/en/PublicationChapters/wir2018_KeyMessage_en.pdf

²⁰ The United National Office on Drugs and Crime (UNODC), *World Drug Report 2018* (booklet 1). Available at https://www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_1_EXSUM.pdf. (Accessed 16 July 2018.)

²¹ Organization for Economic Cooperation and Development (OECD) *Illicit Trade: Converging Criminal Networks*, 2016. Available at: https://read.oecd-ilibrary.org/governance/charting-illicit-trade_9789264251847-en#page1. (Accessed 17 July 2018.)

Finally, in some parts of the world, border zones have been sites of extraordinary if localized violence – a fact behind the Security Council’s growing border concerns. International border zones can be a resource for rebel movements (Buhaug and Gates 2002, Salehyan 2009) especially when sympathetic ethnic ties directly across the border fuel the rebellion (Gleditsch 2007). Border proximity and, more importantly border *policy* are central to the level of violence experienced in refugee camps in border zones (Lischer 2015). Though borders are not always more violent than other regions – much depends on the reasons for the violence – between 2011 and 2015, about 48% of the violent incidents in civil and interstate conflicts have occurred in a very narrow 100 km band around the world’s international borders (Figure 3).

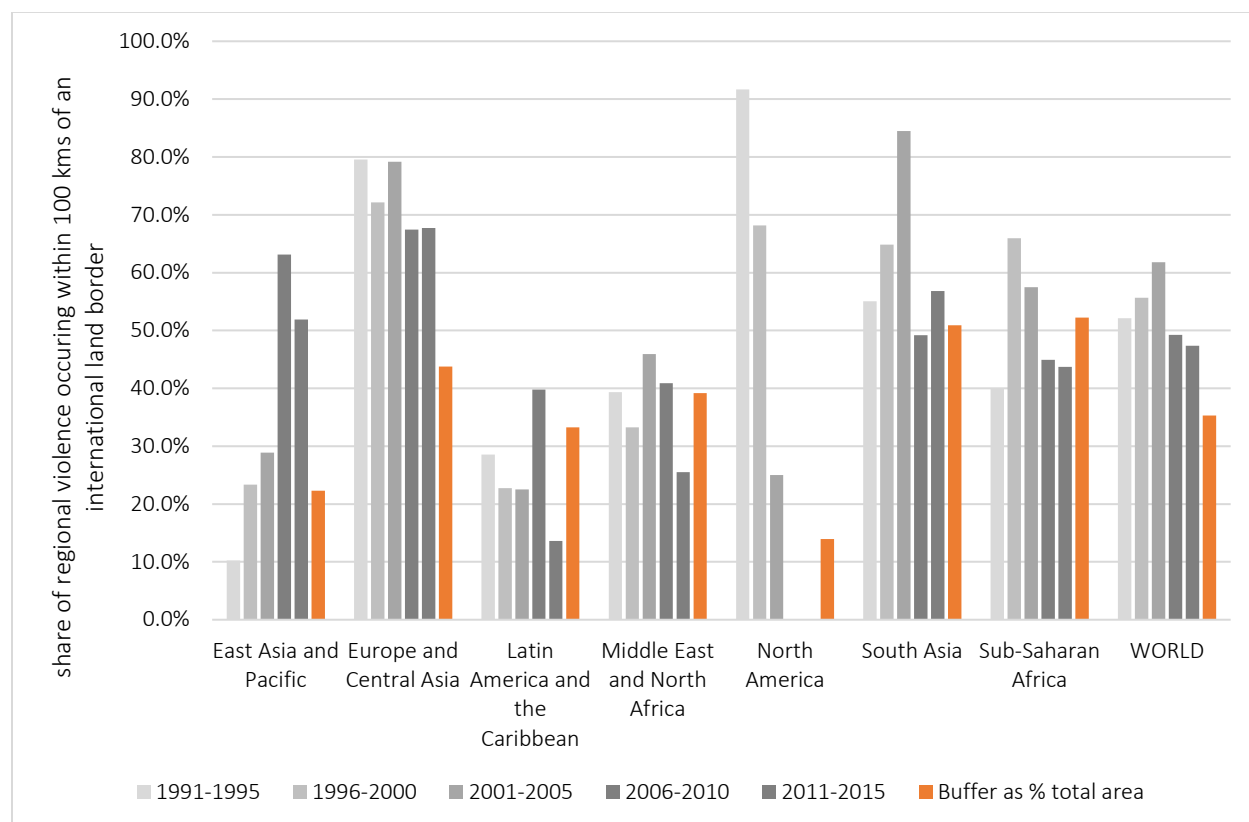


Figure 3: Border zone violence. Share of each region’s violent conflict (civil and interstate) events occurring in with 100 kms of an international border (excluding coastlines). Orang bars indicate the size of the 100km zone compared to each region’s total area. Where the gray bars

exceed the orange bar, border zone conflict by this definition is disproportionate. Conflict data is from the Uppsala Conflict Data Program (<http://ucdp.uu.se/>); Geo-coded data on international borders (without coastlines) is from Natural Earth Data public domain map dataset (<https://www.naturalearthdata.com/>).

In short, international borders are complex living spaces with a host of economic, social and military cross-currents swirling around and flowing across them. Liberalization of borders in some spaces only raised anxieties about border security elsewhere; the most obvious tensions were to be found in the Schengen area, created in 1995, which allowed for free movement within the zone, but securitized the perimeter (Bort 2000). Especially after 9/11, citizens and politicians in wealthy countries began to interpret borders in a new light. Territorial unbundling (Ruggie 1993) now seemed riskier than proper deference to what had earlier been derided as the territorial trap (Agnew 1994). Talk of a borderless world had plateaued by 2000 and started a steep decline after 2004. Concerns about border security have been on the rise since the mid-1990s, as least as reflected in English language library publications (Figure 3).²² Borders as increasingly threatening spaces was gaining salience, rendering borders and their security a growing rather than a receding concern.

²² The temporary bump in references to border security in the late 1970s-1980 is probably due to a confluence of events around the world, including the killing of a US army officer at one of the most sensitive borders in the world (Panmunjom, Korea) in 1977, the Camp David Peace meetings and Accords between Israel and Egypt, the Soviet invasion of Afghanistan, and the Iranian Revolution, all in 1979.

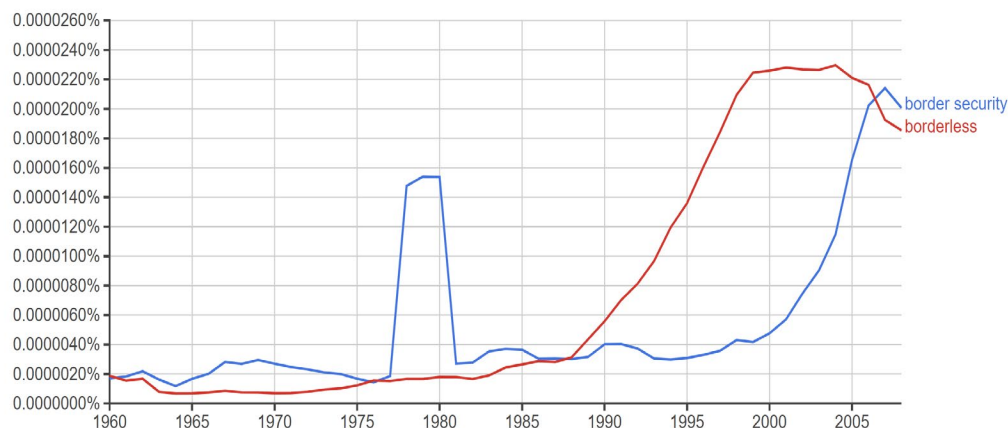


Figure 4: Border Discourse, 1960-2008. Results from Google ngrams, English language, 1960-2009. Available at <https://books.google.com/ngrams>.

