Introduction
Bordering and Ordering: The Reconfiguration of Territory, Rights, and Jurisdiction

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Introduction

In one of the shortest stories ever published – a single paragraph of 130 words – Jorge Luis Borges (1998) provides an account of a fictitious map so detailed that it formed the exact replica of the territory it represented.[1] In a world where immigration and asylum have become hot-button issues, the impossibility of drawing such a map serves as a sharp reminder of the artificiality and constructed nature of the canonical view that sovereignty is correlated with clearly demarcated territory, jurisdiction, and scope of legitimate exercise of authority. This recognition, in turn, places significant strain on the basic legal assumption that borders and boundaries are fixed and immobile. It is precisely this kind of destabilizing effect, of testing the common ground upon which the law stands, which informs our inquiry in this volume. The following chapters employ legal, historical, philosophical, critical, discursive, and postcolonial perspectives, among others, to identify how the *territoriality* of the modern state – ostensibly, the most stable and unquestionable element undergirding the current international system – has been rewritten and dramatically reimagined.[2] Desperately seeking to appease anti-immigrant sentiments, policymakers in affluent countries of the Global North have introduced increasingly draconian

[1] We are grateful to Benjamin Boudou, who helped organize the two conferences from which the original essays appearing in this volume grew and for the reference to Borges' story. We would also like to thank Nicholas Slawnych and Eva-Maria Schäfferle for excellent research assistance.

[2] We understand territoriality as the exercise of legal or political authority, involving both the spatial organization of power as well as the extension or denial of rights and protections over those who reside upon such space.

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border control measures, clamping down on the basic rights and protections afforded to those on the move while simultaneously proclaiming adherence to national, regional, and international law standards. In this gap between commitment and action, the rule of law and arbitrariness, the principles of human rights and the vicissitudes of unaccountable power, lies violence and despair. To excavate these harsh realities and reveal potential openings for democratic contestation and claims-making, this volume revisits afresh some of the most pressing issues of our times: the transnational movement of peoples across the globe and the increasingly punitive responses – deployed under color of law – to arrest mobility, evade rights, and detach borders from fixed territorial markers.

Across the globe, no issue has galvanized tension and anxiety quite like the "fear, both real and perceived, of huge waves of future emigration from poor or weak states" (Ghosh, 2000: 10). Whether driven by persecution and violence, desire for better living conditions, or the ever-worsening consequences of climate change, the movement of people across borders remains one of the most controversial and bitterly contested issues of our time. Shaped by deep global inequalities, colonial pasts, and imperial presents, today's restrictive control measures engender hostility against "uninvited" and "unwanted" migrants, many of whom are racialized, surveilled, and penalized for not seeking protection in the other nations they transited through before reaching their ultimate destination. While migration has become a lightning rod for the rage of populist nationalist movements in wealthy capitalist democracies, the scapegoating of migrants and refugees also extends to other parts of the world.[3] From Morocco's incitement campaign against "'hordes' of illegal immigrants from

Territoriality is thus closely related to the idea of jurisdiction, which may only partly overlap with, or extend well beyond, the physical, material, or geographical bounds of a given spatial demarcation. It can, and often does, differentially impact different populations and locations. Indeed, as the chapters in this volume demonstrate, not only is the scope, reach, and impact of territoriality malleable and significant, but even bounds of territorial sovereignty are often contested and difficult to define.

[3] In April 2023, the United Nations Commission on the Elimination of Racial Discrimination condemned racist hate speech from politicians against migrants. Issuing a statement against Morocco's incitement campaign under its early warning and urgent action procedure, the Committee further said that it was alarmed by the remarks made by Morocco's neighbor, Tunisia's Head

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sub-Saharan Africa" to Brexit's rallying cry of "take back control," and from Europe's recurring "border crises" to heated battles over enforcement versus rights protections at the US–Mexico border, the movement of those who are displaced has generated a sense of multiple crises, giving rise to perceptions of "losing control."[4] Coupled with radically changed economic, fiscal, administrative, ecological, informational, and mediatic environments, where neoliberalism has begun to yield to the growing trends of ethnonationalism and technofetishism, we are witnessing simultaneous and contradictory processes. Fortified walls with digital "eyes" and "ears" are being erected at a speed never witnessed before, alongside a massive extension of migration control that thrives on detaching the exercise of control powers, both spatially and temporally, from the actual border or territorial frontier.[5]

Borders typically conjure up images of defensive fortifications and barbed wires separating one country from another. Today, however, governments seeking to deter mobility rely only partly and rarely on brick and mortar, giving way to bordering activities that are no longer collinear with the frontiers of a nation. The consequent formation of what we might call the "shifting border" (Shachar, 2020b) provides

of State in late February, alleging that "hordes of illegal migrants" arriving from African countries south of the Sahara were part of "a criminal plan to change the composition of the demographic landscape of Tunisia" and were the source "of violence, unacceptable crimes and practices." The Committee found that such remarks were in contravention of the International Convention on the Elimination of All Forms of Racial Discrimination. See United Nations Human Rights Office of the High Commissioner (2023). Discrimination is a concern in both migration and citizenship law and practice. India's Citizenship (Amendment) Act 2019 represents a rare example of explicit discrimination (here, on account of religion). The Act facilitates expedited citizenship to Hindus, Sikhs, Buddhists, other religious minorities who have escaped religious persecution in Afghanistan, Bangladesh, and Pakistan. Similar protection is not granted to Muslim minorities.

[4] The notion of losing control assumes that such state capacity exists in the first place, hence our focus on richer, more affluent countries in the Global North, despite the fact that as of 2023 the burden of migration still falls disproportionately on states in the east and south, with Turkey (3.6 million), Iran (3.4 million), Colombia (2.5 million), and Pakistan (1.7 million) leading in refugee numbers. See United Nations High Commissioner for Refugees (UNHCR) (2023).

[5] For a discussion of the "eyes" and "ears" of the border, see Shachar and Aaqib (2021).

