20. Transboundary rights and indigenous peoples between two or more states

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1. INTRODUCTION

This chapter introduces the concept of transboundary rights as legal rights of communities that straddle cross-border areas between two or more States. Transboundary rights generally and indigenous transboundary rights specifically are rights based on the cultural, religious, livelihood and familial ties of cross-border communities whether they are connected through continuous land territories or across maritime borders between two or more States. Such communities exist across the world, from the Irish Border to the Abyei Area between Sudan and South Sudan; in between the line of control dividing the Pakistani and Indian administered Kashmir; to the Kurdish areas between Syria, Turkey, Iraq and Iran; transboundary fishing communities along the Eritrean and Yemeni Red Sea coastal areas are also included in this category.[2]

As a general guidance, and for the purposes of this chapter, transboundary communities are defined as follows:

> Transboundary communities are groups of individuals who share a common cultural, spiritual, livelihood and/or familial ties that bind them to the territory of two or more States. The location of these ties requires transboundary people to frequently cross international borders to exercise their cultural, spiritual, livelihoods, and familial rights.

Indigenous transboundary communities are thus groups of individuals whose members are indigenous, irrespective of whether or not they are recognised as indigenous in the two or more States they straddle.

Despite the international prevalence of transboundary communities between two or more States, this chapter focuses on indigenous and tribal peoples whose traditional territories transcend the sovereign borders of their host States. To clarify further what is meant by transboundary indigenous peoples, the following preconditions are established:

(1) There is an international land or maritime boundary, whether fixed or temporary;

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[2] These examples are further elaborated in my unpublished doctoral thesis, Harum Mukhayer, 'Transboundary Self-Determination: Remedying the Effects of International Borders' (PhD thesis, University of Cambridge 2020).

(2) The area in or surrounding the vicinity of a boundary is, or was, inhabited by members of the transboundary indigenous community;
(3) Individually or collectively the current or former indigenous inhabitants of the area have in common cultural, spiritual, livelihoods or familial ties that require the crossing of an international boundary.

State actions or territorial changes have disrupted the cross-border ties of the indigenous community and limited their access to their transboundary traditional territories.

Examples of such transboundary indigenous peoples may include: the Sámi peoples in northern Fennoscandia; the Inuit inhabiting the Arctic regions; Native American and First Nation tribes between the USA-Canada and the USA-Mexico border. As legal rights between two or more States, transboundary rights trace their origin story to the *de facto* and *de jure* rights of cross-border communities since time immemorial, prior to the consolidation of States.

With a focus on indigenous and tribal peoples as a sub-set of transboundary communities world-wide, the conceptual and juridical scope of the chapter is limited to a few indicative (as opposed to exhaustive) examples of transboundary rights expressed (or implied) through international legal sources. The examples are drawn from various corners of the world and include communities that are not necessarily categorised as indigenous. These examples offer a legal thread that weaves together the rights of communities separated by an international border. From these more general examples, specific indigenous rights and correlative State obligations will be further discussed.

The doctrinal lineage of transboundary rights is traced through treaties and international conventions; imprints of transboundary custom as demonstrated through the practice of States; and reference to dicta in judgments and awards of international courts and arbitral tribunals. While these sources hint at an outline of a legal right that has long been in circulation, the significance of this contribution is that it names such a right and points to the gap in international law governing the substantive rights of communities between two or more States. These transboundary rights are the cross-border ties indigenous peoples retain as part of their connection to traditional territories and land that has been dissected by international borders.

To paint a more lucid picture of the lived experience of transboundary indigenous people, this chapter refers to examples of indigenous peoples around the world. These indigenous peoples have transboundary indigenous rights that are not exclusively internal to the host States on either side of the border but are also not external to them. As such, transboundary rights are not internal to a State since they do not fit squarely within the territory and jurisdiction of one State as defined by that State's international boundaries; and are neither external to one State since they are necessarily a continuation of legal rights within and across the territories of two or more States. Hence, they are transboundary and are currently not reflected in the existing narratives on indigenous land and property rights within a domestic context confined to the jurisdiction of one State.

The unique character of transboundary rights as collectively expressed individual rights that carry a correlative obligation across international borders confronts a legal limitation. This limitation emanates from the reality that the current legal system of public international law recognises the horizontal legal relations between States, and vertical relations between citizens and the States that represent them internationally. Indigenous and tribal peoples whose rights cross international borders are left without a legal remedy under international law. This is a legal gap that this chapter highlights and posits to bridge.

Both the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the UN Declaration on Minorities Rights have provisions that bear on transboundary rights:

> *Article 36 United Nations Declaration on Rights of Indigenous Peoples (UNDRIP)*
> 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
> 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.[3]
>
> *Article 2(5) United Nations Declaration on Minority Rights*
> 5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.[4]

It should be noted that the above cited Article 36(1) of UNDRIP recognises that international borders may divide transboundary indigenous peoples, and Article 36(2) provides that States 'shall take effective measures to facilitate the exercise and ensure the implementation of this right'.[5] Similarly, Article 2(5) Declaration on Minorities Rights safeguards the right of minorities to establish and maintain 'contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties'.[6]

The legal nature of rights that cross frontiers confront some challenges; both doctrinal and procedural. These challenges emanate from two overlapping causes: first, that until now a transboundary right has not been named and its substance enunciated, and second, because the legal character of transboundary rights has not yet been fully defined the procedural questions are yet to be asked and thus remain unanswered. It is these challenges that form the crux of this chapter's contribution. Before turning to the doctrinal and procedural questions, the next section sketches the parameters of the conceptual framework on which this chapter is based.

2. SETTING THE TERRITORIAL AND CONCEPTUAL SCOPE: CASE EXAMPLE OF THE SÁMI PEOPLES

Between 2015 and 2016 the Human Rights Committee (HRC) received two Communications from members of the Sámi indigenous peoples in Finland and Norway. The subject matter of both submissions was a claim that Finland had interfered in the Sámi right to vote for elections to the Sámi Parliament. In accordance with Finnish law the 'Saami Parliament is not an author-

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[3] United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2 October 2007) (adopted by 144 votes to four; 11 abstentions) (UNDRIP).
[4] United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992) (adopted without vote).
[5] UNDRIP (n 3) art. 36.
[6] United Nations Declaration on Rights of Minorities (n 4) art. 2(1).

ity but an independent institution, a legal person under public law'.[7] The Sámi Parliament in Finland was established in 1973, and there are sister Sámi Parliaments in Norway (1989) and Sweden (1993). Prior to the formation of the national Sámi Parliaments, the Nordic Sámi Council founded in 1956 was the primary Sámi political institution representing all Sámi.[8] In 1992 the Russian Sámi joined the Council membership and the organisation was renamed the Sámi Council.

With growing Sámi parliamentary cooperation between the borders of Finland, Norway and Sweden, the role of the Sámi Council has been supplemented by the joint 'Parliamentary Council of the Sami'[9] which coordinates between the parliaments and the Sámi Council. The role of the Sámi Council is to operate as a middle-man and build on its recognised status as an Indigenous Peoples Organisation. Beyond not interfering with the cross-border Sámi relations, the host Nordic governments provide minimal support.[10] Nevertheless, cross-border cooperation across the Sápmi region has benefited from the EU Interreg-Nord programme which prioritises 'use of Sámi language, preservation and retainment of the region's nature areas as well as collective efforts towards green development and resource efficiency'.[11] Recognising the transboundary nature and significance of reindeer, among the Programmes projects involves the 'cross-border training on maintenance of reindeer in Sámi'.[12] However, only the border between Norway and Sweden is an actual site of transboundary reindeer herding.[13]

Despite cross-border collaboration and joint efforts towards the preservation of the Sámi way of life, the Sámi Parliaments operate independently of each other. Each Sámi Parliament derives its administrative authority from statutory instruments issued by the respective State within which that portion of Sámi territory coincides. In Finland, the administrative and political authority of the Sámi Parliaments evolved significantly from the initial *1973 Presidential Ordinance* leading up to the *Act of the Sámi Parliament of 1995*, amended in 2003.[14]

The text of the Finnish Sámi Parliament Act, §3 contains a definition of who is considered Sámi for electoral purposes: '(1) Saami as a first language, (2) descendent of a person entered in an administrative register as a mountain, forest or fishing Lapp, or (3) at least one parent qualifies as an elector for a Saami election'.[15] It is this definition which sparked the dispute forming the substance of the Communication submitted to the HRC. The crucial question was; where does ultimate authority to admit members into the Sámi electoral role reside?

[7] United Nations Human Rights Council, 'Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2950/2017: Klemetti Käkkäläjärvi et al v Finland' (1 February 2019) UN Doc CCPR/C/124/D/2950/2017, para 4.1.

[8] John B. Henriksen, *Saami Parliamentary Co-Operation: An Analysis* (IWGIA 1999).

