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University of Chicago Legal Forum

Volume 2023

Article 10

2024

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Recommended Citation

Simmons, Beth (2024) "International Borders: Yours, Mine, and Ours," *University of Chicago Legal Forum*: Vol. 2023, Article 10.

Available at: <https://chicagounbound.uchicago.edu/uclf/vol2023/iss1/10>

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International Borders: Yours, Mine, and Ours

Beth Simmons[†]

ABSTRACT

International borders have become divisive issues in international and domestic politics. They have also become sites where the human rights of vulnerable persons have increasingly been documented as at risk. Policies of border hardening in the face of growing human mobility and other external threats—real and imagined—have made international borders focal sites of conflict at many levels. This Article argues that international law can reframe our understanding of bordering, leading to a more constructive approach to border management and greater respect for human rights. Borders are essentially institutions with the potential to settle coordination problems over territory. But of growing importance, they are also relational institutions that often have drastic effects on social and economic interactions. Their relational aspects require governance, for which international law has developed the law of neighborliness. In turn, the law of neighborliness requires, among other things, respect for mutually agreed covenants between sovereign states. Borders should not be presumed to pose inherent national security risks. Indeed, the presumption should be reversed: borders create zones where the need and obligation for friendly cooperation, including policies aimed at human rights protections, is at its highest.

I. INTRODUCTION

On June 7, 2010, an unarmed 15-year-old boy, Sergio Adrián Hernández Güereca, was playing with friends near the international border between El Paso and Ciudad Juárez. They were playing a game that involved running back and forth across a culvert, through which ran the international border between the United States and Mexico, touching a barbed wire fence on the American side, and running back. The boys attracted the attention of a Customs and Border Protection (CBP) agent, who rode up on his bicycle and detained one of them, while the other retreated back to the Mexican side of the border. With-

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in just a few minutes, Agent Jesus Mesa Jr., standing on American soil, pointed his gun and took aim at the retreating teenager, who by now had reentered Mexico. He fired at least two shots, one of which struck the child in the face and killed him.¹

The death of an unarmed boy at the hands of an agent of a neighboring state should raise serious questions not only about how states recruit and train border agents, but also about habits of thought regarding international borders. According to the United States Supreme Court, in response to a lawsuit filed by the Hernández family, CBP has “the responsibility for attempting to prevent the illegal entry of dangerous persons and goods” into the United States, and “the conduct of [their] agents positioned at the border has a clear and strong connection to national security.”² This case is facially about the separation of powers for the creation of a damages remedy. But the Court repeats stark assumptions about the nature of international borders that it never unpacks. What *are* these inscrutable spaces in which a remedy for the death of an unarmed child by a state agent presumptively raises issues of national security? A cross-border shooting claim has been ruled to have “distinctive characteristics” with “national security implications”³—not an area, the Court decided, into which the judicial branch should tread.

This Article offers another view of international borders from the perspective of international law. It is motivated by the unquestioned association of international borders with crucial national security issues, not just in the courts of the United States, but also in a growing number of countries around the world. The national security assumption hides another assumption: that borders are constitutive of a state’s territorial sovereignty. Instead, this Article argues that borders are cooperative international institutions that provide collective international goods of stability. It *reclaims* the cooperative purpose of international borders, reflected in traditional sources of international law, as a basis for recalibrating the weight given to national security in discussions of how to manage and control borders. This part of the project is conservative, in that it restores an aspect of international borders that has been left behind in the politics of our times.

In this Article, I argue that international borders are not unilateral assertions of state sovereignty, and should not be governed as such. Instead, they are cooperative institutions to which states have consented to avoid international conflict. Bordering in international law originates as a collaborative project, with meaning (and obliga-

¹ See *Hernandez v. Mesa*, 140 S. Ct. 735, 740–41 (2020).

² *Id.* at 746.

³ *Id.* at 739.

tions) for cross-border relationships and the international community as a whole. Borders should not be misconstrued as “sovereign,” and because of the relationships they govern, they should not be managed unilaterally. I advance an understanding of bordering that recognizes sovereign territoriality, but which views borders as not just territorial but as also relational. Bordering does not simply draw a dividing line; it also profoundly changes relationships between the divided polities. Border treaties formally create the category of neighbors, underscoring obligations of neighborliness. When sovereign states create borders, they also create border regions—special areas that require cooperative management. Bordering also creates discontinuous regulatory space, with relational consequences, potentially including smuggling, trafficking, and (now) unauthorized migration. The management problems in such space can become more acute the harder international borders become. A vicious cycle ensues when states double down on securitizing their borders.

As a relational institution, borders create the category of neighbor and obligations of good neighborliness. Good neighborliness has its roots in negative obligations—do not attack your neighbor, for instance. These are the core norms of the international legal system. But good neighborliness also requires states to live up to all aspects of their international obligations. Universal human rights overlay these discontinuities. While this obligation knows no territorial limits, border regions and policies to securitize them raise the risks of rights violations. I argue that as an institutional resource for managing collective international goods—order, stability, and the collective project of universal human rights globally—borders define neighbors that are governed by the international law of neighborliness. In turn, the law of neighborliness forbids states from using sovereignty and security justifications to exempt border regions from obligations under international human rights law.

The Article begins by describing the increasingly securitized border landscape of much of the world. Border zones are places of growing interdependence, but also of increasing securitization. The combination has some predictable consequences, namely, harsh enforcement measures that have increasingly violated the rights of border dwellers, crossers, and migrants. National security themes dominate the official response. Specious themes of “sovereign borders” misleadingly characterize international borders. Accountability for human rights violations tends to lag as a result.

The second Part explores the basis in international law for a more balanced view. I suggest a conception of bordering that acknowledges a relationship between sovereign neighbors who usually have functionally interdependent territorial zones. Bordering is valued not only

by the neighbors that consent to them to divide territory, but to the international community as a whole, which values their stabilizing function. International treaty law reflects the *collective* value of border and boundary treaties.

The third Part draws through the theme of borders as relationships for understanding the international law of neighborliness. This body of law is a resource for interpreting rights and responsibilities between states in neighboring zones in which both have interests and obligations. Neighborliness embraces not only negative duties, but some positive duties as well. Most importantly, it requires states to live up to their international legal obligations. Aside from our humanity, aside from cosmopolitan obligations, and aside from the claims individuals and groups have a right to assert vis-à-vis their own state agents—and these, *I will grant are primary*—there is a state-centric reason for the cooperative, coordinated approach to human rights in border regions. Rights are universal, to be sure. But this understanding of borders replaces a “stand your ground” approach to border security with a more collaborative posture toward border management. The message is in the end very modest: minimally, border zones should not be exempt, in the name of sovereignty and security, from close human rights scrutiny. That’s the very least that should be expected from a good neighbor under such obligations by law. More ambitiously, my analysis calls in the longer term for cooperative border policies in a broad range of common endeavors, from environmental management to development to migration management.

The final Part provides some thoughts on ways forward to reach an appropriate balance between states’ legitimate interests in security and international human rights, none of which are especially radical. Conceptually, I hope to reconstitute an image of borders as shared institutional resources for managing a broader range of human values than recent trends have allowed. They define legally the physical contours of the sovereign state, but even more importantly, they are institutions for the cooperative management of interstate relations. States should not try to exempt themselves from human rights scrutiny in these spaces under the mantle of national security. On the contrary, they are obligated to maintain their international commitments in border spaces and to work cooperatively to solve border problems with neighboring states where necessary to do so.

II. MODERN INTERNATIONAL BORDER ZONES

International borders mark jurisdictional divisions in what was once relatively continuous social, economic, and environmental space. As such, they create jurisdictional disjunctures that not only define

the territory under states' sovereign jurisdiction; they also affect the way billions of people live. Some simple statistical descriptions help to make this point. In 2016, almost 25 percent of the world's population—some 1.87 billion human beings—lived within 100 kilometers of an international land border.⁴ Land ports of entry, where roads cross international borders, are estimated to have roughly tripled between 1995 and 2016, and population density within a 5 square kilometer radius of these entry points has increased dramatically, from about 211.6 persons per square kilometer in 1990 to 275.5 in 2010.⁵ The 100-mile border zone of the United States, including coasts, where border patrol have enhanced search and seizure powers, is home to 65.3 percent of the entire U.S. population.⁶ About 1.5 billion tourists passed through international borders in 2019 (to drop off significantly during the pandemic).⁷ These statistics drive home the point that human quality of life is at stake in getting border governance right.