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tremendous power and almost boundless discretion to states (as well as their public and private delegates and partners at multigovernance levels) to rely on increasingly violent techniques of migration governance that restrict movement and constrict rights, extracting deadly costs from migrants, families, and communities everywhere.[6] In a world of shifting borders, we are facing dual movements of deterritorialization and reterritorialization at the same time, a trend with tremendous consequences for the rights of people on the move (Benhabib, 2020). States are not only employing with increased frequency "nonentrée" techniques and legal fictions of "nonarrival" (treating people as if they never reached the border, despite the fact that they have "touched base" on *terra firma*), thus engaging in the *de*territorialization of their jurisdiction, but they have simultaneously stretched the flexible tentacles of shifting borders to regulate mobility from afar and to herald cooperation agreements that authorize the "offshoring" of asylum seekers to remote processing centers, which are often located in poorer countries in neighboring regions or small islands turned into open prisons (*re*territorialization).[7] Such evasive bordering and ordering techniques allow states to disavow responsibility of the consequences of their migration policies by "delinking … the bond, between territory, jurisdiction, and the public in whose name and with whose authorization law and coercion are presumably exercised" (Benhabib, 2020: 88). The end result of these developments is a radical decoupling of state obligations from the physical presence of migrants on the territory. This dynamic, kaleidoscope-like deployment of de- and reterritorialization measures enables states to create "lawless zones" as well as "rightless subjects" – the topic of exploration in this volume.[8]

[6] The "shifting border" concept is drawn from Ayelet Shachar's award-winning book *The Shifting Border: Legal Cartographies of Migration and Mobility* [hereinafter referred to as Shachar (2020b)]. For a discussion of the multidimensional costs of migration, financial, physical, and emotional, see Gowayed (2022).

[7] These are just a few illustrative examples of de- and reterritorialized border regimes. On "nonentreé," see the now classic contributions by James C. Hathaway, e.g., Hathaway (1992); Hathaway & Gammeltoft-Hansen (2015). On the fiction of nonarrival, see Shachar (2020b). For a comprehensive legal account, see Moreno-Lax (2017). On the centrality of islands to the process of offshoring asylum seekers, see Mountz (2011).

[8] To provide one recent example: the Greek Coast Guard is now subject to an EU investigation procedure following the discovery that these officials were engaged in unlawful pushbacks which left asylum seekers who reached

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The focus on territoriality, itself a reflection of the Westphalian gaze, is traditionally associated with unilateral decision-making over migration as a corollary of the view that "sovereigns, *by definition*, have a right or duty to control their borders." (Waldron, 2022: 110) In recent years, however, this very assumption has been contested by theorists and activists alike. As these critics maintain, states, and especially richer and more powerful jurisdictions, deploy their spheres of influence to create "buffer zones" through a thick network of bilateral and multilateral migration cooperation agreements known as "compacts," "statements," "accords," and "cooperation agreements" with a plethora of countries of origin, transit, return, readmission, and remote processing locations (Shachar, 2022a: 975–977). These agreements have the effect of establishing versatile transnational networks of peripatetic gatekeeping and sorting activities, crisscrossing space and time.[9] These hard-to-classify, yet increasingly restrictive, instruments of externalized migration control are often concluded outside the standard democratic process of lawmaking, complicating attempts to mount human rights challenges against such practices. A classic example is the controversial EU–Turkey agreement to "stem the flow" of incoming migrants and asylum seekers in the wake of the 2015 Syrian refugee crisis, which not only escaped democratic accountability but also proved immune to judicial review when challenged before European supranational courts owing to its murky legal status. The EU has since signed accords with Tunisia, Mauritania, and, most recently, Egypt, offering variations on the EU-Turkey agreement. Morocco is expected to be the next "neighborhood" partner doing Europe's bid to stop migrants from reaching the continent's shores by closing its gates from afar. People on the move nowadays routinely encounter the shifting border even *before* they have left their

Europe's shores abandoned at sea, a blatant violation of the duty of nonrefoulement. The practice of "delayed/nonassistance" at sea whereby states decline to assist vessels in distress, despite these migrant boats' arrival in their search and rescue regions, is another example of the production of lawless zones and rightless subjects. This action of the Coast Guard is also against Article 98 of UNCLOS, the United National Convention on the Law of the Sea, the obligation to rescue at sea. www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. See also Mann (Chapter 8).

[9] On the proliferation of these migration agreements, see FitzGerald (2019); Shachar (2022a). For an early account of the significance of binational and coshared borders, see Longo (2018). On borders as sorting machines, see Mau (2023).

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country of origin, and then again along the travel continuum as they pass through buffer zones, rings of protection, and transit countries (Shachar, 2020b). These maneuvers aim at decoupling territorial presence and jurisdiction. As in an endless legal plot of chutes and ladders, passage through these liminal spaces may eventually turn out to be fatal for one's journey to a safe haven. No longer attached to a clearly delineated sovereign authority or territory, these invisible, shifting borders simultaneously erode legality and precipitate lethal violence. In the past decade alone, close to 30,000 migrants have been recorded missing in the Mediterranean Sea, drowning in the "largest cemetery in Europe" after attempting to reach the mainland. In 2022, meanwhile, the International Organization of Migration reported that the US–Mexico border has become the "deadliest land route for migrants worldwide" (IOM, 2023b).

The seductive legal and geospatial "stretchability" of the location and timing of migration control activities paradoxically coexists with, and arguably is motivated by, the formal commitment to human rights by the very states and actors that are vested in undermining access to territory.[10] This is especially true where arriving at the actual border entails the activation of a protection claim, leading states to take drastic steps to prevent such arrival. These proactive efforts to subvert human rights commitments complicate any attempt at challenging shifting borders, as it requires *re*creating the jurisdictional link between those who were denied access to asylum procedures and those evading their legal responsibilities, the very link that states both rely upon when it comes to enforcement yet seek to blur and evade when it comes to rights protections. Although the universal right to seek asylum applies to *everyone*, regardless of *where* they are from or *how* they reached the territory of the state in which they seek protection, countries everywhere are currently establishing ever more sophisticated ways to deter people from reaching their territory in the first place, emulating one another's restrictive measures through processes of interjurisdictional policy diffusion. Recent years have witnessed these restrictions further tightening with every such iteration (Shachar & Ghezelbash 2024). In addition, courts and legislatures in many parts of the world have turned the very act of

[10] This is a core theme of Shachar (2020b). See also the influential writings of Hathaway (1992) and Hathaway & Gammeltoft-Hansen (2015). For a comprehensive analysis in the context of European migration law, see Thym (2023). For a theoretical analysis See Benhabib 2004 and 2011.

