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LIMITS TO RECONCEPTUALIZATION: A THEORETICAL ASSESSMENT OF E. TENDAYI ACHIUME'S *MIGRATION AS DECOLONIZATION*

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Abstract

This article contains a theoretical analysis of E. Tendayi Achiume's article *Migration as Decolonization* (2019). The thesis of *migration as decolonization* is assessed through the concept of the *indeterminacy* of international law – established by CLS-scholars like Martti Koskenniemi and David Kennedy. In *Migration as Decolonization* (2019) Achiume pleads for a reconceptualization of nation-state sovereignty and self-determination by expanding the demos – i.e. political community – beyond its territorial borders to include the subordinated Third World citizens. By doing so Achiume aims to do justice to the subordinated Third World person. While *indeterminacy* on the one hand fuels Achiume's plea to reconceptualization, it is also exactly that which confines the argument to its constraints. Reconceptualization within international law necessitates the awareness of *false contingency* as a component of the law's *indeterminacy*. That international law is fundamentally indeterminate does not entail that things just happen to be as they are, as if they were fully contingent – random or arbitrary. The argument of *migration as decolonization* will therefore be used to exemplify the boundaries of international law's *indeterminacy*.

Keywords: indeterminacy; migration; decolonisation; false contingency; theoretical legal approach

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I. Introduction

The question of how we are governed at the global level is what is at the heart of much of the legal scholarship on international law.[2] The lack of a universal international constitution is not only the cause of many of the problems faced by international lawyers, it is exactly that what makes international law what it is. Each field in international law carries with it a disciplinary sensibility about what the problems are and where solutions lie.[3] Thinking about global governance necessitates to assess the relative blindness to the consequences of treating one perspective as the base rather than another.[4] This insight has sparked many efforts to reimagine the concept of global governance. In *Migration as Decolonization* (2019) E. Tendayi Achiume proposes a reconceptualization of nation-state sovereignty such that it would do justice to the subordinated Third World person.[5] Achiume's plea challenges international law at a fundamental level. It attacks the liberal nationalist notion of nation-state sovereignty and its right to exclude outsiders.[6] The right to *migration as decolonization* transforms Third World persons from excludible outsiders to political insiders. By including Third World migrants into the political community of First World nation-states, the right to exclude them from the national community ceases to exist. For Achiume, the First World nation-state does not have any more right to exclude Third World migrants than it has to exclude its own *de jure* citizens.[7]

By linking migration to the colonial past and the unequal distribution of wealth in today's society, Achiume aims to challenge the sovereign right to exclude. A right which is at the heart of First World migration policies. In her conclusion Achiume contemplates how the premise of *migration as decolonization*, its critique of nation-state sovereignty, has a much broader effect on international law than just the reconceptualization of migration as such. Because it concerns such a fundamental aspect of international law as a practice, it requires us to rethink the entire structure of international law. International law is a system where the sovereign nation-state is seen as the main vehicle for the creation of the law.[8] It is therefore interesting to put her argument in a broader theoretical framework to grasp how such a rigorous reconceptualization could even be justified.

This article tries to situate Achiume's plea to reconceptualize nation-state sovereignty within the by now well established critical international law tradition of *indeterminacy*.[9] Achiume's

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[2] David Kennedy, 'The Mystery of Global Governance' [2008] 34(3) *Ohio N.U. L. Rev.* 827, 840.
[3] David Kennedy, *ibid.*, 845.
[4] David Kennedy, *ibid.*, 845.
[5] Achiume uses the terms "First World" and "Third World". Although she acknowledges in *note 12* that the term "Third World" can been seen as anachronistic or offensive for its derogatory connotations, her choice is rooted in its analytical significance and in the term's force in the larger intellectual tradition of Third World Approaches to International Law (TWAIL). She refers readers to "for an analysis of the category "Third World" as a "counter-hegemonic term that is designed to rupture received patterns of thinking" see Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography,* 1998-1999 THIRD WORLD LEGAL STUD. 1, 3-4. Rajagopal addresses the anachronism critique and also lays bare how popular derogatory associations with the term Third World are instructive for international legal theory. *See id.* At 7-11." E. Tendayi Achiume, E. Tendayi Achiume, 'Migration as Decolonization' [2019] 71(6) *Stanford Law Review* 1509, footnote 12, 1513-1514.
[6] E. Tendayi Achiume, *ibid.,* 1574.
[7] E. Tendayi Achiume, *ibid.,* 1520.
[8] E. Tendayi Achiume, *ibid.,* 1574.
[9] Martti Koskenniemi, 'The Politics of International Law' [1990] 1(1) *EJIL* 4; Martti Koskenniemi, 'Epilogue (2005)' chapter in: *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006); Martti Koskenniemi, 'The Politics of International Law - 20 Years Later' [2009] 20(1) *EJIL* 7.