The broad, variegated, and intense nature of near-border and transborder phenomena reflects the fact that border regions are dynamic and highly interdependent. Policies taken in one state can have effects across a border that are not considered when implementing the policy. Cross-border pollution is a classic example of a negative externality governed by a suite of international treaties.⁸ Differential regulatory regimes create incentives for smuggling, which by some counts is on the rise.⁹ Cross-border travel restrictions during the COVID pandemic have been analyzed as a negative externality when substituted for cautious internal policies.¹⁰ Gross neglect of human rights

⁴ Calculated using the LandScan database. See *LandScan*, OAK RIDGE NAT'L LABORATORY (2022), <https://www.ornl.gov/project/landscan> [<https://perma.cc/53ZH-KWTF>] (last visited August 31, 2023). Approximately ninety-nine million people (1.32%) live within 5 kilometers, 200 million people (2.7%) within 10 kilometers, and more than 600 million people (8.05%) live within 30 kilometers of an international land border. These figures exclude coastlines.

⁵ Calculations based on data from author's database of border crossings and population from LandScan. See *LandScan*, OAK RIDGE NAT'L LABORATORY (2022), <https://landscan.ornl.gov/> [<https://perma.cc/5KBS-TXPP>] (last visited Aug. 31, 2023).

⁶ Tanvi Misra, *CityLab/MapLab: Inside the Massive U.S. 'Borderzone'*, BLOOMBERG (May 14, 2018), <https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone> [<https://perma.cc/RX9Y-YM4L>].

⁷ *UNWTO World Tourism Barometer and Statistical Annex*, UNWTO ELIBRARY (Jan. 2020), <https://www.e-unwto.org/doi/abs/10.18111/wtobarometereng.2020.18.1.1> [<https://perma.cc/7CTN-25LT>].

⁸ See, e.g., Convention on Long-range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217, https://treaties.un.org/doc/Treaties/1979/11/19791113%2004-16%20PM/Ch_XXVII_01p.pdf [<https://perma.cc/43M9-HFR4>].

⁹ OECD, *ILLICIT TRADE: CONVERGING CRIMINAL NETWORKS 5* (2016), https://read.oecd-ilibrary.org/governance/charting-illicit-trade_9789264251847-en#page1 [<https://perma.cc/3ZXA-N2BG>].

¹⁰ Michael Kenwick & Beth A. Simmons, *Pandemic Response as Border Politics*, 74 INT'L ORG. E36, E52 (2020). Positive externalities are possible as well. For example, if one country has an effective vaccine campaign it can potentially reduce infection rates in a neighboring state.

and basic human needs can be seen as negative externalities in the form of refugee flows from the perspective of nearby countries. Such externalities could potentially be addressed through cooperation and cross-border accountability.¹¹ In some areas, some states have cooperated intensively.¹² Much current evidence, however, points to the opposite: a turn to unilateral solutions to a broad range of external threats, *real, exaggerated, and imagined*.

A. A Global Trend of Border Hardening

Despite growing interdependence, there are gathering signs of border unilateralism. Evidence can be found in physical border security investments as well as in popular border discourse. Evidence of the first can be found, quite literally, on the ground. Satellite images show that the border crossings of the world—places where highways transect interstate borders—have far more elaborate inspection stations, official buildings, and gates than they have had at any point in the past twenty years.¹³ Border walls and fences, almost all of which were constructed unilaterally,¹⁴ are on the rise world-wide, with a huge acceleration since 2001.¹⁵ Even states of the European Union imposed border controls and barriers at some of their *internal* borders during the refugee inflows of the 2010s¹⁶ and the COVID pandemic only three

¹¹ Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 328 (2013).

¹² The most obvious case is that of the European Union, and Frontex is an example. Note, however, that cooperation between states can be normatively problematic. For the critique of the legitimacy of European cooperation, see Hallvard Sandven, *The Practice and Legitimacy of Border Control*, AM. J. POL. SCI. 1, 4 (2022). With respect to North America, see Matthew Longo, *From Sovereignty to Imperium: Borders, Frontiers and the Specter of Neo-Imperialism*, 22 GEOPOLITICS 758, 768 (2017).

¹³ See Michael Kenwick et al., *Infrastructure and Authority at the State's Edge: The Border Crossings of the World Dataset*, J. PEACE RSCH. (forthcoming) (on file with author).

¹⁴ This point is developed and supported with examples in Michael R Kenwick et al., *Border Walls as Cooperation Failures*, (U. Pa. L. Sch., Pub. L. Rsch. Paper No. 23-13, 2023), <https://ssrn.com/abstract=4343982> [<https://perma.cc/CHN9-HE6N>]. It is important to acknowledge that States may decide to govern some aspects of their shared border cooperatively, as the United States and Mexico have done in the past, then suddenly shift to a more unilateral stance. Matthew Longo identifies “co-bordering” as a global trend. MATTHEW LONGO, *THE POLITICS OF BORDERS: SOVEREIGNTY, SECURITY, AND THE CITIZEN AFTER 9/11*, at 121 (2017).

¹⁵ For descriptive statistics, see Kenwick et al., *supra* note 14. See also Beth A. Simmons & Michael Kenwick, *Border Orientation in a Globalizing World: Concept and Measurement*, 66 AM. J. POL. SCI. 853, 861 (2022); Ron E. Hassner & Jason Wittenberg, *Barriers to Entry: Who Builds Fortified Boundaries and Why?*, 40 INT'L SEC. 157, 166 (2015); Élisabeth Vallet & Charles-Philippe David, *Introduction: The (Re)Building of the Wall in International Relations*, 27 J. BORDERLANDS STUD. 111, 113 (2012); David B Carter & Paul Poast, *Why Do States Build Walls? Political Economy, Security, and Border Stability*, 61 J. CONFLICT RESOL. 239, 249 (2017).

¹⁶ Sean M. Topping, *Defying Schengen through Internal Border Controls: Acts of National Risk-Taking or Violations of International Law at the Heart of Europe*, 48 GEO. J. INT'L L. 331, 333 (2016).

years later.¹⁷ Nor do these studies reflect the full picture of intensified border enforcement: extraterritorial border enforcement, both unilateral and collaborative, on land and at sea, is on the rise as well.¹⁸ Pushing borders outward and enforcing them internally represent extraordinary challenges to fundamental principles of both the European Union and the United States.¹⁹

Exactly what animates the past two decades' worth of border hardening is an active area of research. Certainly, there are some real threats, including transnational crime,²⁰ international terrorism,²¹ and, in some opinions, unusually strong refugee flows.²² Some studies suggest "crisis rhetoric,"²³ "border anxiety,"²⁴ or "moral panic"²⁵ play a role. But there is also a changing set of understandings about borders themselves that should be exposed and examined. State officials are increasingly harnessing the rhetoric of "sovereign borders" to justify their enforcement policies. When the Australian government launched a program to intercept, detain and deport maritime asylum seekers in

¹⁷ For a 28-page list of all border controls implemented by members pursuant to Article 25 and 28 et seq. of the Schengen Borders Code, see *Temporary Reintroduction of Border Control*, EUROPEAN COMM'N MIGRATION & HOME AFFAIRS, https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en [<https://perma.cc/W5ZH-3AAV>] (last visited Sept. 18, 2023).

¹⁸ On U.S. policy in the Americas, see Nancy Hiemstra, *Pushing the US-Mexico Border South: United States' Immigration Policing Throughout the Americas*, 5 INT'L J. MIGRATION & BORDER STUD. 44 (2019). On Australia, see Amy Nethery et al., *Exporting Detention: Australia-Funded Immigration Detention in Indonesia*, 26 J. REFUGEE STUD. 88 (2013). On Europe, see Anneliese Baldaccini, *Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea*, in EXTRATERRITORIAL IMMIGRATION CONTROL 229 (2010); Maribel Casas-Cortés et al., *'Good Neighbours Make Good Fences': Seahorse Operations, Border Externalization and Extra-Territoriality*, 23 EUR. URB. & REG'L STUD. 1 (2016).

¹⁹ Jaya Ramji-Nogales & Iris Goldner Lang, *Freedom of Movement, Migration, and Borders*, 19 J. HUM. RTS. 593, 593 (2020).