These demographic, economic and security trends are little more than a sketch of possible sources of anxiety surrounding international borders. Using a variety of data sources – from public opinion data to text analysis to ethnography – researchers should trace, document and explicate the roots of these anxieties. What sorts of external threats, real and perceived, resonate deeply within a given polity? How do authoritative international bodies such as the United Nations Security Council frame the issues surrounding international borders, and have these changed significantly over time? How have nation states responded to narratives of external threat? Have opportunistic opinion and political leaders used such threats to consolidate xenophobic coalitions under their leadership, or have policymakers developed strategies of reassurance that are reasonably commensurate with documentable risks? How have states attempted to reassert their authority in the face of perceived challenges? Preliminary evidence suggests that many have adopted policies of border hardening, whether functional or symbolic.

Being there: state presence at the border

Many states have doubled-down on their presence at or very near international borders and border crossings in recent years by erecting protective structures at their borders. State-created walls and fences are unmistakably on the rise world-wide. Indeed, they have started to erect walls at an accelerated rate (Carter and Poast 2015, Hassner and Wittenberg 2015, Vallet 2016). Of the 51 boundary fortifications since the end of World War II, around *half* were constructed between 2000 and 2014 (Hassner and Wittenberg 2015).²³

Data collection efforts can scarcely keep up with new border barrier projects around the world. Russia's neighbors have been especially nervous about their borders since the annexation of Crimea in March of 2014. In 2015 Latvia announced it would build a 90km fence along its border with Russia. The Mediterranean and Middle East refugee crisis of 2015 has been a significant stimulus to border wall-building and fencing as well. In 2017 the Lithuanian interior minister announced a fence around Kaliningrad, and a year later, Poland announced it would build one of the longest border fences in the world. Meanwhile on the other side of the world, in 2015-16 an American presidential campaign centered around walling the southern border of the United States, adding to border fortifications that began to take off in 2006.²⁴ The trend has gained momentum elsewhere in the western hemisphere, as Argentina began to develop a series of small fences in 2015 ostensibly to control border crossing traffic, and Ecuador started building a wall with Peru in 2017 aimed at controlling smuggling.

States have a remarkable and growing physical presence at their border *crossings* as well. These are the spaces in which states tend to expend the most effort to *filter*: to implement a mix of policies, structures and symbols that connect and separate, that facilitate and block exit and

²³ There is a significant literature that critiques the effectiveness of borders walls and fences to achieve their aims. (Gulasekaram 2012).

²⁴ Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638 (signed into law on October 26, 2006).

entry selectively. State presence at border crossings are likely to display contradictory impulses: to *connect* and integrate with a neighbor (as represented by a major infrastructural commitment, i.e., the road itself); to *control* this relationship with infrastructure for inspection, law enforcement, immigration control and customs collection; and to *display* sovereign authority of the state through various symbols of state officialdom. Satellite images reveal the built environment on each side of the world's international borders, displaying visual evidence of effort to filter persons, goods and services, and threats at the border crossing.

State presence at border crossings is roughly represented in Figure 5. The map is a spatial representation of data gathered to date on evidence of a physical, semi-permanent state presence at international border crossings: official looking buildings, inspection stations, and evidence of barriers/gates at the road.²⁵ Wealthy states have a much more protective architecture at their border crossings than do poorer states – even more so when they face a relatively poorer neighbor. State presence is prioritized near population areas; remote geography and low demand account for many lightly guarded crossings of the world, from the crest of the Andes in the Southern Cone of Latin America to the Saharan Desert. Institutions and agreements have a significant impact on state presence. As per the Schengen Agreement,²⁶ there is (or at least was, prior to 2015) practically no state presence at border crossings among the parties, but the outer edge of the area from Northern Norway to Eastern Poland to Gibraltar indicate exceptionally strong state presence at the perimeter. While the map cannot capture it, an analysis of each

²⁵ For a detailed description of the data collection process and coding rules, see Simmons 2018.

²⁶ European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement")*, 19 June 1990, available at: <http://www.refworld.org/docid/3ae6b38a20.html> (Accessed 11 July 2018.)

border crossing shows a good deal of structural symmetry on each side. Whether this represents competition, coordination or mere homophily is hard to determine with this evidence.

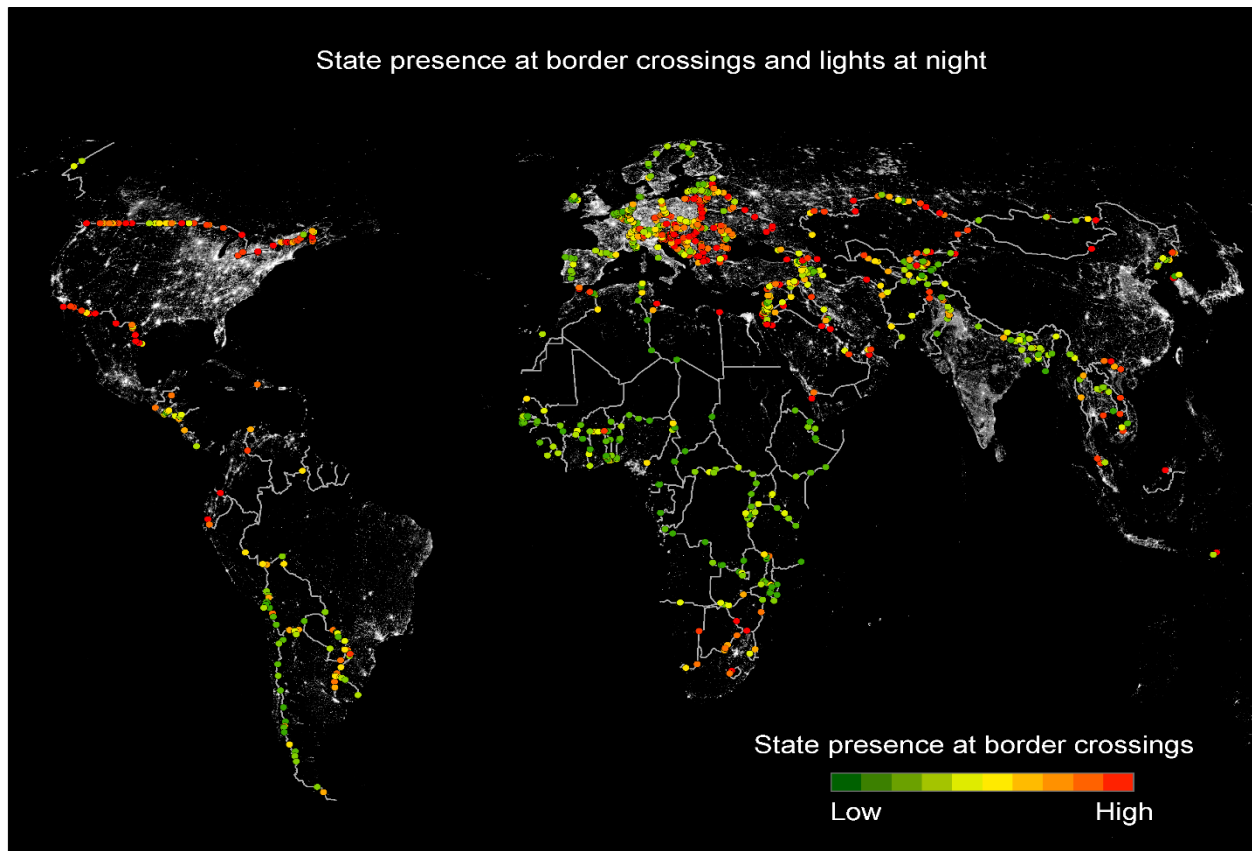


Figure 5: State Presence at International Border Crossings of the World. This map overlays international political borders on a global network of major highways and lights at night. Each circle represents a border crossing. Red circles indicate a high state presence as indicated by official looking buildings, inspection stations, and evidence of barriers/gates at the road. Highways are as of 1997 and images were collected and coded between 2015 and 2018.