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reaching the territory or arriving at the border (the traditional basis for seeking territorial asylum) into grounds for *refusal* of access to protection, if not outright injunction to pursue one's claim "elsewhere" (Aleinikoff & Owen, 2022). Treating the shifting border as a migration control and asylum management tool, we increasingly witness the reconceptualization of arrival without preauthorization emerging as the new legal barrier deployed by states, based on the argument that people on the move must follow prescribed and orderly gateways to entry – even when such gateways are hypothetically possible to access but in reality pretty daunting to reach. This reinterpretation effectively closes both the literal and metaphorical door to those seeking protection. In the hall of mirrors that now characterizes migration and asylum procedures, failure to pursue "lawful, safe, and orderly pathways" renders people fleeing their home countries *ineligible* for asylum (though such "unlawful" arrival is technically permitted under the provisions of the 1951 Refugee Convention). This Kafkaesque legal construction turns the asylum seeker in need of international protection into a threat to the public order, a vilified culprit in the eyes of border guards and angry publics veering toward populist, nationalist, anti-immigrant parties.

Even administrations that have campaigned on promises to avert the demonizing of migrants struggle to counter the "loss of control" narrative. In the United States, for example, the Biden administration in 2023 introduced large-scale restrictions on suitable applicants for asylum, taking inspiration from a previously rescinded Trump-era policy. This rebranded transit ban effectively bars most individuals arriving at the US–Mexico border from exercising their legal right to seek relief unless they meet a narrow set of exceptions or manage to preschedule an appointment through their smartphones, using the CBP One app (CBP is the abbreviation for Customs and Border Protection). This new technique of regulation adds a "digital border" that migrants will encounter spatially and temporally before they reach the actual border, making the interaction with the state not only remote but also "faceless" as appointments are allotted to asylum seekers utilizing a semirandom algorithm determining whose "number" may come up to seek humanitarian protection (Lind, 2023).[11]

[11] Circumvention of Lawful Pathways, 88 FR 11704, 11708 (proposed February 23, 2023) (to be codified at 8 CFR 208 and 8 CFR 1208). Final Rule, 88 FR 31314, Effective date: May 11, 2023.

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What is more, under this rule, titled Circumvention of Legal Pathways, a migrant's failure to avail themselves to asylum procedures in the transit countries they passed on their way toward the United States constitutes valid grounds for denying them an asylum hearing, even though the US government itself admits these countries are not safe. For those trying to escape the short stick they received in the initial birthright lottery (Shachar, 2009), these new shifting border techniques constitute an additional "refugee lottery [open only to a] limited number of … asylum seekers, many of whom are fleeing from globally recognized oppressive regimes" (American Immigration Council, 2023). In this way, regimes designed to offer protection to anyone seeking asylum are curtailed as responsibility is shifted to the individual herself owing to her alleged "illegal" arrival without permission at the border. Post-Brexit UK has gone a step further, emulating Australia's lead in its campaign to "stop the boats" by introducing the Illegal Migration Bill, which, as critics have sharply observed, seeks to "allow the British government to deport people fleeing from formerly colonized regions, who somehow make it to the territory of the arch-colonizer UK, to another formerly colonized region [Rwanda]" (Steinbeis, 2023). The European Court of Human Rights (ECtHR) in Strasbourg thwarted the British government's controversial plan, sparking in turn a new round of political calls for the UK to leave the European Convention on Human Rights and thus the jurisdiction of the ECtHR, in effect transforming the redrawing of borders and closure of asylum procedures into a tool to attenuate legality itself.[12] The British government's plan to offshore asylum seekers to Rwanda, based on a partnership agreement signed between the two countries in 2022 has been put on hold by the courts, including, most recently, a unanimous decision of the UK Supreme Court (*R on the application of AAA (Syria) and others v Secretary of State for the Home Department*) which held the plan was unlawful.[13] The

[12] For further discussion of the relationship between the shifting border and the attenuation of legality, see Shachar (2020b, 218–231). Before the Illegal Migration Bill was introduced, the ECtHR prevented the UK government from deporting people to Rwanda at the eleventh hour; see *N.S.K. v. the United Kingdom* (application no. 28774/22, formerly *K.N. v. the United Kingdom*), June 14, 2022.

[13] [2023] UKSC 42. The next chapter is now being written in shutting the doors to asylum seekers. In April 2024, the UK Parliament overturned the UK Supreme Court decision by passing legislation that declares Rwanda

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European Union, too, is attempting to overhaul its asylum system by mainstreaming the use of so-called mandatory border procedures: accelerated asylum proceedings that occur at islands, airports, transit zones, and carved-out "non-arrival" territorial spaces. These border procedures remain murky but would likely prevent the acquisition of the rights protections that otherwise would have been attached to "applications for international protection made in the territory, including at the border, in the territorial waters, or in the transit zones," again revealing the tremendous length to which countries are now going to prevent the option of legally "touching base" on their territory.[14] At the bilateral level, Italy recently struck an agreement with Albania (a non-EU country) to offload migrants stopped at sea by Italian officials in Albanian ports and outsource the processing of their protection claims. If implemented, this latest variant of the shifting border would add yet another twist to the already fraught landscape of lawless zones and rightless subjects; although critics have already

a "safe third country." The Rwanda scheme, which was established by the Conservative government, was scrapped by the newly elected Labour government in July 2024.

