



## RESPONSE

**The Struggle Against Empire Continues:  
Reflections on *Migration as Decolonization***

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*Migration as Decolonization* telegraphs the essence of a postcolonial approach to the assertion of sovereign territorial exclusion. Tendayi Achiume's concept of "de-imperial migration" clarifies and enhances a set of important critiques and should justly impact not just legal scholarship but also broader public discourse.<sup>1</sup>

One of the article's most valuable elements is its contribution to reframing the discourse on migration. By reinforcing the reframing of migration from the global South to the global North as a response to a history of domination and exploitation, the article sounds in a rich tradition of anti-colonial theoretical and political work on what it means to act and speak—to "strike back"—against empire.<sup>2</sup>

It has been a privilege to work within a growing network of scholars, including Professor Achiume, in exploring the relatively uncharted terrain of international law on migration, mindful of the ways in which political and economic power shape and misshape the international order.<sup>3</sup> In this brief comment, I bring out two of the concepts in *Migration as Decolonization* that I find especially interesting and relate them, as a fellow traveler, to my earlier discussions of "interconnectedness" between migration-sending and migration-receiving territories.<sup>4</sup> The first question concerns the factual nexus

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1. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1565 (2019).
2. For an influential treatment of the concept, see generally CTR. FOR CONTEMPORARY CULTURAL STUDIES, UNIV. OF BIRMINGHAM, *THE EMPIRE STRIKES BACK: RACE AND RACISM IN 70s BRITAIN* (1982). For a discussion of the book's contribution to scholarship, see Claire Alexander, *The Empire Strikes Back: 30 Years On*, 37 ETHNIC & RACIAL STUDIES 1784, 1784 (2014) (as part of a symposium reflecting on the book, describing it as "a landmark text in the formation and transformation of ethnic and racial studies in Britain [and particularly] issues of race, migration, nation and inequality").
3. For a sense of this growing area of research, see *Symposium on Framing Global Migration Law*, 111 AJIL UNBOUND 1-518 (2017).
4. See, e.g., Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELBOURNE J. INT'L L. 393, 447-48 (2013).

between countries that underpins the normative and analytical justification of migration against empire—what Achiume calls “de-imperial migration.” I raise a question about the nature of the nexus as posited in Achiume’s thesis, less as a point of challenge than as a point for clarification. The second question relates to the argument for “sovereignty as interconnection,” which I want to consider not only in relation to “interconnectedness,” but also within the longer tradition of “Third World lawyering.”<sup>5</sup> After noting some shared perspectives on this question, I observe the historical pliability of the concept of sovereignty as way of expressing both admiration for, and slight caution about, Achiume’s formulation.

### I. Interconnectedness Part 1: Timing the Connection

Professor Achiume notes the importance of specific historical relationships between migration-sending and migration-receiving countries, which she notes can occur through formal colonialism or functional neo-colonialism.<sup>6</sup> This concept is quite sympathetic to a core argument in my own work on international economic asymmetry.<sup>7</sup> The difference in emphasis is instructive, however. The “asymmetry” argument begins with a recognition of the centrality of historical relations between migrant-sending and migrant-receiving countries, but then embarks on a study of the effects of more contemporary international arrangements.

In particular, I argue that there is a relationship between increased migration over the past two decades, and a broader contemporary international order that has sought increasing economic integration and liberalization.<sup>8</sup> The tools used by developing country governments in earlier eras to enact state-led domestic growth policies—fiscal expenditures through employment and subsidy, controls on foreign investment and trade, state ownership of the means of economic production, and price controls—have been disallowed or dismantled under the international trade and investment laws and agreements of the past few decades. Many developing-country governments over the same time frame have agreed to a phalanx of market-opening and government-shrinking policies. The increased focus on cross-border market integration has coupled with significant wealth disparity between countries to increase

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5. Professor Achiume has taken care to situate her analysis within the approach of “Third World Approaches to International Law,” or TWAIL. Achiume, *supra* note 1, at 1513-14 n.12.

6. *Id.* at 1541-42.

7. See, e.g., Chantal Thomas, *Migration and International Economic Asymmetry*, in *WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION* 241-42 (Alvaro Santos et al. eds., 2019).

8. See CHANTAL THOMAS, *DISORDERLY BORDERS: HOW INTERNATIONAL LAW SHAPES IRREGULAR MIGRATION* (forthcoming 2020).

pressures for out-migration from poor to rich countries, whether authorized or unauthorized.