migration as decolonization thesis will be used to exemplify how *indeterminacy* can be conceived of as both enabling and constraining. In line with how Ntina Tzouvala recently put it in *Capitalism as Civilisation* (2020), this article understands *indeterminacy* as the historically contingent way in which contradictions of a global system are inscribed into international legal argumentation.[10] For Achiume the contradiction is the continuing subordination of Third World people while maintaining an international legal system in which these same people are being excluded from having a say in the political community imposing the subordination upon them.

The article will proceed with section II in which it will be set out what Achiume's argument for the reconceptualization of nation-state sovereignty is. Following this, section III will be used to explain the theory of the *indeterminacy* in relation to sovereignty, setting the stage for the analysis of Achiume's reconceptualization argument within this theoretical framework. In section IV it will be contemplated how *indeterminacy* can be considered both enabling and constraining, exemplifying the boundaries of international law's *indeterminacy*. Section V will then place Achiume's argument within the theoretical framework, showcasing why it seems necessary to challenge the doctrine of sovereignty in the first place. The article will conclude in section VI by summarizing and stringing together the main argument.

II. Achiume's Argument

In *Migration as Decolonization* (2019) Achiume pleads for a reconceptualization of nation-state sovereignty to move towards a more novel and ethical way of dealing with migration.[11] The leading justifications in today's society for the right to exclude migrants are based upon the collective self-determination of the political community and its right to decide on its own terms who gets to be part of this community. In the liberal tradition, democratic theory and cultural nationalism combined supply the dominant conception in support of the intertwinement of political and territorial borders.[12] Achiume contests these justifications of the sovereign nation-state's right to exclude migrants by supplying an argument in which the *demos* – i.e. the political community – is expanded beyond the territorial borders of the nation-state. She bases her argument on the interdependence and interconnection that exists between the First and Third World. According to Achiume, the structure of international law is defined by the neocolonial relationship which maintains the subordination of Third World people in favour of their First World counterparts.[13] She argues that those Third World migrants who are being subordinated should not be considered excludible outsiders but rather political insiders, leaving the First World nation-states no more right to exclude them than their own *de jure* citizens.[14]

By granting the subordinate Third World person the right to migrate as a form of corrective distributive justice, the concept of *migration as decolonization* aims to ensure the Third World

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[10] Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law.* Cambridge Studies in International and Comparative Law, 142. (CUP 2020), 40.
[11] E. Tendayi Achiume, 'Migration as Decolonization' [2019] 71(6) *Stanford Law Review* 1509, 1509.
[12] E. Tendayi Achiume, *ibid.*, 1524-1525.
[13] E. Tendayi Achiume, *ibid.*, 1549. Neocolonial imperialism refers to the practice of empire defined as the projection of political and economic power beyond territorial borders of power-wielding and political communities. It refers to the fact that while colonialism has been formally outlawed, the relationship between former colonizers and colonized remains uneven.
[14] E. Tendayi Achiume, *ibid.,* 1547.

person of its fundamental right to self-determine.[15] The *migration as decolonization* claim is an individual right which would enable Third World people, disadvantaged by the status quo, to overcome the neocolonial subordination inflicted upon them by the current structure of international law.

