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TRANSNATIONAL MIGRATION LAW: AUTHORITY, CONTESTATION, DECOLONIZATION

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INTRODUCTION

On 20 July 2015, the Haudenosaunee Nation Women's Lacrosse Under-19 team, the Haudenosaunee Nationals, announced that they would no longer be competing in the World Championships scheduled to begin a few days later in Edinburgh, Scotland. The reason for their withdrawal was the persistent refusal of U.K. immigration officials to recognize the team members' Haudenosaunee passports for the purpose of entering the U.K..[1] This refusal had previously sparked a diplomatic standoff in 2000, when the Iroquois Nationals men's squad was unable to travel to compete in a world tournament held in Manchester, England, for a similar reason. Yet, after much political efforts on the part of Haudenosaunee diplomats, two years later, the Haudenosaunee Nationals would play in the 2017 World Championship held in Guildford, England, having arrived in the U.K. with their Haudenosaunee passports.[2] In the words of the Haudenosaunee women's team captain Amber Hill, this was a historic moment that represented an "acknowledgment of the Haudenosaunee as our own sovereign people."[3]

This chapter suggests that the struggle over the recognition of the Haudenosaunee passport can also be read as a story about transnational migration law. Rather than only a matter of

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[1] Sam Laskaris, "Passports Rejected: Haudenosaunee Women's LAX Withdraws from World Championships," *Indian Country Today Media Network*, July 20, 2015, http://indiancountrytodaymedianetwork.com/2015/07/20/passports-rejected-haudenosaunee-womens-lax-withdraws-world-championships-161139; see also Sara Dehm, "Passport," in *International Law's Objects*, eds. Jessie Hohmann and Daniel Joyce (Oxford: Oxford University Press, 2018), 342-56.

[2] Kaya Burgess, "Native American Lacrosse Team Allowed to Come to Britain on Haudenosaunee Passports," *The Times (UK)*, July 22, 2017, https://www.thetimes.co.uk/article/native-american-lacrosse-team-allowed-to-come-to-britain-on-haudenosaunee-passports-qspzt6jsc.

[3] Celia Balf, "A Team of Native American Players Is Making History at the 2017 Lacrosse Women's World Cup," *Excelle Sport*, July 19, 2017, http://www.excellesports.com/news/lacrosse-haudenosaunee-fil-rathbones-world-cup. On the history of Haudenosaunee lacrosse teams' use of the passport, see Allan Downey, *The Creator's Game: Lacrosse, Identity, and Indigenous Nationhood* (Vancouver: UBC Press, 2018).

conflicting jurisdictions, overlapping sovereignties or the lawfulness of a particular document, it denotes a more fundamental struggle over the very recognition and definition of a lawful authority and the power to authorize lawful movement at the start of the 21st century. In the context of the regulation of human movement, such legal struggles occur between a plethora of potentially "rival" authorities seeking to bring the regulation of mobile people into their jurisdiction.[4] In this chapter, I seek to capture such struggles through describing and theorizing "transnational migration law". Here, I understand "transnational migration law" to be a juridical assemblage of practices, subjects and relations that become visible through a particular analytics that refracts questions of legal authority and lawful relations through the concept of the "transnational". In short, this means "transnational migration law" is not a specific pre-existing field of law, or readily-accessible object of study, but rather must necessarily be constructed into a recognised area of legal inquiry, engagement and analysis.

My argument is that transnational migration law is best conceived of as the product of a mode of scholarly engagement and critique concerning the regulation of human mobility that is attentive to the idiom of the "transnational". Following Zumbansen, the idiom of the "transnational" is less a spatial domain than a useful *methodological* approach that, in the context of international migration, can reveal how human mobility has come to be governed, ordered and contested in the contemporary world.[5] The "transnational" then offers a lens for analyzing and denaturalizing the international system of nation-states in the present, but also helps to understand how modern states – as powerful political institutions that purport to monopolize the "legitimate means of movement"[6] – have been made, enacted and challenged by a range of actors, processes, and collectives, within and beyond the nation.

This chapter consists of two parts. In Part I, I unpack the idiom of the "transnational" in relation to migration (and) law, and then proceed to map a range of practices enacted by different, at times rival, authorities in the contemporary world. While it would be impossible to adequately touch upon the diversity of public and private actors that give shape to the transnational

[4] On the concept of rival authorities, see Shaun McVeigh and Sundhya Pahuja, "Rival Jurisdictions: The Promise and Loss of Sovereignty," in *After Sovereignty: On the Question of Political Beginnings*, eds. Charles Barbour and George Pavlich (Abingdon: Routledge, 2009), 97-114; Sundhya Pahuja, "Laws of Encounter: A Jurisdictional Account of International Law," *London Review of International Law* 1, no. 1 (2013): 63-98.