In a forthcoming analysis, *Disorderly Borders*, I focus on migration from Central America and Mexico to the United States.<sup>9</sup> I argue that those migration patterns result not only from historical connections between this set of countries, but also from more contemporary dynamics wherein U.S. trade and investment helped both to displace local production in Central America and Mexico and to establish increased connectivity. *Disorderly Borders* sets its exposition within the postcolonial frame,<sup>10</sup> introducing its analysis by pointing out how international law has shifted from a posture enabling immigration during the era of colonial expansion, to one conferring the prerogative of presumptive territorial exclusion to the state. Nevertheless, its focus in terms of setting forth the factual nexus between policies and actions generated by the global North, and immigration as a response in the global South, is much more on the contemporary.

Professor Achiume's analysis of historical relationships, and particularly colonial ones, provides a welcome addition to this focus on more contemporary linkages. There is a continuum, of course, between historical relations of formal dominion of developing countries, on the one hand, and trade and investment relations under the contemporary economic order, on the other. Trade and investment flows have often tended to follow those older patterns of connection, making the dynamics reinforcing and cumulative. *Migration as Decolonization* invites us to consider that continuum more closely and to foreground, rather than background, the colonial encounter. Although *Migration as Decolonization* refers to a host of modern international arrangements, whether "multilateral . . . or bilateral," the particularities of those arrangements remain largely unspecified.<sup>11</sup> Perhaps in that sense, *Migration as Decolonization* sets the terms for a possible agenda for future research.

In elaborating the relationship between the factual claim of colonial and neocolonial subjugation and the normative claim toward migration as decolonization, some interesting line-drawing exercises arise. These resemble in some ways the kinds of questions that have arisen in the discourse around reparations for slavery. Indeed, there is now an emerging discourse on migration as reparations that follows the same intuition guiding *Migration as Decolonization*, and that situates that intuition within an alternate vocabulary of compensation for historical wrongs.<sup>12</sup> In the slavery reparations debates, a

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9. *See id.*

10. My discussion of the postcolonial frame in the introduction to *Disorderly Borders* also appears as Chantal Thomas, *Mapping Global Migration Law, or the Two Batavias*, 111 *AJIL UNBOUND* 504 (2018).

11. Achiume, *supra* note 1, at 1542.

12. *See, e.g.*, SUKETU MEHTA, *THIS LAND IS OUR LAND: AN IMMIGRANT'S MANIFESTO* 1-13 (2019); Suketu Mehta, *Why Should Immigrants 'Respect Our Borders'? The West*

typical question relates to the necessary specificity of the historical wrong. Who bears the obligation for reparations: only those persons who can be tied to particular actions (such as corporations and other legal persons in existence at the time of slavery or the more recent atrocities of Jim Crow-era mass lynching), or all those persons who can be said to have derived a benefit from the social and structural inequality that those actions created? And who carries the entitlement for reparations: only those persons who have, if not a direct historical link to the same actions, than as direct a link as possible through family lineage, or all those persons who can be said to have borne the mantle of the disadvantages that those actions created?

In the same vein, one might ask whether the “migration as decolonization” or “migration as reparations” frame would need to establish a particular historical linkage between countries, and if so, how direct that linkage would need to be. For example, would persons from the African continent carry an entitlement to entry into only those countries who acted as colonial powers, or is a general regional relationship between, say, Europe and Africa at play? For this reason, Professor Achiume’s emphasis that both colonial and neocolonial relationships form part of the analysis is important, though further elaboration would also be welcome. Ultimately, such line-drawing exercises can serve as a diversion away from the larger normative point, which remains no less compelling. In a future in which the normative argument might lead to some form of execution, those decisions would of course have to be made, and the best understanding of these discourses is that their moral power is in no way diminished by uncertainty about the particulars of implementation.

## II. Interconnectedness Part 2: (Re)Defining Sovereignty

Professor Achiume’s most striking theoretical contribution to postcolonial discourse in the field of international law is the concept of “sovereignty as interconnection.”<sup>13</sup> As she notes, this concept relates to a discussion of interconnectedness I presented in a 2013 article, *What Does the Emerging International Law of Migration Mean for Sovereignty?*<sup>14</sup> and I welcome further development of these ideas. *Migration as Decolonization* applies the insight of interconnectedness as a basis, not only for critiquing, but also for reconceptualizing, foundational concepts of international law. In doing so, *Migration as Decolonization* also expands on the analytical category of the

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*Never Respected Theirs*, N.Y. TIMES (June 7, 2019), <https://perma.cc/9TK2-544L> (linking the quest for slavery reparations for African-Americans to the “bigger bill that the United States and Europe . . . owe to other countries for their colonial adventures”).