[14] Directive 2013/33/EU of the European Parliament and of the Council of June 26, 2013. According to a recent agreement reached on a new European Migration and Asylum Pact, the Council of Europe is proposing to endorse exceptional measures in crisis situations: "In a situation of crisis or force majeure, member states may be authorized to apply specific rules concerning the asylum and the return procedure. In this sense, among other measures, registration of applications for international protection may be completed no later than four weeks after they are made, easing the burden on overstrained national administrations" [Migration policy: Council agrees mandate on EU law dealing with crisis situations – Consilium (europa.eu);10/04/2023]. In addition, the Council is recommending the relocation of refugees and asylum seekers from the member state in crisis to other contributing members; it is foreseeing "responsibility offsets" and providing financial contributions or other solidarity measures. This proposal is part of the Pact on Migration and Asylum, which was ratified by the European Parliament in April 2024. In addition to enhancing solidarity measures among member states, the purpose of this legislation is to give member states more leeway in determining the measure of compliance they must exercise in screening, approving, or removing asylum seekers from their "territories," which may now take place at border crossing points, accelerating the timeline for adjudicating applications and deportations, and creating excision-like zones where fundamental rights are nowhere to be found – creating the lawless zones and rightless subjects at the heart of this volume's inquiry. See European Commission, 2024. https://home-affairs.ec.europa.eu/policies/migration-and-asylum/new-pact-migration-and-asylum_en.

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questioned whether this plan was "legal, ethical, practical or even real" (Horowitz and Pianigiani, 2023). We might describe the coexistence of these fractured pathways and inconsistent commitments as the "mirage of asylum" – formally upholding the *de jure* commitment to refugee protection and migrants' rights while *de facto* hollowing these same rights at the same time. Through these contradictory moves and reimagined relationships between space, time, movement, law and domination, formidable yet opaque regulatory powers are spent to ensure that the migrant in need either does not reach the shore or territory of the state of refuge; or, that once she does, she is rapidly extradited, expelled, and/or placed under deportation proceedings (Benhabib, 2023).

As these introductory remarks reveal, the puzzle that we seek to address in this volume is the remarkable malleability and versatility of the categories of asylum, protection, and migration, as well as the alarming collateral dissolution of human rights and protections afforded to those on the move. We respond to these issues by emphasizing the plasticity of territoriality and its embeddedness within constellations of relations of power and authority, and by exploring the encounters arising from migrants' pursuits of international protection on contested terrains. We further highlight the web of normative responsibilities emerging from the state's exercise of brute power in the lawless zones where rightless people increasingly find themselves in a world rapidly shutting down opportunities for asylum. Such concerns are both urgent and pressing. Territorial presence on *terra firma* or vessels at sea that function as surrogates for territorial sovereignty is typically seen as establishing the required connection between the person crossing borders and the country offering protection, between the abstracted universal right to asylum and its concrete embodied manifestation vis-à-vis a particular individual in need of protection in that particular territorial state which she (somehow) reached amid increasing barriers to mobility. The current developments explored in this volume make the protection of migrants a hollow promise, a pipedream in a world where migration and displacement pressures are unlikely to subside any time soon, and if anything, are projected to rapidly intensify into the future owing to human and climate-induced crises.

These complex moves and maneuvers by states, supranational, and subnational actors alike are both constitutive of and constituted by the reconfiguration of borders, rights, and territory, giving rise to a

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changing legal cartography of international relations and international law. The purpose of this volume is to study this new reconfiguration of rights, territoriality, and jurisdiction at empirical and normative levels, and to examine its implications for the future of democratic governance within and across borders.

1 Structure and Coverage of the Volume

The introduction establishes the volume's substantive agenda and is followed by summaries of individual contributions. This volume is divided into four sections: I. Territoriality and Rights Protection; II. New Geographies of Borders: Territory, Land, and Water; III. Public Territory and Private Borders: Tracing Transnational Power Relations; and IV. Democratizing Shifting Borders.

Part I

In Chapter 1, "Moving Borders, Refugee Protection, and Immigration Policy," Hiroshi Motomura argues that a nation-centered justice framework for assessing migration and the rights of migrants is no longer effective or complete. "One trend is the externalization of borders and border controls. The second trend is the shift in political focus away from irregular migrants inside a country and toward newcomers fleeing international conflicts, civil wars, environmental degradation, poverty, and famine. These two trends have combined to intensify attention on the international system for 'protecting refugees.'"

Hiroshi addresses some of the consequences of what is referred to as "refugee exceptionalism." The 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol are well-established legal conventions subscribed to by 146 states to the former and 147 to the latter.[15] Despite the many obstacles created by states to granting asylum and refuge, once their claims are recognized, such migrants gain favorable status under domestic and international law leading in most cases to residency permits, housing, health, and other social

[15] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954). Referred to in this volume as the 1951 Refugee Convention. www.unhcr.org/en-in/1951-refugee-convention.html. Accessed May 15, 2023.

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benefits. This special status of refugees depends upon their distinction from "economic migrants," a migrant group that is assumed to have *chosen* to leave and not have been *forced* to do the same. It is increasingly apparent, however, that this clear demarcation between those who choose to leave for reasons of economic self-betterment and gain and those who choose to leave to avoid persecution on the basis of the five categories named in the 1951 Refugee Convention is tenuous and untenable.[16] Nevertheless, states try to reduce the number of those whom they consider truly deserving refugees compared with those whom they see as merely seeking economic or professional opportunities. This bifurcation has two significant consequences: On the one hand, states resort to increasingly versatile and restrictive shifting-border techniques, making it more and more difficult for migrants to come under their jurisdiction; while on the other hand, the gap between ordinary migrants and refuge and asylum seekers is reinforced, excluding many categories of "in-between" individuals who have been forced to flee their countries for reasons that may not neatly fit under current definitions of the "refugee" category (whether in international, regional or the respective national law) but who nevertheless are in dire need of protection. Generalized violence and insecurity, domination and execution by nonstate actors, gender-based violence, abject poverty, and, of course, climate change are among such grounds.[17]

Being present on the territory of a recognized political entity is the most common way in which a claim to the protection of certain human and civil rights can be raised by persons. But place is not the only dimension along which rights are claimed, accepted, and/or rejected. In Chapter 2, "Cease-Fires: Temporality, Bordering, and Climate Mobilities," Elizabeth F. Cohen focuses on how time creates and undoes the rights and claims, options, and opportunities of many migrants. Cohen observes that forced migrants wait, move, navigate temporariness, and at the same time forge informal forms of permanence when

[16] A refugee is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion…" is unable or unwilling to return to his country of nationality or habitual residence. Refugee Convention, Art. 1(A)(2). See also Hathaway and Foster (2014).