> "The point is that where the necessary structural change is not forthcoming, action can be taken by individuals disadvantaged by the status quo that can increase their individual capacities to self-determine, and this personal pursuit to enforce political equality should be viewed as a matter of corrective distributive justice."[16]

According to Achiume, for some people this action for corrective distributive justice may thus very well be pursuing political equality and asserting self-determination through migration.[17]

Since the main component of Achiume's argument consists in that the *demos* is expanded across nation-state borders, it results in a political community which is not exclusively based on national identity and territory. While the sovereign right to exclude is being challenged, it is not abolished in its entirety. *Migration as decolonization* can be considered a radical break from what in international law is commonly understood as sovereignty and the right to self-determine, in which it is argued that the political community should be expanded to a community which gives both First and Third World people the right to an equal say. To achieve this equality *migration as decolonization* pleads to grant subordinated Third World people the right to migrate to the First World. Following Achiume's argumentation, only those Third World people who suffer the continuing subordination of the neocolonial empire are entitled to the political inclusion in the First World nation-states.[18] The argument supplied for this expanded political community is: that the historical and continuing Third World subordination by the First World meets the threshold of coercion and coercively undergirded processes necessary to render Third World people as part of a shared *demos*.[19] The aim of her argument is to establish that to the extent that Third World migrants are seen as a threat to First World nation-states, they are only truly threatening the continuing and illegitimate subordination of Third World people by the First World.[20]

In doing so, Achiume pleads for a radical shift in our conception of international law. By linking migration to the colonial past and the unequal distribution of wealth in today's international society, Achiume aims to abolish nation-state sovereignty in its liberal nationalist understanding. By transforming migration into a form of corrective distributive justice, Achiume links the colonial past and unequal distribution of wealth in today's international society to the right to exclude. This right to exclude is not only at the heart of First World migration policies, it is a fundamental component of the system of international law. Achiume contemplates in her conclusion that the premise of *migration as decolonization*, its critique of nation-state sovereignty, has a much broader effect on international law than just a reconceptualization of migration as such. It impacts the entire structure of international law because it contests the fundamental

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[15] General Assembly Resolution 2625 (XXV). This right to self-determine refers to the right of identifiable groups to "determine for themselves how they wish to be politically organized." Jan Klabbers, *International Law* (3rd ed. CUP 2021) 130.
[16] E. Tendayi Achiume, 'Migration as Decolonization' [2019] 71(6) *Stanford Law Review* 1509, 1552.
[17] E. Tendayi Achiume, *ibid.,* 1552.
[18] E. Tendayi Achiume, *ibid.,* 1559.
[19] E. Tendayi Achiume, *ibid.,* 1549.
[20] E. Tendayi Achiume, *ibid.,* 1568.

notion on which the system is build – a system where the sovereign nation-state is seen as the main vehicle for the creation of the law.[21]

The concept of *migration as decolonization* is aimed at establishing migration as a form of individual distributive justice.[22] Achiume sees the right to exclude Third World person by the First World as unethical[23] and frankly, unjust.[24] The continuing subordination of Third World people due to their position within the neocolonial empire, leads them to have a valid *migration as decolonization* claim that would enable them to enter and settle in First World nation-states.[25] Through *migration as decolonization* Third World persons can take hold of their own right to self-determine by acquiring the possibility to influence the political community from the inside. Achiume shifts the conception of decolonization from a process of the political collective to a right for the individual.[26] It is important to note that this individual right entails a reconceptualization of what decolonization is presumed to be as well as a reconceptualization of nation-state sovereignty.

III. International Law's Fundamental Indeterminate Nature

As far as reconceptualization under international law goes it is always connected to the conception of international law as fundamentally indeterminate. This section will set out the meaning of *indeterminacy* and how it can be considered a fundamental aspect of international law. In doing so the section aims to set the stage for the analysis of Achiume's *migration as decolonization* argument within the theoretical framework of *indeterminacy*.

Because in most areas of non-treaty related state conduct, specific obligations can be made to seem either ambiguous or lacking, the state's sovereignty will emerge as a normative principle in its own right, regardless of legal idiom.[27] In absence of clear prohibitions, a state must be assumed to be free. This principle – known as the *Lotus principle*[28] – capsulates the assumption that the mere fact of statehood has a normative sense and that in absence of unambiguous legislative prohibitions any attempt to overrule its liberty can appear only as an illegitimate constraint on their sovereign rights.[29] The difficulty with this principle is that international law is always more or less indeterminate in its content. If the mere fact of possible different interpretations is sufficient to trigger presumptions of liberty, then the binding force of rules under international law in general seems to be an illusion.[30] As Koskenniemi notes in *The Politics of International Law* (1990), the liberal idea of the *Rechtsstaat* in its international counterpart cannot achieve the same as it does in the domestic sphere. Even though a common legal rhetoric exists among international lawyers, – i.e. the language of international law – international law essentially, for reasons internal to the ideal itself, relies on contested, political principles.[31]

