Series editor's foreword

The crossing of borders is generally recognized as a key phenomenon in international political theory and in international law today—and the literature on the mobility of money, goods, and humans, and on migration and on the claims of asylum seekers, refugees, and non-citizen residents is exploding. Yet many contributions to the literature are unaware of a hidden presupposition they share. They assume that while people will try to move, borders will remain constant.

The original insight in Ayelet Shachar's lead essay is that states have made their borders a moving target, such that the crossing of borders is no longer frustrated only by making them physically insuperable. States can keep unwanted people out by moving the borders themselves, outward or inward, depending on the desired effect. Shachar argues that the shift from a "movement of people across borders" to "the movement of borders to regulate the mobility of people" (p. 7) amounts to a transformation from a physical/territorial conception to a functional view of jurisdiction.

The "shifting border," Shachar's felicitous term for the new phenomenon, is part of a process of modernization of border regimes, a mechanism for the managing of would-be migrants who can be rejected in transit or deported before they are deemed to have arrived. At the same time, the "portable" wall of the new type of border "changes form depending on how it is approached and by whom" (p. 13): while advances in technical infrastructure have enhanced the mobility of the global middle classes, they have at the same time strengthened the potential for control and arbitrary exclusion of unwanted applicants.

Although the phenomenology of the shifting border, as Shachar shows, is protean and complex, its logic follows a single aim: to keep unwanted arrivals out. In using new technology, co-opting third parties, or outsourcing control to private collaborators, it adds to the informalization and arbitrariness of the measures, and caters to the changing

needs of states. Its productivity results from the fact that it breaks up the traditional nexus between territorial presence and the ability to trigger legal procedures.

While in an earlier, “Westphalian,” age, refugees could by their physical presence on the territory exercise rights of claiming asylum or *non-refoulement* status, this can no longer be taken for granted in a world in which states disown their territorial boundaries and treat new arrivals “as though they had never reached [the country], despite having physically landed on its shores,” and where undocumented migrants are chased well into the heartland. In an echo of Kant’s distinctions in *Toward Perpetual Peace*, “access” is no longer considered “entry,” “entry” is no longer co-terminous with “admission,” and, where possible, “access” is blocked by legal fictions, technological innovations, or sheer physical force.

Ayelet Shachar is perhaps the best-placed person to diagnose the physiognomy of the shifting border, as its characteristic features have been at the center of her research in law, political science, and political theory for many years. She has discussed immigration law, cultural diversity, and structural inequality in her book *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge: Harvard University Press, 2009), which confronts inherited citizen status with demands of justice such as the principle of equality of opportunity. In the lead essay of the current volume, the “birthright lottery” provides a continuing orientation point for her, in that it continues to demarcate the “persisting fault line” between those privileged and those disadvantaged by the phenomenon of the shifting border. In her forthcoming book, entitled *The Transformation of Citizenship: Territorial, Cultural, and Wealth-Based* (Oxford University Press), she again highlights selective inclusion. She has also made seminal contributions to the debate on the marketization of citizenship, another stratifying trend of immigration regimes—for example, in her article ‘Citizenship for Sale’, in *The Oxford Handbook of Citizenship* (Oxford: Oxford University Press), which she spearheaded as lead editor in 2017.

In the current volume, Ayelet Shachar shows how the border regimes of countries such as the United States, Canada, or Australia, or of

supranational federations like the European Union, have become insuperable for some by extending outward or inward. In the case of the United States, borders effectively moved inward when officials were empowered to perform an “expedited removal” (p. 20) of undocumented migrants within a 100-mile zone within US territory. Both Canada and Australia have pushed their borders outward, deep into the points of embarkation in the states of origin or departure. Australia’s “excision zone” creates the legal fiction that refugees who have arrived on Australian soil have never set foot there and can thus be returned to extra-territorial sites without violating the *non-refoulement* clause of the 1951 Refugee Convention. Perverting the logic of modern asylum law, the very presupposition for making asylum claims—touching soil—disqualifies applicants peremptorily from admission. The European Union, “tak[ing] a leaf out of Australia’s playbook” (p. 56) in its pilot project iBorderCtrl, uses technology to permanently screen individuals before and after crossing territorial borders, effectively making them “carry” the border when moving about.