Globalization, criminal trafficking, mobility and civil strife point to the sheer complexity of state purposes and responsibilities at the border. On the one hand *connectedness* has been the lifeblood of economic development in most parts of the world. Millions of people world-wide live in border communities. Borders must be efficient places for trade and travel. On the other hand, the perceived risks and dangers emanating from border zones and crossings have proliferated. Border security, broadly understood, requires a state presence at the border, as

neighbors increasingly require rules and routines for making sometimes sensitive decisions about security risks, human vulnerabilities, and international cooperation.

Is border securitization actually on the rise? Aside from the suggestive evidence discussed above, there is practically no systematic global data on the issue. Research should document and trace the networks of international firms that sell sophisticated border security systems, from electronic surveillance to drones; and from biometric devices to border fencing. Similarly, research on epistemic communities of border security agents and decisionmakers should be studied for their understanding of threat and how they diffuse knowledge on “best practices” at the border. Most critically, careful attention should be given to the consequences of highly securitized borders (of which more will be said in section IV below). For example, we should be asking, whether border security has had an impact on local communities, crime patterns, or even spatial trends in human settlement. One possibility among many is that securitized borders reinforce jurisdictional dams. Suggestively, asymmetrical population clustering near border crossings seems to be on the rise: in 1990, the *difference in density* on each side of an 5km radius from international border crossing border was a global average of almost 31 persons/km², while the disparity in population density in 2010 had grown to about 46 persons/km². Exactly what may be causing such disparities is not clear, but it does suggest that barriers of some kind to population movement near international borders are becoming more significant. Investments need to be made in research that assesses both why states are apparently increasingly keen to securitize their borders, as well as the consequences of doing so.

III. Ruling International Borders

What is the relevance of international law for contemporary international borders?

Governing borders has become a complex matter. Borders rules attempt to both distinguish and connect jurisdictions; provide security and enhance prosperity; empower state authority and preserve civil society freedoms. As discussed above, the public international law of borders itself is fairly thin, but state practices have become more dense, involving multiple layers of the state, sometimes in close coordination with regional authorities (as in the case of Europe) and occasionally at the behest of and in compliance with UN authority. There are three major purposes at which these rules aim: *delimitating and demarcating*; *securing* the border, and *filtering* entry and exit.

The Traditional Focus: Delimitation and Demarcation

Modern border governance starts with a traditional prescription: determine where the border is (e.g., describe it precisely in a treaty with appended maps), and demarcate it physically (e.g., with pillars, fences, or other markers on the ground).²⁷ Observers routinely point to the importance of physical demarcation to facilitate coordination of responsibilities and reduce conflict in border regions (Anebo 2016, Forum 2016, Agbiboa 2017, Binder 2017, Foyou, et al. 2018). Modern border management seems to assume that all actors, public and private, know where the border *is*.

There is no formal rule that obligates states to delimit their international borders by treaty, let alone place physical markers down on their borders. Border demarcation is a matter for

²⁷ For a succinct distinction between delimitation and demarcation see Martin Pratt's presentation in *Applied Issues in International Land Boundary Delimitation/Demarcation Practices* (Organization for Security and Cooperation in Europe, 2011), p. 8. Available at: <https://www.osce.org/secretariat/85263?download=true>. (Accessed 9 October 2018.)

sovereign states alone.²⁸ But these are strong norms of the international community. Once a border has been negotiated and delimited, it is common (if sometimes controversial in practice) to create physical indications distinguishing one state from the other. The reason is clear: although people have lived for thousands of years without legal borders or visible markers separating them into nations, modern international relations interprets delimitation and demarcation as signs of mutual acceptance, lack of contestation, and general friendly relations between states. In recent decades, demarcation is taken as a signal of good neighborliness and is sometimes a precondition for other forms of border liberalization and cooperation. For example, the cooperative demarcation of the border between Kosovo and Montenegro was a practical precondition for the liberalization of the visa regime between these two countries.²⁹

Demarcation is a practice clearly supported by the international community, international courts, and the United Nations. The UN considers adequate delimitation and demarcation of borders a critical aspect of the maintenance of international peace and security in post-conflict setting (Kagawa 2013). For example, after the first Gulf War, the Security Council unanimously passed Resolution 833 calling for border demarcation between Iraq and Kuwait.³⁰ The United Nations has provided assistance and facilitative support for the demarcation of the border between Eritrea and Ethiopia, although until very recently the latter has resisted the demarcation

²⁸ Border demarcation is considered a sovereign action, which is why Iraq found it important to immediately and categorically deny they had agreed to any demarcation of the territory for which the Kurds voted to assert autonomy in 2017. See “Iraq: No border demarcation with Kurdish region.” *Al-jazeera*, 13 March 2018. Available at: <https://www.aljazeera.com/news/2018/03/iraq-border-demarcation-kurdish-region-180313142513900.html>. (Accessed 11 July 2018).

²⁹ EU Commission Statement, Joint Statement on the ratification of the Border Demarcation Agreement between Kosovo and Montenegro, 21 March 2018. Available at: https://ec.europa.eu/commission/commissioners/2014-2019/hahn/announcements/joint-statement-ratification-border-demarcation-agreement-between-kosovo-and-montenegro_en. (Accessed 11 July 2018).

³⁰ S/RES/833(1993) Available at [https://undocs.org/S/RES/833\(1993\)](https://undocs.org/S/RES/833(1993)). (Accessed 5 August 2018.) Saddam Hussein refused to cooperate with the Commission and rejected its findings in 1993, but the Security Council effectively accepted them anyway (De Wet 2004:363-64).

results and the UN has not enforced the plan on the ground. The United Nations set up a mixed commission within one month of the 2002 territorial decision of the ICJ in the case of Nigeria and Cameroon, with the purpose of implementation and demarcation.³¹ Demarcation of the borders between Sudan and South Sudan may not put an end to the violence – which seems better deterred by the presence of peace keepers than lines on the ground – but it is seen as critical for locals to enjoy some degree of free movement through safe and controlled border crossings.³² Indeed, demarcation is often framed as a necessary step for the realization of human rights locally. UN human rights experts have also advocated for demarcation as a step toward securing indigenous rights in ill-defined zones such as Brazil’s periphery.³³ The Organization for Security and Cooperation in Europe (OSCE) has devised a set of best practices for border demarcation, arguing they are important for cooperative border management which in turn is critical to local daily life in border regions.³⁴

Securing the Border

The international community no longer sees borders merely as territorial divisions among states. These spaces now are seen as a challenge to traditional state governance itself. The business of the United Nations Security Council reflects this development. The last 15 years of debate and decision-making in the UNSC has shifted from the *legitimation* of specific borders to

³¹ United Nations Office for West Africa, “Cameroon Nigeria Mixed Commission.” Available at <https://unowa.unmissions.org/cameroon-nigeria-mixed-commission-0>. (Accessed 12 July 2018).