[9] The Declaration by the Sami Parliamentary Conference on the Nordic Sami Convention adopted in Umeå 2014 (20 February 2014) https://www.sametinget.se/73165 accessed 14 June 2021.

[10] Margret Carstens, 'Sami Land Rights: The Anaya Report and the Nordic Sami Convention' (2016) 15 *Journal on Ethnopolitics and Minority Issues in Europe* 75, 89.

[11] Interreg-Nord, 'Borderless Opportunities' (*European Union* 2018, Project version 2018-02-23) http://www.interregnord.com/wp-content/uploads/Projectportfolio-ENG-version-2018-02-23.pdf accessed 14 June 2021.

[12] Ibid.

[13] Stefan Kirchner, 'Cross-Border Forms of Animal Use by Indigenous Peoples' in Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020) 59.

[14] An unofficial translation can be found at: Act on the Sámi Parliament (974/1995; amended 1026/2003) https://www.finlex.fi/en/laki/kaannokset/1995/en19950974.pdf accessed 15 June 2021.

[15] Act on the Sámi Parliament, ibid., §3.

The legal history of the case starts in 2011 and four years later in 2015 the Supreme Administrative Court of Finland ruled in favour of including almost 100 non-Sámi people into the Sámi Parliament electoral roll on account of individual self-identification. The Sámi parliamentarians appealed the decision, but their appeal was refused. Although under Finish law individual persons may appeal the ruling of the Supreme Administrative Court, a collective could not. The Administrative Court's reasoning was that since the Board of the Sámi Parliament were not 'personally involved in the [rulings, they] cannot be affected by them'.[16] Having exhausted all domestic remedies, the President of the Sámi Parliament approached the HRC.

Both the 2015 and 2016 Communications presented to the HRC centred on the problematic definition of 'who is to be regarded as a Saami for the purposes of being allowed to vote in the elections for the Parliament' stipulated in §3 of *The Act on the Saami Parliament* (974/1995). The first communication was submitted on 2 October 2015 in which the President of the Sámi Parliament argued that the Finnish State had unlawfully interfered in Sámi political affairs by admitting 93 non-Sámi persons to the electoral roll of the Sámi Parliament. This decision has implications on Sámi 'lands, culture, and interests'.[17]

The second Communication was submitted by 24 Sámi members (22 members hold Finnish nationality and the remaining are citizens of Norway). The communication dated 23 March 2016 disputed the Finnish Supreme Administrative Court's ruling in favour of admitting the non-Sámi persons to the Sámi electoral roll, effectively going against the decision of the Sámi Board of Parliament and the Election Committee. The applicants argued that such an action impedes their 'right to self-determination protected under Article 1 of the Covenant'[18] and amounted to forced assimilation.[19]

In both Communications, the 'Committee t[ook] into account the individual and collective dimensions of [the Sámi applicants] rights',[20] recognising that the Sámi Parliament plays an important role in both the individual and collective exercise of their rights under Articles 25 and 27 of the *ICCPR*. The Committee's finding was that 'the State party is under an obligation to provide the authors with an effective remedy'[21] for violating their 'rights under article 25, read alone and in conjunction with Article 27, as interpreted in light of Article 1 of the Covenant'.[22] However, it is the combined effect of Article 25 and Article 27 within the defined territorial scope of the Sámi homeland which highlight the significance of the decision.

[16] HRC, 'Views adopted by the Committee concerning communication No. 2950/2017: Klemetti Käkkäläjärvi et al v Finland' (n 7) para 6.9, State party's observations on merits.

[17] United Nations Human Rights Council, 'Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2668/2015: Tiina Sanila-Aikio v Finland' (1 February 2019) UN Doc CCPR/C/124/D/2668/2015, para 1.2.

[18] HRC, 'Views adopted by the Committee concerning communication No. 2950/2017: Klemetti Käkkäläjärvi et al v Finland' (n 7) para 3.1.

[19] Ibid., para 3.4.

[20] HRC, 'Views adopted by the Committee concerning communication No. 2668/2015: Tiina Sanila-Aikio v Finland' (n 17) para 8.

[21] HRC, 'Views adopted by the Committee concerning communication No. 2950/2017: Klemetti Käkkäläjärvi et al v Finland' (n 7) para 11; HRC, 'Views adopted by the Committee concerning communication No. 2668/2015: Tiina Sanila-Aikio v Finland' (n 17) para 8.

[22] HRC, 'Views adopted by the Committee concerning communication No. 2668/2015: Tiina Sanila-Aikio v Finland', ibid., para 6.11.

This legal triad – minority rights, political rights and territorial rights – add an element of territorial control to the pre-existing political autonomy the Sámi may exercise in connection to the Sámi homeland in Finland. By connecting the right to participate in public life with collective minority rights within the Sámi homeland the Committee teetered away from a formulaic reading of indigenous and minority rights. Rather than issuing an itemised list of traditional fishing or hunting rights over which the right to participate is applicable, Article 27 is interpreted as enshrining the inalienable right of indigenous peoples to freely determine their political status and pursue their economic, social and cultural development. These are rights that would otherwise flow uninterrupted in the absence of the Finnish State's interference. Taken further, the Finnish State's interference with the Sámi triadic rights suggests the notion that indigenous and minority rights are in fact transboundary rights whose enjoyment has been impeded by State borders.

3. DOCTRINAL INKLINGS: TRANSBOUNDARY RIGHTS BY REFERENCE TO THE SOURCES OF INTERNATIONAL LAW

Tested in relation to the sources of international law, as well as their third-party judicial procedure,[23] this section highlights the legal thread in international law underpinning transboundary self-determination. Examples and suggestions as to the potential content of transboundary rights are provided based on cultural, livelihood, religious and familial ties of indigenous peoples between two or more States. There is a tension between transboundary rights and the legal system for human rights, and there might also exist a temptation to equate transboundary rights with human rights. However, they are distinct and this distinction is inherently territorial.

Within the legal framework of a State, international human rights law recognises the obligations on States towards their own citizens. It is generally accepted that human rights are international in character because they are 'rights that cannot be given or withdrawn at will by any domestic legal system'.[24] Similarly, what makes transboundary rights transboundary is that they straddle an international border, and the fact that they require a crossing of an international border is what grants them an international status. In the *Desautel* Case we observe that like international human rights, transboundary rights 'may most effectively be implemented by the domestic legal system' however, 'that system is not the source of the right'.[25]

In the next section, the sources of transboundary rights and correlative transboundary obligations will be discussed. This exercise is intended to outline the doctrinal inklings underpinning the transboundary legal obligation on States vis-à-vis transboundary indigenous peoples on either side of an international border. With reference to the rights of indigenous peoples, the discussion on the extent to which these transboundary rights are reflected in domestic law leads naturally to whether they are reflected in bilateral and regional custom or as a form of *lex specialis*.

[23] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 100.
[24] Ibid., 97.
[25] Ibid.

3.1 Treaties and Conventions

The Vienna Convention on Succession of States in Respect of Treaties 1978, in Article 11 on Boundary Regimes states the following: '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.'

The International Law Commission's (ILC) commentary on State succession further clarifies how the *uti possidetis* rule leaves unchanged the settlement of the succeeding States' boundary as well as any 'treaty provisions ancillary to such settlement'.[26] Such ancillary aspects may accommodate for private individual interests as well as collective rights. For example, during the Ethio-Somalian Boundary Dispute[27] the transboundary rights of the Somali tribes were never questioned. The Ethiopian government remained 'consistent in its position that the boundary clauses as well as the grazing provisions of the 1897 Anglo-Ethiopian Agreement remain valid and that they are binding upon both Ethiopia and Somalia'[28] well after both States had attained independence.

Treaties establishing an international boundary receive exceptional treatment under the principle of *moving treaty frontiers* and *clean-slate principle*.[29] According to the moving treaty frontiers' principle, a territorial situation created by a treaty is not disrupted even if a treaty lapses or the predecessor State ceases to exist. Similarly, treaties relating to boundary or territorial regimes are exempt from the clean-slate principle.