²⁰ A prominent U.S. example includes THE WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE (NSPD-22) COMBATING TRAFFICKING IN PERSONS (2002), <https://ctip.defense.gov/Portals/12/Documents/NSPD-22.pdf> [<https://perma.cc/9H5T-L89E>].

²¹ An example at the international level is the establishment of the United Nations Office of Counter-Terrorism, through the adoption of G.A. Res. 71/291 (June 15, 2017). Border security is one of the organization's key capacity-building emphases. See *What We Do*, U.N. OFF. OF COUNTER-TERRORISM, <https://www.un.org/counterterrorism/what-we-do> [<https://perma.cc/S5BU-B8UT>] (last visited Sept. 11, 2023).

²² *Figures at a Glance*, UNCHR, THE UN REFUGEE AGENCY (June 14, 2023), <https://www.unhcr.org/about-unhcr/who-we-are/figures-glance> [<https://perma.cc/5N76-RDKY>].

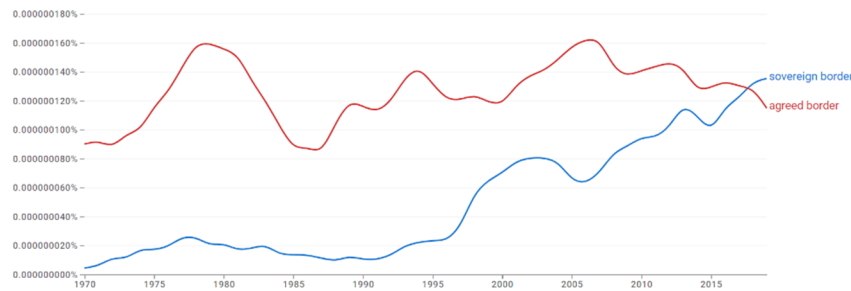
²³ Céline Cantat et al., *Migration as Crisis*, 67 AM. BEHAV. SCIENTIST (forthcoming 2023) (manuscript at 1) (finding that "migration has become inseparable from a narrative of crisis").

²⁴ Beth A. Simmons & Robert Shaffer, *Border Anxiety in International Discourse*, AM. J. POL. SCI. (forthcoming) (on file with author) (defining border anxiety as "a heightened sense of instability or vulnerability perceived to be linked with a broad range of cross-border phenomena," and emphasizing that it can often be exaggerated).

²⁵ See generally David A. Shirk, *The Escalation of US-Mexico Border Enforcement, in BORDERS & BORDER WALLS: IN-SECURITY, SYMBOLISM, VULNERABILITIES* (Andréanne Bissonnette & Élisabeth Vallet eds., 2020).

2013, it dubbed the program “Operation Sovereign Borders.”²⁶ The United Kingdom’s recently revamped asylum program, though much more limited, revives the same “Sovereign Borders” label.²⁷ The mainstream press amplifies the confusion by conflating state border control agents with state sovereignty itself, as in the New York Times’ mention of “sovereign border guards” in its description of state border control agents.²⁸ It is becoming very common in scholarly work to refer erroneously to “sovereign borders” as well. The density of the phrase “sovereign borders” in English-language books has accelerated consistently since the mid-1990s and even surpassed “agreed borders” by 2017 (Figure 1).²⁹ The more we speak of “sovereign borders,” the greater the claims of exclusive and unchecked authority, states—and others—are likely to make in their defense.

Figure 1: Google Ngrams



Notes. Comparing the density in Google Books of the phrases “sovereign border” and “agreed border.” Accessed July 30, 2023.

Unfortunately, the risk is that such phrases may be used to justify policies. After all, every state has the right to defend its territorial sovereignty. This is the fundamental principle at the core of interna-

²⁶ For the Office of Home Affairs’ campaign page, see *Operation Sovereign Borders*, AUSTRALIAN GOV’T, <https://osb.homeaffairs.gov.au/> [<https://perma.cc/YCW8-95P7>] (last visited Sept. 11, 2023).

²⁷ Introduced as the “Sovereign Borders Bill” in 2020. *Sovereign Borders: International Asylum Comparisons Report*, HOME OFFICE (Sept. 2020), <https://freemovement.org.uk/wp-content/uploads/2022/11/Annex-A-Sovereign-Borders-International-Asylum-Comparisons-Report-Section-1-Drivers-and-impact-on-asylum-migration-journeys.pdf> [<https://perma.cc/4P9R-UKQF>].

²⁸ Matina Stevis-Gridneff, *E.U. Border Agency Accused of Covering Up Migrant Pushback in Greece*, N.Y. TIMES (July 18, 2021), <https://www.nytimes.com/2020/11/26/world/europe/frontex-migrants-pushback-greece.html> [<https://perma.cc/2QHE-2VC5>] (referring to “a conundrum at the core of E.U. ambitions to tighten external borders by pooling resources and involving the bloc in the sensitive, zealously shielded work of sovereign border guards”).

²⁹ GOOGLE NGRAMS, <https://books.google.com/ngrams/> [<https://perma.cc/ZCW9-L3V9>] (last visited Sept. 11, 2023).

tional law.³⁰ If the phrase “sovereign borders” makes any sense at all, then it follows that border control is among the highest possible national security interests. The phrase invites the conclusion that borders are unquestionably a matter of national security, that an inability to control border flows threatens the state and society itself. We are back to the situation that played a part in depriving the Hernández family of a remedy for the death of their child near a culvert outside of El Paso.

B. The Incoherence of “Sovereign Borders”

A central premise of this Article is that a phrase like “sovereign borders” is conceptually incoherent. As I will develop in the following Section, borders are cooperative institutions. They are not unilaterally determined, changed, or managed. They are certainly not sovereign entities. The fallacious rhetorical connection between “borders” and “sovereignty” is undoubtedly intentional. Hitching “open borders” to a loss of sovereignty and construction of a border wall with “reestablished American sovereignty”³¹ serves a political purpose but makes no legal sense. Sovereignty traditionally means supreme legal authority in a territorial space: the authority to rule independently from another state in a territorial space.³² States are sovereign internally, and independent of other states’ authority or other bodies of foreign law externally, *other than public international law* developed through treaties or custom.³³ Of course, public international law provides precisely the legal tools and mechanisms to create, develop, and maintain international borders, as I will further develop below. It is important to distinguish between the sovereign actor and the institution that, in cooperation with other sovereign actors, they have created.

Clearly, then, borders do not “create” sovereign states. They are neither a necessary nor a sufficient condition for independent statehood. According to one authoritative formulation, “[n]one of the differ-

³⁰ For elaboration, see the discussion in Jack Goldsmith, *Review: Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959 (2000).

³¹ See, e.g., *Remarks by President Trump at the 45th Mile of New Border Wall, Reynosa-McAllen, TX*, THE WHITE HOUSE (Jan. 12, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-45th-mile-new-border-wall-reynosa-mcallen-tx/> [https://perma.cc/B8ZJ-G3ED].

³² Commonly cited are the words of Max Huber, arbitrator in *Island of Palmas (U.S. v. Neth.)*, 2 U.N. Rep. Intl. Arb. Awards 821, 838 (1928): “Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise there, to the exclusion of any other states, the function of a state.” See also *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 39, 43 (Apr. 9) (“By sovereignty, we understand the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relations with other states.”).

³³ Helmut Steinberger, *Sovereignty*, 10 ENCYCLOPEDIA DISP. INSTALLMENT 397, 408 (1987).

ent sources of international law listed in Article 38(1) of the Statute of the International Court of Justice makes the existence of a state contingent upon the existence of a well-defined and undisputed territory.”³⁴ International borders are institutions that help to sharpen the spatial limits of two sovereign entities,³⁵ but that is not what makes the two entities sovereign. Sovereign states have no explicit international legal obligation to delimit or demarcate international borders. Indeed, borders are not mentioned at all in the United Nations Charter, nor in any of the sources of law on the rights and duties of states.³⁶ To be sure, state sovereignty is territorial, and the U.N. Charter requires that its member states “shall refrain in their international relations from the *threat or use of force* against the territorial integrity or political independence of any state.”³⁷ This is the fuzzy criterion that consensus suggests would trigger *sovereignty* concerns. But the exact meaning of “territorial integrity” is essentially a coordination problem that establishing international borders is meant to address, not an aspect of sovereignty per se. As a solution to a coordination problem, borders help secure the peace between territorial human organizations, but they do not per se constitute sovereign states. Indeed, the reverse is more often true. As a coordinating institution, border integrity can be thought of as a shared resource of the neighboring states, if not the international community as a whole. While sovereignty over territory is “mine,” the international border is *ours*.