But Shachar does not restrict herself to diagnosing how borders “migrate,” nor does she stop at criticizing the various manifestations and exclusionary consequences of current border regimes. She carefully outlines a normative proposal that is both constructive and radical. The constructive element is her sketch of various institutional responses to the shifting-border phenomenon, using her intimate familiarity with the workings of international law but infusing them with the forward-looking energies of legal and political philosophy. The radical element is the principled decoupling of state obligations from the criterion of the physical presence of applicants, enabling her to provocatively question the “overrated premium of territorial arrival” (p. 71). Although her suggestions never lose sight of what is pragmatically achievable, they demand nothing less than the beginnings of a “conceptual and paradigm shift that is long overdue” (p. 96).

The key element in countering the shifting realities remains the power to trigger claims for asylum or refugee status, thus activating “the protection machinery of host states.” Shachar is clear that “recourse

to territorial arrival must remain available to those seeking safety" (p. 72), while we also should not blind ourselves to the "unequal distributional effects of the current system" (p. 73). This entails that territorial recourse should no longer constitute the universal, or only, mechanism for processing mobility and migration claims. In her reconceptualization of the relationship between law and territory, Shachar therefore accepts the new reality of the shifting border, only to subversively turn it against itself. The first move is to see states assuming legal obligations toward individuals as soon as those are subjected to "effective control" by state agents or their delegates (p. 16). Whenever potential migrants encounter state authority in a functional sense, however far removed from state territory, this fact ought to trigger rights to have their claims processed. A second strategy is to bring the border to those seeking refuge. In functional terms, borders can be extended to process, review, and grant refuge and asylum extraterritorially—for example, in overseas refugee camps, as in the pioneering Welcome Refugees initiative by the Canadian government. This goes some way toward "de-territorializing" borders, which could be further strengthened by giving the United Nations High Commissioner for Refugees (UNHCR) a stronger role in the global re-allocation of refugees. None of these strategies, Shachar contends, can be achieved without significant political mobilization.

The contributions to this volume reflect the disciplinary strands that Shachar draws together in her lead essay. They come from international relations, political philosophy, political sociology, and international law. Acknowledging the innovation that a shifting-border framework brings to redescribing the confrontation between humanitarian needs and repressive state politics, they address all elements of Shachar's lead essay, from her diagnosis of the phenomenon and her focus on democratic systems, via her interpretation of public international law as it stands, to the coherence and desirability of her normative recommendations. They insist that any progressive developments in migration and mobility law will depend as much on the correct diagnosis of trends in global governance as on the legal intricacies of national and international court decisions, and will be put to the test in the electoral politics of the host states.

The responses section is kicked off by Sarah Fine, who likens Shachar's "magnificent and terrifying" idea of the shapeshifting state to Hobbes's vision of Leviathan, and challenges Shachar's strategy of "taming" the new beast. Noora Lori stresses the temporal transformations of borders and migration, arguing that they parallel the processes of spatial transformation highlighted by Shachar. She stresses that current developments threaten to incorporate autocratic migration policies in the heart of democratic systems. Steffen Mau agrees with Shachar that the ability to control an "outer shell" (p. 141) of borders will remain a central feature of statehood. He is skeptical about the attempt at de-territorializing sovereignty obligations such as the extraterritorial processing of asylum claims—in his view, the planned EU asylum centers in Africa represent an attempt to outsource such obligations. Chimène Keitner, from an international-law perspective, formulates a realist challenge to Shachar's diagnosis and recommendations, accentuating the constraints of state power on progressive designs, while Leti Volpp embeds Shachar's diagnosis into a larger legal history of the "manipulation of . . . legal salience" (p. 169), and criticizes Shachar's attempted conceptual separation of rights from territory. Jakob Huber, finally, reads Shachar's proposal from the perspective of Kant's philosophy of cosmopolitan right, and likewise argues that the link between territorial presence and legal entitlement should be strengthened, not suspended. In response, Shachar makes a passionate case for a critical methodology in interpreting today's institutional and legal frameworks, as well as their underlying normative commitments. She develops the analogy of a "hospital on the hill" to illustrate the limitations of pegging access to protection to close-to-impossible territorial arrival, offering instead the image of mobile field hospitals to demonstrate that we can constructively translate abstract ideas into concrete, actionable measures. Her reply further emphasizes the links between shifting-border policies and illiberal domestic policies, the complex relations between social and legal change, and, finally, the potential for political action and transnational solidarity to alleviate human suffering and injustice. She sides with the philosophers in having faith in the power of ideas to change

the world. With the lawyers, she shares a belief in the value of institutional design and a commitment to holding governments to account. In the best tradition of critical theory, she believes the solutions lie within the contradictory social and political processes she has so eloquently ascertained.

Peter Niesen