The clean-slate exception suggests that all treaty obligations are wiped clean when a State accedes to independence, except those 'obligations imposed on it either by general International Law or by definite international settlement relating to its territory'.[30] Reference to the ILC's Commentary on the Draft Articles suggests that settlement relating to State territory may include 'obligations arising from agreements locally connected which had established propriety or quasi-proprietary rights'.[31] For example, Article 11 of the *Treaty between Australia and Papua New Guinea* (PNG) states that 'each Party shall continue to permit free movement and the performance of lawful traditional activities in and in the vicinity of the Protected Zone by the traditional inhabitants of the other Party'.[32] The Australia-PNG mari-

[26] 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (1974) II(1) *Yearbook of the International Law Commission* 198.
[27] Cedric Barnes, 'The Ethiopian-British Somaliland Boundary' in Dereje Feyissa and Markus Virgil Hoehne (eds), *Borders and Borderlands as Resources in the Horn of Africa* (Boydell & Brewer 2010); Mesfin Wolde Mariam, 'The Background of the Ethio-Somalian Boundary Dispute' (1964) 2 *The Journal of Modern African Studies* 189, 189.
[28] Draft Articles on Succession of States in Respect of Treaties with Commentaries (n 26) 200; Edward Ullendorff, 'The 1897 Treaty Between Great Britain and Ethiopia' (1966) 22 *Rassegna di Studi Etiopici* 116.
[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Separate Opinion of Judge Weeramantry) [1996] ICJ Rep 595, 645.
[30] The Aaland Islands Question: Report of the Committee of Jurists (October 1920, special supplement no. 3) League of Nations Official Journal, vi; Draft Articles on Succession of States in Respect of Treaties with Commentaries (n 26).
[31] Draft Articles on Succession of States in Respect of Treaties with Commentaries, ibid., 202.
[32] Australia – PNG, Treaty concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters (with annexes). Signed at Sydney on 18 December 1978.

time boundaries treaty not only acknowledges the transboundary rights of the inhabitants but holds that usual immigration controls must not be used to limit transboundary free movement.

Articles protecting transboundary rights are not only limited to treaties delimiting a boundary or a territorial regime. The *Agreement dated 25 February 1964 between Burkina Faso and Mali* deals with 'Problems of land and the maintenance of rights of use on either side of the frontier' and provides that the '[r]ights of use of the nationals of the two States pertaining to farmland, pasturage, fisheries and waterpoints will be preserved in accordance with regional custom'.[33]

The point is that not even the clean-slate principle can 'relieve a newly independent State of the obligation to respect a boundary settlement and certain other situations of a territorial character'.[34] So, the privileged character of international boundaries is not only because boundaries serve as parameters for where the sovereignty of one State ends and the other State starts. It is implied in this formulation of State territorial regime that State 'rights pertaining to territory must in the last resort benefit the inhabitants',[35] which entails local populations and their 'proprietary or quasi- proprietary rights'.[36]

By this logic, the centrality of territory and territorial stability extends to the rights of inhabitants and may include grazing rights,[37] water rights[38] or rights to hold land.[39] In the context of State succession these rights are not limited to indigenous peoples, however they indicate an honouring of the transboundary ties potentially disrupted by an international border. The same legal reasoning underpins Article 3 of *The 1794 Jay Treaty* which governs 'Amity, Commerce and Navigation'[40] between the USA and Canada. Article 3 of the Jay Treaty states:

> the Indians dwelling on either side of the said Boundary Line freely to pass and repass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America.

In relation to the law on State succession in respect of treaties, and the bilateral practice of States on issues concerning their share border areas, this section has highlighted the general practice concerning transboundary rights. The reference to transboundary communities in these treaties appears general, with the exception to the *1794 Jay Treaty* which makes specific reference to the indigenous inhabitants along the Medicine Line between the USA and Canada. Whether these treaties create boundary regimes that indicate an international practice or whether they constitute *lex specialis* is outside the scope of this chapter.

[33] Agreement cited in *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgement) [1986] ICJ Rep 554, 617.

[34] Thomas Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (Palgrave Macmillan 2015) 118.

[35] See Article 12 commentary, Draft Articles on Succession of States in Respect of Treaties with Commentaries (n 26) 207.

[36] Ibid., 202.

[37] See ibid., 200, for commentary on transboundary grazing rights under the 1897 Anglo-Ethiopian Treaty.

[38] See ibid., 204, for Syria's discussion on water rights in a cross-border context.

[39] Ibid., 204.

[40] Treaty of Amity, Commerce, and Navigation (Great Britain-United States) (adopted 19 November 1794) (The Jay Treaty).

3.2 Customary International Law: Some *de facto* and *de jure* Examples of Transboundary Rights

In the preceding section it was established that treaties embody elements of State recognition of transboundary rights, free movement, and privileged territorial passage between borders. However, this is not sufficient to establish transboundary rights, or transboundary self-determination as a customary rule. In its Judgment to *Nicaragua v. United States of America* in 1986, the ICJ clearly stated:

> Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice[41]

The practice of States on the rights of communities between their shared borders as it currently stands is one limited to bilateral State relations or as an expression of regional custom.[42] The extent to which transboundary rights constitute international custom would require a more detailed analysis than the space and time allocated to this chapter permit.[43] The legal reality of transboundary rights under international law is a complex and fragmented one, however there is some evidence as to the practice of States as demonstrated in other sections of this chapter. Contrary to making the claim that transboundary rights exist as a matter of customary international law, this section defers the analysis on *opinio juris* when sufficient state practice is catalogued.

For the purposes of this chapter, some examples of *de facto* and *de jure* transboundary rights will be highlighted. While this by no means confirms State practice accepted as law, it offers some indications. Furthermore, these examples are general, rather than specific to indigenous peoples and are derived from around the world, including Irish Border areas, the Abyei Area, Kashmir, and Kurdish inhabited border areas between Turkey, Syria, Iraq and Iran. Despite this convergence, the cases demonstrate a diversity of transboundary communities between two or more States; transboundary communities are not monolithic, and neither are their rights.

3.2.1 Irish border areas

The departure of the United Kingdom from the European Union reopened discussions of the border between Northern Ireland and Republic of Ireland, thus shining the spotlight of renewed legal interest in the Irish border areas. Although the Irish border was never intended to be an international frontier, it was developed as such after the 1920s due to successive policies adopted by the Northern Irish Assembly (formerly the Government of Northern Ireland from 1921 to 1972) and the Irish Free State. The outline of the border is implied through

[41] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 98.

[42] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* [2015] ICJ Rep 665, 714; *Case Concerning the Frontier Dispute* (n 33) 616–617.

[43] In my unpublished doctorate thesis, Mukhayer, 'Transboundary Self-Determination' (n 2), I provide eight cases which highlight the *de facto* and *de jure* practice of States in relation to transboundary rights in the Irish Border, Abyei Area, Kashmir, Kurdistan, Sámi laplands, US–Canada/ US–Mexico border, Chagos archipelago and the Red Sea islets between Eritrea and Yemen.

Article 1(2) of the Government of Ireland Act, which states that Northern Ireland consists of the 'parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry' from which the border line can be deduced.[44]

From the period of violent conflict known as 'The Troubles' and following Brexit negotiations,[45] the significance of the Irish border area to peace and stability in the UK and Ireland brought the area under institutional focus. The local authorities devised specialised cross-border networks dedicated to economic and social development. The first two networks were founded in the 1970s, they are: the Eastern Border Regional Council (EBRC)[46] and the North West Region Cross-Border Group (NWRCBG)[47] led by local authorities who have over the past 40 years pioneered cross-border cooperation in the Irish border areas. The third network, Irish Central Border Area Network (ICBAN),[48] founded in 1995 was established with the support of the EU as an extension of European Cohesion policy and in support of the GFA.[49]

These 'trans-jurisdictional sub-regional'[50] networks started off as initiatives by local authorities to lobby relevant ministries and departments in the border areas. Over the years these cross-border networks developed into regional mechanisms coordinating between government agencies on either side of the border to develop the border regions through targeted programmes and projects. Each network focuses on different priorities depending on the needs of its stakeholders. For example, the EBRC, later incorporated as East Border Region Ltd, runs projects on cross-border business incubation,[51] heritage tourism,[52] and cross-border energy efficiency and biodiversity.[53] Founded in 1976, the NWRCBG[54] prioritises renewable energy, construction and lobbying for recognition of cross-border groups 'in providing channels and

[44] Kieran Rankin, 'Theoretical Concepts of Partition and the Partitioning of Ireland' (2006) University College Dublin, IBIS Working Paper No 67; Kieran Rankin, 'The Creation and Consolidation of the Irish Border' (2005) University College Dublin, IBIS Working Paper No 48, 2.

[45] Cathal McCall, *Border Ireland: From Partition to Brexit* (Routledge 2021).

[46] EBRC: Newry, Mourne and Down District Council, Armagh, Banbridge & Craigavon Borough Council, and Ards and North Down Borough Council in Northern Ireland; and Louth, Monaghan and Meath County Councils in the Republic of Ireland.

[47] NWRCBG: Donegal County in Republic of Ireland; Derry City Council, Limavady Borough Council, Magherafelt District Council and Strabane District Council in Northern Ireland.

[48] ICBAN: Donegal County Council, Sligo County Council, Leitrim County Council, Cavan County Council and Monaghan County Council from Ireland and Fermanagh and Omagh District Council, Mid-Ulster District Council and Armagh, Banbridge and Craigavon District Council from Northern Ireland.

[49] Jonathan Greer, *Partnership Governance in Northern Ireland: Improving Performance* (Routledge 2019) 117.

[50] Ibid.