III. REFRAMING BORDERS AS COOPERATIVE INSTITUTIONS

International borders and their fortification have been misleadingly, even dangerously, elided with the concept of sovereignty. I have argued this position is incoherent. International borders are properly understood as a central institution of modern international law and interstate relations. The transition from non-spatial rule to territorial rule forcibly disrupted dynasties, challenged spiritual authorities, and undermined political organization based on ethnic and kinship relations.³⁸ Some mechanism was needed to facilitate this transition. The

³⁴ North Sea Continental Shelf (Ger. v. Den./Ger. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 46 (Feb. 20). See also Giuseppe Nesi, *Boundaries*, in RESEARCH HANDBOOK ON TERRITORIAL DISPUTES IN INTERNATIONAL LAW 193, 195 (Marcelo Kohen & Mamadou Hébié eds., 2018) (arguing that “a boundary has no effect on the existence of a state”).

³⁵ Montevideo Convention on Rights and Duties of States adopted by the Seventh International Conference of American States art. I, Dec. 26, 1933, 165 L.N.T.S. 19 (stating that a “defined territory” is one of the qualifications a “state as a person of international law should possess[]” according to the most widely accepted international convention on statehood).

³⁶ For example, borders are not mentioned in the G.A. Res. 375 (IV), (Dec. 6, 1949).

³⁷ U.N. Charter art. 2, ¶ 4.

³⁸ See Beth A. Simmons & Hein E. Goemans, *Built on Borders: Tensions with the Institution*

idea of modern international borders—ideally, delimited in law and demarcated on the ground—fit the bill. The international law of borders developed to stabilize territorial facts on the ground with a special suite of rules that help to fix jurisdictional divisions in geographical space.³⁹

International borders are essentially a public international good for consolidating states and coordinating their international relations. Under-provision of border stability risked “endanger[ing] the life of the State itself.”⁴⁰ A special area of treaty law developed to make this outcome less likely.⁴¹ Certainly, this body of law does not eliminate interstate conflicts. Territorial and boundary disputes remain relatively likely to lead to violence.⁴² And yet over the past century, border agreements have served the international community fairly well. Even as the number of states has proliferated—directly contiguous border pairs have increased from about fifty in 1940 to over 300 at present⁴³—attempts by one state to conquer all or part of another state’s territory have declined drastically since the middle of the twentieth century⁴⁴ (which is one reason why the brazen attack of Russia to alter the borders of Ukraine has been so shocking). Explicit international agreements are associated with a reduction in interstate violence: research shows that border treaties reduce the likelihood border disputes will become militarized.⁴⁵

For these reasons, states have afforded special status to border agreements in international treaty law. First, states cannot unilater-

Liberalism (Thought It) Left Behind, 75 INT’L ORG. 387, 389–91 (2021).

³⁹ The principle of stability is traditionally deemed as *the* criterion for interpreting boundary treaties. See CHARLES DE VISSCHER, *PROBLEMES DE CONFINES EN DROIT INTERNATIONAL PUBLIC* 28 (1969).

⁴⁰ *Dubai/Sharjah Border Arbitration*, 91 INT’L L. REP. 543, 578 (2009).

⁴¹ Malcolm N. Shaw, *Boundary Treaties and Their Interpretation*, 5 QUEEN MARY STUD. INT’L L. 239, 239 (2012) (claiming in his opening paragraph that “[b]oundary treaties are treaties, but are distinctive. They constitute a special category of treaties”).

⁴² There is vast empirical literature in international relations supporting this point. For an early statement and findings, see John Vasquez & Marie Henehan, *Territorial Disputes and the Probability of War, 1816–1992*, 38 J. PEACE RSCH. 123 (2001).

⁴³ These numbers reflect the total number of interstate land borders in “direct contiguity,” generated from the Correlates of War Dataset. *Data Sets*, CORRELATES OF WAR, <http://www.correlatesofwar.org/data-sets> [<https://perma.cc/YEZ4-JA86>] (last visited Sept. 11, 2023). See Beth A. Simmons, *Border Rules*, 21 INT’L STUD. REV. 256, 260 fig.1 (2019).

⁴⁴ Dan Altman, *The Evolution of Territorial Conquest After 1945 and the Limits of the Territorial Integrity Norm*, 74 INT’L ORG. 490, 490 (2020).

⁴⁵ Kenneth A. Schultz, *What’s in a Claim? De Jure Versus De Facto Borders in Interstate Territorial Disputes*, 58 J. CONFLICT RESOL. 1059, 1059 (2014). (finding that “among states that have homeland territory disputes, the adoption of a legally binding border is associated with a significant reduction in the likelihood of future militarized conflict over the territory”). See also Nesi, *supra* note 34, at 150 (concluding that “[s]tates are more capable of peacefully carrying their relations and exercising sovereign rights when their territory is well defined—that is to say, when it can be easily identified”).

ally withdraw from or terminate border treaties. Long considered a part of customary international law,⁴⁶ this principle is now explicitly articulated in the Vienna Convention on the Law of Treaties (VCLT),⁴⁷ which exempts border treaties from its *rebus sic stantibus* provision, Article 62(1): “A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties,” may be invoked to terminate a treaty if the change radically alters the conditions of consent in ways that were unforeseen. However, this unilateral termination justification is *not* available “if the treaty establishes a boundary.”⁴⁸ As such, border agreements are an example of a small class of treaties from which states cannot withdraw unilaterally in the absence of a termination clause,⁴⁹ even if other conditions which might normally justify treaty termination have fundamentally changed. Border agreements are broadly recognized as surviving state revolution and other radical changes.⁵⁰ When interpreting border treaties, “unilateral modification is not possible.”⁵¹

Second, border agreements have special status in the law of state succession. Article 11 of The Vienna Convention on the Succession of States in Respect of Treaties provides that “[a] succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary.”⁵² Such was the case, for example, when Texas joined the United States,⁵³ and when Cambodia succeeded France.⁵⁴ Newly independent states generally have a clean slate when it comes to (re)negotiating treaties, but they continue to be bound by their pre-independence border agreements.⁵⁵ This is essentially a formalization

⁴⁶ Shaw, *supra* note 41, at 242.

⁴⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

⁴⁸ *Id.*

⁴⁹ Humphrey Waldock, *Fifth Report on the Law of Treaties*, 2 Y.B. INT'L L. COMM'N 1, 43 (1966).

⁵⁰ Humphrey Waldock, *Sixth Report on the Law of Treaties*, 2 Y.B. INT'L L. COMM'N 51, 92–93 (1966).

⁵¹ Shaw, *supra* note 41, at 259 (in the context of the Eritrea-Ethiopia boundary commission).

⁵² Vienna Convention on Succession of States in respect of Treaties art. 11, Nov. 6, 1996, 1946 U.N.T.S. 3 [hereinafter Vienna Convention].

⁵³ *United States v. Texas*, 143 U.S. 621 (1892) (holding that upon independence in 1840, Texas's boundary with the United States was that established by treaty with Mexico in 1828).

⁵⁴ *Temple of Preah Vihear, (Cambodia v. Thai.)*, Judgment, 1962 I.C.J. 6 (June 15) (ruling that Cambodia succeeded to a 1904 boundary treaty concluded by France for Cambodia and Siam).

⁵⁵ Vienna Convention, *supra* note 52, at art. 16 (“A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.”).

of *uti possidetis*—a long recognized general principle of customary international law.⁵⁶

Third, and admittedly most controversially, international courts and jurists have held that boundary agreements can create obligations for third parties. For example, in the Eritrean/Yemen Arbitration case, the Tribunal found that boundary and territorial treaties can have legal effects on others. In deciding that Yemen could not claim the Hanish Islands in part because title to them had been established through the Treaty of Lausanne (to which Yemen was not a party), the Tribunal noted that “[b]oundary and territorial treaties made between two parties are *res inter alios acta* [a thing done between others] vis-à-vis third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes* [for all].”⁵⁷ Having “effects” for all may not be quite as strong as creating “obligations” for all. Nonetheless, citing this finding, Shaw holds that boundary treaties “may establish an objective territorial regime which is valid *erga omnes* and thus applicable to third parties.”⁵⁸

Boundary regimes, such as those that regulate access to an international waterway,⁵⁹ have long been recognized as having a special status that limits the general rule in treaty law that an agreement binds only consenting parties.⁶⁰ These agreements are sometimes referred to as “objective regimes” because they create objective conditions to cooperatively govern a specific place, and share an intent of the parties “*in the general interest to create a regime of general obligations and rights for a region, territory or locality which is subject to the treaty-making competence of one or more of them.*”⁶¹ Objective territorial divisions with the public goods function of stabilizing international relations arguably meet this criterion. Border agreements not only address the immediate interests of the immediate proximate parties;

⁵⁶ Maurizio Ragazzi, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia*, 31 INT’L LEGAL MATERIALS 1488, 1499 (1992).