[5] In making this argument, I am indebted to Peer Zumbansen's theorising of the "transnational" as a methodology: see Peer Zumbansen, "Transnational Legal Pluralism," *Transnational Legal Theory* 1, no. 2 (2010): 141-89.

[6] John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000), 5.

regulation of migration, what I hope to illuminate are some core contested *sites, forms and practices of legality* that these actors have come to create and use in the regulation of human mobility. Here in particular, I draw attention to the technologies of control, differentiation and selection that have come to characterise much of "transnational migration law". In Part II, I argue that scholars of transnational migration law need to think critically about the *relationship between migration and struggles for decolonization and global justice*. In settler-colonial contexts, this means holding on to an anti-racist politics that challenges state law's logics and practices of stratification, selection, elimination and exclusion while also centring diverse and situated Indigenous legal traditions as sources of authority in the making of migration laws.[7] Furthermore, attending to the relationship between the multitude of struggles for migrant justice around the world and situated projects of decolonization is all the more pressing in light of the increasing technologies of control, containment, surveillance and segregation that states are employing in their regulation of human mobility at the start of the 21st century. Such technologies have resulted in the maintenance of a "global hierarchy of mobility" – or what some scholars have called "global apartheid" – that allows the global elite to travel with security, resources and ease while other racialized migrants, primarily poorer people of colour from the Global South, may only be able to travel in limited, bonded, precarious, unauthorized or dangerous ways.[8]

CONCEPTUALIZING TRANSNATIONAL MIGRATION LAW

Key Concepts

The term "transnational migration law" requires some probing. It is, after all, a term that can be located in different scholarly traditions of thinking about human relations outside of and beyond the state, most notably in legal scholarship that position an analytics of 'transnational

[7] See especially Amar Bhatia, "We Are All Here to Stay? Indigeneity, Migration, and 'Decolonizing' the Treaty Right to Be Here," *Windsor Yearbook of Access to Justice* 31, no. 2 (2013): 39-64; Amar Bhatia, "'In a Settled Country, Everyone Must Eat': Four Questions about Transnational Private Regulation, Migration, and Migrant Work," *German Law Journal* 13, no. 12 (2012): 1282-95.

[8] Zygmunt Bauman, *Globalization: The Human Consequence* (New York: Polity Press, 1998), 88; Anthony Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (Oxford: Oxford University Press, 1994); Nandita Sharma, "Global Apartheid and Nation-Statehood: Instituting Border Regimes," in *Nationalism and Global Solidarities: Alternative Projections to Neoliberal Globalisation*, eds. James Goodman and Paul James (Abingdon: Routledge, 2006), 71-90.

law' against mid-20th century formalist accounts of international law.[9] The concept of "migration" also, as distinct from terms such as "travel", "colonisation", "movement" or "resettlement", has particular connotations. For this reason, each element of the term "transnational migration law" needs unpacking. What does it mean to speak of something as "transnational" (whether it be a phenomenon, a subject of legal regulation, legal domain or approach to law)? How might we understand "migration" as an object of study? And what is at stake in our accounts of law as transnational in conceptualizing the regulation of "migration"? To respond to these broad questions, I consider each element of the term 'transnational migration law' in turn.

First, *transnational*: I argue that the idiom of the transnational offers a critical viewpoint for, first, showing the limits of how conventional accounts of migration law in both their domestic and international guises are understood and for, second, offering a reconstructed understanding of how human mobility is governed in our contemporary world. This latter reconstructive gesture allows for capturing legal relations that extend beyond and constitute the territorial space of the "national" such that they might be thought of as constituting a particular legal domain – that of "transnational migration law" – differently. Put otherwise, this chapter uses the analytics of "transnational" not as a spatial term that seeks to overcome or unsettle the tired binary between the domestic and international. This means that the transnational is not a subcategory of *scale* structured through a logics of verticality where the "transnational" ambivalently sits somewhere between the "global" and the "local". Rather, the idiom of the "transnational" offers what might be best thought of as a *diagnostic* from which to mount a critique of existing ways of framing "migration law" as well as for refiguring legal relations. In this latter sense, it offers an *analytics* of *relations*: that is, a transnational approach allows us to make visible the production, enactment and maintenance of particular sets of structural relations and the enactment of an assemblage of legal practices that shape how people move in the contemporary world.[10] In the context of migration, this can mean looking to the complex set of migrant networks that span across different cities in different states as well as the power and effects of transnational structures of capitalism and neoliberal globalization. Yet, in referencing the "national", the term transnational also risks re-centring the state in the

[9] See Jessup's foundational definition of transnational law as "all law which regulates actions or events that transcend national frontiers" and consists of a mix between public and private forms of regulation: Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), 2; see also Carrie Menkel-Meadow, "Why and How to Study 'Transnational' Law", *UC Irvine Law Review* 1, no. 1 (2011): 97-128.