[51] East Border Region Ltd, 'B.I.G. Project Hosts Successful Launch!' (2007) http://www.eastborderregion.com accessed 5 November 2021.

[52] East Border Region Ltd, ''Borderlands' New Tourism Initiative Launched' (2008) http://www.eastborderregion.com accessed 5 November 2021.

[53] East Border Region Ltd, 'Nature Has No Boundaries with Cross-Border Biodiversity Project' (2011) http://www.eastborderregion.com accessed 5 November 2021.

[54] Elected Member representation is cross-party and cross-border with six members from Donegal and four each from the northern Councils. The Group was established purely for public benefit and works with communities and stakeholders to encourage partnership and co-ordination of effort. North West Region Cross Border Group, 'Annual Report: July 2013–2014' (2014) https://www.derrystrabane.com/getmedia/d0313976-e25d-4735-bc05-c9c6fff666b6/NWRCBG-Annual-Report-June-2014.pdf accessed 16 June 2021.

a forum for cross-border relations'.[55] In parallel with the work of the cross-border networks the North-South Ministerial Council (NSMC) is the primary inter-governmental governing body for the whole Island of Ireland.

3.2.2 Abyei: between Sudan and South Sudan

Abyei presents an effective archetype of transboundary rights. During the war between Sudan and South Sudan a significant proportion of the inhabitants of Abyei fled; 10,000 travelled north and 50,000 fled south.[56] With the signing of the Comprehensive Peace Agreement (CPA) in 2005,[57] Abyei Area Administration (AAA) gradually began a programme of resettlement in accordance with the Abyei Protocol[58] and the Abyei Road Map Agreement.[59] The lives of the residents of Abyei, like the rest of the Sudan-South Sudan border inhabitants are shaped by a shared environmental system, cross-border trade and familial ties that straddle the border between the Two Sudans.[60] This border is both largely inhabited[61] as well as heavily militarised. The transboundary story that shapes the boundaries of Abyei is one along other segments of the border between Sudan and South Sudan and the 15 pastoralist groups that rely on crossing it.[62]

Like most transboundary towns the inhabitants of Abyei live on the margins of central government policy and therefore supplement their day-to-day lives by goods and services that are more readily available across the border. Take education for example, since access to basic primary schools is problematic along the border areas many families send their children to schools further north or south of the border.[63] This applies to a wide spectrum of public services where families from both sides of the border relocate where economic opportunities

[55] Ibid., 28.

[56] Human Rights Watch, 'Abandoning Abyei: Destruction and Displacement' (21 July 2008) https://www.hrw.org/report/2008/07/21/abandoning-abyei/destruction-and-displacement-may-2008 accessed 16 June 2021.

[57] 'The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the SPLM/SPLA' (9 January 2005) https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_060000_The%20Comprehensive%20Peace%20Agreement.pdf accessed 16 June 2021.

[58] 'Chapter IV: The Resolution of the Abyei Conflict' (26 May 2004) in 'The Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the SPLM/SPLA' (9 January 2005) https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_060000_The%20Comprehensive%20Peace%20Agreement.pdf accessed 16 June 2021.

[59] 'Abyei Road Map Agreement' (8 June 2008) https://unmis.unmissions.org/abyei-road-map-agreement accessed 16 June 2021.

[60] The term 'Two Sudans' is often used to refer to the Republic of Sudan and The Republic of South Sudan. It refers to both Sudans within the scope of their territorial and national unity between 1956–2011 as well as post-separation in 2011. Peter Woodward, 'Towards Two Sudans' (2011) 53(2) *Survival* 5.

[61] Joshua Craze, *Dividing Lines: Grazing and Conflict along the Sudan – South Sudan Border* (Small Arms Survey 2013).

[62] Zoe Cormack and Helen Young, 'Pastoralism in the New Borderlands: Cross-Border Migrations, Conflict and Peace-Building' (2012) Tufts University Working Paper https://fic.tufts.edu/assets/Pastoralism-in-the-New-Borderlands.pdf accessed 16 June 2021, 15.

[63] UNICEF, 'Situation Assessment of Children and Women in South Sudan' (*ReliefWeb*, 24 March 2016) https://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF%20South%20Sudan%20Situation%20Assessment%20of%20Children%20and%20Women%202015.pdf accessed 16 June 2021.

and improved healthcare takes them, but continue making seasonal migrations.[64] In addition to the pursuit of public service delivery, the interracial and multi-faith social milieu along the border creates transboundary ties that are deeply rooted and not easy to demarcate.

3.2.3 Kashmir: family ties across the Line of Control

In 1971, the boundary line dividing the Pakistan and Indian portions of Kashmir known as the Line of Control (LoC) was designated as the official ceasefire line through the *Simla Agreement*.[65] The LoC effectively functions as an international frontier with the exception of matters of trade whereby 'both India and Pakistan do not accept [the] Line of Control as an international border and refer [to] Cross-LoC trade as domestic [...] between two regions of one State'.[66]

Although the LoC is a complete barrier to movement,[67] with exception to the heavily regulated border crossing points, Kashmiris still continue to visit friends or family living on the other side through a weekly bus service.[68] The bus service between Muzaffarabad – Srinagar, suspended since 1965 was reopened in 2005, and a new service between Poonch – Rawalkot was introduced in 2006 as part of a conceptual compromise and attempt towards eventual 'irrelevance of borders'[69] in both sides of Kashmir. These initiatives signal efforts by the two States towards softening the LoC and enabling the movement of people, economy and trade. The compromise retains the LoC as a territorial division; one that is heavily militarised yet amenable to the human element.

3.2.4 Kurdish transboundary rights: between Turkey, Syria, Iran and Iraq

The regulated movement of peoples and goods in Kashmir resonates with the Kurdish example of transboundary kulbarans in the border towns between Iran and Iraq. In the border areas between Iraq and Iran kulbarans[70] trade across the Zagros mountains as an expression of transboundary rights. Kulbarans are semi-legal traders and cross-border 'people of mainly Kurdish-dominated provinces of West Azerbaijan, Kermanshah and Kurdestan who carry

[64] UN Radio, 'Rezeigat and Dinka Grazing Tradition Threatened by Sudan-South Sudan Conflict' (*ReliefWeb*, 6 July 2012) https://reliefweb.int/report/sudan/rezeigat-and-dinka-grazing-tradition-threatened-sudan-south-sudan-conflict accessed 16 June 2021.

[65] Agreement on Bilateral Relations between the Government of India and the Government of the Islamic Republic of Pakistan (India-Pakistan) (adopted 2 July 1972) (Simla Agreement).

[66] Altaf Hussain Kira, 'Cross-LoC Trade in Kashmir: From Line of Control to Line of Commerce' (2011) Indira Gandhi Institute of Development Research Working Paper 2011-020 http://www.igidr.ac.in/pdf/publication/WP-2011-020.pdf accessed 16 June 2021.

[67] Based on a report based on a 'total of 3,774 interviews, selected by quota sampling [...] held face-to-face in 11 of the 14 districts in Indian Jammu and Kashmir (J&K) and seven of the eight districts in Azad Jammu and Kashmir (AJK) in Pakistan between 17 September and 28 October 2009. Gilgit-Baltisan was excluded.' See full results in Robert Bradnock, 'Kashmir: Paths to Peace' (*Chatham House*, 2010) 20 https://www.chathamhouse.org/events/view/156537 accessed 16 June 2021.

[68] Press Trust of India, 'Srinagar-Muzaffarabad Bus Operates despite Tension at Kashmir's Uri Sector' (*Business Standard India*, 23 October 2017) https://www.business-standard.com/article/current-affairs/srinagar-muzaffarabad-bus-operates-despite-tension-at-kashmir-s-uri-sector-117102300378_1.html accessed 16 June 2021.

[69] P.R. Chari and Hasan Askari Rizvi, 'Making Borders Irrelevant in Kashmir' (*United States Institute of Peace*, September 2008) https://www.usip.org/publications/2008/09/making-borders-irrelevant-kashmir accessed 16 June 2021.

[70] The term kolbars is also used in the literature to refer to these cross-border foot traders.

contraband on their backs through mountainous areas to earn their livelihood'.[71] In 2017, the Iranian government issued 8,000 'mobility permits' to allow the kulbarans safe passage.[72] There are many such examples of government attempts at setting up 'border markets and free zones, such as in Baneh region'.[73]

Transboundary communities within the same region may have transboundary rights that differ depending on the segment of the same international border. Distinct pockets of transboundary rights are shaped by different sociocultural, ecological and political currents. For example, transboundary rights along the Iraq-Syria border villages of Syrian and Iraqi Baghouz are significantly different than those exercised by the kulbarans.