⁵⁷ Eritrea v. Yemen, 22 U.N. Rep. Intl. Arb. Awards 209, ¶ 153 (1998).

⁵⁸ Shaw, *supra* note 41, at 239. There is growing consensus that boundary treaties indeed can bind third parties. See, e.g., Ulf Linderfalk, *International Legal Hierarchy Revisited—The Status of Obligations Erga Omnes*, 80 NORDIC J. INT’L L. 1, 15 (2011).

⁵⁹ See Humphrey Waldock, *Third Report on the Law of Treaties*, 2 Y.B. INT’L L. COMM’N 5, 26–31 (1964).

⁶⁰ Importantly, however, the International Court of Justice has held that joint territorial regimes between two states do not dispose of the rights of independent Third Parties. See *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, 2012 I.C.J. 624, ¶ 227 (Nov. 19).

⁶¹ Waldock, *supra* note 59, at 31. See also Francesco Salerno, *Treaties Establishing Objective Regimes*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 225, 226 (Enzo Cannizzaro ed., 2011) (referring to “existence of a prevailing general interest in the certainty of the law”).

they also are a means to enhance international stability *for all*.⁶² Their dispositive nature is in this sense in the general interest, which further supports their status as “objective regimes” from which even third parties benefit and are bound to respect.⁶³

Objective international boundary regimes are not limited to creating lines of division on the ground. In many historical cases, they have represented systems of governance in spaces of crucial shared interest. Some classic examples have established a regime of permanent neutralization, as did the agreements concluded by the Congress of Vienna on permanent Swiss neutrality,⁶⁴ or to permanently demilitarize a specific zone, as in the case of the Aaland Islands Convention.⁶⁵ As interdependence has become more intense, the concept of objective regimes can legitimately be applied to the governance of issues of urgent international public interest, which involve “general . . . interests so essential and fundamental to international public policy as to provide States with a normative basis for the creation of objective regimes opposable to third parties.”⁶⁶

International border agreements that divide territory between sovereign states, then, are the fundamental cooperative international legal institution of the modern state system. Yes, they are lines of demarcation that confer rights, but the above discussion suggests that they are not legitimately created, changed unilaterally, or maintained as mere private deals between contracting parties. They are also institutions that constitute normative resources that govern interstate behavior. Stable borders can be reclaimed as a common resource for managing interstate conflict. The collective interest of the international community in international- borders-as-institutions is reflected

⁶² Notably, resolving border and territorial disputes is considered an important factor for joining some international organizations such as NATO and the European Union. For NATO, settling such disputes “would be a factor in determining whether to invite a state to join the Alliance.” *Study on NATO Enlargement*, NATO (Nov. 5, 2008), https://www.nato.int/cps/en/natohq/official_texts_24733.htm [<https://perma.cc/C8PQ-D4XK>].

⁶³ On “objective regimes” and their effect on third parties, see *Reports of the International Law Commission on the Second Part of its Seven-Teenth Session and on its Eighteenth Session*, 2 Y.B. INT’L L. COMM’N 169, 231 (1966); see also Arnold D. McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. Y.B. INT’L L. 100, 102–03 (1930). Somewhat skeptically, see Carlos Fernández de Casadevante Romani, *Objective Regime*, in 7 MAX PLANCK ENCYCLOPEDIA PUB. INT’L L. 912 (2010).

⁶⁴ Swiss permanent armed neutrality was internationally recognized at the Congress of Vienna in 1815 by Russia, England, Prussia, Austria, and France. Thomas Curson Hansard, *In Congress, At Vienna, June 8, 1815*, 32 PARLIAMENTARY DEBATES FROM YEAR 1803 TO PRESENT TIME 71, 182 (1816).

⁶⁵ Convention Relating to the Non-Fortification and Neutralization of the Aaland Islands, Apr. 6, 1922, 9 L.N.T.S. 211.

⁶⁶ Richard A. Barnes, *Objective Regimes Revisited*, 9 ASIAN Y.B. INT’L L. 97, 98 (2000). As examples, Barnes analyzes Antarctica, Outer Space, the Deep Seabed, the High Seas, and “Zones of Peace.” *Id.* at 106.

in the territorial integrity norm of the U.N. Charter itself.⁶⁷ Borders exist to manage jurisdictional divisions that are increasingly interdependent and concern the international community. Sovereignty “belongs” to the bordering states. But the border agreement and related boundary regimes are the concern of the international community as a whole.

IV. FROM COOPERATIVE BORDERING TO COOPERATIVE BORDER MANAGEMENT

At this point, readers may be wondering: what does all this state-centric talk of stability, cooperation, and international-borders-as-institutions have to do with human rights? How do borders as interstate institutions (focused on *horizontal* relationships) address the universal rights of humans vis-à-vis states (*vertical* relationships)? How would it have made any difference to Sergio Adrián Hernández Güereca, or how might his family’s case look not-so-easy to dismiss under the mantle of national security if we viewed borders as cooperative institutions?

The dissenting justices in the Hernández decisions⁶⁸ provide a hint to where this argument is going. They recognized that the shooting took place in a special space where “de jure sovereignty” should not determine the protections Hernández should have been entitled to. Most telling is Justice Breyer’s description of the culvert as “at the least a special border-related area (sometimes known as a ‘limitrophe’ area . . .)”⁶⁹ that Mexico and the United States had worked together to manage over the years, and which, when construction was completed, President Johnson had celebrated as “bridges between cultures’ created by the countries’ joint effort.”⁷⁰ The United States and Mexico had worked together for decades to maintain both the infrastructure and manage the water.

Justice Breyer’s dissent then shifts to what international law has to say about such spaces. “[I]nternational law recognizes special duties and obligations that nations may have in respect to ‘limitrophe’ areas Those areas are subject to a special obligation of cooperation and good neighborliness”⁷¹ Justice Breyer described such spaces

⁶⁷ U.N. Charter art. 2 ¶ 4.

⁶⁸ *Hernandez v. Mesa*, 582 U.S. 548, 557 (2017) (vacating and remanding the Court of Appeals for the Fifth Circuit’s decision affirming the District Court’s dismissal of the parents’ claims, and directing the Court of Appeals to address several questions); *Hernandez v. Mesa*, 130 S Ct. 735 (2020) (confirming the judgment of the Court of Appeals).

⁶⁹ *Hernandez*, 582 U.S. 548, 557 (2017) (Breyer, J., dissenting).

⁷⁰ *Id.* at 558.

⁷¹ *Id.* at 559.

as regimes of *voisinage*, where neighbors cooperate on managing common resources and infrastructure. Justice Ginsburg's dissent in particular notes there is something totally arbitrary about the question of on "whose territory" the teenager was killed.⁷² A mere few feet north, and the case would have been deemed an excessive use of force, for which Hernández's family would likely have been awarded a remedy. Instead, the majority viewed it as an international incident involving national security and thus beyond the court's scrutiny. Viewing the border as a cooperative institution provides one perspective; seeing it as a sovereign dividing line leads to quite another.

A. From Division to Relations: Bordering as Neighboring

To return to our argument: There are two major consequences of bordering. International borders *divide* territory, and they *define* (and sometimes alter) legal and social relationships. Most analyses of international bordering concentrate on the former function. *Territorial* aspects of bordering emphasize the physically delimited jurisdictional exclusivity that borders imply, while downplaying how international bordering institutions and practices affect *relationships* between states and local communities. For example, Lord Curzon's early-twentieth-century dictum that "[t]o claim territory is to deny it to others"⁷³ is a stark formulation of the former. It is a view that sees the "least encroachment on the territory of another [as] an act of injustice."⁷⁴ What matters, in this view, is the sanctity of the division itself as a symbol of sovereignty.