³² The Crisis Group, Keeping the Hotline Open Between Sudan and South Sudan. Commentary, 13 April 2018. Available at <https://www.crisisgroup.org/africa/horn-africa/sudan/keeping-hotline-open-between-sudan-and-south-sudan>. (Accessed 11 July 2018).

³³ *UN News*, “In Brazil, UN expert highlights deadly consequences of delaying land demarcation.” 21 March 2016. Available at <https://news.un.org/en/story/2016/03/525002-brazil-un-expert-highlights-deadly-consequences-delaying-land-demarcation>. (Accessed 12 July 2018.)

³⁴ OSCE, *Applied Issues in International Land Boundary Delimitation/Demarcation Practices*. 31 May to 1 June 2011. Available at: <https://www.osce.org/cpc/85263?download=true>. (Accessed 11 July 2018).

their *security, control and governance*. Interstate territorial issues have been shoved aside as states now grapple with a host of non-traditional threats from vulnerable and/or opportunistic people, illicit networks and non-state entities. In some ways, borders as sites of social struggle are converted into the paradigms of law enforcement (Andreas 2003) and, perhaps euphemistically, management (Andrijasevic and Walters 2010).

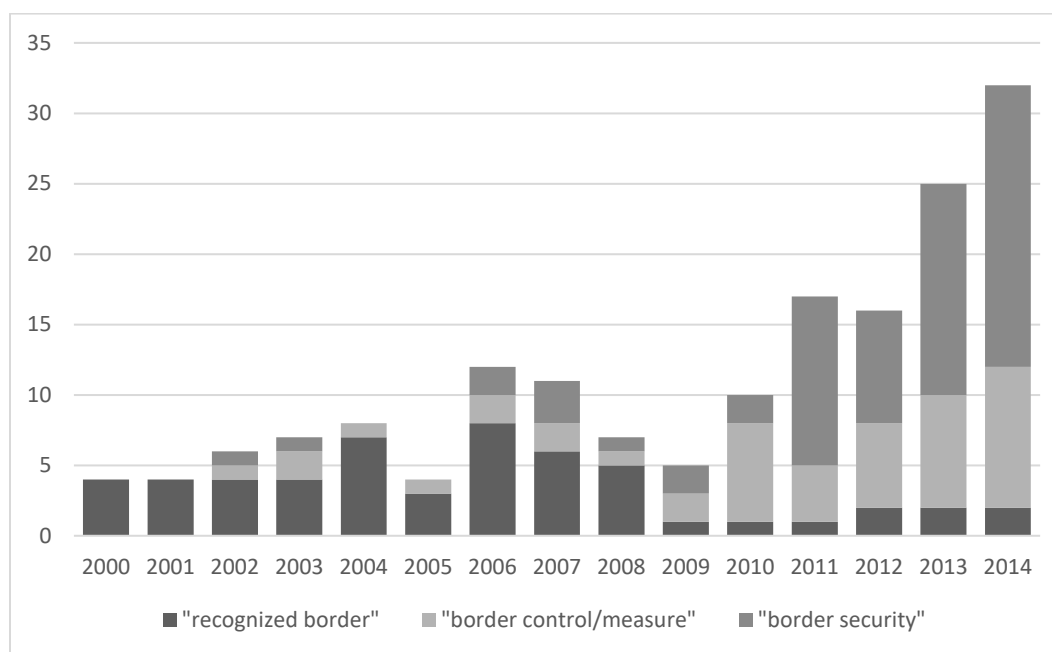


Figure 6: Shifting Border Concerns at the UN Security Council. References to borders are on the increase, but attention has shifted from a call for recognized borders to aspects of border control and border security itself. Number of mentions of each phrase in the decisions and resolutions of the Security Council, by fiscal years, 2000/2001-2014/2015. Years 2001/2002 and 2002/2003 are estimated because the document are not searchable. No documents are searchable prior to 2000. Original documents are located at <http://www.un.org/en/sc/documents/volumes/>. (Accessed 10 July 2018).

What it means to secure the border is contested. For United States Department of Homeland Security, border security entails “Protecting our borders from the illegal movement of weapons, drugs, contraband, and people, while promoting lawful trade and travel...”³⁵ European

³⁵ United States Department of Homeland Security: <https://www.dhs.gov/topic/border-security> (accessed 10 July 2018).

members of the Schengen area have similar concerns about undocumented migration, transnational crime, as well as unprecedented refugee flows.³⁶ At the Liberian-Ivorian border, border security means controlling the spread of Ebola and addressing governance gaps that allowed crime to flourish.³⁷ Border security for China means many things related to its perceived geographic vulnerability to traditional land-based attack, but the recent focus has been on preparing for a possible influx of refugees from North Korea should the peninsula erupt.³⁸

States have recently made border security a soft obligation in only a handful of multilateral treaties, reflecting a growing salience in state strategy documents and practice.³⁹ Indeed, securing against various non-state threats has dominated security issues in many border zones (Anderson and Den Boer 1994, Bigo 1997, Andreas 2003, Bigo 2003). Yet, states generally have no formal international obligation to secure their borders. Nor do they have a customary international legal obligation to do so, although the public international law of state responsibility could potentially be applied.⁴⁰ International agreements dealing with counterterrorism historically have never mentioned border measures, controls, security or cooperation;⁴¹ instead the Global Counter Terrorist Forum has called for “comprehensive,

³⁶ Frontex: https://europa.eu/european-union/about-eu/agencies/frontex_en

³⁷ Conciliation Resources, “Peace and security along the Ivorian-Liberian border: The local perspective.” See <http://www.c-r.org/downloads/755%20CR%20MRR%20Liberia%20report%20ENG%20Draft%2010%20-%20lo-res.pdf>. (Accessed 5 August 2018.)

³⁸ See press reports, including <https://www.straitstimes.com/asia/east-asia/china-boosts-security-at-n-korean-border>

³⁹ The most recent US National Security Strategy document (2017) mentions “borders” 24 time and border security twice in 68 pages. The focus in most references is undocumented migrants. According to the United States’ National Security Strategy (December 2017), under the heading of Migration (p. 10), “The apprehension and swift removal of illegal aliens at the border is critical to an effective border security strategy.” Available at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>. (Accessed 12 July 2018.)

⁴⁰ An entire paper could be devoted to state responsibility at international borders, the starting point of which would be the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html>. (Accessed 21 July 2018.)

⁴¹ None of the 19 legal instruments the UN lists as relevant to counterterrorism mention border security. See <http://www.un.org/en/counterterrorism/legal-instruments.shtml>. (Accessed 5 August 2018.)

cooperative, coordinated, and integrated BSM,” which are *voluntary* in nature and “ideally are explicitly formulated in national border management strategies (BMS) and national action plans (NAP).”⁴² Counter-terrorism arrangements in maritime border zones are largely informal as well.⁴³ A partial exception to this informality relates to border measures to prevent money laundering and terrorist finance.⁴⁴ Similarly, treaties to control international drug trafficking surprisingly make little reference to border security. Of the three most important anti-drug trafficking treaties, none mentions an obligation of border security or control.⁴⁵

Human trafficking and smuggling are a somewhat different story. Early anti-human trafficking treaties in 1904,⁴⁶ 1921,⁴⁷ 1951⁴⁸ made no reference to international borders or border security. The key shift came in 2000 with the negotiation of the 2000 Convention against Transnational Organized Crime (Palermo) Convention. The 2000 Palermo Convention had three protocols on human trafficking, human smuggling and firearms. The smuggling and human

⁴² The Global Counter Terrorism Forum was created by states to fulfill UN resolutions about terrorism; their rules are informal: “The good practices contained in this non-binding document are intended to inform and guide governments as they develop policies, guidelines, programs, and approaches for effective BSM, with the specific aim to strengthen cross-border cooperation and border surveillance in a counterterrorism context.” Available at <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Good-Practices%20-BSM-ENG.pdf?ver=2016-09-13-124953-540>. (Accessed 20 July 2018.)