3.3 General Principles of Law: *uti possidetis juris*, Territorial Integrity of States and Self-determination

In legal terms, the geopolitical boundaries that define and delimit the territories of recognised sovereign States are known as international borders or international frontiers. Whether depicted as a boundary line or a zone, international borders retain legal sanctity under international law and are safeguarded through the principles of territorial integrity and national unity.[74] International borders, even where partially disputed, act as receptacles of a State's legal personality and exclusive jurisdiction. In this section, the analysis on general principles of international law as they relate to the transboundary rights of indigenous peoples are limited to: *uti possidetis juris*, the principle of territorial integrity and principle of self-determination.

In its arbitral decision on the case concerning the Abyei Area between Sudan and South Sudan, the Permanent Court of Arbitration (PCA) made extensive reference to general principles of international law in the area of transboundary and traditional ties to land. The PCA cited the *Western Sahara Case* that there are '"ties which kn[o]w no frontier between the territories" and which are "vital to the very maintenance of the life in the region"'.[75] The Tribunal went further to suggest that there is a 'positive duty on the part of states to safeguard the rights of peoples to their traditional land use'[76] and considers that the 'transboundary rights'[77] in Abyei fall within the scope of this duty under *ILO Convention No. 169*.[78]

[71] 'Calls for Border Economic Recovery' (*Financial Tribune*, 8 February 2017) https://financialtribune.com/articles/economy-domestic-economy/59220/calls-for-border-economic-recovery accessed 17 June 2021.

[72] Ibid.

[73] United Nations Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran' (28 January 2020) UN Doc A/HRC/43/61.

[74] James R. Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 118; *Re Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* (1998) 115 ILR 536 (Supreme Court of Canada).

[75] *In The Matter of An Arbitration Before A Tribunal Constituted In Accordance With Article 5 Of The Arbitration Agreement Between The Government Of Sudan And The Sudan People's Liberation Movement/Army on Delimiting Abyei Area* (Final Award) [2009] PCA, para 749; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 35.

[76] Ibid., para 763.

[77] Ibid., paras 756–757.

[78] International Labour Organization, *Indigenous and Tribal Peoples Convention, 1989* (No. 169), arts 31(1), 14(1), and 14(2).

The reasoning adopted by the Tribunal is convincing; the rights of the residents of Abyei are transboundary and should not be affected by the delimitation of an international boundary. The Tribunal's finding that the delimitation of Abyei should not affect the transboundary rights attached to the Abyei Area irrespective of whose sovereignty the territory lies within has two implications: first is that transboundary rights (the Tribunal refers broadly to traditional rights, customary land rights, and explicitly names 'transboundary rights')[79] require some form of transboundary administration that is neither exclusively Sudanese nor South Sudanese, yet accounts for freedom of movement and service delivery for transboundary peoples.

The second implication of the Tribunal's finding is that the fate of Abyei as a self-determination unit is determined by the residents of Abyei. According to the 2005 Comprehensive Peace Agreement[80] and the 2004 Abyei Protocol,[81] it is the residents of Abyei who will ascertain whether Abyei becomes part of Sudan or South Sudan. The decision to choose either Sudan or South Sudan will inevitably result in a catch-22 situation whereby Abyei residents will be effectively limiting their own transboundary rights to the boundary of one State.

The challenge presented by international borders is not unique to the transboundary communities along the Sudan–South Sudan border. It is also one that can be circumvented by recognition of the fact that the rules of international law governing boundaries are compatible with the continuity of transboundary rights. In the dictum of the ICJ's judgment in the 1986 Frontier Dispute, the Court clarified the principle of *uti possidetis* as follows:

> By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession. International law – and consequently the principle of *uti possidetis* – applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the 'photograph' of the territorial situation then existing.[82]

The Court's use of the 'photograph' metaphor reflects the stabilising effect of *uti possidetis*; it captures the boundary regime in a moment of stillness forever preserved in the global photo album of States. However, what is captured by a photograph or a snapshot[83] is not merely a boundary line, but rather the lived experience surrounding its border areas. It captures a territorial situation that includes settlements,[84] inhabitants[85] and the territorial authority administering them.[86]

More accurately, a territorial situation is best represented through a series of snapshots collated together into a time-lapse of photographs reflecting the personality of the State at its

[79] *Area* Final Award (n 75) paras 756–757.

[80] 'The Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the SPLM/SPLA' (n 57).

[81] 'Chapter IV: The Resolution of the Abyei Conflict' (26 May 2004) in 'The Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the SPLM/SPLA' (n 58).

[82] *Case Concerning the Frontier Dispute* (n 33) 568.

[83] Georges Abi-Saab, 'Comments on ICJ Judgement (Burkina Faso/ Republic of Mali)' (2014) 20 *African Yearbook of International Law Online* 121, [63].

[84] *Case Concerning the Frontier Dispute* (n 33).

[85] *Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras: Nicaragua intervening)* [1992] ICJ Rep 351, 516.

[86] *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625, 683.

borders. The notion of a time-lapse depicts the legal narrative embodied in boundary and territorial regimes; as places of interaction between State rights on one hand, and State obligations in relation to the rights of peoples on the other. By this reasoning, at the point of independence transboundary rights form part of the international boundary. They exist alongside the international legal personality of the States on either side of a boundary without disrupting the stability and continuity of borders or undermining the territorial integrity of States.

Conceptually, by recourse to the right and principle of self-determination, transboundary rights circumvent the unique tension they confront as international legal rights. In this chapter, self-determination with its rich legal origins and divergent interpretations does not receive a comprehensive treatment.[87] However, some key assumptions are necessary for setting the context to which the principle of self-determination may extend to transboundary rights: first that self-determination as both a right and a principle embraces a broader concept unlimited to the decolonisation context;[88] second, that it is an ongoing right and a constant entitlement;[89] finally, transboundary rights, expressed as a form of self-determination can be exercised in a way that is compatible with the territorial integrity of two or more host States.[90] In that sense, self-determination can be perceived as an option from which transboundary indigenous peoples can express their choice:[91] as an option it lies somewhere in between the internal and external[92] expressions of self-determination.[93]

[87] Mukhayer, 'Transboundary Self-Determination' (n 2).

[88] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 159; In a Verbal Note to the ICJ Finland claimed:

> It has sometimes been suggested that the widespread application of the principle of self- determination during the decolonization process was a 'special case' and that after the end of the process the door to statehood by this means had been closed. This is wrong. Not only would it create an arbitrary distinction …, it also misunderstands the rationale of the principle itself.

See also: 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo: Response Submitted by Finland to Questions of Judge Koroma and Judge Cançado Trindade' (*International Court of Justice*, December 2009) 3 https://www.icj-cij.org/public/files/case-related/141/17888.pdf accessed 17 June 2021.

[89] Higgins, *Problems and Process: International Law and How We Use It* (n 23) 120.

[90] For a detailed discussion of the compatibility of transboundary self-determination with *uti possidetis* and the principle of territorial integrity see Mukhayer, 'Transboudary Self-Determination' (n 2), ch 1.

[91] In Chapter 7 of her book the jurist Rosalind Higgins discusses the history and legal parameters of self-determination. She suggests that (n 23), 119:

> it is very desirable that there should be opportunities for free access to each other by members of the same tribe, group, or people living on opposite sides of an international boundary. But that is to be achieved by neighbourly relations and open frontiers, not by demands for the redrawing of international boundaries. *Uti possidetis* does not prevent states freely agreeing to redraw their frontiers. But self-determination does not require this of them.

While I agree entirely with this State-centric account of self-determination, I suggest that there exists a parallel peoples right to have their transboundary ties honoured as an expression of self-determination, and a correlative obligation on States either side of an international boundary.

[92] Although widely accepted, the author acknowledges that the internal-external dichotomy is by no means the only way of organising self-determination. James Summers, 'The Internal and External Aspects of Self-Determination Reconsidered' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013).

[93] For an account of the internal-external self-determination dichotomy see, Harold S. Johnson, *Self-Determination Within the Community of Nations* (A. W. Sijthoff 1967) 28.

To demonstrate the notion of a transboundary self-determination unit compatible with international borders: imagine a group of reindeer-hunting Sámi peoples living along the border between Sweden and Norway.[94] This particular group of Sámi have Swedish citizenship. The Sámi traditional territories are intersected by multiple international borders delimiting the States of Sweden, Norway, Finland and Russia. However, this particular group of Sámi inhabit the border areas along the Sweden–Norway border, thus their transboundary self-determination unit overlaps those portions of Sweden and Norway where their transboundary right to hunt reindeer attach. Every time the Swedish Sámi exercise their right to hunt within the territory of Sweden, their rights are protected by human rights law subject to the jurisdiction of Sweden. However, their domestic right to hunt acquires an international legal character when they hunt reindeer across the border in Norway.