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[21] E. Tendayi Achiume, 'Migration as Decolonization' [2019] 71(6) *Stanford Law Review* 1509, 1574.
[22] E. Tendayi Achiume, *ibid.,* 1552-1553.
[23] E. Tendayi Achiume, *ibid.,* 1553.
[24] E. Tendayi Achiume, *ibid.,* 1550.
[25] E. Tendayi Achiume, *ibid.,* 1552.
[26] E. Tendayi Achiume, *ibid.,* 1522.
[27] Martti Koskenniemi, 'The Politics of International Law' [1990] 1(1) *EJIL* 4, 18.
[28] Permanent Court of International Justice, *SS Lotus*, (1927), Publ. PCIJ, Series A, no. 10.
[29] Martti Koskenniemi, 'The Politics of International Law' [1990] 1(1) *EJIL* 4, 18.
[30] Martti Koskenniemi, *ibid.,* 18.
[31] Martti Koskenniemi, *ibid.,* 7.

While international law as a language is highly structured, it is quite fluid and open-ended as to what can be said with it.[32] International law contains an argumentative structure in which international lawyers have the capability to criticize each substantive position. The fact that lawyers can justify different positions and, in reality, are constantly justifying various positions, demonstrates that the structure of international law does not distance itself from political choices.[33]

> "It seems possible to adopt a position only by a political choice: a choice which must ultimately defend itself in terms of a conception of justice."[34]

Conceiving of international law as a means of communication between international lawyers means that to see it not as a set of rules, but a complex argumentative practice in which rules are connected to other rules at different levels of abstraction and communicated from one person to another.[35]

> "What is being put forward as significant and what gets pushed into darkness is determined by the choice of the language through which the matter is looked at, and which provides the basis for the application of a particular kind of law and legal expertise."[36]

The main point here is that legal arguments are not judged upon some universal right or wrong. In international law neither facts nor rules are self-evident in the way Enlightenment lawyers once believed they were. International law is defined by its interpretations. Since interpretation determines international law, international law is necessarily indeterminate. For each interpretation there exists an opposite which is no less right or wrong than the other.[37] By rejecting naturalism – for which according to Koskenniemi everybody since the Enlightenment has had good reason to – it becomes impossible to make substantive decisions within the law which would imply no political choice.[38]

The idea of political choice being intrinsic to international law is important for Achiume's reconceptualization argument because it opens up the possibility to revaluate and, if necessary, challenge certain conceptions that seems to dominate international law as a practice.

IV. False Contingency as a Component of Indeterminacy

Because international law is not something consisting of necessary and natural given concepts, but fundamentally indeterminate and characterized by (politically fuelled) interpretation, it seems to open up the possibility to reconceptualize notions within its system. It is the illusion of the social world which mistakes present society for possible humanity which constitutes the *false*

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[32] Martti Koskenniemi, 'Epilogue (2005)' chapter in: *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 562.
[33] Martti Koskenniemi, 'The Politics of International Law' [1990] 1(1) *EJIL* 4, 8-9.
[34] Martti Koskenniemi, *ibid.*, 9.
[35] Martti Koskenniemi, 'Epilogue (2005)' chapter in: *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 566.
[36] Martti Koskenniemi, 'The Politics of International Law - 20 Years Later' [2009] 20(1) *EJIL* 7, 11.
[37] Martti Koskenniemi, 'Epilogue (2005)' chapter in: *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 585.
[38] Martti Koskenniemi 'The Politics of International Law' [1990] 1(1) *EJIL* 4, 30-31.

necessity of international law's fundamental notions.[39] Standing behind the concept of *false necessity* is the idea of necessity and its postulated alternative: contingency.[40]

> "Actuality is not destiny, and we need to search out and expose the various forms of thought which obscure that fact and lend an aura of solidity and self-evidence to what must instead be revealed as precarious and contingent."[41]

Instead of considering ideas and attitudes of the established order to be natural, necessary or authoritative, they should be conceived as merely that what is not being challenged and/or remade.[42] This is an important aspect for Achiume's plea to reconceptualize nation-state sovereignty, in the sense that her concept of *migration as decolonization* does just that: challenging what is not being challenged.