⁴³ E.g. 2012 Declaration on the Conduct of Parties in the South China Seas (a political agreement on efforts against piracy at sea and marine terrorism). October 17, 2012. Available at: http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-3. (Accessed 21 July 2018) Generally, see Wu (2016).

⁴⁴ There is one partial exception: under an obligation to cooperate, Article 18(2), of the International Convention for Suppression of Terrorist Financing (1999) states that “States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering... (b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.”

⁴⁵ According to the UNODC. See <https://www.unodc.org/unodc/en/treaties/index.html>. The only reference to border controls in the most widely ratified anti-narcotics agreement employs soft language only with respect to free trade zones and free ports, not borders generally. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. Article 18. Available at: https://www.unodc.org/pdf/convention_1988_en.pdf. (Accessed 12 July 2018).

⁴⁶ International Agreement for the suppression of the White Slave Traffic, Paris, 1904. Available at <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0424.pdf> (Accessed 12 July 2018).

⁴⁷ International Convention for the Suppression of the Traffic in Women and Children. Geneva, 30 September 1921; available at

⁴⁸ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; 25 July 1951. Available at <https://www.ohchr.org/Documents/ProfessionalInterest/trafficpersons.Pdf>. (Accessed 5 August 2018.)

trafficking protocols require states “as part of a comprehensive international approach,” to “strengthen border controls as may be necessary to prevent trafficking and detect smuggling, including...denial or revocation of visas for protocol violators...” and to “consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”⁴⁹

Border security obligations are weak in multilateral treaties, but they are clear, strong and backed with significant institutional capacity in the context of regional integration. The Schengen Agreement which formed a visa- and border control free area covering much of Europe in 1995 is the best example. The agreement eliminated visa requirements for internal travel but obligated states to more tightly secure their borders around the outer perimeter. A recent amendment further requires the states along Schengen’s “foreign” borders to systematically check everyone who comes and goes – whether EU citizens or not – against databases maintained by the Schengen Information System (SIS) and Interpol's database on stolen and lost travel documents (SLTD).⁵⁰ Since 1995, the Schengen external border has been defended by highly orchestrated cooperation among the European Border and Coast Guard Agency (Frontex, which is in charge of border protection), the European Police Office (Europol, supporting cooperative law enforcement operations), and the European Judicial Cooperation Unit (Eurojust, assisting Member States in judicial proceedings)(Olsson, et al. 2016).

⁴⁹ These provisions are basically identical for both protocols. See Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime Adopted 15 November 2000 Entered into force 28 January 2004; available at <http://www.unhcr.org/en-us/protection/migration/496323791b/protocol-against-smuggling-migrants-land-sea-air-supplementing-united-nations.html>. (Accessed 5 August 2018.)

⁵⁰ Official Journal of the European Union, Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders. Available at <http://www.europeanmigrationlaw.eu/documents/Regulation%202017-458-Reinforcement%20of%20checks%20at%20external%20borders.pdf>. (Accessed 20 July 2018).

Increasingly, states are starting to realize that they are as interdependent at their borders as they are in other policy domains (Hollifield 2004). Many realize that they need to develop common procedures and cooperative routines to address non-state externalities, such as the unwanted movement of people, products, crime and violence across borders. For example, Norway paid for the buildings on the Russian side of the Storskog border crossing near Kirkenes in the Arctic Circle to ensure the presence of border officials and enhance cooperation at the border.⁵¹ Oman recently relocated its border control facilities at Wadi Saa (paired with Khatm Al Shikla on the UAE side) which were once located 25 kms within Oman,⁵² possibly for similar reasons. In 2015, the United States and Canada released plans for coordinated and complementary border security and infrastructure investments.⁵³ Many of these cooperative routines develop because local personnel interact constantly with their counterparts in their geographic vicinity (Gavrilis 2008), performing tasks that range from the mundane (returning escaped reindeer from Russia to Norway) to the occasional unexpected crisis (processing 5,000 refugees from Syria, Afghanistan and Iraq in a matter of weeks at the Storskog crossing, the northernmost entry to Schengen).⁵⁴ The international community continues to urge local cooperation that “focuses on improving day-to-day communication and necessary activities. It can range from information exchange to solving possible operational challenges in order to facilitate legitimate cross-border movements”(Forum 2016:6)

⁵¹ Author site visit and interview with Norwegian officials, including Border Commissioner Roger Jacobsen and Head of Storskog Border Station Mr. Gøran Stenseth. June 20 and 21, 2018.

⁵² See author’s description of this border crossing at <https://global.upenn.edu/perryworldhouse/blog/oh-man-united-arab-emirates-oman-and-back-notes-border>. (Accessed 20 July 2018.)

⁵³ See Department of Homeland Security, “Border Infrastructure Investment Plan, Canada - United States, April 2013.” Available at <https://www.dhs.gov/sites/default/files/publications/border%20infrastructure%20investment%20plan%20-%20final%20.pdf>. (Accessed 26 July 2018.)

⁵⁴ Author site visit, Commissioner Roger Jacobsen June 20 and Mr. Gøran Stenseth. June 21, 2018, Kirkenes, Norway.

States have increasingly adopted a host of cooperative modalities, short of formal treaty obligations, to deal with interdependence at their borders. Memoranda of Understanding (MOUs) have proliferated between state authorities and transnational organizations and between sub-state administrative units across states to control human mobility. The new strategy is to enforce borders beyond the formal territorial space by processing transnational movers before they reach the destination jurisdiction. For example, United States Customs and Border Protection have negotiated preclearance at nine Canadian airports,⁵⁵ four in the Caribbean, two in Ireland and one in the Middle East.⁵⁶ Australia has negotiated a series of MOUs with its Pacific neighbors to perform preprocessing functions for asylum seekers traveling by boat destined for Australia.⁵⁷ The most ambitious and systematic program is the Global Approach to Migration (GAM) policy of the European Union.⁵⁸ This strategy of exporting borders involves “partnerships” (Kunz 2013) that essentially outsource border enforcement to source and/or transit countries (Casas-Cortes, et al. 2016). In this way, cooperative law enforcement among states, parts of states, and even private agents acting for states (such as airline security personnel) render borders themselves mobile (Kinnvall and Svensson 2015, Zaiotti 2016).

⁵⁵ Which has raised sovereignty issues in Canada. See Henry Chang, “Preclearance Bill Raises Concerns Over Canadian Sovereignty.” *Huffington Post*, 21 February 2017. Available at https://www.huffingtonpost.ca/henry-chang/precleanance-canadian-sovereignty_b_14888744.html.

⁵⁶ United States Customs and Border Protection (USCBP), “Pre-Clearance Locations.” Available at <https://www.cbp.gov/border-security/ports-entry/operations/precleanance>. (Accessed 20 July 2018.)

⁵⁷ Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues. 29 August 2012. Available at <http://dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx>; “Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues.” 6 August 2013. Available at <http://dfat.gov.au/geo/papua-new-guinea/Pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr.aspx>. (Both accessed 20 July 2018.)