[10] See Zumbansen, *supra* note 5.

discussion, naturalizing the state as a stable historical actor and political concept despite that fact that the emergence and maintenance of the state as a principal political authority has been a recent historical phenomenon and one that must be constantly enacted, re-imagined and held together through a variety of institutional techniques and practices.

Next, *migration*: I understand human mobility to be the capacity of people to move across space and their physical acts of movement, including moving in-between and across spaces marked by different and potentially rival political authorities. In contrast, I take migration to refer to specific forms of human mobility as it is shaped through law and regulation. To speak of migration is then to always already reference the product of particular legal and institutional arrangements that determine or channel how people can and do move, and how that movement is understood and protected (or not, as in the case of unauthorized or clandestine migration). In the contemporary world, this means recognizing that references to the term "migration" – either as "internal" or "international" – rely upon the existence of the state as the dominant and purportedly universalized container that structures ideas of human life, sociality and belonging, and has become an assumed referent in our understandings of human mobility. Holding on to the distinction then between human mobility and migration importantly allows for a questioning of how different forms of human mobility come to be framed, conditioned and channelled through historically-specific political institutions (such as the state) and the associated regimes of migration law and regulation that these institutions have enabled. This includes noticing the assemblage of terminologies, techniques and norms for controlling or channelling human mobility that have made mobility across state borders "not equally accessible for all".[11] Distinguishing between "migration" and "human mobility" also allows for a critical distance to thinking about the regulation of human mobility only through the categories offered by either international or domestic law such as "economic migrant", "illegal immigrant", "refugees", "trade in services", "family reunification", or "citizen". Or to put it more fundamentally, it allows for a recognition that the very categorization of a person as a "migrant" also already rests upon a prior recognition of a set of legal institutions, techniques and categories that structure our understanding of the particular relation between a person and the space that they inhabit or move in. By extension, to refer to "migration law" then frequently takes for granted the way that human mobility may be shaped through institutional regimes, most notably through assuming the presence of the state as the main container for authorizing

[11] Juan Amaya-Castro, "'In Its Majestic Inequality': Migration Control and Differentiated Citizenship," in *The Transformation of Citizenship*, vol. 2, eds. Jürgen Mackert and Bryan S. Turner (Abingdon: Routledge, 2017), 84-100.

and regulating human mobility. Or, as Catherine Dauvergne has put it, "without immigration law there is *no such thing as illegal migration*".[12]

And finally, *law*: here, rather than setting out a precise definition of law, I adopt an orientation towards thinking about law through questions of its authorization, mechanics and contestations – as well as the prior question of recognition. What forms of political authority are recognized as lawful? Through what modes of representation are forms of law authorized or enacted? How do different forms of law encounter or relate to each other? This means that instead of enumerating the doctrines and sources of "transnational migration law", I am instead interested in attending to struggles over the authority to regulate human mobility that involve, exceed and displace the modern state as the only perceived source of "proper" law in the world.[13] This might be best thought of as a project of critically redescribing the world through an attentiveness to plural legal authorities and practices of law that order relations between mobile people and political authorities in specific times and places.[14] It also involves a recognition of state law as the active agent in processes of illegalization, that is, in "making people illegal".[15]

How then has human mobility come to be regulated at the turn of the 21st century? In this new millennium, it has become commonplace to say that we live in a world of human mobility. The 2017 UN Secretary-General Report, entitled *Making Migration Work for All*, began by noting that migration is an "an expanding global reality", a phenomenon that represents "one of the most urgent and profound tests of international cooperation in our time".[16] This language of urgency and crisis is habitually reiterated, including in official state discourses, institutional documents and media representations. We need only think of a few recent examples to suffice: the "global refugee crisis", the "2014 Central American – US migration crisis", the "European migration crisis of 2015", and so forth. Similarly, migration law itself – in both its domestic

[12] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008), 2.