The question that arises is: if something is not necessary the way it is but falsely conceived as being so, should it then be considered fully contingent? Marks argues in her article *False Contingency* (2009) that this does not have to be the case. Something is contingent if it may or may not happen. The emphasis is thrown on chance, accidence and all that is random, indeterminate and out of hands.[43] But just as much as *false necessity* sheds light on wrong conceptions of necessity, Marks establishes the concept of *false contingency* to shed light on the misconception that events – i.e. phenomena – in the world are fully random or arbitrary.[44]

False contingency urges an approach to international law that considers phenomena not in discrete, monadic or flee-floating terms, but relationally as elements within larger social systems which are connected in history.[45] It sets us on a path to a historical approach in which the cause of phenomena in the sphere of international law is determined. Although facts of history are about individuals, they are not facts about actions of individuals performed in isolation. They are not about conscious motives and willed outcomes.[46] Any adequate theory on history should take into account that people's actions often have results that were not intended or even desired.[47] This does not entail that people are just unconscious tools of some deterministic force. It just stipulates the fact that social circumstances matter in historical explanation.[48]

By examining phenomena relationally it enables us to find the actual causes of events in the world. Marks contemplates that *false contingency* is true so far it goes, but false as to what it excludes.[49]

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[39] Roberto Unger, 'Introduction to the New Edition' chapter in: *False Necessity--Anti-Necessitarian Social Theory in the Service of Radical Democracy:* From: *Politics, a Work in Constructive Social Theory* ((version Pbk. ed.). Politics, V. 1. Verso, 2004), xx.
[40] Susan Marks, 'False Contingency' [2009] 62(1) *Current Legal Problems* 1, 4.
[41] Susan Marks, *ibid.,* 3.
[42] Roberto Unger, 'Introduction to the New Edition' chapter in: *False Necessity--Anti-Necessitarian Social Theory in the Service of Radical Democracy:* From: *Politics, a Work in Constructive Social Theory* ((version Pbk. ed.). Politics, V. 1. Verso, 2004), xxviii.
[43] Susan Marks, 'False Contingency' [2009] 62(1) *Current Legal Problems* 1, 6.
[44] Susan Marks, *ibid.,* 15.
[45] Susan Marks, *ibid.,* 20.
[46] E.H. Carr, *What Is History?* (Vintage 1961), 52.
[47] E.H. Carr, *ibid.,* 91.
[48] Susan Marks, 'False Contingency' [2009] 62(1) *Current Legal Problems* 1, 5.
[49] Susan Marks, *ibid.,* 17.

> "(…), it really is the case that the meaning of democracy is less self-evident than debates over the norm of democratic governance might have us led to believe. And it really is the case that international human rights initiatives are less universally beneficial than the human rights movement generally admits. But to stop the discussion there is in each case silently to signal that these phenomena are isolated problems, unrelated to wider processes, tendencies and dynamics at work in the world, and that is false."[50]

But it is not only false in the sense that it is unfulfilling. Also, in leaving processes, tendencies and dynamics unacknowledged and unexplored, we occlude awareness of what it takes to actually effect change.[51] Establishing that something is indeterminate does not bring us any closer to effecting actual change. Even more so, establishing that something is not necessary the way it is does not entail that it just happens to be as it is. Examining how something is determined by the structure of the system it is in, the process leading up to event or the relationship between several phenomena, can lead us to find the cause of the phenomenon at hand and create the possibility to actually change something about it.

What *false contingency* reveals is that both necessity and contingency do not suffice. Once the inevitability of specific outcomes is rejected while simultaneously recognizing that the range of outcomes is not fully contingent it will lead us to the category of possibility – the possibility to actually affect change.[52]

In line with Marks *false contingency* thesis, Koskenniemi notes that competent international lawyers know for a fact that in the world of legal practice very little is fully random or arbitrary.[53] Even though argumentative structures are open to interpretation, not anything goes.[54]

> "A demonstration of the lack of coherence ('politics') of legal arguments is only a preface to the more important point that although all the official justifications of decision-making are such that they support contrary positions or outcomes, in practice nothing is ever that random."[55]

While *indeterminacy* may show that legal arguments are open to interpretation it does not entail that it is not bound by the constraints of social structures and political choices exposed through *false contingency*.

