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SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART II

REIMAGINING INTERNATIONAL LAW FOR GLOBAL MIGRATION: MIGRATION AS DECOLONIZATION?

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The European colonial project involved the out-migration of at least sixty-two million Europeans to colonies across the world between the Nineteenth and first half of the Twentieth Century alone.[1] It also involved movement in the reverse direction of human and natural resources, overwhelmingly for the benefit of Europe and Europeans. By connecting certain forms of migration in the present century to this mobility of people and goods in prior centuries, I seek to shift some of the fundamental commitments at the core of the international law, norms and discourse around global migration.

If the "field of global migration law explores transnational movement of people,"[2] modern international law emerges decidedly as an antagonist. Existing international law does a poor job of regulating international migration—it authorizes too narrow a slice of the type of international movement that nonetheless occurs across the globe, and it contributes to the chaos and inhumanity that characterizes international migration outside the law.[3] The root of international law's dysfunctional relationship with international mobility is this law's steadfast protection of the almost unfettered right of a state to exclude noncitizens. For scholars of international law within the field of global migration law, a pressing challenge remains a reimagination of the relationship between the nation state and the nonnational that destabilizes territorial exclusion as a fundamental feature of state sovereignty. In this essay, I propose that reconceiving the movement of certain migrants across international borders today as *decolonization* offers a new and productive logic, ethics, and lens for international law's application to global migration.[4]

As a candidate for a new ethics of political-economic migration, my approach historicizes migration and takes seriously the fact of interconnectedness.[5] The argument, which I will only outline here, is the following. In a sense,

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[1] J.L. Miège, *Migration and Decolonization*, 1 Eur. Rev. 81, 85–86 (1993). Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 Melb. J. Int'l L. 392, 439 (2013) (noting that "[m]easured either as a percentage of the total population, or in terms of economic significance, the impact of the earlier wave of [colonial and New World] immigration was much greater than the [contemporary] one.").

[2] Jaya Ramji-Nogales & Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL Unbound 1 (2017).

[3] *See* Jaya Ramji-Nogales, *Migration Emergencies*, 68 Hastings L.J. (forthcoming 2017). With respect to international legal failures in the management of labor migration, see Thomas, *supra* note 1, at 441. I use "outside the law" in Hiroshi Motomura's dual sense of both unlawful and within the sovereign's extensive discretion. Hiroshi Motomura, Immigration Outside the Law 4 (2014).

[4] I aim to elaborate this idea in future work.

[5] I view my proposal as kindred in spirit to Chantal Thomas's recent call for a new ethics of international migration that pursues the value of a historicized approach to the conditions of this migration. Thomas, *supra* note 1, at 439. Thomas analyzes how different political theory traditions have constructed state sovereignty, and the limitations of these constructions for explaining or reforming international law. She

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colonialism can be understood as migration from Europe to the rest of the world that initiated indefinite global co-dependence. Colonial migration entrenched a colonizers' advantage that now accrues to a set of beneficiaries broader than just the former European colonial powers. If so, then decolonization could meaningfully be understood as international movement that responds to the asymmetrical benefits structure of co-dependence in the contemporary global order and seeks to achieve a more equitable relationship between center and periphery.[6] In other words, global political-economic migration today can be understood as an attempted rebalancing of the beneficiaries of an asymmetrical system initiated by many of the very same state sovereigns that now self-righteously seek the exclusion of these migrants.[7]

Of the many international migrants that international law fails, I choose to focus on the class that is arguably the most reviled in popular and policy discourse on migration the world over—the unauthorized "economic migrant." Typically, the territorial admission of migrants who move in search of economic opportunity is understood to fall within the full discretion of the receiving state. This is the case even when the motivation for this movement is extreme socioeconomic hardship in the migrant's country of origin that is nontrivially connected to prosperity in the country of destination. In popular, policy, and even doctrinal conceptions, this discretion permits strikingly inhumane treatment that citizens of receiving states would reject out of hand but for the fact that it targets unauthorized economic migrants, who are understood to be legitimate targets of exclusion. International law does little to disrupt this understanding and instead ratifies it. Violent and other forms of exclusion of economic migrants remain legitimate in part because the international law concept of territorial state sovereignty is conventionally understood to authorize sovereign exclusion of these noncitizens.[8] The fate of the iconic unauthorized economic migrant—who violates national immigration rules and procedures but seeks to benefit economically from national membership—remains firmly subject to the whim of each territorial sovereign.[9]