[13] This approach to law owes much to, yet is distinct from other accounts of law in "transnational law" or "legal pluralism" scholarship. In the former tradition, e.g., a prevailing understanding of transnational law is the "study of legal phenomena, including lawmaking processes, rules, and legal institutions, that affect or have the power to affect behaviors beyond a single state border" (Menkel-Meadow, "Why and How to Study 'Transnational' Law", *supra* note 9, 104). Here the guiding question is one of effectiveness of regulation, rather than lawful or formal status of the regulatory body. In the legal pluralism tradition, in contrast, law has been framed as and through multiplicity, uncovering multiple overlapping jurisdictions, affiliations, legal systems and social orders (see, e.g., Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* Cambridge: Cambridge University Press, 2013).

[14] Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012); Pahuja, "The Law of Encounters," *supra* note 4.

[15] Dauvergne, *supra* note 12. See also David Bacon, *Illegal People: How Globalization Creates Migration and Criminalizes Immigrants* (Boston: Beacon Press, 2009).

[16] *Making Migration Work for All: Report of the Secretary-General*, UN Doc A/72/643, 12 December 2017, 2.

and international guises – is also commonly depicted through the language of crisis.[17] State law, in such depictions, is threatened by the mass displacement or influx of people into a particular state, or fails either the community of citizens who implemented it (by, for example, offering "too many" rights and benefits to non-citizens) such that it is deemed to be in need of reform or renewal. This language of "crisis" reflects what sociologist Zygmunt Bauman has termed "migration panic", referring to rhetorical discourses that are directed towards infusing a sense of fear and vulnerability in migrant-receiving societies.[18] Rather than illuminating the forces of globalization and economic liberalisation that may compel migrants from states experiencing political conflicts and economic turmoil to move, discourses of moral panic instead target migrants to make them into "collateral victims" of migrant receiving states' anxieties and insecurities.

Additionally, the dual framings of these "crises" of human mobility and of law assume a particular state of normalcy where people can and should move in a certain, consistent ways and state law can and should control migration, thus maintaining an illusion and project of control over mobile people for the state. It also obscures the fact that the overwhelming number of people in the world remains sedentary, either by choice or by circumstance. While the number of people globally classified as "migrants" has grown in recent years, migrants still only constitute around 3.4 per cent of the world's population, even if this percentage does – as is stated in the UN Secretary General's report – amount to an estimated 258 million people. In adopting a critical distance to this language of "crisis", this chapter instead seeks to uncover how control over human mobility is itself a struggle between different and at times rival political authorities. To do so, in the next sub-section, I turn to the more mundane and everyday modes of regulating human mobility that, despite — or perhaps even more accurately, owing to — their "normalcy" or technicality, can still have severe effects and consequences for people who migrate in ways that may be unauthorised by states or that led to the production of deportability, regimes of racial exclusion or lives of precarious and exploitable existence.

[17] Simon Behrman, "Refugees and Crises of Law," *Patterns of Prejudice* 52, nos. 2-3 (2018): 107-20. Moreover, as many scholars have noted, that such "migration crisis" are in fact produced through forms of law and regulation. See, eg, Chantal Thomas, "Transnational Migration, Globalization, and Governance: Theorizing a Crisis," in *Oxford Handbook of the Theory of International Law*, eds. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 882-921.

[18] Zygmunt Bauman, *Strangers at Our Door* (Malden, M.A.: Polity, 2016).

Mapping the Plural and Contested Actors, Sites and Modes of Transnational Migration Law-Making

In this section, I posit that giving an account of "transnational migration law" means making visible plural and contested *sites and modes* of regulation, *actors of law-making* and *forms of authority* and *legal subjects and relations* of control over mobile people. Yet, this project of mapping can then facilitate a more political project of foregrounding how the transnational regulation of migration produces certain people as racialized, precarious and deportable "migrants" who are not entitled to the same legal protections and forms of social belonging as those people recognized as "citizens".[19] Analytically, such exercises in describing a "transnational migration law" as a constituted field of legal inquiry, engagement and analysis allows us to see what I shall refer to as both the *productive* and *coercive* forces at work in this domain. That is, how particular sites, subjects and forms of legal authority are produced, assembled and regulated (*productive forces*), and the effects of that regulation in creating new hierarchies, forms of power/exploitation and political contestations/possibilities (*coercive forces*). This acknowledgement of the productive and coercive forces of transnational migration law needs to be tempered with a recognition that the state's purported monopoly over the "legitimate means of movement" has never been, and can never be, fully realized in the face of migrants who travel clandestinely in defiance of state borders and, in the context of settler colonial states, Indigenous nations who maintain their sovereignty over land and people. As a starting point, a politically-informed and empirically-accurate account of "transnational migration law" should recognise "migrants" as *law-creating actors who are involved in shaping, negotiating and resisting spaces of regulation within and beyond the state*. For instance, this can entail noticing how regimes of migration control are necessarily responsive to the very movement and action of mobile people and how the decision-making of migrants and the routes that they choose to migrate along "can force the reorganisation of control itself".[20] For instance, in recent years, migrant use of technologies such as mobile phones along