13. Achiume, *supra* note 1, at 1520-21.

14. *Id.* at 1519 n.34; Thomas, *supra* note 4, at 447 (discussing my “critique of atomism, and my corresponding endorsement of a turn towards interconnectedness rather than individualism as the starting premise for a new ethics” of law, sovereignty and international migration).

“stranger” discussed in the earlier article<sup>15</sup> by elaborating a conception of the “political stranger.”<sup>16</sup> Additionally, like the earlier piece,<sup>17</sup> this article analyzes sovereignty through a consideration of prevailing camps within political theories relating to sovereign territoriality.<sup>18</sup> The article’s comparatively more streamlined consideration of approaches within mainstream political thought (dubbed “liberal democratic theory” and “cultural nationalism”) allows it to gain in clarity what it might lack in the comprehensiveness of the earlier piece, which also considered continental social theories of biopolitics and cosmopolitanism in some detail.

*Migration as Decolonization* offers a number of permutations of the concept of interconnectedness as theorized in the 2013 article. To begin with, whereas the earlier article discussed “interconnectedness” in the context both of a historical, postcolonial critique of sovereignty, and of a more metaphysical argument for a “new organicism,” *Migration as Decolonization* focuses on a set of empirical assertions about the colonial / neo-colonial encounter.<sup>19</sup> This is a streamlining move that adds to the clarity and potentially the persuasive power of the piece. Moreover, whereas the earlier piece developed “interconnectedness” as a critique of sovereignty, Professor Achiume achieves a further integration of these ideas, by arguing for a revised conception of sovereignty as departing from the norm of atomism and radical autonomy that I critiqued, and rather embracing and reflecting a dynamic of interdependence.<sup>20</sup>

Here I want to offer a few additional reflections on the concept of “sovereignty as interconnection.” The doctrine of sovereignty has varied through the modern period and has reflected notions of greater permeability and interdependence or interconnectedness than the presumption of “sovereign territorial prerogative” and its underlying conceptualization of absolute autonomy would suggest. One variation emerges in the early modern jurists of international law, who conceived of a global commons, within which states would necessarily respect rights of travel and hospitality.<sup>21</sup> Another runs, perhaps paradoxically, through the same core traditions in contemporary private law and foundations of international law that uphold a presumptive normative frame of autonomy: the principle of *pacta sunt servanda*. This principle serves as a bedrock justification underlying, for example, the law of contracts: It is precisely because of their autonomy that individuals can bind

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15. See Thomas, *supra* note 4, at 395, 410 (analyzing the concept of the stranger and calling for a “vivid ethical position towards the stranger that arises from interconnectedness”).

16. Achiume, *supra* note 1, at 1523-47.

17. See Thomas, *supra* note 4, at 410-432 (analyzing and comparing strands of liberal political philosophy with critical social theories related to the concept of biopolitics).

18. Achiume, *supra* note 1, at 1523-29.

19. *Id.* at 1519 n.34 (making this distinction between the two articles).

20. *Id.* at 1522.

21. See Thomas, *supra* note 4, at 438.

themselves and become connected, through contractual obligations, to others. As such, it reflects not atomism but interconnectedness and interdependence.

Within international law, the same principle of *pacta sunt servanda* served as a touchstone for key cases during the decolonization era, in the 1960s, 70s and early 80s. Here, the principle was employed *against* developing-country interests as they were defined at the time. At that time, developing country governments and thinkers from the global South led a movement to reshape international affairs to reflect more fully a conceptualization of sovereignty as absolute autonomy. The Declaration on the Establishment of a New International Economic Order emphasized not only “equity,” “interdependence” and “international co-operation,” but also the principle of “sovereign equality.”<sup>22</sup> Part of decolonizing international law,<sup>23</sup> then, was reforming it to better achieve effective, *de facto* independence for newly sovereign states, rather than independence in name only. Western states, under this view, were formally obliged by international law to cooperate with developing states as newly co-equal sovereigns, rather than according to the historical imbalance between them, to achieve a more equitable international order.

The movement within international law for permanent sovereignty over natural resources reflected this approach, providing sovereign states with a theoretical and juridical framework for disregarding agreements made earlier with foreign investors and for nationalizing industrial concerns held by foreign owners. This argument for sovereign autonomy under international law, however, collided with the argument for sovereign obligation under *pacta sunt servanda*.