At least for those whom I call *political-economic migrants*, I want to suggest a different way of understanding their relationship to the countries to which they are likely to seek access. I use the term "political-economic migrant" provisionally to refer to individuals who are motivated to move across international borders by fairly extreme socioeconomic conditions that are a nontrivial function of either or both of the following: (1) contemporary

concludes this insightful analysis by advocating an ethics that takes as its starting point interconnectedness rather than individualism: "If sovereignty is premised upon an atomistic conception of the state of nature, then surely a more interconnected understanding of nature raises the question whether the basic presumption of autonomy that undergirds sovereignty should shift in favour of a politics of interdependence." *Id.* at 448.

[6] My approach to decolonization seeks to avoid an overly formal or legalistic conception of decolonization. *See* Miège, *supra* note 1, at 85–86 ("Political decolonization focused on the search for symbolic dates does not depict the boundary between two worlds. It is very often the legal aspect which is only the most visible part of a complex ensemble of elements. The 'Year' of political independence of French-speaking black Africa was, in practice, the beginning of a long period of rapid growth in the European population of black Africa.").

[7] *See, e.g.*, Marie-Laurence Flahaux & Hein De Haas, *African Migration: Trends, Patterns, Drivers*, 4 COMP. MIGRATION STUD. 1, 4–5 (2016) ("colonial occupation and concomitant practices of the slave trade and the systematic use of forced labour and recruitment have in many ways shaped contemporary migration patterns within and from [Africa] … . '[P]ush-pull' views, however, ignore that people will only migrate if they have the ambitions and resources to make this happen. We can see migration as a function of people's *aspirations* and *capabilities* to migrate.").

[8] Even though international human rights law has qualified the sovereign's prerogative, Vattel's absolutist conception of sovereignty is still applicable to many individuals who move due to economic conditions. *See* Thomas, *supra* note 1, at 404 (quoting Vattel).

[9] This capricious discretion remains the case even when the receiving state both benefits and relies upon this unauthorized migration. *See, e.g.*, MOTOMURA, *supra* note 4, at 107 ("U.S. immigration law has tolerated significant unauthorized migration to assure a supply of flexible, cheap labor, subject to discretionary, unpredictable, and inconsistent enforcement.").

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globalized political economic structures that overlap with colonial political economic structures; (2) climate change-related factors linked to the practices of the European colonial enterprise and its present-day beneficiaries.

Colonialism as a Mandatory Invitation to Co-Depend

The first step in my argument is to frame the European colonial project as a mandatory invitation from European colonial powers to the rest of the world to co-depend *indefinitely*. International and bilateral law among European nations, and agreements involving European private corporations played an important role in securing the *colonial advantage*: the economic and political dominance of colonial powers at the expense of colonies during that period. In important respects, European colonialism also initiated fundamental co-dependence between colonizing and colonized nations, and this co-dependence was similarly formalized in international and bilateral agreements. I use the term co-dependence to emphasize *mutual* reliance between colonizer and colonized that intertwined the economic wellbeing and fate of both, notwithstanding the power differential between the two groups.

The Failure of Decolonization as a Failure of International Law

As the sun began to set on the colonial era, modern international law—including the UN Charter itself—preserved colonial advantage even as it professed the formal political independence of former colonies and the equality of all sovereign states, including these former colonies.[10] A salient example of this preservation was evident in international legal doctrines that prevented reparation or remediation of systematic colonial exploitation of third-world national resources, and that remain in effect today.[11]

For third-world states and peoples, formal decolonization and a seat at the international law-making table within the United Nations represented an opportunity to rewrite international law to eliminate from it colonial advantage in favor of a more equitable arrangement for all states, old and new alike. Scholars working within Third World Approaches to International Law have analyzed the push for a New International Economic Order (NIEO) as perhaps the zenith of former colonies' and other nonaligned states' efforts to produce an international law that did not so disproportionately favor the interests of former colonial powers, their allies and their populations.[12] Significantly for my arguments below, the colonial advantage that the NIEO sought to overcome did not accrue *exclusively* to former European colonial powers. The colonial advantage and its instantiation in modern international law conferred benefits to national hegemons that were European (e.g. Russia) or the progeny of Europe (e.g. the United States of America), to ruling elites of postcolonial nations, to nonstate actors (e.g. transnational corporations),[13] and to others engaged in different imperial projects (e.g. China).[14] This is a crucial point—the

[10] *See generally*, Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2004).