[19] Here some scholars have productively unpack the concept of the border, or "bordering" as a way of analyzing the proliferation and intensification processes of differentiation and containment: see, eg, Sandro Mezzadra and Brett Nielson, *Border as Method, or, the Multiplication of Labor* (Durham: Duke University Press, 2013); Gargi Bhattacharyya, *Rethinking Racial Capitalism: Questions of Reproduction and Survival* (London: Rowman & Littlefield, 2018). On the global production of precarious working conditions for migrants, see Louise Waite et. al., eds., *Vulnerability, Exploitation and Migrants: Insecure Work in a Globalised Economy* (Basingstoke: Palgrave Macmillan, 2015).

[20] See generally Dimitris Papadopoulos, Niamh Stephenson and Vassilis Tsianos, *Escape Routes: Control and Subversion in the Twenty-First Century* (London: Pluto Press, 2008).

popular routes of mass migration has allowed migrants to increase their access to information, to initiate rescue operations, and to articulate new sets of rights claims in law (such as the right to a mobile phone), while also informing and transforming how state and other authorities use digital tracking and surveillance to monitor and control unauthorized movement.[21] Additionally, centring the law-making action of migrants can mean acknowledging migrants as part of local or transnational civil society coalitions that create "alternative political spaces to the 'official' fora" of transnational migration governance while nonetheless still recognising them as, what Stefan Rother has called, "transnationally marginalized groups".[22] The "Civil Society Days" as part of the *Global Forum on Migration and Development* provide one such example of a space and platform from which migrants can articulate regulatory proposals and demands.[23] Another good example of such latter forms of regulation is the Coalition of Immokalee Workers (CIW)'s *Fair Food Program* that has improved the conditions of migrant farmer workers in the tomato industry in Florida and other eastern coast states in the US. The Program adopts a variety of mechanisms for regulating the industry supply chain including legally-binding agreements with large-scale buyers and consumer education campaigns. It is largely worker driven and certified, and centred on a Code of Conduct that covers key areas of worker rights and protections (including wages, occupational health and safety, anti-discrimination etc.).[24] While the Program does not address the regulation of migrant admission conditions or status in the United States (what might be considered the "traditional" doctrinal area of migration law), it does affect what gets recognized as the "proper" working conditions of certain migrant farmerworkers and their enforceability in practice. It is thus one instance of migrant worker law-making, standard-setting and enforcement that forms part of the assemblage of norms, practices, actors and processes that make up "transnational migration law".

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[21] See, eg, Koen Leurs, "Communication Rights from the Margins: Politicising Young Refugees' Smartphone Pocket Archives," *International Communication Gazette* 79, nos. 6–7 (2017): 674-98; Simona Zavratnik and Sanja Cukut Krilić, "Digital Routes, 'Digital Migrants': From Empowerment to Control over Refugees' Digital Footprints," *Družboslovne Razprave* 34, no. 89 (2018): 143-63.

[22] Stefan Rother, "Angry Birds of Passage: Migrant Rights Networks and Counter-Hegemonic Resistance to Global Migration Discourses," *Globalizations* 15, no. 6 (2018): 854-69, 855.

[23] Stefan Rother, "A Tale of Two Tactics: Civil Society and Competing Visions of Global Migration Governance from Below," in *Disciplining the Transnational Mobility of People*, eds. Martin Geiger and Antoine Pécoud (Basingstoke: Palgrave Macmillan, 2013), 41-62.

[24] CIW, "Fair Food Program," //www.fairfoodprogram.org. For an insightful history and analysis of the CIW's approach, see Manoj Dias-Abey, "Justice on Our Fields: Can 'Alt-Labor' Organizations Improve Migrant Farm Workers' Conditions?" *Harvard Civil Rights-Civil Liberties Law Review* 53 (2018): 167-211.