The 1977 case of *Texaco v. Libya*, concerning Libya’s nationalization of Texaco’s oil operations in its territory, exemplified a series of similar cases of the time. The Sole Arbitrator of *Texaco v. Libya*, the professor of international law René-Jean Dupuy, employed the doctrine of *pacta sunt servanda* to negate the validity of Libya’s decree of nationalization. Dupuy held: “[T]he State, by entering into an international agreement with any partner whatsoever, exercises its sovereignty whenever the State is not subject to duress and where the State has freely committed itself through an untainted consent.”<sup>24</sup>

By contrast, developing states argued for a strong interpretation of sovereignty, one that would lead to effective economic rather than merely nominal political independence, and would entail the right to nullify international contracts in order to reclaim natural resources. The international jurist Mohamed Bedjaoui wrote, a year after the *Texaco v. Libya* case:

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22. G.A. Res. 3201 (S-VII), Declaration on the Establishment of a New International Economic Order (May 1, 1974).

23. SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY 1-4 (2011).

24. *Texaco v. Libya*, 17 I.L.M. 1, 23 (1977).

The Third World has . . . become aware that if the principle of sovereign equality between States is really to be rid of all its illusions, it must be formulated afresh so as to restore to each State the basic elements of its national independence on the economic level. With this end in view, the principle of economic independence, invested with a crucial new legal function, and thus raised to the rank of a principle of modern international law, must in particular be reflected in the right of peoples and States to dispose of their own natural resources, in the prohibition of all forms of illegitimate interference in their economic affairs, and in the banning from international economic affairs of force and all other forms of constraint. That indeed is the outline of a new international economic order.<sup>25</sup>

A consideration of this brief history demonstrates the pliability of legal concepts and the way they shift with the vectors of power and interest. At the apex of the decolonization movement, developing-country states argued for a strong sovereignty. That mantle has now shifted in many cases to the developed world as many of its representatives articulate justifications for strong border controls. If we go back to the nineteenth century, we see the Western countries move from the vision of sovereignty as interdependence that fueled jurisprudence such as *Texaco v. Libya's* discussion of *pacta sunt servanda*, and towards an embrace of the positivist view that international law was only what sovereign states (and not colonies) dictated it to be.<sup>26</sup> And even before that, in the early modern period of the seventeenth century, as mentioned above, we see an international law that emphasizes natural law over state positivism.

An awareness of this variability has informed a certain detachment within one strain not only of international legal scholarship, but of legal scholarship more generally. Think of this detachment as a corollary to the critique of “rights talk”: However persuasive an argument for legal change, because a legal argument can and eventually will be made deploying the same legal concept in the opposite direction, a project for change must be founded in broader normative and political commitments. It is this more legal-realist, critical tradition from which my discussion of interconnectedness operated. I began with the social fact of interconnectedness and argued for a reimagining of international order based on that fact, arguing that to “adopt a posture of organic—that is to say—inherent, interconnectedness would necessarily change the starting point for consideration of migration law and policy and the frame for debating possibilities for reform.”<sup>27</sup> I left undefined, beyond the fundamental movement away from presumptive territorial exclusion, the particular shifts in legal rules that would flow from this normative change.

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25. MOHAMMED BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 87 (1979).

26. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 32-114 (2004) (providing an analysis of the ways in which the definition of sovereignty as crafted within international law furthered the ends of imperialism by reinforcing the legal, political and moral distinctions between European and non-European collectivities, attributing sovereignty to the former but not the latter).

27. Thomas, *supra* note 4, at 449-50.

The juridical conception of sovereignty that Professor Achiume has proposed takes an important step in that concretizing direction. It could be argued in some ways that Professor Achiume's conceptualization of sovereignty moves away from the vision proposed by newly independent states during the decolonization era. Yet in other ways, it upholds and extends that vision. In that era, a generation of lawyers from the Global South became statesmen for the international order of the time, and sought to reimagine international law with both creativity and fidelity to international law's core principles.<sup>28</sup> Professor Achiume's argument for reimagining sovereignty honors this eminent tradition.

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28. This generation of international lawyers have been acknowledged as the original "TWAAIL" by the authors of the TWAAIL movement. *See, e.g.*, Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 78-79, 79 n.5, 80-82 (2003); *see also* Introduction to THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS, AND GLOBALIZATION vii-viii (Antony Anghie et al. eds., 2003); Makau Mutua, *What is TWAAIL?* 94 PROC. ANN. MEETING AM. SOC'Y INT'L L. 31, 32 (2000).