[17] The Addis Ababa and Cartagena Conventions establish more expansive grounds for refugee protection.

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states leave them no other options. For forced migrants, time has a particular urgency, and often the minutes of an hour can mean the difference between escape and persecution, abuse or even death. Despite the fragility and temporal urgency experienced by forced migrants, receiving states are increasingly establishing temporary protection programs whose purpose extends beyond the singular goal of managing large-scale displacement. Instead, as Cohen observes, "[w]hile temporary protection programs are diverse, a common and important element of these measures is the *normalization of precarity* for forcibly displaced persons with no pathway to permanent residency or citizenship in the event that temporary protection becomes protracted." Contrary to its humanitarian intentions, Temporary Protection Status (TPS) thereby perpetuates precarity, and Cohen is particularly interested in ensuring that states do not treat climate migrants as merely requiring "episodic redress" via the exclusive provision of TPS.

Among the many nonentrée techniques that have become common in recent decades, none is more often resorted to than the so-called safe third-country protection, invented by European countries in the 1970s and since emulated globally.[18] Paul Linden-Retek (Chapter 3) and Dana Schmalz (Chapter 4) examine the development of safe third-country policies and legal practice. In "'Safe Third Country': Democratic Responsibility and the Ends of International Human Rights," Linden-Retek gives an extensive account of safe third-country case law both in European and US courts. He notes that the United Nations High Commissioner for Refugees (UNHCR) has accepted the legality of safe third-country return provided that the protection offered by the third-country meets minimum human rights standards. Jurisprudential developments have thus enabled European and the Inter-American court systems to secure and articulate higher levels of rights protection for those seeking asylum in the procedures of a safe third-country system, but despite these positive developments, the responsibility for a state's coercive measures and the integrity of human rights protection continue to remain vague and contested in several essential respects. Linden-Retek argues that "[f]ocusing on the safety of the transfer, as the individual rights frame would have us do, concedes too much to the

[18] For an overview of this history and the interjurisdictional emulation of rights-restricting migration policies, especially those pertaining to refugees and asylum seekers, see Shachar (2022a).

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worldview that posits the state as a stable point of origin – for analysis, normativity, and decision-making." His work uncovers an important harm created by safe third-country rendition practices that he names "democratic responsibility." By reducing refugee protection and refugee choice to conditions of guaranteeing minimal security or "bare life," safe third-country practices betray the *telos* – the end goal – of human rights: enhancing and enabling democratic agency.

In "The Role of Proximity for States' Obligations Toward Persons Seeking Protection," Dana Schmalz asks whether the role of proximity for allocating state responsibility is legitimate. Proximity also plays a key role in the doctrine of safe third country, in that a person seeking refuge has to first cross territories contiguous to the ones she is escaping from in order to reach her desired country of refuge. More often than not, once first movement is initiated, legal constraints on onward movement confine people to territories of proximity. Thus results one of the most unjustifiable injustices of the current global refugee system: While affluent liberal democracies in Europe and the USA, Canada, Australia, and New Zealand are most vociferous about their burdens in accommodating refugees, the largest number of refugees reside in countries *neighboring* the world's major crises zones and source countries of displacement (see Karadag, Chapter 12).

With the start of the Ukraine–Russia War, however, nearly 6.5 million persons have been displaced across international and, mainly, the Schengen borders of the European Union (UNHCR, 2024). Schmalz begins by considering the contemporary discussion about the protection granted to Ukrainian refugees in the EU, disagreeing with those who see the TPS of Ukrainian refugees as an act of racist discrimination against other refugees. She argues that "[t]he role of proximity does not have to be negated entirely, as long as it is coupled with effective access to territory and protection, and complemented with other bases for state obligations, taking into account links of causation and refugees' explicit choices." For Schmalz, *proximity* as well as *affectivity* serve as legitimate criteria for sustaining political community. Proximity implies territorial presence; but states also have extraterritorial obligations in fulfilling the human rights of those whom they control not only territorially but also "functionally." Affectivity suggests that communities of kinship based on language, ethnicity, religion, shared histories, and other factors may generate special obligations toward refugees.

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In Chapter 5, "The Border Within: Mobility, Stereotypes, and the Case for Asylum Seekers as Migrants," Frédéric Mégret returns to question the distinction between asylum seekers and migrants, maintaining that refugee law itself compels migrants to present themselves, their life histories, and their narratives as would refugees. He notes that

> in seeking to uphold a category of asylum seekers fleeing persecution as entirely distinct from that of migrants, the international legal regime of cross-border mobility forces refugees into a bind: Either "migrate" to the place of their choosing to seek asylum but then risk reinforcing the suspicion that they are, indeed, migrants; or seek protection in the closest or first "safe" country that they can access by prioritizing their most immediate need for protection, but at the cost of frustrating their own life plans.

Noting that there is nothing in the 1951 Refugee Convention to suggest that refugees should claim asylum in the *first* safe country they traverse, Mégret agrees with Motomura and Linden-Retek's claim that extant legal frameworks distort and inhibit refugee choice and agency. Challenging the standard view which focuses singularly on the protection needs of refugees, Mégret emphasizes instead the multiple motivations, ambitions, and contexts that trigger departure. This account counters the invisibility of refugees' migratory trajectories and highlights in its lieu the agency of refugees in exercising (or at least seeking to exercise) a certain degree of choice as to where they may properly seek asylum. In this, Mégret offers a fresh reading of the 1951 Refugee Convention and explores the topics further elaborated by Svenja Ahlhaus and Eva-Maria Schäfferle in Chapters 15 and 16, respectively: the potential for refugees to not only be shaped by the shifting borders identified by Shachar, but also to shape and reshape such borders themselves. As Mégret notes, "in demanding asylum in *this or that country*, refugees manifest themselves as political agents of change."

Part II

Having scrutinized the relationship between territorial presence and jurisdiction as it pertains to the status of refugees and asylum seekers in a number of different scenarios, Part II of this volume turns to an examination of the components of land, air, and water which constitute territoriality at a normative and even ontological basis, asking what kinds of entities these are.