⁵⁸ European Commission, “Global Approach to Migration and Mobility,” Available at https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en. (Accessed 20 July 2018.)

Filtering at, near, or on behalf of the Border

International borders are sites of rare crisis, but for the 600 million people – more than 8% of the world’s population – who live practically *right on* (within 30 kms of) an international border, they are features of everyday life. Globalization has been boosted by regional and neighborly trade. Despite the political attention to securing the border, the real problem is *filtering* at the border: implementing a mix of policies, structures and symbols that facilitate and block exit and entry selectively. Indeed, the authority and capacity to determine who and what enters and leaves, and on what terms, is practically what it means to be a modern state (Torpey 1998, 2000).

Customs & Trade

States not only need the World Trade Organization (WTO) to negotiate multilateral trade law; they also need rules for moving that \$15 trillion across international borders while stopping as much of the billions of dollars in illicit trade as possible. This is a filtering task of major proportions. Almost all states start this task by funneling traffic to specific legal ports of entry (maritime, land border crossings, and international airports) equipped to start the filtering process. Since the early 1970s, they have also worked through what is now the World Customs Organization (WCO) to coordinate their efforts to enforce customs laws, primarily through information sharing among customs officials, law enforcement and private businesses.⁵⁹ Reflecting trends in many other areas, these cooperative agreements began as recommendations, evolved toward a model Bilateral Agreement on Mutual Administrative Assistance (updated in

⁵⁹ World Customs Organization, <http://www.wcoomd.org/>. (Accessed 5 August 2018.)

2004),⁶⁰ and have more recently included a pair of binding multilateral instruments.⁶¹ The thrust of these agreements is to establish routines and expectations for information sharing among customs administrations, especially with respect to smuggling and fraudulent documentation. Some states, such as the United States, prefer to work these arrangements out bilaterally rather than multilaterally: the US, for example, has concluded 78 bilateral CMAAs around the world,⁶² but has not ratified the multilateral 1977 Nairobi Agreement.⁶³

The concept of filtering is critical to customs practices and cooperation, because the central concern is to repress law violation without hampering legal trade. The WCO refers to its “vital role...in stimulating the growth of legitimate international trade, [and] its efforts to combat fraudulent activities are also recognized internationally.”⁶⁴ While some states have joined assistance agreements to enforce customs laws, most are also competing heavily to improve their ranks in the World Bank’s “Trading Across Borders” Ease of Doing Business Index.⁶⁵ Scrutinizing, comparing and sharing information for purposes of customs enforcement increasingly coexists with competitive pressures to reduce the time and cost associated with documentary compliance and border compliance. State capacity has a good deal to do with the ability to filter: there is a mildly positive correlation between participation in multilateral

⁶⁰ Available at <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/tools-and-instruments/model-agreement.pdf?la=en>. (Accessed 5 August 2018.)

⁶¹ International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (Nairobi Convention) 9 June 1997 (53 States Parties), Available at <http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/nairobi/naiengl.pdf?la=en>; (Accessed 5 August 2018.) International Convention on Mutual Administrative Assistance in Customs Matters, Brussels 27 June 2003 (not yet entered into force); Available at <http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/johannesburg/internconvmutualadmineng2003.pdf?la=en>. (Accessed 5 August 2018.)

⁶² US State Department; Available at <https://www.cbp.gov/border-security/international-initiatives/international-agreements/cmaa>. (Accessed 21 July 2018).

⁶³ For a list of parties, see <http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/conventions/eg0019e1.pdf?la=en>. (Accessed 5 August 2018.)

⁶⁴ WCO in Brief, <http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx>. (Accessed 5 August 2018.)

⁶⁵ World Bank, Trading Across Borders. Available at <http://www.doingbusiness.org/data/exploretopics/trading-across-borders>. (Accessed 5 August 2018.)

customs agreements and sophisticated information systems that support efficient customs procedures for imports and exports.⁶⁶ Border presence (as represented in Figure 5 above) is also mildly positively correlated with the World Bank's *Trade Across Borders Index*, suggesting that state presence at border crossings likely facilitates rather than impedes the flow of legitimate trade, at least on average. States with the political will and capacity have clearly established cooperative regimes and sophisticated infrastructures to pursue both liberal trade and the ability to filter traded goods.

Migration & Immigration

People do not have a right to migrate from one country to another at will. They need permission. The main tool for filtering people is the issuance of visas – documents that prove permission to enter. Citizens from the industrialized democracies (roughly the OECD, plus Singapore) tend to have powerful passports: they can enter visa-free into the most countries in the world.⁶⁷ Passport holders from developing and poor countries are in a fundamentally different position. Research on networks of Visa Waiver Agreements show that generally international travel has become easier between 1969 and 2010, but at the same time the ability to traverse international borders is getting more and more unequal, representing what some authors have referred to as a “global mobility divide” (Mau, et al. 2015).

Tightening border control raises the issue of how to accommodate local movement and interaction. The solution has often been a series of localized agreements in which clearly defined

⁶⁶ Ratification of the Nairobi Agreement and sophisticated information technology in the form of implementation of Electronic Data Interchange (EDI) and Single Window (SW) systems are mildly positively correlated (.201). Data for implementation of EDI and SW systems are available from the World Bank at <http://www.doingbusiness.org/data/exploretopics/trading-across-borders>. (Accessed 21 July 2018.)

⁶⁷ Global Passport Power Rankings, 2018; available at <https://www.passportindex.org/byRank.php>. (Accessed 5 August 2018.)

local residents – residents for a minimum number of years in a defined radius around a border crossing, for example.⁶⁸ Schengen experience provides another interesting example. To comply with the Schengen agreement, new EU countries had to terminate their local border agreements by May 1, 2004, but since 2006 have been permitted to negotiate bilateral agreements with their eastern neighbors.⁶⁹ This allowed, for example, a series of agreements between Schengen countries and Ukraine for local border traffic to be negotiated between 2006 and 2015.⁷⁰ The single crossing between Norway and Russia is governed by an agreement whereby persons residents for at three years locals within 30 kms of the border can apply for multiple entry visas.⁷¹

Visas and waiver agreements spell out the *formal* rules of entry. But border mobility is laced with *informal* decision rules as well. The informal rules about entry and denial can reflect subjective categories from physical characteristics, to linguistic abilities, to dress to class. While the world of visas and passports has a formalistic flavor on the websites of foreign ministries, in practice they can involve a good deal of discretion on the ground (Romero 2006, Hall 2013, Pickering and Ham 2013).

Scholarly attention to border agreements in international relations has almost exclusively concentrated on the virtues of border delineation and demarcation, and has found that “settled” borders reduce interstate conflict and enhanced trade. And yet we know almost nothing about which states enter into cooperative customs, policing, information sharing, or liberal visa

⁶⁸ Discussion with Rune Rafaelsen, Mayor of Kirkenes; Norway; 19 June 2018; discussion and border tour with Mr. Gøran Stenseth head of the border station, Storskog, Norway; 21 June 2018.

⁶⁹ See OJ L 405 of 31.12.2006. [get full citation]

⁷⁰ A list of agreements between Ukraine and Schengen members can be accessed at: <https://ukraine-eu.mfa.gov.ua/en/ukraine-eu/justice/border-traffic>. (Accessed 26 July 2018).