Undoubtedly, states have come to act as central actors in channelling and controlling migration. State institutions can and routinely do enact immigration laws, administer visa regimes, police the immigration status of individuals in their territories and deport non-citizens who are deemed to be without entitlement to remain within the espoused territory of the particular state. It is the state that has come to have a principal monopoly over how state-based regime of nationality and/or citizenship operate, dictating not only the rights, privileges and access to resources of individuals within a state's territory but also affecting how this bestowing of status is recognized by other states too. After all, a person's recognized nationality is a significant determinant of their ability to access state documentation that facilitates authorized and safe international migration to other states, with different state passports treated vastly differently by state authorities. While this emergent global hierarchy of passports allows some "privileged" travellers – primarily individuals from economically powerful states, often in the Global North – to migrate with little consideration of state and regional visa regimes, for others it can result in stasis due to discriminatory visa regulations and restrictions elsewhere.[25]

Yet, an attentiveness to different forms of legal authority entails disaggregating the state as an actor to understand how bodies within a state may act in at times contradictory ways in the regulation of migration. For example, while state immigration authorities may act to select, filter and/or exclude potential and actual migrants from a state's territory, state employment law enforcement bodies may act to recognize migrants as legal subjects with particular entitlements irrespective of their migration status, including people who may no longer be physically present in the territory of a state. In South Africa, for instance, the Commission for Conciliation, Mediation and Arbitration (CCMA) has since 2008 recognized that migrants working in South Africa "illegally" – that is without state authorisation or documentation – are entitled under the South African Constitution to the protections of South African labour laws and standards, including against unfair dismissal. This recognition has had the effect of bringing the regulation of unauthorized migrant workers outside of a purely immigration enforcement jurisdiction and into a much broader purview of state institutions.[26] While this formal development is significant, in practice, many migrant workers still appear to be reluctant to access such protections for fear of deportation by the state or retribution from their employers.[27]

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[25] See, eg, Dehm, "Passport", *supra* note 1, 349.

[26] *Discovery Health v CCMA*, [2008] ZALC 24 (South Africa).

[27] Laura Griffin, "When Borders Fail: 'Illegal', Invisible Labour Migration and Basotho Domestic Workers in South Africa," in *Constructing and Imagining Labour Migration Perspectives of Control from Five Continents*, eds. Elizabeth Guild and Sandu Mantu (Farnham: Ashgate, 2011), 15-38. See also Laura Griffin, "Unravelling

Such instances of state law-making and rearrangements of jurisdiction might extend certain aspects of labour law protection; yetthey nonetheless remain limited in addressing the underlying economic and social dynamics that compel migrant workers to accept jobs with limited rights and remunerations. In Canada, for example, the Ontario Workplace Safety and Insurance Appeals Tribunal decided in 2017 that a migrant worker from Jamaica, Michael Campbell, was entitled to partial-loss-of-earning benefits after he was sustained a back injury while working on a fruit farm as part of Canada's Seasonal Agricultural Workers Program (SAWP).[28] A key consideration in the case was whether the quantum of the migrant worker's entitlement should be assessed with reference to a suitable occupation available to him in Canada or in his home state of Jamaica. In deciding the latter, the ruling overturned an earlier Workplace Safety and Insurance Board decision to cut Campbell's entitlements on the basis that he could find alternative work as a cashier in Ontario, despite the fact that Campbell had long since returned to live in rural Jamaica and had no entitlement to return to Canada. While the ruling provides an important benchmark for subsequent compensation claims by injured migrant workers who are working or have worked in Canada, it ultimately remains unable to challenge how the SAWP's specific mode of production and profitability rests of the creation and supply of an unfree, deportable, racialized and precarious labour force that may place them at greater risk of particular work place injuries.[29]

Alongside this attentiveness to such varied forms of state regulation, *transnational migration law* also encompasses the growing raft of international norms, conventions, processes and others instruments that have come to challenge, complicate or interact with state attempts to monopolize the "legitimate means of movement".[30] Here key instruments directly addressing migrant rights or criminalizing certain forms of violence against migrants include UN *Convention on the Rights of Migrant Workers and their Families* (1990), the *Protocol against Smuggling of Migrants by Land, Sea and Air* (2000), and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons* (2000). Yet, a multitude of other instruments and processes

Rights: 'Illegal' Migrant Domestic Workers in South Africa", *South African Review of Sociology* 42, no. 2 (2011): 83-101.

[28] Decision No 1773/17, [2017] ONWSIAT 2962, online (http://www.wsiat.on.ca/Decisions/2017/1773%2017.pdf) (Canada).

[29] See also Adrian A. Smith, "Migration, Development and Security within Racialised Global Capitalism: Refusing the Balance Game," *Third World Quarterly* 37, no. 11 (2016): 2119-2138.