Continuing with the example of the reindeer-hunting Sámi between Norway and Sweden, consider the nature of the legal ties between the Sámi and their host State. When in Sweden, the Swedish Sámi have a vertical legal relationship with their host Swedish State; when they cross the border into Norway, they retain their Swedish citizenship. However, the nature of their legal relationship with Sweden is now a diagonal relationship and they acquire a vertical relationship with the Norwegian State. Thus, transboundary rights are simultaneously vertical and diagonal (as opposed to horizontal State-State and only vertical citizen-State legal relations).

As such transboundary rights (or transboundary self-determination) is a symbiotic relationship between the two or more States on either side of an international border and the transboundary communities whose cultural, religious, livelihood and familiar ties predate the formation of States. By directing the reader to the rich content on self-determination elsewhere in this Handbook, the next section of this chapter focuses the content of transboundary indigenous rights between two or more States by reference to judicial decisions.

3.4 Judicial Decisions

The analysis in this section focuses on judicial decisions by international human rights treaty bodies, domestic courts, and references to transboundary rights in the dictum of international courts and tribunals.

3.4.1 International human rights treaty bodies

It must be stated from the outset that there is currently no explicit transboundary human right, however there are some references in human rights instruments that can be extended to the transboundary context. In Article 25 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) reference is made to the right to freely utilise natural resources within the scope of cultural and social rights.[95] Article 1(2) and Article 47 of the ICCPR also

[94] Note only the international boundary dividing the Sámi peoples between Norway and Sweden is a site of transboundary reindeer herding, see Kirchner, 'Cross-Border Forms of Animal Use by Indigenous Peoples' in Peters (ed), *Studies in Global Animal Law* (n 13) 59.

[95] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI), art 25.

extend to resource rights.[96] Regional instruments also lend support to transboundary rights. The American Convention on Human Rights Article 21 on the right to property[97] and the African Charter on Human and Peoples' Rights Article 21 governs natural resources wealth.[98]

Human rights on access to and use of natural resources as an expression of cultural ties often work their way through human rights bodies by drawing on multiple rights. For example, the *Saramaka v Suriname* case before the Inter-American Court of Human Rights (IACtHR) relied on Article 21 (the right to property) and Article 25 (the right to judicial protection) to cement the connection of the Saramaka peoples' to their ancestral territory.[99] Activities such as 'agriculture, hunting, fishing, and other traditional ways of using the land and resources' were considered central to 'their entirety and intertwined with social, ancestral, and spiritual relations, which govern their daily life'.[100]

The right to property featured prominently in the IACtHR Judgment in *Lhaka Honhat v Argentina*.[101] The Lhaka Honhat is an association composed of 132 different transborder[102] indigenous communities who have been inhabiting 'the province of Salta and borders on Paraguay and Bolivia, since before 1629'.[103] The case relied on Article 21 (right to property), combined with Article 23 (political rights), and social and cultural rights enshrined in Article 26 (progressive development).[104] Argentina was found to be in violation of the Lhaka Honhat rights because it did not recognise their collective title and failed to respect, protect, and facilitate the impact of illegal logging and other unregulated land-use on the communities' traditional territories.[105]

The Court held that '[t]his had altered the indigenous way of life, harming their cultural identity because, even though this has an evolutive and dynamic nature, the changes in the indigenous way of life in this case were not the result of consensual interference'.[106] As

[96] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 1(2) and 47.

[97] American Convention on Human Rights (adopted 22 November 1969) 1144 UNTS 123, art 21.

[98] Article 21, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 21.

[99] American Convention on Human Rights (n 97) arts 21, 25.

[100] *Saramaka v Suriname*, Application to the Inter-American Court of Human Rights, (Case No. 12.338) para 92 https://www.cidh.oas.org/demandas/12.338%20Saramaka%20Clans%20Suriname%2023%20junio%202006%20ENG.pdf accessed 17 June 2021; *Saramaka People v Suriname*, Judgement on Preliminary Objections, Merits, Reparations, and Costs (28 November 2007), IACHR Series C No. 172.

[101] *Lhaka Honhat v Argentina*, Judgement on Merits, Costs, and Reparations (6 February 2020) IACHR No. 12.094.

[102] Parliament of First Nations and others, 'Evaluation of Compliance with the International Covenant on Civil and Political Rights in the Framework of the Presentation of the Fifth Periodical Report Before the Human Rights Committee.' (May 2016) https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ARG/INT_CCPR_CSS_ARG_24354_E.pdf accessed 17 June 2021.

[103] *Lhaka Honhat v Argentina* (n 101).

[104] American Convention on Human Rights (n 97), arts 21, 23, and 26.

[105] For a more involved discussion of the case, see Angel Cabrera, Daniel Cerqueira and Salvador Herencia-Carrasco, 'Remarks on the Judgment of the Inter-American Court in the Lhaka Honhat vs. Argentina case' (*Justicia en las Américas*, 29 July 2020) https://dplfblog.com/2020/07/29/remarks-on-the-judgment-of-the-inter-american-court-in-the-lhaka-honhat-vs-argentina-case/ accessed 17 June 2021.

[106] *Lhaka Honhat v Argentina* (n 101).

a measure of reparations, the Court ordered Argentina to delimit and grant a single title for the 132 indigenous communities over the entire territory of the Lhaka Honhat, and secondly that Argentina must remove all obstacles to their enjoyment of their territory by ensuring voluntary removal of the non-indigenous settler population occupying the Lhaka Honhat territory.

The *Lhaka Honhat* decision offers insight into the myriad of legal constraints inherent in the human rights system when dealing with rights of 'transborder' communities like some of the communities in the Lhaka Honhat association. A report authored by Alianza Indígena Sin Fronteras / Indigenous Alliance Without Borders highlights the legal, moral and institutional challenges associated with the protection of transboundary rights.[107] In the report they cite UNDRIP,[108] ILO Convention no. 169[109] and the ICCPR;[110] however, it is not the lack of principles or declarations that make transboundary rights unique and procedurally complicated, but rather the absence of expressed legal protections.

3.4.2 Judgments by domestic courts

> [T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of the Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognised as such in treaty and legislation.[111]

In 2017, Mr Desautel, an American citizen and a member of the Lakes Tribe of the Colville Confederated Tribes was called to trial for hunting ceremonial elk meat in a portion of the Colville tribal territory that coincides with the jurisdiction of the Canadian province of British Columbia. After reporting the kill to the conservation officers in Canada, he was charged for hunting without a license in violation of §11(1) of the *Wildlife Act*[112] and for hunting big game without being a resident of Canada violating §47(a) of the same Act. After seven years of protracted litigation, a trial judge of the British Columbia Provincial Court acquitted Desautel on both charges. The decision was appealed but the appeal was dismissed.

It is the grounds for Desautel's acquittal that form the focus of the analysis presented here. In particular, the Crown's challenge to Desautel's hunting right was on grounds of sovereign incompatibility, which is legally and procedurally distinct from the extinguishment argument the trial judge based her decision on.

The Crown argued that for the right to hunt to be consistent with the sovereignty of Canada it must be accompanied by a mobility right which would permit the bearer to enter Canada. Given that no such mobility right existed the mere crossing of the international border and entering Canada is a violation of Canadian sovereignty. The Supreme Court of British Columbia dismissed the mobility right argument by citing *Mitchell v M.N.R*; 'An aboriginal right, once established, generally encompasses other rights necessary to its meaningful

[107] Alianza Indígena Sin Fronteras and Leza (2019).
[108] UNDRIP (n 3) arts 4, 5, 8(2), 9, 10, 11, 12, 13, 18, 19, 24, 25, 33, and 36.
[109] Articles relevant to cross-border rights: ILO, No. 169 (n 75) arts 2, 5(a), 6(1), 8(1), 14(1), 16(1), and 32.
[110] ICCPR (n 96) arts (1), 12(4), 18(1), 23(1), and 27.
[111] Felix Cohen, *Handbook of Federal Indian Law* (United States Department of the Interior, Office of the Solicitor 1940) 121.
[112] RSBC 1996, c 488.

exercise.'[113] Addressing the fact that border control is an important function of Canada's sovereignty, it was made clear that Desautel had not made any special claim to crossing the border and if he did he would not be 'a person who would be denied entry'.[114] The Court also considered it 'unnecessary and inappropriate'[115] to discuss international boundary crossings in context of a transboundary aboriginal right on grounds that it was a matter of federal jurisdiction.