⁷¹ Agreement between the Government of the Russian Federation and the Government of the Kingdom of Norway on Facilitation of Mutual Travel for Border Residents; Oslo, 2 Nov. 2010. Available at http://www.carim-east.eu/media/legal%20module/biag/ru/15.2.%20Norway_en.pdf. (Accessed 26 July 2018.)

regimes with other states. Which states are the leaders in creating such agreements? Who resists, and who is never invited to the party? How is trust among border officials nurtured locally, and what conditions disrupt cooperative local relationships and practices? How is local cooperation affected by national narratives that pander to nationalist and xenophobic sentiments? These questions are practically unexplored territory for social scientists interested in the law and practice of border cooperation.

IV. Tensions: Universal Human Rights Meet Border Politics

Borders impose distinctions. Human rights are universal. When norms of exclusive territorial jurisdiction were developing, there were practically no international norms about the rights of human beings no matter their location or citizenship. International law had long addressed minorities residing in neighboring countries, nationals living abroad, and of course the property rights of international investors. But after World War II the scale of human rights abuses and refugee displacement led states to develop norms of recognition and protection of the rights of all human beings, no matter where they are territorially situated, and to recognize the rights of protection for refugees fleeing involuntarily from persecution or violence. Border control is in some degree of tension with *universal* human rights.

The Universal Declaration of Human Rights⁷² is perhaps the most authoritative international statement available of the inherent rights of human beings, no matter their location or their citizenship. The Declaration was noteworthy because it was both universal in its application to all individuals and because it was adopted unanimously (although with eight

⁷² UN General Assembly. (1948). Universal Declaration of Human Rights (217 [III] A). Paris. Retrieved from <http://www.un.org/en/universal-declaration-human-rights/>. (Accessed 5 August 2018.)

abstentions and two states not voting) by the General Assembly of the brand-new United Nations. According to Article 2, “*Everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The declaration proclaimed that everyone has the right to life, liberty and security of person, the right not to be subjected to cruel, inhumane or degrading treatment, recognition as a person before the law, and the right to not be subject to arbitrary detention or arrest.⁷³ Importantly, the universality of these rights meant that government should recognize them for both citizens and foreigners, by virtue of their status as human beings.

Three years later, the international community would negotiate the Refugee Convention (1951),⁷⁴ which created obligations with serious implications for border zones and border crossings. The Convention gave refugees – persons who have been forced to flee his or her country because of persecution, war or violence, and who has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group – the right to special protections. Originally applicable to European refugees, the convention was amended in 1967 to lift this limitation. The Convention is based on three major principles: that people who claim to be refugees should not be discriminated against on the basis of race, religion or country of origin,⁷⁵ that refugees should not be penalized for otherwise illegal

⁷³ These rights are found in the first nine articles of the UDHR.

⁷⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> (Accessed 9 July 2018).

⁷⁵ Refugee Convention, Preamble and Article 3.

entry or stay,⁷⁶ and that refugees should not be forcibly returned to a dangerous situation.⁷⁷ The Convention maintains the right to deny refugee status to persons deemed threats to national security⁷⁸ and who have committed serious crimes,⁷⁹ but solidifies obligations otherwise to consider asylum for persons who are able to make a credible claim to refugee status.

People do not have a right to cross international borders; no state has surrendered completely the sovereign right to decide who and what may enter their territory. But they have conceded that people have rights as human beings that must be respected *everywhere* – including in border regions. As international borders have begun to tighten, and as human movement has come to be interpreted as a security risk (Adamson 2006), it is increasingly important to understand how human rights are implicated. Trafficking in persons and drugs, the crises faced by refugees and the states and societies who receive them, death and vulnerability of irregular migrants, threats to family units, and the micro-aggressions by law enforcement in border regions all suggest a need not only to understand the rules of access, but also the obligations to respect human rights in an age of heightened border security (Pécoud and De Guchteneire 2006). The United Nations General Assembly (UNGA) has at times recognized international borders as a special place of vulnerability for migrants, and has called on states generally to respect human rights at their borders and train their personnel to do so as well.⁸⁰

⁷⁶ Refugee Convention, Article 31(1). This obligation is hotly debated. In most cases, the clearest way to ensure compliance with Article 31 is to consider any claim of refugee status before exercising state jurisdiction (e.g., incarceration). One common interpretation is that Article 31 relates to the treatment of refugees already in a country; most states will claim an unconditional right to determine entry. See the discussion in UNHCR (1997), no page number; available at <https://www.unhcr.org/3d4ab5fb9.pdf>.

⁷⁷ Refugee Convention, Article 33(1).

⁷⁸ Refugee Convention Articles 9, 28(1) and 32(1).

⁷⁹ Refugee Convention, Articles 1(F)(a); Article 33(2).

⁸⁰ A/RES/58/190, “Protection of migrants” 22 December 2003; A/RES/61/165, “Protection of migrants,” 19 December 2006.

Universal human rights do not intersect in a completely happy manner with border politics.⁸¹ Especially during major migrations, potential rights violations in the name of border security include discrimination at the border on the basis of religion or country of origin; arbitrary detention; family separation; orders to shoot at sight to deter unwanted migrants; and sometimes torture.⁸² When the international community encountered the most severe refugee crisis in Europe since the Second World War in 2015, cries went up to respond to migrants' rights in a comprehensive way. The result was The New York Declaration for Refugees and Migrants,⁸³ which contained general (though non-binding) commitments to protect the human rights of all refugees and migrants, regardless of status; condemn and combat xenophobia; provide migrant and refugee children education and end child detention while determining migration status; and to prevent and respond to sexual and gender-based violence. Before a vote on the non-binding compacts could get underway, however, the United States withdrew from the process, stating, "We will decide how best to control our borders and who will be allowed to enter our country. The global approach in the New York Declaration is simply not compatible with U.S. sovereignty."⁸⁴

Aggressive forms of border security can pose serious dangers for persons who have been protected since 1951: refugees. Since the Refugee Convention stipulates that, subject to specific

⁸¹ Amnesty International, *Fear and Fences*, 2015. Available at: <https://www.amnesty.org/download/Documents/EUR0325442015ENGLISH.PDF>. (Accessed 5 August 2018.)

⁸² United National High Commissioner for Human Rights (UNHCR), 2014: *Recommended Principles and Guidelines on Human Rights at International Borders*. Available at https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf. (Accessed 17 July 2018.)

⁸³ UN General Assembly, *New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a4.html>. (Accessed 17 July 2018.)

⁸⁴ United States Mission to the United Nations, "United States Ends Participation in Global Compact on Migration," December 2, 2017, available at <https://usun.state.gov/remarks/8197>. (accessed 17 July 2017). The United States also rejected the Compact on Refugees in November 2018. See "Explanation of Vote in a Meeting of the Third Committee on a UNHCR Omnibus Resolution," November 13, 2018. Available at <https://usun.state.gov/remarks/8744>.

exceptions, refugees should not be penalized for their illegal entry or stay,⁸⁵ some states have tried to preempt the territorial entry that would give rise to a right to try to establish asylum in the first place by intercepting migrants prior to arrival. "Interception," is defined by UNHCR as "all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination..."⁸⁶ Such interceptions at sea have arguably been responsible for a number of migrant deaths at sea and elsewhere.⁸⁷

Though they are more passive, border walls have been analyzed as affronts to human rights as well. The preponderance of border rules surely give states the right to build walls, fences and other structures at, or inches within, their borders. But what if walls and fences prevent people fleeing for their lives from pursuing their right to asylum in a neighboring country? What if their existence forces migrants facing extraordinary push factors to take much more dangerous routes to safety?⁸⁸ While there maybe moral arguments to be made to the contrary (Paz 2016, 2017), what international law there is in this area tends to favor the rights of the state to block. The Security Fence for example was explicitly considered a violation of international law in the advisory of opinion of the International Court of Justice *not* primarily

⁸⁵ Refugee Convention Article 31(1). This is not generally interpreted to mean refugees have a general right of entry. See fn.77 above.