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In Chapter 6, "The Border as Accordion: Linear Borders, Territoriality and the Problem of Naturalness," Matthew Longo argues for denaturalizing the very concept of territory, seeing it as emerging out of a particular kind of state formation usually referred to as the "Westphalian model" and relying on the state/territory/border triad. He postulates that it is more helpful to analyze borders along two axes. The first axis would consider the border as a site of *authority*, including the components of territoriality, exclusivity, and linearity. The second axis would consider it as a site of *control*, entailing defense, extraction, and filtration. Longo concludes that it is more fruitful to consider borders via the interplay and changing modalities of the *de jure* exercise of authority and *de facto* exercise of control. These interactions may or may not always match or be congruous: Authority may not necessarily attain control, and control can possibly exist without authority.

In Chapter 7, "The Materiality of Territory," Nishin Nathwani takes a deep dive into the history of ancient and modern political thought, revisiting two core concepts in Roman law – *dominium* and *imperium*. Nathwani maintains that this dichotomy between *dominium*, which involves control over territory as well as its occupants, and *imperium*, which is primarily control over the community that inhabits the territory, permeates the works of John Locke as well as Immanuel Kant. Nathwani further finds these presuppositions continued by seminal political philosophers such as John Rawls and Michael Walzer. His thesis is that "juxtaposing dominium and imperium as ideal-typical alternative viewpoints on territorial sovereignty serves as a theoretical strategy to remind us that the moral-ethical dilemma of inclusion in a bordered world is profoundly imbricated with the ecological-ontological question of how we imagine our collective 'selves' to be co-constituted with the natural space around us." According to the *dominium* view, which leads to the "propretarian" conception of jurisdiction, territory is divisible, tameable, and ownable. Territorial dominium therefore also operates along the two axes identified by Longo, and can potentially exclude others.

Of course, it is difficult to apply this propretarian model of territory in its *de jure* and *de facto* dimensions to the high seas. Itamar Mann thus enjoins us in Chapter 8, "Territoriality from the Sea: Political Action in a World of Vanishing Exteriority," to ask the following questions: "What is territoriality, if we consider it from a maritime, rather than landed perspective? And how should borders be reconsidered, if we assume that the non-sovereign space of world seas is constitutive of politics, rather

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than exceptional to it?" Mann thus traces the stages in the evolution of modern international law of the sea beginning with Hugo Grotius' well-known theory of the "*mare liberum*" (1609), which regards the seas as the maritime commons. But Mann observes that Grotius built "on natural rights traditions to support property acquisition as an imperial mode of accumulation. A common sea was the conduit for the imposition of military rule across centuries and many colonies, and the exploitation of their resources." Already in Grotius' time, every ship carried its flag and brought its laws with it. The conception of the ship as "floating territoriality" begins in this period, whose development Mann then traces to a second stage of maritime law, labelled the "second internalization," which radically departs from the first. As Mann explains, "*[m]are liberum* internalized the sea, but still anchored a perspective free of territoriality. The second internalization is about a process of selective territorialization of the sea. Rather than the sea being constructed as free in order to serve the territorialization of land, the sea itself is being gradually constructed *as land*." Consequently, Mann illustrates how border-externalization processes, which are among the most common rights-evasion techniques resorted to by states, are now constructing certain segments of the sea as if they were national territorial areas over which sovereign authorities can be exercised so as to prevent refugees and asylum seekers from reaching their destination. The shifting border now regularly extends its reach to maritime waters, creating a virtual wall that is both moveable and consequential, manufactured from digital signals and airborne maritime surveillance which, together with the earlier discussed cooperation agreements, are deployed to initiate "pull back" operations to prevent refugees and migrants from traveling on the high seas toward European countries and other desired destinations. These developments contribute to processes of "enclosure" that turn *mare liberum* into *mare clausum*.[19]

In the face of a climate crisis that may ultimately amount to climate collapse, in Chapter 9, "'Forced Migrants,' Human Rights, and 'Climate Refugees,'" Michael Doyle calls for an overhaul of the

[19] Such rebordering, combined with the retreat from search and rescue operations, has led to harrowing results. The International Organization of Migration's Missing Migrants Project reports that in the last twenty years more than 50,000 people have lost their lives during unsafe migration journeys, the majority of whom (close to 30,000 people) drowned at sea during attempted crossing of the Mediterranean Sea (IOM, 2023a).

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international legal frameworks currently governing mobility, which fail to address the dire needs and range of protection claims raised by those who bear the brunt of climate disasters and displacements (at present primarily in the Global South but eventually elsewhere), namely, "climate refugees." His analysis reminds us that one of the most important functions of territory is to enable the sustainability of human life. But what happens if, and when, earth systems reach tipping points and territory becomes unable to sustain future human life? Doyle draws upon the jurisprudence of the landmark *Teitiota Case* (2020) in which a national of Kiribati, an island nation in the Pacific which may eventually be rendered uninhabitable for its inhabitants by rising sea levels, petitioned for protected status in New Zealand on grounds of being a "climate change refugee." While Teitiota's claim was eventually denied, he filed a complaint to the United Nations Human Rights Committee arguing his right to life was violated. The Human Rights Committee held that Teitiota did not qualify for protection, but importantly took the occasion to comment on the possibility that "the effects of climate change or other natural disasters could provide a basis for protection." This ruling, as Committee experts explained, "sets forth new standards that could facilitate the success of future climate change-related asylum claims" (United Nations Human Rights Office of the High Commissioner, 2020). In another pioneering decision from the Human Rights Committee, *Torres Straits Island Case* (2022), the Committee explored the duties owed by governments to persons risking the loss of family life (homes and livelihood) as well as their ability to maintain their indigenous culture, their traditional way of life, and the right to pass on their culture and traditions to future generations. Doyle endorses these developments before ultimately criticizing them as insufficient, concluding that the general protections available under current international instruments inadequately respond to the needs of climate refugees. Instead, new human rights conventions must be drawn up to address the climate-specific responsibilities owed by the international community to climate refugees as forced migrants.