Although it was clear that border crossing was implied by virtue of Mr Desautel's American citizenship, it was not seen as a violation of any law. In fact, the whole question of sovereign incompatibility was swapped with an argument in favour of sovereign *compatibility* as necessary to the exercise of a transboundary right. The logic behind Judge Mrozinzki's reasoning is worth remark:

> Without deciding the point [on sovereign (in)compatibility], I am prepared to accept the 1846 Treaty had an impact on the Sinixt's prior practice of moving about their territory at will. The Treaty had the effect of imposing a boundary that the Sinixt had and have to acknowledge and live with. It does not follow that this assertion of sovereignty cannot co-exist with their right to hunt in their traditional territory north of the 49th parallel.[116]

The Colville Indian tribe, descendants of Sinixt people, is one of the 573 Federally Recognised Native American tribes,[117] according to the US doctrine of tribal sovereignty. Prior to colonial settlement the Sinixt traditional territory extended into the Canadian Kootenay region near Revelstoke and south into Kettle Falls in Washington State, straddling both North American States and intersecting the international boundary between the US and Canada. Because the Sinixt peoples, of which the Colville tribe are part, do not enjoy the same status as a territorial sovereign in Canada, as they do in the US, the key focus of the trial court was to establish if an aboriginal right to hunt extends to the portion of Colville tribal territory across the Canadian border, or if the right was extinguished.

Judge Mrozinski found that the exercise of aboriginal rights was not extinguished with the assertion of Canadian sovereignty following the *1846 Oregon Boundary Treaty*,[118] but was in fact preserved and affirmed by s. 35(1) of the *Canadian Constitution Act, 1982*.[119] The trial court decided that the aboriginal right exercised by Desautel was not, quoting Justice Brennan in *Mabo*, 'washed away by the tide of history'.[120] Placing the aboriginal right within its intertemporal context, the Court found that the aboriginal right was not extinguished and was not incompatible with the Crown's sovereignty as alleged by the Crown. Two legal tests were

[113] *Mitchell v MNR*, 2001 SCC 33, [22].
[114] *R v Desautel*, 2017 BCSC 2389, [115].
[115] Ibid., [122].
[116] Ibid., [148].
[117] United States National Archives, 'Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs' (Bureau of Indian Affairs, 23 July 2018) 84 FR 1200, Doc #2019–00897 https://www.federalregister.gov accessed 17 June 2021.
[118] Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains (Great Britain-United States) (adopted 15 June 1846, entered into force 5 August 1846) 9 Stat 869 (1846 Oregon Boundary Treaty).
[119] The text of § 35(1) reads: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'
[120] *R v Desautel* (n 114) [6].

applied. The first test relates to tribal membership as laid out in *R v Powley*.[121] The second test is to prove continuity of the right as a fundamental part of the collective culture in accordance with the precedent set in *R v Van der Peet*.[122]

Because the Colville Tribe is composed of Sinixt resident members in Washington, as well as Sinixt residents in British Columbia, the courts of British Columbia were satisfied that the hunting traditions form an aboriginal right that is central to the tribe's way of life. In an interesting twist, the Provincial Court's decision was that the assertion of the *Wildlife Act* was actually an infringement upon Mr Desautel's aboriginal right, rather than Mr Desautel's actions as an infringement upon the Crown's sovereignty in British Columbia. The case offers a rigorous and illuminating analysis of peoples' rights and sovereign territorial rights. It raises questions of State sovereignty and international boundaries within a historical context and shows how transboundary rights fit within this legal and territorial framework.

Without fully engaging with the mobility argument, it is clear that the rights inherent in the *Desautel* decision are transboundary rights which entail the mobility right. But they are also rights made possible by the permeability of the international border between the US and Canada and rights of free passage in accordance with Article 3 of the *Jay Treaty*:

> It is agreed that it shall at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of the said Boundary Line freely to pass and repass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America.[123]

So, while the arrest of Mr Desautel constituted an unjustifiable infringement of his transboundary rights between the US-Canada border, if he was a member of the Pascua Yaqui Tribe further south between the US-Mexico border he would not have recourse to the exact same right. For the simple reason that his transboundary rights create a connection over the specific State territories between the US and Canada, and none other. However, if a Mexican citizen and member of the Pascua Yaqui Tribe[124] wanted to cross the Mexico-US border to visit family they would have to provide necessary photo identification issued by the US Government to Mexican members of the transboundary tribe. Similarly, members of the transboundary Tohono O'odham tribe of Arizona[125] have to produce passports and border identification cards to be permitted entry into Mexico and back into the US.

The mobility question notwithstanding, the relevant rights these transboundary peoples may enjoy once in the territory of the neighbouring State are subject to the needs of their peoples and justifiable limitations imposed by States. These rights are often capped within the borders of a State and subject to the discretion of State officials. While the US tribes benefit from the

[121] *R v Powley*, 2003 SCC 43.

[122] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289.

[123] The Jay Treaty (n 40).

[124] 'Department of Homeland Security and the Pascua Yaqui Tribe Announce a Historic Enhanced Tribal Card' (*United States Department of Homeland Security*, 30 July 2010) https://www.dhs.gov/news/2010/07/30/department-homeland-security-and-pascua-yaqui-tribe-announce-historic-enhanced accessed 17 June 2021.

[125] 'Department of Homeland Security and Tohono O'odham Nation Announce Agreement to Develop Enhanced Tribal Card' (*United States Department of Homeland Security*, 3 November 2009) https://www.dhs.gov/news/2009/11/03/department-homeland-security-and-tohono-oodham-nation-announce-agreement-develop accessed 17 June 2021.

doctrine of tribal sovereignty, their rights as a domestic dependent nation within the borders of the US, or across its borders, clearly raise questions of international law. These questions may be adjudicated domestically but clearly lie outside the scope of domestic courts.

3.4.3 Transboundary rights in the dicta of international judicial decisions

In 1998, the PCA Tribunal issued an award on the Sovereignty and Maritime Delimitation in the Red Sea between Eritrea and Yemen. Both states claimed sovereignty over a chain of islands which were sites of transboundary fishing by their nationals. In the *Dispotif* the Tribunal sets out a traditional fishing regime, and provides the following guidance:

> In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region. This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar islands and the islands of Jabal al-Tayr and the Zubayr group. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and the livelihoods of this poor and industrious order of men.[126]

Besides the *Eritrea/Yemen* case, there are a multitude of examples in which States honour the transboundary rights of fishing communities to fish in their maritime territory. These honoured obligations are mainly expressed through bilateral agreements or treaties; for example, agreements between Indonesia and Malaysia, Indonesia and Australia, Papua New Guinea and Solomon Islands, and Papua New Guinea and Australia.[127] The feature of the *Eritrea/Yemen* case that makes it most relevant to this chapter is how it construes transboundary rights as international rights. The juridical lens with which the Arbitral Tribunal in *Eritrea/Yemen* unpacks the territorial rights of the fishing communities in the Red Sea affirms two things: first, that such rights do not affect the territorial title of either State over the Islands, and second that these transboundary rights should remain unaffected by the award on territorial sovereignty over the islands.

Similar reasoning was advanced by the highly qualified publicist and international jurist Judge Weeramantry in his dissenting opinion to the Kasikili/Sedudu Islands dispute between Botswana and Namibia. Affirming the only unanimous paragraph in the Court's Judgment, Weeramantry advances his proposal of a joint régime on the 'equal national treatment' concept set out in operative paragraph 3. Turning to the question of preserving the integrity of an ecological or cultural unit, Weeramantry brings to the forefront principles of international law which extend an obligation on both States. He suggests that the fact a unit 'straddles national boundaries does not necessarily mean that it is to be dissected between the two or more States whose boundary runs through it'.[128] Citing Judge Jessup in the *North Sea Continental Shelf*

[126] *Territorial Sovereignty and Scope of the Dispute (Eritrea v Yemen)* (First Stage Award) (3 October 1996) PCA, para 526.

[127] Polite (2013). Dysi Polite, 'Traditional Fishing Rights: Analysis of State Practice' (2013) 5 *Australian Journal of Maritime & Ocean Affairs* 120.

[128] *Kasikili/Sedudu Island (Botswana/Namibia)* (Dissenting Opinion of Vice-President Weeramantry) [1999] ICJ Rep 1153, 1181–1182.

cases,[129] Weeramantry brings in the principle of international co-operation as a means of ensuring equitable considerations where boundaries produce divisive outcomes. In his dissent, he announces prophetically of the disruptive effects international boundaries have on transboundary rights:

> The present case offers us an instance of a situation which is likely to come before the courts more often in the future. The evolution of legal guidelines for such situations is not a venture into new legal territory, for many precedents already exist. I see it as inevitable that the future will bring before international tribunals other situations as well in which there are interests of a universal nature which need to be preserved, and where two or more States may need to co-operate to ensure that some important aspect of the universal heritage of humanity is not diminished.[130]

With reference to the jurisprudence of international courts and tribunals reviewed in this chapter, the common feature concerning transboundary rights is that they arise not because of 'who' transboundary peoples are but rather 'where' they are geographically located – between borders. While the designation indigenous peoples plays a critical role in the Sámi Communications, and the aboriginal rights were central to Desautel's legal success before the Canadian courts, some of the other examples concerned the continuity of transboundary ties, irrespective of indigeneity.

Whether taken together or apart, the various cultural, religious, livelihood and familial ties that underpin transboundary rights share a common feature: they are international legal rights that are without a suitable remedy under international law.