⁸⁶ U.N. High Commissioner for Refugees, *Interception of Asylum seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, at 2, U.N. Doc. EC/50/SC/CRP.17 (2000); *see also* U.N. High Comm'r for Refugees, *Conclusion on Protection Safeguards in Interception Measures*, 22, U.N. Doc. A/AC.96/987 (2003). More critically, such policies have been referred to as "neo-refoulment" or a "geographical strategy of preventing the possibility of claiming asylum through a new form of forced return." (Hyndman and Mountz 2008).

⁸⁷ Euro-Mediterranean Human Rights Network, "Violations of the Rights of Migrant and Refugees at Sea," Policy Brief, June 2014. Available at <http://www.statewatch.org/news/2014/jul/eu-migrants-at-sea.pdf>. (Accessed 3 August 2018).

⁸⁸ See for example Amnesty International "Fear and Fences," 2015. Available at <https://www.amnesty.org/download/Documents/EUR0325442015ENGLISH.PDF>. (Accessed 4 August 2018.)

because it excludes desperate people or violates rights, but mostly because it did not adhere to the internationally recognized border.⁸⁹ For the most part, the ruling did not significantly challenge traditional notions of state sovereignty at and over internationally recognized borders. Some analysts have claimed that international human rights courts and other judicial or quasi-judicial bodies have done little more than to entreat states to offer safety-valves for the most vulnerable (Paz 2017:623), but some regional courts in Europe and the Americas are working toward decisions about the conditions under which governments can legally expel migrants at the border, and the rights of those that enter illegally by scaling walls or making dangerous crossings by sea.⁹⁰

Far more empirical research should be done to document the ways in which border security measures place a range of serious human rights at risk. The plight a refugees, with extreme push factors at their backs, is an obvious case in which empirical evidence should inform legal and moral analyses that balance rights considerations with justified national security measures. But research might go even further to reveal the myriad ways in which hardened borders serve to drive extreme wedges between people in ways that systematically deny a

⁸⁹ See *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, available at: <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> [accessed 6 December 2018]. Importantly, this advisory opinion *only* dealt with the route along the Occupied Palestinian Territory, so this is hardly a general case. The decision did acknowledge that “The wall, along the route chosen, and its associated regime gravely infringe a number off rights of Palestinians residing in the territory occupied by Israel, and the infringement resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.” At pp. 61-62, para. 137.

⁹⁰ See for example European Court of Human Rights, Press Release, “Grand Chamber hearing in a case concerning the immediate return of a Malian and an Ivorian migrant who had attempted to enter Spain illegally.” ECHR 314 (2018) 26.09.2018. See also the Advisory Opinion of the InterAmerican Court of Human Rights, OC-25/18, 30 May 2018, holding that persons have a right to claim asylum, and there is an obligation not to return a person to a situation of danger, meaning, likely “persecution or threat thereof, generalized violence or massive violations of human rights, ... torture or other cruel, inhuman or degrading treatment”. “Return” includes rejection at the border without an individual hearing; paragraph 190. Available in Spanish at http://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf.

significant part of humanity access to basic justice and economic opportunity. If such research reveals border structures and practices as barriers to basic human rights, arguments about the sanctity and legitimacy of international borders should take a new turn.

V. Conclusions

Borders traditionally were tools of national integration, identity formation and markers of territorial jurisdiction. Traditional international law accommodated these tasks and historically has constituted a conservative set of rules to stabilize the state system. States now face complex tasks in the face of globalization. Intensive and extensive human mobility, and social and economic interdependencies across borders challenge territorial state authority in new ways. Borders are as salient as ever, and their governance has become a hot domestic topic and a matter of high international politics.

The resurgence of borders and their contestation may well be the result of an important tension in the post-World War 2 order itself. That order reasserted the primacy of territorial sovereignty, jurisdiction, and integrity prominently in the UN Charter.

Understandably, collective security based on exclusive state territoriality was seen as the surest route to peace. And yet on top of this territorial order was overlaid a set of principles that cut almost directly against it: *integrated* world market and *universal* human rights. The tension between the territorial and the global has been manageable – and more many highly beneficial – for most of the postwar years. It is way beyond the purposes of this essay to suggest exactly when the tension became untenable. But over time, attachments to place and identity reasserted claims to privilege and belonging that some thought had been ceded to global markets and

universal rights. Nationalism and populism are real forces in a growing part of the world, reclaiming the international border as an important ordering institution in political and cultural life.

Every statement in the paragraph above is contestable. For scholars, this is a crucial moment for new directions in research. This research should focus at least in part on how international borders have come to acquire political salience anew. Some of the old tools have been useful, but can only take us so far in understanding the new tensions. Yes, borders are useful focal institutions; yes, settled borders have contributed to peace and prosperity; and yes in many respects the international law of territorial sovereignty has served at least a good part of humanity well by rendering international conflict less likely. But these liberal theories have neglected the importance of identity attached to *place*. Liberalism has always had a better grasp on the universal and the optimal than on matters local and distributive.

So we face new conditions that call for new perspectives for research and tools of management. In this atmosphere, state security agents – police, militaries, customs and border patrols – are more present at international borders than ever. Walls and fences have proliferated. Many of today's border problems inherently require cooperation, from information sharing to cooperative policing to refugee settlement. Co-bordering is an almost inescapable necessity (Longo 2017). One political philosopher has even argued cogently that because international borders are formed cooperatively through international conventions there is no state right to unilateral establishment or management of border issues (Espejo 2018), though this is hardly a mainstream view. Maybe it should be taken as a serious point of departure; after all, territorial sovereignty is about jurisdiction within borders, it does not make the border either “ours” or “theirs.”

International studies scholars are well-positioned to investigate the trends surveyed in this essay. To do so, we need to go beyond studying borders as mere territorial divisions, and even beyond theorizing their important coordinating functions that stabilize the state system and produce joint gains. One research agenda would investigate what kinds of state and social anxieties have given rise to growing demands to secure the borders. We should develop research strategies to document state presence and practice in border zones, and to monitor these practices for their effectiveness as well as their unintended consequences. We should also work to understand how and why sentiments and attitudes toward borders as places of opportunity versus danger arise and spread. Most importantly, we need to understand what impact these sentiments and attitudes have on policy.

That policy itself requires much more systematic analysis. This review has revealed how utterly decentralized border rules are. Formal multilateral treaties contain some hints, but the real practice of border rules develop bilaterally and to some extent regionally. Some are formal – the details of how Norway and Russia maintain border cooperation are centrally negotiated and spelled out in detail. Some are bilateral agreements, such as the customs cooperation agreements modeled on the World Customs Organization’s model treaty, or bilateral visa waiver agreements between states. Some of the most interesting border ‘rules’ are informal. Border practices are constituted by the thousands of discretionary decisions and judgments made at and near international borders on a daily basis. Some of these decisions impact the quality of life and even life itself for millions of people. Understanding border rules in all of their variety and complexity is an important direction for international studies.

For all the talk of their inviolability, it is important to keep in mind that international borders are a means to an end, and not an end in themselves. They exist to organize social and

political life in ways that promote human welfare. In many ways and in many parts of the world, they have performed this function well. How and whether this is still largely true – and what we can do to implement border rules that support human rights and welfare – should be at the center of research in international law and international relations.

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