Indeterminacy is not a critique of international law, Koskenniemi rather conceives of it as an absolute central aspect of its acceptability.[56] The claim is not that all international legal words are ambivalent. The idea of the *indeterminacy* of international law is much stronger than that, it is much more fundamental. It states that even when there is no semantic ambivalence, international law remains indeterminate because it is based upon contradictory premises, seeking to regulate the future to which even the preferences of a single actor remain unsettled.[57] The important point here is that *indeterminacy* should not be thought of as something scandalous

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[50] Susan Marks, 'False Contingency' [2009] 62(1) *Current Legal Problems* 1, 17.
[51] Susan Marks, *ibid.,* 17.
[52] Susan Marks, *ibdi.,* 10.
[53] Martti Koskenniemi, 'The Politics of International Law - 20 Years Later' [2009] 20(1) *EJIL* 7, 9.
[54] Martti Koskenniemi, *ibid.,* 9.
[55] Martti Koskenniemi, *ibid.,* 9.
[56] Martti Koskenniemi, 'Epilogue (2005)' chapter in: *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 591.
[57] Martti Koskenniemi, *ibid.,* 590.

or even as a structural deficiency. The *indeterminacy* of international law does not emerge out of the carelessness or bad faith of legal actors – e.g. states, diplomates, lawyers – but from their justified and deliberate wish to ensure that legal rules fulfil the purpose for which they were adopted in the first place.[58]

The argument of *indeterminacy* thus is not that all legal words are ambiguous and open to every reconceptualization one sees fit. Stating that international law is necessarily indeterminate is nothing more than to say that international law emerges through a political process. By using *indeterminacy* to shed light on the politics involved in legal argumentation, Koskenniemi aligns with the idea of *false contingency* in that it points to the same relational elements – the constraints of legal argumentation. In this way *indeterminacy* can be understood as both restraining and enabling. *Indeterminacy* is the historically contingent way in which the contradictions of a global system are inscribed into international legal argumentation.[59] By pleading for a radical reconceptualization Achiume seems to build upon the openness of *indeterminacy* and in doing so it necessitates her to take into consideration the restraining element of *indeterminacy* as well.

V. Reconceptualization Through Legal Argumentation

The exposition of *indeterminacy* does nothing more than show that politics are intrinsic to international legal arguments. It is important to reemphasize that the idea of *indeterminacy* does not entail that international law is open to all and any politics. It may be possible to defend any course of action through legal arguments but this does not necessarily mean that international law is ambiguous and open to reconceptualization by anyone who feels like it. The contents of international law are indeed indeterminate, although not random or arbitrary but based upon political choices and social structures. That being said *indeterminacy* does provide the opportunity for those who are not willing to confront the contradictions of the global order but rather struggle for the relative improvement of individuals within the given framework.[60]

Achiume seems very aware of the constraints of social structures within international law. By defending a course of action with legal arguments she seems to be doing exactly that which Marks urges to with the concept of *false contingency*. *Migration as Decolonization* (2019) gives us insight in how the phenomenon of migration in today's society unfolds by examining the neocolonial structure of international law – the interconnected and interdependent relationship between the First and Third World.[61] Achiume challenges the doctrinal understanding of sovereignty and presents it as a necessary component for the existence of the neocolonial empire. It is the 'independence' and 'autonomy' which is inscribed in nation-state sovereignty that is being challenged.

Achiume not so much criticizes international law as an intrinsic oppressive system, but rather the structural disadvantages of the system we come to see as natural and necessarily given. As Rose Parfitt rightfully put it in *The Process of International Legal Reproduction* (2020), if international law is normatively indeterminate why is it so that certain communities always seem to draw the

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[58] Martti Koskenniemi, 'Epilogue (2005)' chapter in: *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 591.
[59] Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law.* Cambridge Studies in International and Comparative Law, 142. (CUP 2020), 40.
[60] Ntina Tzouvala, *ibid.,* 41.
[61] E. Tendayi Achiume, 'Migration as Decolonization' [2019] 71(6) *Stanford Law Review* 1509, 1520-1522, 1561, 1566-1567, 1574.

short straw when it comes to allocation and exercise of power and resources?[62] Achiume locates the problems faced in relation to the unequally distributed world – and consequently migration – within the doctrine of sovereignty itself.