[30] This expression is from Torpey, *The Invention of the Passport*, *supra* note 6, 5.

covering discrete aspects of human mobility in the fields of trade, labour, human rights, maritime and air law, consular and diplomatic protection and nationality law also add to this expanding yet fragmented international jurisdiction. While these instruments might converge with or diverge from each other in terms of their norms, processes and substance, depending on specific regime interactions, in general, they cohere around a dominant understanding of sovereignty that allows states to exclude non-nationals as a state sees fit and places no duty of admission on states (with only minor exceptions most notably for humanitarian reasons in the context of refugee law or for the protection of life under the law of the sea).[31] Nonetheless, asserting and determining the jurisdiction of a particular international instrument can affect the obligations and conduct of states towards migrants once they have been lawfully admitted into their territories.

Regional inter-state bodies too have become contested *sites* for the adjudication and regulation of migrant standards that can challenge a state's distribution and restriction of rights and resources. These regional authorities have given particular substance to how key norms within international instruments should be interpreted and applied, and have provided key sites for scrutinizing state conduct and advancing migrant rights. The African Commission on Human and People's Rights, for instance, has held that state authorities should not deport an individual without "giving them the possibility to plead their case before the competent national courts", irrespective of their immigration status.[32] To take another similar example from a different regional context: in 2003, the Inter-American Court of Human Rights (IACrtHR) issued an important advisory opinion on the rights of undocumented migrants, at the request of Mexico who was motivated by the treatment of Mexican nationals in the U.S.. The Court's Advisory Opinion emphasised that all states are required to respect and protect the principles of non-discrimination and equality of individuals before the law as a *jus cogens* norm of international law including in relation to the treatment of migrants and non-citizens. Critically, the Court stated the "migratory status of a person can never be a justification for depriving him [sic] of the enjoyment and exercise of his [sic] human rights, including those related to employment".[33]

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[31] See Chantal Thomas, "Convergences and Divergences in International Legal Norms on Migrant Labor," *Comparative Labor Law and Policy Journal* 32, no. 2 (2011): 405-441.

[32] African Commission of Human and Peoples' Rights, Communication No 159/96 (November 11, 1997), para 20.

[33] *Juridical Condition and Rights of Undocumented Migrants* (2003), Advisory Opinion OC-18/03, Inter-Am Ct HR (Ser A) No 18, http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

More recently, in 2016, an Inter-American Commission on Human Rights (IAComHR) decision found that the U.S. had violated the rights of undocumented workers by failing to provide them with social security benefits and equal treatment before the law.[34] The case concerned two Mexican nationals, Leopoldo Zumaya and Francisco Berumen Lizalde, who had both been injured while working in the United States, the former man as an apple picker and the latter man as a painter. Both the IAComHR decision and the Mexican request of the IACrtHR Advisory Opinion were in response to an earlier 2002 U.S. Supreme Court decision of *Hoffman Plastic Compounds* that had held that an undocumented worker who had been illegally fired by her employer was not entitled to recover unpaid wages nor any lost earnings.[35] Through its decision that included several recommendations for U.S. domestic law reform, the IAComHR positioned itself as the proper authority for determining the rightful distribution of rights and resources within its member states including to people present within a political community without state authorisation. In response, the US expressed "disappointment" in the Commission's rejection of the U.S.'s argument that the case was inadmissible on the basis of time restrictions, and noted that it "strongly disagreed" with the Commission's finding that the U.S. had "any international legal obligations" in regards to the matter.[36] Scholars have noted that the Inter-American human rights institutions – as new sites of struggle over migrant rights – have demonstrated a "remarkable" willingness to place "human beings at the centre" of their jurisprudence,[37] even if their actions have not necessarily "brought about clear improvements in the treatment of migrant workers in the region".[38]

Yet the effect of such political, economic and judicial institutional *regionalization* of the regulation of human mobility is paradoxical: oscillating between enabling new forms of *contestation* on the one hand and new modes of norm *harmonization* in line with state conduct on the other. This means that while some actions of regional institutions do challenge states' ability to exclusively determine the rights and conditions of migrants in their territories, other regional initiatives act to bolster and rationalize the authority of a state to manifest more

[34] *Undocumented Workers: United States of America* (2016), Inter-Am Comm HR, Merits Report No 50/16, Case 12.834.
[35] See *Hoffman Plastic Compounds, Inc. v National Labor Relations Board*, 535 US 137 (2002) (*Hoffman*).
[36] United States Department of State, *Digest of United States Practice in International Law*, ed. CarrieLyn D. Guymon (2016), 328.
[37] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford: Oxford University Press, 2015), 302.
[38] James Cavallaro and Stephanie Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court," *American Journal of International Law* 102, no. 4 (2008): 768-827, 823.