4. CONCLUDING REMARKS

From a reading of indigenous peoples' transboundary rights between two or more States a territorial pattern begins to emerge. The transboundary rights of indigenous peoples are neither secessionist nor internal, but rather lie somewhere in between. They are rights short of territorial sovereignty but recognise the territorial ties indigenous communities establish since time immemorial. They are distinct from land or property rights confined to the jurisdiction of one State, but also entail features of such rights.

In the section of the chapter where doctrinal inklings are traced through the sources of international law, transboundary rights emerge as a possibility for uniting communities separated by international borders. Although not all transboundary communities are indigenous peoples, the principle of self-determination may be construed to reconcile between the territorial integrity of a State and the cultural, religious and political integrity of peoples within their traditional territories and homelands.

Whether it is the practice of religion tied to a sacred site, cultural rights to hunting and fishing, or speaking one's own language; these individual rights, and their collective expression, occur within a territorial context. A territorial context that predates the creation of States and continues to exist alongside it. It is this territorial context which forms the basis of

[129] *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)* (Judgement) [1969] ICJ Rep 3, 53.

[130] *Kasikili/Sedudu Island (Botswana/Namibia)* (Dissenting Opinion of Vice-President Weearamantry) (n 127), 1180.

UNDRIP Article 36 and underpins the substance of transboundary rights as advanced in this chapter.

Although this preliminary sweep of transboundary rights generally and indigenous transboundary rights specifically under international law is promising, it raises more questions than it answers. It also appears to be the case that while the sources of international law discussed point to an inkling of a general transboundary right, the manner of implementation of such a right is determined by the particular State subject to regional or bilateral custom. It is yet to be established whether the content of an international transboundary right may be measured against an international standard from which variation can be legally restricted.

Despite these remaining questions, some preliminary conclusions can be drawn regarding the legal rights described in this chapter, and the correlative diagonal obligations on States. Having named transboundary rights as a category of legal rights under international law, this section answers the question of remedies. Borrowing from the indigenous property rights paradigms of 'individual sticks' rather than considering 'property rights as an all-encompassing "bundle of sticks"'[131] the below discussion proceeds with an unbundling of transboundary indigenous rights.

4.1 Rights to Access and Use

Irrespective of the cultural, religious, livelihood or familial basis of transboundary peoples' claims, the first stick in the transboundary bundle is the right to cross a border as a prerequisite for access. In *Desautel* the issue of an incidental mobility right was raised in the proceedings, and it was submitted that 'it is unnecessary to consider if [Desautel's] claimed Aboriginal right necessarily includes an incidental mobility right because the Sinixt right to hunt in the Arrow Lakes region did not require an incidental right to cross a border that did not exist'.[132] Hence a transboundary right carries through its *de facto* or *de jure* expression an inherent right to access and use. However, that is not to say that such rights are unlimited. The example of the mobility permits issued to transboundary Kurdish kulbaran traders is an example of State regulation, or the regulation of fishing rights in the Red Sea islets between Eritrea and Yemen discussed above.

4.2 Right to Property and Territorial Rights Short of Sovereignty

The right to property is an important human right. However, in a transboundary context the right to property takes on a more territorial character. In a transboundary context, the right to property is intimately connected to the land transboundary peoples inhabit. This relationship to land has found references in decisions of international courts and tribunals and judgments of human rights courts. Such ties that know no frontiers found explicit expression in the *Western Sahara* Advisory Opinion:

[131] Michael Newhouse, 'Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: The Mille Lacs Case' (2000) 21 *Public Land & Resources Law Review* 21 https://scholarship.law.umt.edu/plrlr/vol21/iss1/8.

[132] *R. v. Desautel*, 2019 BCCA 151, [45].

> The Court considers that, in the relevant period, the nomadic peoples of the Shinguitti country possessed rights, including some rights relating to the lands through which they migrated. These rights constituted legal ties between Western Sahara and the Mauritanian entity. They were ties which knew no frontier between the territories and were vital to the very maintenance of life in the region.[133]

The Abyei Arbitration shows the interface between right to property and territorial rights by suggesting that transboundary rights are essentially property rights that hold a territorial character. This territorial character is not adequately contained within the borders of Sudan or South Sudan, but requires an Area that is shared, over which the residents of Abyei should freely self-determine. Some parallels between the Abyei decision may be drawn from the jurisprudence of international human rights bodies. For example, the IACtHR through the machinery of the American Convention has established the territorial character of Article 21 which protects the right to property in the context of indigenous peoples' claims.[134]

4.3 Natural Resources and Transboundary Consultation

Regional State practice under human rights instruments such as the Arab Charter on Human Rights 2004 and the African Charter on Human and Peoples' Rights affirm that all peoples have the right to control and freely dispose of their wealth and natural resources, as enshrined in Article 2(1) of the Arab Charter and Articles 20–22 African Charter respectively.[135] However, when natural resources extend beyond national boundaries, the principle of territorial sovereignty *ipso facto* promotes the exclusion of transboundary peoples.

In a recent article, Dwight Newman and Maruska Giacchetto offer two examples of transboundary indigenous consultations concerning natural resources.[136] The first concerns the Porcupine Caribou population between Canada and Alaska and the second highlights objections by Alaskan indigenous communities against mining in Northern Canada. While these recent developments show efforts by transboundary indigenous communities to assert their right to cross-border consultation on exploitation of natural resources, they are yet to be reflected in the actual practice of States.

The rights of indigenous communities to be consulted on issued concerning the exploitation of natural resources derives from an innate normative position:[137] that the State should not abuse its sovereign powers and discriminate against specific groups of peoples within their borders. This reasoning resonates with the example of the Sámi presented in section 2 of this chapter, and the findings by the HRC on Finland's violation of Article 27 of the ICCPR.

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[133] *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12, [152].

[134] Inter-American Commission on Human Rights, 'Indigenous and Tribal People's Rights Over Their Ancestral Lands and Natural Resources' (Organisation of American States 2009), OEA/Ser.L/V/II Doc 56/09.

[135] Arab Charter on Human Rights, 22 May 2004, art 2(1); African Charter on Human and Peoples' Rights, 27 June 1981, arts 20–22.

[136] Dwight Newman and Maruska Giacchetto, 'Recent Developments on Transboundary Indigenous Consultation Issues' (2019) 7 *Current Developments in Arctic Law* 39–45.

[137] See Macklem's discussion of the *Awas Tigini v Nicaragua* case before the IACHR on the application of art 21 of the American Convention; Patrick Macklem, 'Indigenous Rights and Multinational Corporations at International Law Symposium: Holding Multinational Corporations Responsible under International Law' (2000) 24 *Hastings International and Comparative Law Review* 475.

In its General Comment to Article 27 of the ICCPR, the HRC confirms the fact that minority rights do 'not prejudice the sovereignty and territorial integrity of a State party' even where such rights are closely 'associated with territory and use of its resources'.[138] In upholding the Sámi right to self-determination within the Sámi homeland areas in Finland, the HRC held that Finland is under an international obligation to ensure the functioning and operations of the Sámi Parliament in line with its responsibilities under Article 27. In doing so the significance of the HRC decisions to the two Sámi Communications in 2015[139] and 2017[140] is that the Committee brings within the scope of Article 27 an element of Sámi control over their traditional homelands. While the Committee's decision binds Finland alone, the reasoning may extend across borders since 'A Sami is not alone, but is a part of a generational and communal chain of Sami across [State] borders'.[141]

4.4 Conclusion

The scope of transboundary indigenous rights in this chapter has been expanded considerably to include examples from transboundary communities that are not indigenous. Where reference to transboundary communities generally has been resorted to, the intention has been two-fold: first, to buttress the phenomena of transboundary rights under international law by drawing on as many examples as possible, and second, to highlight the territorial and spatial nuances of the right. The second spatial intention has some fundamental legal repercussions that relate to the recognition of indigenous transboundary communities. For example, an indigenous community that straddles two or more States may confront a challenge whereby their kin on one side of the border may have attained legal recognition of their indigeneity, whereas their cross-border kin have not. The emphasis of transboundary indigenous rights should be on '*where*' they are located, rather than '*who*' holds them. This where-then-who causality offers a legal test by which substantive transboundary indigenous rights can be harmonised to circumvent the legal challenge of recognition.

Finally, this chapter offers a legal sketch of the parameters of transboundary right under international law and their application to indigenous peoples between two or more States. It marks the first leg of a long transboundary journey and invites further legal study into an area that has been omitted from international legal theory and practice.

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[138] HRC, 'General Comment No. 23: Art. 27 (Rights of Minorities) CCPR/C/21/Rev.1/Add.5' (1994).

[139] Tiina Sanila-Aikio v Finland (n 17).

[140] Klemetti Käkkäläjärvi et al v Finland (n 7).

[141] Ibid., [2.11].