Alternatively, borders can be seen as essentially *relational* in nature. The world itself is a constellation of social relationships in space. What all borders do, by definition, is introduce divisions into the world. They "place at least two spaces in specific relation to one another."⁷⁵

All borders have this in common: they profoundly affect social relationships. At the most abstract level, *there is no other reason to border*. Some theorists conclude that a thing does not even qualify as a border if it has no social impact.⁷⁶ Bordering in this view is a dynamic

⁷² See generally *Hernandez*, 130 S Ct. at 756–57 (Ginsburg, J., dissenting).

⁷³ Daniel-Erasmus Khan, *Territory and Boundaries*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 225, 234 (Bardo Fassbender & Anne Peters eds., 2012).

⁷⁴ EMER DE VATEL, *THE LAW OF NATIONS* 308 (Béla Kapossy & Richard Whatmore eds., 2008).

⁷⁵ Martina Löw & Gunter Weidenhaus, *Borders That Relate: Conceptualizing Boundaries in Relational Space*, 65 *CURRENT SOCIO.* 553, 555 (2017).

⁷⁶ THOMAS NAIL, *THEORY OF THE BORDER* 7 (2016).

process that affects how people interact.⁷⁷ Viewed in this way, the purpose and the inevitable nature of bordering is to alter social relationships in space.

Public international borders, this view implies, are not mainly about claiming territory. They are about relationships. International bordering coordinates state *neighbors*: entities that are proximate to one another and that are juridically separate, but that are also in many ways likely to be interdependent. Beyond dividing, bordering is the recognition of neighboring states that share a common interest in coordinating their jurisdictional differences. This entails legal acknowledgment that my state has territorial limits on its sovereignty, and to require this mutual acknowledgement of my neighbor.⁷⁸ Through negotiation and with consent, as required by international law, bordering is a relational process that sets expectations about how two sovereign entities will behave toward one another, and not merely a territorial division achieved through demarcation.⁷⁹

Understood as a social process, international borders do not only have to be drawn—they have to be maintained. If the purpose of bordering in the first place is to realize jurisdictional authority in space—if territorial sovereignty is to become meaningful—then rules have to be created and enforced, routines need to be developed to avoid costly clashes, official communications near the border need to be established, and infrastructure needs to be repaired and replaced.⁸⁰ Without maintenance, the effort to border will fade into irrelevance. State-to-state relationships are key to the ongoing process of bordering.

International law anticipates all of these ongoing needs in principles of good neighborliness, which Justice Breyer alludes to in his dissent above. The *law of good neighborliness*⁸¹ is rooted in respect for other

⁷⁷ Anssi Paasi, *Border Studies Reanimated: Going Beyond the Territorial/Relational Divide*, 44 ENV'T & PLAN. A 2303 (2012). Paasi usefully describes a boundary as a sociological institution with both territorial and relational aspects. He sees borders not as “static ‘things’” but rather as “dynamic, unfolding relations.” *Id.* at 2304.

⁷⁸ See Andreas Müller, *Territorial Borders as Institutions: Functional Change and the Spatial Division of Authority*, 15 EUR. SOC'Y 353, 365 (2013) (describing “borders as reciprocal restrictions of influence”).

⁷⁹ Delimitation is the process of negotiating the location of an international border, and demarcation is how it is made visible in the landscape, e.g., through the placement of markers, signs, monuments, etc.

⁸⁰ Nail is explicit about these ongoing aspects of dynamic bordering: “[B]order technologies must be maintained, reproduced, refueled, defended, started up, paid for, repaired, and so on. . . . Management in some form or another has always been part of their existence.” NAIL, *supra* note 76, at 7.

⁸¹ On the international (and E.U.) law of good neighborliness, see Elena Basheska & Dimitry Kochenov, *The Meso Level: Means of Interaction between EU and International Law ‘Good Fences Make Good Neighbors’ and Beyond . . . Two Faces of the Good Neighbourliness Principle*, 35 Y.B. EUR. L. 562, 564 (2016) (formulating the obligation of good neighborliness as a “general principle [to be] accepted by all UN members”).

states' sovereignty, which is a legal obligation under the Charter of the United Nations. The U.N. Charter's Preamble requires states to "live together in peace with one another as good neighbors."⁸² Article 74 requires states to take into account the interests and wellbeing of the rest of the world.⁸³ While the U.N. Charter universalizes obligations of neighborliness, neighborliness is firmly rooted in the urgency of proximity. It generalizes "the ensemble of conventional and customary norms regulating mutual relationships between neighboring States in the adjacent portions of their territories."⁸⁴ Borders not only regulate and moderate that adjacency; their maintenance requires the modicum of cooperation that neighborliness implies.

The "ensemble of norms" comprising the international law of neighborliness originated in the familiar negative duties of states, such as a duty to respect the full sovereignty of the neighbor, the inviolability of territorial sovereignty, and a duty to comply fully and in good faith with international legal obligations.⁸⁵ As such, it is more than a political exhortation to be nice. It has become a well-recognized, cross-culturally adopted,⁸⁶ judicially tested,⁸⁷ binding⁸⁸ principle of international law. In addition, international courts have

⁸² U.N. Charter pmb.

⁸³ *Id.* at art. 74. ("Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.")

⁸⁴ Laurence Boisson de Chazournes & Danio Campanelli, *Neighbour States*, in 7 MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. 600, ¶ 6. (2006). Likewise, Tadeusz Gadkowski stresses that "[t]he good-neighborliness principle is thus undoubtedly an expression of the interdependence of the rights and interests of States *bordering* on each other and the requirement ensuing from this, namely that each State limit the activities that may cause damage outside its territory." Tadeusz Gadkowski, *The Principle of Good-Neighbourliness in International Nuclear Law*, 12 PRZEGLĄD PRAWNICZY UNIwersytetu IM. ADAMA MICKIEWICZA 265, 267 (2021) (emphasis added).

⁸⁵ Paraphrasing the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter. G.A. Res. 2625 (XXV) (Oct. 24, 1970) [hereinafter *The Declaration on Friendly Relations*]. The Declaration on Friendly Relations, like the U.N. Charter as a whole, is based on the assumption of the "inviolability of territorial integrity."

⁸⁶ See *Bandung Conference: Asia-Africa 1955*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Bandung-Conference> [<https://perma.cc/2CYQ-M43Q>] (last visited Oct. 10, 2023) (adopting a declaration on the promotion of world peace and cooperation). In addition, at least nine United Nations General Assembly (UNGA) resolutions that have grappled with defining good neighborliness. See Basheska & Kochenov, *supra* note 81, at 574.

⁸⁷ See Gadkowski, *supra* note 84.

⁸⁸ BRUNO SIMMA, *THE CHARTER OF THE UNITED NATIONS* 1097 (1995) (concluding that "[t]he principle of good neighborliness rather sets a general, though nonetheless legally binding aim for policy; it is thus more than just a political principle."); Boisson de Chazournes & Campanelli, *supra* note 84, ¶ 28 (concluding that "the concept of good neighborliness possesses some legal contours, though imprecise.").

urged states to interpret their multilateral obligations and settle disputes with concepts of good neighborliness as a criterion.⁸⁹

Good neighborliness is directly and urgently relevant to the governance of proximate human and natural environments, shared resources, and interdependence.⁹⁰ However, negative duties do not suffice among neighbors whose proximity makes them intensively interdependent. Cross-border externalities are better managed actively and cooperatively, a point that is well-recognized in the area of international environmental law, where such externalities are evident.⁹¹ International environmental law understands that harm can result from inaction as well as action.⁹² For example, international courts have held that international neighborliness in the environmental area implies that states have a positive duty to warn others of harm,⁹³ to engage in meaningful negotiation to avert harm,⁹⁴ and to cooperate when the interests of the neighbor are at stake.⁹⁵ Principles of preventive action, arguably flowing from due diligence requirements,⁹⁶ are also well-developed in international environmental law. The International Court of Justice has even developed procedural standards for preventing harmful environmental effects on neighbors, including the conditions that would trigger a duty to perform an environmental impact assessment.⁹⁷

Some of the same principles have a clear place in the management of rights-respecting border spaces; arguably, even more so. International borders are relationships between states; but border *controls*—how states make their territorial sovereignty meaningful—are a means to govern *populations*.⁹⁸ People are “territorialized by the

⁸⁹ In the *Haya de la Torre* case, the ICJ suggested that the parties should “find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good neighborliness which, in matters of asylum . . .,” thus nudging states in Latin America to conclude the Caracas Convention on Diplomatic Asylum in 1954. *Haya de la Torre* (Colom. v. Peru), Judgment, 1951 I.C.J. 71, 83 (June 13).