Contesting the fundamental freedom of self-determination of the nation-state is Achiume's way of overcoming the construct through which dominance is exerted over former colonial regions. Following Koskenniemi's conception of *indeterminacy* this unequal system of sovereignty could be seen as part of the 'structural bias'[63] of international law itself. The inevitability of political choice induces a sense that more alternatives are possible than practitioners realize.[64] Achiume provides an impeccable legal argument which supports a preference that is not normally heard: a conceptualization of sovereignty going beyond the nationalist territorial border of the sovereign nation-state. Through her analysis the problem of the unequally distributed international world – the division between a relatively prosperous First World and an impoverished Third World – becomes one within the law's grasp again instead of something solely 'political,' 'economic' or 'technical' outside of it.[65]

VI. Conclusion

This article has examined Achiume's concept of *migration as decolonization* to show how the *indeterminacy* of international law can be understood as both enabling and constraining. Achiume's argument is used to showcase the boundaries of international law's *indeterminacy*. In *Migration of Decolonization* (2019) Achiume pleads for a radical reconceptualization of the doctrine of sovereignty, to abolish the First World nation-state's right to exclude subordinated Third World migrants because of their status as 'political outsiders'. By examining the phenomena of migration in today's society Achiume argues that the doctrine of sovereignty is underpinned by the neocolonial relation between the First and Third World. In doing so Achiume reflects what Marks intends with her concept of *false contingency*. *Migration of decolonization* is therefore not seen as a critique of international law as such but more of a challenge to the structural disadvantage of a system we come to see as necessary and naturally given.

Because the contents of international law are indeterminate – although not random or arbitrary but based upon political choices and social structures – it enables Achiume to challenge a fundamental notion like nation-state sovereignty. While *indeterminacy* enables Achiume to confront the contradiction of nation-state sovereignty inscribed in international law, [66] she still has to deal with constraints imposed by social structures and politics. As Martti Koskenniemi has pointed out competent international lawyers know for a fact that in the world of legal practice very little is fully random or arbitrary.[67] Even though argumentative structures are open to interpretation, not anything goes.[68] It is the *false contingency* confined in the understanding of international law as indeterminate which constitutes the constraints of the

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[62] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance.* Cambridge Studies in International and Comparative Law, 137. (CUP 2019), 21.
[63] Martti Koskenniemi, 'Epilogue (2005)' chapter in: *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 600-615.
[64] Martti Koskenniemi, "Epilogue (2005)' chapter in: *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 602.
[65] Martti Koskenniemi, *ibid.*, 606.
[66] Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law.* Cambridge Studies in International and Comparative Law, 142. (CUP 2020), 41.
[67] Martti Koskenniemi, 'The Politics of International Law - 20 Years Later' [2009] 20(1) *EJIL* 7, 9.
[68] Martti Koskenniemi, *ibid.*, 9.

system as a whole. That being said, Achiume seems very much aware of the concept of *false contingency*. By arguing for a course of action through legal arguments, Achiume seems to be doing exactly that which Susan Marks urges to with *false contingency*.

Migration as decolonization is not an ideological argument. It is much more than that, it shows how the phenomenon of migration in today's society unfolds and exposes, through legal argumentation, how the doctrinal use of nation-state sovereignty in its current form constitutes a system of neocolonialism which structurally subordinates Third World people to their First World counterparts. Achiume's analysis shows how the right to exclude is not just a random, arbitrary, contingent occurrence in a natural given and necessary system but a component of the doctrine of sovereignty itself. It is exactly because of this why Achiume is challenging the doctrine in the first place. Through her analysis and legal argumentation the problem of the unequally distributed international world becomes a problem within the grasp of the law again.

Indeterminacy is a central component to international law which shows that politics is intrinsic to the ideal itself. This does not amount to a critique of the system rather it contributes to the acceptability of international law. Because of the fundamental politics within international law it becomes possible to challenge how certain notions are imposing rather unjust situations upon certain groups in favour of others. It is the politics underlining the doctrine of sovereignty that constitutes neocolonialism within the system of doctrinal international law and it is because of these politics that Achiume is able to contest the notion of nation-state sovereignty.