Part III

Part III examines the creation, maintenance, and manipulation of jurisdictional spaces within and across state territories through power relations. It is neither just place nor time but bordering through

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specific power relations that define individuals as juridical subjects falling under diverse jurisdictional regimes. In Chapter 10, "From the Colony to the Border: The Lawful Lawlessness of Racial Violence," Ayten Gündoğdu underscores tensions between the promise of equality to all inhabitants and the reality of its breach. She emphasizes that although a migrant's entry into the territory of a state is supposed to trigger protection obligations, states are disavowing these obligations by delinking the bond between territory, jurisdiction, and rights. Quoting Hannah Arendt, Gündoğdu elucidates the multiple ways in which shifting border strategies place migrants in "'a condition of rightlessness,' denying them access to territory, personhood before the law, and the right to have rights." Moreover, she places these developments within a broader framework of rethinking migration in relation to colonialism and empires, exploring how present-day border control practices resemble in their formulation the techniques of governance and domination that were deployed in colonial contexts. Her analysis focuses on the violence and death caused by policies that manipulate jurisdictions to generate the racialization of status categories, demonstrating how reliance on "lawful lawlessness" contributes to the creation of fluctuating border zones where rights and protections are suspended, especially with regards to the violence exerted onto the racialized bodies of migrants on the move. Gündoğdu is particularly concerned with the shifting of responsibility, or culpability, to migrants themselves by turning migrants' purported "illegality" into a cause for denying them legal protection and basic rights while applying the logic of emergency or exception to justify states' extreme measures of extraterritorial migration control under the guise of self-defense against intruders "storming" the gates of ever-shifting borders.

Anna Jurkevics extends the discussion in Chapter 11, "Private Borders, Hidden Territories," by exploring how the presumption of equality within a given territory is challenged when land is carved up into extractable tracts of "special economic zones" (SEZs) in which state and capital cooperate to consolidate each other's power. Her analysis illustrates how the expansion of SEZs depoliticizes territory and operates as a shield to evade democratic control and block redistributive demands. By shifting the gaze to the realm of private and privatized geographies, Jurkevics aims to reveal the ways in which "[c]urrent transformations in sovereignty do not dissolve the power of the territorial state, but instead rechannel it." Any inquiry into the

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emergent catalog of such territorial reconfiguration must include public as well as private borders that generate political and economic differentiation and stratification. Focusing on Shenzhen, one of China's most successful SEZs, Jurkevics highlights the dark side of this global center of technology. Shenzhen is a metropolis that rose from a small village to China's third-largest megacity. Alas, its glitzy image obscures private borders operating within private jurisdictions, making power invisible and unaccountable. Tracing how these economic spaces of exception and exploitation are enabled by legal rules that detach and reattach land to certain private power holders (e.g., foreign owners holding quasisovereign authority within demarcated geographical areas that are immune to "vestiges of state intervention"), Jurkevics argues that SEZs and other special zones where the rules on the inside differ from those on the outside (with regard to labor and environmental protection standards, for example) ought to be reined in by, following Shachar's approach, shifting the lines of democracy to follow the shifting lines of territorial enclaves. In a global age of reconfigured power relations, political power is reimagined as overlapping and dispersed, encompassing local and transnational sites of democratic resistance and contestation whereby "new social movements … [are] acting in multiple places and on multiple scales at once" (Ejsing & Denman, 2022: 403).

The creation of lawfully lawless spaces within the existing territorial states is also the topic of Chapter 12, "Cycles of (Im)Mobility: Floating Populations in the Case of Turkey," by Sibel Karadağ. She places a spotlight on Turkey, the world's leading refugee-hosting country, to unpack the use of time and space in bordering, governing, and monitoring the lives of millions of displaced persons. Turning the gaze away from the usual suspects of Global North countries toward powerful actors in the Global South, she analyzes how the techniques of migration governance deployed by Turkish authorities morph into arbitrary and capricious practices of population control, leaving millions of already vulnerable populations in a state precarity that sustains the "irregularity of regulars." She further traces how registration systems that assign displaced persons to specific cities combined with raids and forced policies of return and expulsion create invisible lines within the Turkish migration regimes, lines that people unintentionally and unknowingly find themselves violating, and with dire consequences. Karadağ further illustrates how Turkey's location as a gatekeeping

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country at the edge of the EU is cynically turned into a strategic asset by the Turkish authorities as they "capitalize on displaced bodies and turn them into political weapons" by forcefully mobilizing undocumented migrants toward the (locked) border gates of the EU, threatening to "open the floodgates" by allowing unrestricted access to EU territory. Playing on the fear of loss of control, Turkey has obtained concessions from the EU, offering a textbook example of the calculative manner in which the tools of the shifting border paradigm can be "reverse engineered" against their architects by orchestrating the use of human beings as bargaining chips, tragically placing migrants in a no man's land of rightless subjects in lawless zones.

Thinking of borders as filters is deeply entrenched in the Westphalian model of sovereignty. By multiplying the locations and techniques of sorting and screening people on the move, the scale of such activities today is sweeping, a trend only likely to intensify in the future given the increased use of digital borders and biometric identification technologies that rely on information not only about the person but also *from* the person. In Chapter 13, "UNHCR and Biometrics: Refugees' Rights in a Legal No-Man's Land?," Marie-Eve Loiselle shows that digital borders play a crucial role in breaking the link between a refugee's physical presence and their ability to make claims by virtue of having arrived on the territory or its proximity (see also Schmalz, Chapter 4), foreclosing territorial asylum by stopping in their tracks racialized bodies attempting to reach safety before they reach the "promised lands" of migration. That national governments endorse a panoply of biometric techniques which allow them to expand their jurisdictional reach and reinforce their monopoly over "legitimate means of movement" is not -surprising, but Loiselle shows that international organizations as well, including those with a prominent humanitarian mandate such as the UNHCR, are leading the way in the adoption of digital tools and biometric technologies.[20] Loiselle scrutinizes the UNHCR's justifications for its growing reliance on large-scale biometric databases – which contain the fingerprints and iris scans of millions of refugees and displaced populations worldwide – including the efficient delivery of services, fraud reduction, and making the refugee population "legible" through datafication. She raises concerns

[20] The term "legitimate means of moving" is drawn from John Torpey (Torpey, 1998).