⁹⁰ MALGOSIA FITZMAURICE & OLUFEMI ELIAS, *WATERCOURSE CO-OPERATION IN NORTHERN EUROPE: A MODEL FOR THE FUTURE* (2004). For the development of community of interest with respect to international watercourses, for example, see *id.* at 13–15.

⁹¹ EDGARDO SOBENES ET AL. *THE ENVIRONMENT THROUGH THE LENS OF INTERNATIONAL COURTS AND TRIBUNALS* 549–59 (2022);

⁹² Joanna Kulesza, *Human Rights Due Diligence*, 30 WM. & MARY BILL RTS. J. 265 (2021) (discussing this in the context of due diligence and international liability concepts).

⁹³ *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9).

⁹⁴ *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 142 (Sept. 25).

⁹⁵ *MOX Plant* (Ir. V. U.K.), Case no. 10, Order of Dec. 3, 2001, 2001 ITLOS Rep. 95. Especially see the Separate Opinion of Judge Rudiger Wolfrum. *Id.* at 135.

⁹⁶ SOBENES, *supra* note 91, at 553. Due diligence requirements are still being formulated. See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2 Y.B. INT'L L. COMM'N 26 (2001), discussed in Kulesza, *supra* note 92.

⁹⁷ SOBENES, *supra* note 91, at 556.

⁹⁸ Damiano Canale, *Walled Borders, Territoriality and Sovereignty: A Typology*, 1 ATHENA—

law.”⁹⁹ A relational concept of borders has profound consequences for the dynamic matrix of social relations among communities and societies, encouraging some forms of connectedness and suppressing others.¹⁰⁰ Border *controls* alter how people move, work, study, participate in governance, invest, pay taxes, shop, and play; in short, how they live. The stronger the wedge that states are determined to drive between these social relations, the more they have a legal and moral obligation to anticipate the perfectly predictable consequences: it will be harder to disrupt the economic transactions and social relationships the state sees as a threat to its jurisdictional sovereignty.

One more thing should be obvious: good neighborliness requires states to live up to their obligations in international law. This is only to reiterate a fundamental norm that international customary and treaty law is binding. The importance of stressing this as a basic requirement of international good neighborliness is to highlight how extraordinary it would be to suspend international law compliance in precisely the areas of adjacency that neighborliness norms were originally designed to govern. For this reason, the Hernández dissenters defended the obligation of the United States to compensate its neighbors for the death of their son—as required by the International Covenant on Civil and Political Rights, which explicitly requires a remedy for such a violation, and which both the United States and Mexico signed, ratified, and were bound to follow.¹⁰¹ Border zones should not be places of legal exception. They should be governed cooperatively and according to law in all but the most exceptional circumstances.

B. Ways Forward for Neighbors and Human Rights

Neighboring states share physical proximity, some degree of social and economic connectedness, and common obligations under international law. The lens of borders as cooperative institutions connects these commonalities in profound ways. We face a choice: double down on the borders-as-sovereignty narrative, which I have argued is fallacious, or draw on a broader conception of international borders as a shared resource for managing common interests and collective goods cooperatively.

What does this mean in practical terms? First, reclaiming the institutional roots of international border law suggests a shift from a

CRITICAL INQUIRIES L., PHIL. & GLOBALIZATION 37, 47 (2021).

⁹⁹ *Id.* (quotations omitted).

¹⁰⁰ Löw & Weidenhaus, *supra* note 75, at 557; Ran Hirschl & Ayelet Shachar, *Spatial Statism*, 17 INT’L J. CONST. L. 387, 391 (2019) (emphasizing states’ use of law to restrict various forms of mobility by creating a “new configuration” of the Weberian state).

¹⁰¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

unilateral to a cooperative default setting. Unilateral border hardening has been rampant globally, from the construction of border walls and fences to the deployment of military troops in peace time.¹⁰² In too many parts of the world, states have failed to coordinate their migration policies to anything like the same degree as they have their trade policies.¹⁰³ The yearly amount of trade between the U.S. and Mexico more than tripled between 1994 and 2019, increasing from \$173 billion to \$615 billion.¹⁰⁴ In sharp contrast, the five-year count of total migrant flows between Mexico and the United States was cut by half, from 3.6 million (1995–2000) to 1.58 million (2013–2018).¹⁰⁵ While many factors drive such flows, these contradictory trends are likely due to the harsher border environment for migrants than for commercial interests. Border security seems compatible with huge trade flows, but mobile people are dealt with as security threats and are handled as such. A borders-as-institutions perspective calls for special regimes of *voisinage*,¹⁰⁶ with flexible rules to communicate on such issues. Coordination around infrastructure, policing, and rights of passage for local workers in the border zone are useful arrangements.¹⁰⁷

Second, reclaiming the institutional roots of international border law requires states to be transparent about what constitutes a threat to national security and then to make a case to domestic and international audiences that national security is at stake in important ways in the border zone. In only a very few cases will national security truly be at stake. Where it is, states must define the national security threat, and then use extraordinary means only as a necessity and only

¹⁰² See, e.g., Kenwick et al., *supra* note 14, (presenting evidence that many border hardening projects are taken without consultation with a neighboring state and sometimes explicitly against their preferences).

¹⁰³ Max Mendez-Parra & Linda Calabrese, *One-stop Border Posts in East Africa*, ODI (July 2023), https://cdn.odi.org/media/documents/Report_-_One-stop_border_posts_in_East_Africa_-_July_2023.pdf [<https://perma.cc/65WY-LW77>] (emphasizing the innovations in trade cooperation while not addressing migration).

¹⁰⁴ TEX. DEP'T OF TRANSP., TEXAS-MEXICO BORDER TRANSPORTATION MASTER PLAN 1-1 (2021), <https://library.ctr.utexas.edu/Presto/content/Detail.aspx?ctID=UHVibGljYXRpb25fMT E2MTA%3D&rID=MzMyNjU%3D&ssid=c2NyZWVuSURfMjEzZmJl%3D&bmdc=MQ==> [<https://perma.cc/3G3A-36T3>]. These numbers are based on inflation adjusted to 2019 dollars. *Id.* (citing *Trade in Goods with Mexico*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/foreign-trade/balance/c2010.html> [<https://perma.cc/WJ3W-JWEV>]).

¹⁰⁵ Ana Gonzales-Barrera, *Before COVID-19, More Mexicans Came to the U.S. Than Left for Mexico for the First Time in Years*, PEW RSCH. CTR. (July 9, 2021), <https://www.pewresearch.org/short-reads/2021/07/09/before-covid-19-more-mexicans-came-to-the-u-s-than-left-for-mexico-for-the-first-time-in-years/> [<https://perma.cc/LA62-S6Z2>].

¹⁰⁶ VAUGHAN LOWE, *INTERNATIONAL LAW* 151 (2007).

¹⁰⁷ Hints at a more neighborly approach along these lines are evident in *FACT SHEET: Second Meeting of the U.S.-Mexico High-Level Security Dialogue*, THE WHITE HOUSE (Oct.13, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/13/fact-sheet-second-meeting-of-the-u-s-mexico-high-level-security-dialogue/> [<https://perma.cc/CU6Q-GZNA>].

in proportion to the danger to the nation as a whole. Unless a clear and reasonable distinction is made, there is a real risk of “national security creep,” by which I mean the state’s “increasingly broad claims about what constitutes national security.”¹⁰⁸

A crucial step to stop the creep is to sort out national security threats from humanitarian crises and respond appropriately.¹⁰⁹ The importation of military concepts such as “deterrence”—or the idea that it is possible to strike back so hard as to discourage border crossing in the first place—into the border strategy playbook has mainstreamed policies of threatening harm,¹¹⁰ many of which cross a threshold into the violation of international human rights.¹¹¹ Hying border security concerns affects threat perceptions on the ground and signals a need for an excessive response. In the case of the U.S., an exaggerated sense of threat is likely to have played a role in extraordinary episodes of border enforcement coercion such as family separation policy, aggressive horseback enforcement,¹¹² and pushback strategies that lead to unnecessary migrant injuries.¹¹³ This is not a uniquely American issue. Migrant deaths in the Mediterranean have likely resulted from the aggressive border enforcement policies of individual European countries as well as Frontex.¹¹⁴ Systematic studies reveal that heightened border security regimes signaled by border walls and fences are associated with a higher incidence of torture allegations around the

¹⁰⁸ See Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549 (2023).