[11] *Id.* at 196–244.

[12] *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. 77, 82 (2003).

[13] Citing Mohammed Bedjaoui, Antony Anghie notes, for example, how trading companies acquired "rights" alongside colonial powers to third-world resources "through duress and deception, and concessions [that] had often never been the subject of meaningful consent on the part of Third World peoples." Anghie, *supra* note 10, at 213. Anghie argues that multinational companies in as late as the 1960s "were in many respects successors to entities such as the Dutch and British East India Companies, which after all, had been central to the whole imperial project." *Id.* at 224.

[14] "'Colonialism' refers, generally to the practice of settling territories, while 'imperialism' refers to the practices of an empire." *Id.* at 11.

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colonial advantage did not and does not accrue exclusively to former European colonial powers. Its beneficiaries extend beyond its authors.[15]

Third-world states conceived the NIEO as a means of mitigating material inequalities between the First and Third Worlds by reordering the international economic system, including in ways that would finally secure the permanent sovereignty of the latter over their natural resources. But the NIEO and related efforts failed in important respects—third-world states were unable to write the colonizer's advantage out of international law. Although contemporary international law denounces colonialism, it remains an important bulwark protecting the political and economic dominance of former European colonial powers and other powerful international actors, whose success comes in part at the expense of the Third World. This imbalance has persisted in international law alongside deepening globalization that reinforces co-dependence between the postcolonial world on the one hand, and the expanded class of beneficiaries of the colonial advantage on the other.[16] The gap between the winners and losers within this global framework has become untenable, and in this respect contemporary technologies of mobility have arguably become a game changer. Economically and politically marginalized populations increasingly have the means and the desire to reach wealthier centers in the North and they are doing so, some in pursuit of survival, others in pursuit of better options.

Political-Economic Migration as Decolonization?

For my purposes then, decolonization is the pursuit of a long overdue geopolitical reordering of benefits of a global order defined by interdependence forged in the colonial era. As people move across international borders fleeing *or rejecting* severe political-economic conditions and the fallout of these conditions, the movement of these individuals can be understood to enact an important step in the process of decolonization. If colonialism was a mandatory invitation to co-depend in a relationship characterized by asymmetric benefits, decolonization as I conceive of it here is the pursuit of a more equitable marriage between the geopolitical center and the periphery. To my mind, the fact of this marriage is neither per se a problem, nor a relation that can be undone—there is no divorce in sight likely fully to sever global interdependence, although recent shifts in global politics suggest that the interdependence may become more brutal before it becomes less so. It is the distribution of power and benefit within this marriage that is untenable, and for many in the Third World, a more equitable marriage may be achievable only through long and deadly journeys from geopolitical peripheries to their centers.

What would it mean or do to recast this unauthorized movement of political-economic migrants as perhaps a promising means of finally destabilizing, if not dismantling, economic and political inequality originating in the European colonial project? Could it, for example, reshape the significance of the nation state in achieving decolonization? For some scholars, an important puzzle piece in understanding why third-world peoples failed to reorder international law to achieve substantive decolonization was their reliance on the nation state as the vehicle through which economic and political emancipation would be achieved.[17] In contrast, the unauthorized movement of political-economic migrants and others may instead represent a remarkable *personal* circumvention of the nation state by every individual who crosses from the Third World to the First motivated by the very features that distinguish the two. More provocatively, could this unauthorized movement of persons be the most promising threat

[15] Scholars have made the compelling case that the geopolitical and economic relations initiated by the European colonial project persist alongside other forces in today's era of globalization and that they inform movement across borders today. *See, e.g.*, Thomas, *supra* note 1, at 442.

[16] *See id.* at 439.

[17] Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 Third World Legal Stud. 1 (1999).

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to the concept of the state's territorial sovereignty and the many ways in which this concept operates as a threat to safe and humane regulation of international migration, and as a barrier to decolonization?

At the very least, creating historical, ethical, and analytical links among colonial and postcolonial political economy, contemporary political economic migration, and international law suggests a different construction of the baseline relationship between political-economic migrants and the receiving sovereign. Political-economic migrants and citizens of the receiving sovereign are no longer strangers but are instead indefinite co-dependents who must together rewrite the terms of their union. One consequence of such a destabilization of the state sovereign prerogative of territorial exclusion might be a future global migration law in which international law is no longer, or at least less, of an antagonist.

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