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about the securitization logic undergirding the "growing reliance on biometric data for filtering the movement of suspicious populations," as well as the problematic grounds upon which consent is acquired to collect personal data in digital and biometric forms when it comes to refugees in precarious situations who must rely on such biometric identity to secure access to basic life necessities such as food rations. As digital borders heavily rely on technologies produced and managed by corporate actors, Loiselle, like Jurkevics, cautions against the growing role played by private for-profit companies and contractors in the regulatory spaces once reserved for states, developments that accentuate refugees' vulnerability to the "conditions of rightlessness," also identified by Gündoğdu, Jurkevics, and Karadag, highlighting the global stratification of mobility between trusted travelers and those deemed suspicious and untrustworthy.

Part IV

The concluding section returns to normative questions in democratic theory: What are the consequences of this new configuration of rights, territories, and jurisdictions for the *demos* which still operates with the premise of the congruence of people, territory, and rights? Moreover, at times of looming planetary crises owing to climate change and global poverty, how to best respond to the effects of shifting borders that upend traditional notions of territorial legitimacy? In Chapter 14, "Three Responses to Shifting Borders: Sovereigntism, Democratic Cosmopolitanism, and the Watershed Model," Paulina Ochoa Espejo proposes three models which reinterpret these new relations. The sovereigntist position gives priority to the congruence of peoples and territories, even at the expense of jeopardizing migrants' rights and drastically restricting human mobility across borders. While expressing concern for the precarious situation of "people out of place," sovereigntists ultimately give priority to citizens over migrants and will thus seek to realign refugees with their home countries or other safe third countries. The democratic cosmopolitan response provides a different solution: accepting as a matter of lived experience the reality of a border in flux that may untether the connection between territory and people, it insists that rights, especially those pertaining to safety, dignity, and protection of persons must be extended to those on the

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move. It is the humanity of the migrant and the embodied encounter with state power, rather than the location of the encounter, which governs the relationship and warrants strict limits on the exercise of sovereign authority, *wherever* it is exerted. The watershed model, the third discussed response, formalizes place-specific rights in relation to specific territories. Ethical relations and obligations are mediated through land, highlighting the democratic promise of self-organizing localities that shape their life in common based on shared presence. On this model, the border remains intact, perhaps even hardened, favoring those already settled in a given area. Ochoa Espejo envisions, however, openness to migrants as long as they are willing to take on obligations that grow out of local norms. She writes that "rights do not fall like manna from heavenly principles" but instead are earned by performing place-specific duties within the jurisdiction. Rather than relying on legal categories of status and migration, individuals and communities become members by virtue of "mutual obligations mediated by the land." Environmental sustainability and bottom-up local participation define the people, rather than top-down policing of national identities.

Svenja Ahlhaus asks in Chapter 15, "Shifting Borders, Shifting Political Representation," how, within the current international system of states, those who have crossed borders and entered new territories are to be represented if they are not yet citizens or will not be recognized as such – how will they have their voices heard and claims represented? Taking as her starting point the core claim for political inclusion and representation – "nothing about us without us" – Ahlhaus develops a "plural reconstruction" methodology both to capture and amplify the variety and diversity of representation claims raised by refugees and noncitizens. In an age of shifting borders that generate violence in their path, she emphasizes how refugees define themselves as political actors who speak not only for themselves but also for a broader group of "those who did not make it here." This community is expansive and is constituted through acts of representation and shared experiences of moving and crossing. This varied constituency of grassroots activist groups resists the straitjacket of existing legal status ascriptions and the domination, silence, and absence they create, generating a critique of border politics that is fused with novel claims for representation: "There are no names for those they deport; they bear all of our names."

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In Chapter 16, "Justice and Democracy in Migration: A Demoicratic Bridge towards Just Migration Governance," Eva-Maria Schäfferle returns to a key question implicit in all contributions: can there be just democratic governance in migrations? She writes:

> If we want to improve migrants' legal situation in a durable and hence sustainable way, we must complement our reflections on just migration governance with reflections on democratic migration governance. Migration governance, according to this contribution's central claim, cannot become more just without also becoming more democratic. Or, put differently, it can become more just only by becoming more democratic.

This echoes Ahlhaus' call for connecting the critique of the injustice of current migration regimes with proposals for new (and better) institutions to represent migrants' voices and Mégret's invitation to give greater weight to the agency and viewpoints of refugees in "a kind of epistemic reversal" (Celikates, 2022: 100) of the dominant statist viewpoint, a reconstructive move embraced by many authors in this volume. Schäfferle aims to push the argument a step further by seeing citizens as *potential* migrants, and as such sharing an interest in facilitating cross-border movement and extending rights to "people out of place." Accordingly, Schäfferle recommends a "demoi-cratic" mode of migration governance that gives voices to the various parties and publics in whose name coercive mobility-control authority is exercised and/or on whose bodies it is etched. This approach accepts transnationality not only as a fact, but also as a potent normative tool to guide political struggles to counter the stratification of status, rights, and movement across the vast spaces of today's deterritorialized and reterritorialized border regimes.

Recalling Borges' image of a map that perfectly overlaps the territory it represents, scholars of Europe's migration cooperation agreements sought to provide a visual representation of the complex web of bilateral and multilateral links created by these new measures of movement control. The result was a space of pitch black. The myriad of nodes and lines zigzagged the globe, permitting no possibility of escape from their reach. Territory no longer mattered. The nowhere-and-everywhere border has simultaneously become both boundless and ubiquitous (Shachar, 2020b).

Nonetheless, as many of the contributions in this volume argue, neither refugees' and migrants' longings for a life of security, dignity, and

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peace nor the re-imaginings and modalities of belonging are exhausted. Reckoning with the transformations brought about by shifting borders, deterritorialization and reterritorialization are crucial for citizens of democracies as well as autocracies in whose name, but often without their knowledge and input, these changes are enacted (Benhabib, 2020). This volume hopes to contribute to a conversation among global citizens beyond and across borders.

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