¹⁰⁹ See, e.g., Maureen Meyer et al., *Not a National Security Crisis: The U.S.-Mexico Border and Humanitarian Concerns, Seen from El Paso*, WOLA, (Oct. 2016) https://www.wola.org/wp-content/uploads/2016/10/WOLA_NoNationalSecurityCrisis_October2016.pdf [<https://perma.cc/9CS7-U5RX>] (arguing that there is no “national security” crisis, but rather a humanitarian crisis at the southern U.S. border).

¹¹⁰ See CARLA N. ARGUETA, CONG. RSCH. SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 3 (2016).

¹¹¹ The U.N. Special Rapporteur on Torture has reported that torture and other inhuman acts are in many cases “the direct or indirect result of policies and practices adopted by States with a view to deterring, punishing or controlling irregular migration.” Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at 16, U.N. Doc. A/HRC/37/50 (2018).

¹¹² Camilo Montoya-Galvez & Nicole Sganga, *Border Patrol Agents on Horseback Used “Unnecessary” Force Against Haitian Migrants Last Year, Investigators Find*, CBS NEWS (July 8, 2022), <https://www.cbsnews.com/news/border-patrol-agents-on-horseback-used-unnecessary-force-against-haitian-migrants-last-year-investigators-find/> [<https://perma.cc/XGQ8-PHDZ>].

¹¹³ Acacia Coronado, *Texas Trooper’s Accounts of Bloodied and Fainting Migrants on US-Mexico Border Unleashes Criticism*, AP (July 18, 2023), <https://apnews.com/article/texas-border-razor-wire-fainting-7aa811baf2708b89a0316804c3f2e35e> [<https://perma.cc/V2L6-ZLN9>].

¹¹⁴ See *Human Costs of Border Control*, UNIV. AMSTERDAM, http://www.borderdeaths.org/?page_id=5 [<https://perma.cc/JJ4N-EBMK>] (last visited Sept. 10, 2023). This is a database of migrant deaths in the Mediterranean region, which concentrates on the border management system of Spain, Gibraltar, Italy, Malta, and Greece.

world.¹¹⁵ Torture is notoriously difficult to document in a systematic way, but a recent meta study found that prevalence rates were in the range of some 25 percent of forced adult migrants in and attempting to enter wealthy countries.¹¹⁶

Several practices would move the ball forward for human rights protections in and around border areas. Far from suspending human rights protections, states should develop and nurture neighborly routines for safeguarding them. Some have begun to develop policies to do so. Although clinging to the strategy of deterrence, the U.S. Department of Homeland Security announced policies in May 2023 to “*humanely* manage the border through deterrence, enforcement, and *diplomacy*,”¹¹⁷ which is not a revolution, but an improvement. Frontex claims to “strictly adhere[] to the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, and relevant instruments of international and human rights law, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.”¹¹⁸ The organization also uses “[f]orced-return monitors [to] observe and report on Frontex supported return operations.”¹¹⁹ In extreme migration surges, such a practice could be generalized to include third party observers in ways analogous to the role that the United Nations High Commissioner for Refugees plays with respect to treatment of refugees or the International Red Cross plays with respect to the laws of war. It would be a step forward to collaborate to train border officials on human rights best practices. In addition, every technological innovation designed to enhance border security within and across border zones—from biometrics to instant cell-phone downloads to razor wire—should undergo collaborative human rights review for best practices and to discourage potential abuse. These steps would enhance accountability both to populations and to neighboring states.

¹¹⁵ Gino Pauselli & Beth A. Simmons, *From Physical Barriers to Physical Abuse: Border Hardening and Torture Allegations* (forthcoming 2023) (on file with author).

¹¹⁶ Erika Sigvardsson et al., *Prevalence of Torture and Other War-Related Traumatic Events in Forced Migrants: A Systematic Review*, 26 J. ON REHAB. TORTURE VICTIMS & PREVENTION TORTURE 41 (2016).

¹¹⁷ *Department of State and Department of Homeland Security Announce Additional Sweeping Measures to Humanely Manage Border through Deterrence, Enforcement, and Diplomacy*, U.S. DEP’T OF STATE (May 10, 2023). <https://www.state.gov/department-of-state-and-department-of-homeland-security-announce-additional-sweeping-measures-to-humanely-manage-border-through-deterrence-enforcement-and-diplomacy/> [https://perma.cc/8NSX-X9G8].

¹¹⁸ *Fundamental Rights at Frontex*, FRONTEx, <https://frontex.europa.eu/fundamental-rights/fundamental-rights-at-frontex/#:~:text=Frontex%20strictly%20adheres%20to%20the,Refugees%20and%20its%201967%20Protocol> [https://perma.cc/S4UG-87EM] (last visited Sept. 10, 2023).

¹¹⁹ *Id.*

Reconceptualizing international borders as cooperative institutions suggests recalibration of national security concerns relating to borders. Borders should not be thought of as national security zones *by default*. Readiness needs to be tempered with a sober assessment of what exactly the risk to national security is and what is causing it. When it comes to extraordinary levels of undocumented migration, intensified enforcement should be addressed first and foremost through well-designed immigration policies. In the rarest situations, border securitization and even militarization may be needed. When this is the case, extraordinary actions should at a minimum be monitored and follow customary practices of proportionality and necessity.

V. CONCLUSION

A great many observers and scholars have concluded that there is a growing imbalance between sovereign rights of states to control their borders and human rights concerns. Twentieth century expansion of such rights has long been in tension with “traditional” doctrines of state sovereignty,¹²⁰ and with the arbitrariness of territory.¹²¹ Efforts have been made to reconcile these tensions by turning to more cosmopolitan approaches. Theories of subsidiarity with room for a “domain of cosmopolitan duty” recognize the sphere of state sovereignty while giving a principled role to “justice sensitive externalities” such as human rights.¹²² Another solution is to reinterpret sovereign states “as trustees of humanity,”¹²³ with underlying obligations to strangers.

This Article has suggested there is yet another, more state-centric, way to approach what is becoming an untenable conflict between international human rights and the presumed right of sovereign states to control their borders at all costs. This move involves *understanding international borders as fundamentally cooperative institutions chosen by sovereign states to govern their mutual relations*. Borders in this conception are ways to achieve the *collective good* of international stability, as we have seen from the unusual exceptions made for border agreements in treaty law and the extraordinary value states place on settled borders in multilateral law. Territorial sover-

¹²⁰ See Elizabeth M. Bruch, *Open or Closed: Balancing Border Policy with Human Rights*, 96 KY. L. J. 197 (2007).

¹²¹ See Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1 (2016).

¹²² Mattias Kumm, *Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities and the Proper Domain of the Consent Requirement in International Law*, 79 LAW & CONTEMP. PROBS. 239, 255–57 (2016).

¹²³ See Benvenisti, *supra* note 11.

eignty, in this understanding, is exclusive. However, the institutions created to establish understandings to manage proximate sovereignty are shared. Sovereignty divides space into “yours” and “mine.” But the border as an institution is *ours*. States have obligations to each other and to border residents and crossers to continue the cooperative traditions of international bordering.

As institutions, borders are not only territorial. They are also relational. They regulate and shape how nations and populations interact. They do not create sovereignty, which I have argued is not logically or legally dependent on bordering; sovereign states can and have historically had fuzzy and permeable borders and yet enjoyed sovereign status. Rather, they create and coordinate relationships of neighborliness. Obligations of neighborliness are traditionally negative, but increasingly recognized as positive. The public international law of neighborliness is a real thing that states have practiced, developed, committed to, and litigated over many decades. It suggests a state-based rationale for a broad range of cooperative border practices. The primary positive duty of good neighborliness is to live up to all obligations undertaken in international law. International human rights obligations are paramount among such obligations.

The public international law of neighborliness is an additional door through which international human rights law must claim entry. While there is room for theorizing more cosmopolitan approaches, it makes sense to not concede the cooperative foundations of international borders to call for the respect of universal international human rights, everywhere. Deference to border security in places and for people most impacted by jurisdictional disjunctures cannot be an acceptable default. Before accepting border security as a rationale for inscrutable state prerogatives, states should be held to their own institutions of neighborliness.