exclusive control over human mobility at and within its borders. For example, since 2006, the African Union has had a *Migration Policy Framework* for Africa that reiterates principles of state sovereignty while providing member states with "comprehensive policy guidelines and principles" in a range of areas (labour migration, border governance, irregular migration, forced displacement etc.) to assist in the development of each state's migration, custom, labour, trade and other laws.[39] The A.U. also has an African Labour Migration Advisory Committee whose mandate is to facilitate, monitor and report on the implementation of A.U. migrant worker standards in the region. While these instruments might best be considered "soft law", they can still be instructive in shaping the behaviour of states in their treatment of migrants. Understanding transnational migration law then requires an attentiveness not only to the developments, technicalities and impacts of these regional regimes, but also to the "interplay" between different forms of regionalism vis-a-vis international institutions, affected domestic law, civil society actors, and migrants themselves.[40]

Alongside such dynamics of regionalization, a multitude of other private and quasi-private actors have come to be enrolled in the facilitation and regulation of international migration, creating new relationships of both antagonism and exploitation on the one hand, and dependency and profit on the other. On the recruitment side of labour migration, the role of labour brokers in states of origin has transformed from being mere facilitators of migration to acting as key drivers of the migration process as so-called "merchants of labour".[41] It is estimated that there are now thousands of small licenced migrant worker recruitment agencies located in capital cities across Asia in addition to unlicensed recruiters.[42] The actions of these labour brokers can not only profoundly shape the experiences, opportunities, decisions and vulnerabilities of migrant workers, but also come to create the normative landscape in which migrant workers move, act and live. During the process of travel too, carrier sanction laws and civil aviation practices shape the conduct of commercial airlines and place penalties (including hefty fines) on a carrier who allows a person to travel without the required documentation or

[39] African Union, *The Migration Policy Framework for* Africa, Doc No EX.CL/276 (IX), June 2006, online (https://au.int/sites/default/files/pages/32899-file-1._au_migration_policy_framework_for_africa.pdf).
[40] Sandra Lavenex, "Regional Migration Governance: Building Block of Global Initiatives?" *Journal of Ethnic and Migration Studies* 45, no 8 (2019): 1275-1293.
[41] On the use of this terminology, see, eg, Christiane Kuptsch ed., *Merchants of Labour* (Geneva: International Institute for Labour Studies, 2006); Philip Martin, *Merchants of Labor: Recruiters and International Labor Migration* (Oxford: Oxford University Press, 2017).
[42] Bassina Farbenblum and Justine Nolan, "The Business of Migrant Worker Recruitment: Who Has the Responsibility and Leverage to Protect Rights?" *Texas International Law Journal* 52, no. 1 (2017): 1-44.

fails to enforce the visa requirements of the destination state. Private companies are thus enrolled in the immigration infrastructure of a state, acting as de facto enforcers of a state's immigration screening rules and processes beyond the state's actual territory.[43] And within a migrant's state of employment, their private employers also become actors with authority, in some cases even called upon by state institutions to police immigration status and control migrants' experiences of employment. While some initiatives such as the Dhaka Principles for Migration with Dignity, finalised by the Institute for Human Rights and Business in 2012, adopt a sector-wide approach to regulating this diffused set of actors in the migrant labour recruitment supply chain, such initiatives remain largely at the margins of other state-championed practices.[44]

Finally, transnational migration law should also take into account the laws and practices of Indigenous nations across the world that also regulate migration, even if their laws and authority to do so are not always recognized by state institutions or other actors. For example, in settler colonial contexts, this can mean recognizing that Indigenous nations do as a matter of both fact and law exercise authority over their lands and the people residing and visiting there, using a variety of jurisdictional techniques such as: enacting ceremonial welcomes; issuing, use and recognition of First Nations passports; maintaining communal membership practices; practicing oral traditions of story-telling; adhering to Indigenous protocols for visiting places; and travelling along recognised travel routes.[45] As I will discuss in the final section of this chapter, migration law scholars have a responsibility to acknowledge and foreground such practices as a form of sovereign law-making so as to not perpetuate the logic of settler colonialism in our scholarship and academic praxis.

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[43] Sophie Scholten, *The Privatisation of Immigration Control through Carrier Sanctions* (Leiden: Brill Nijhoff, 2015); Tendayi Bloom, "The Business of Migration Control: Delegating Migration Control Functions to Private Actors," *Global Policy* 6, no. 2 (2015): 151-157.

[44] The Dhaka Principles are based on international human rights instruments and ILO core standards. They have since been endorsed by the International Trade Union Confederation and the International Confederation of Private Employment Agencies (CIETT). On the 'governance deficit' in the global recruitment of labour, or what Jennifer Gordon terms the 'human supply chain', see Jennifer Gordon, "Regulating the Human Supply Chain," *Iowa Law Review* 102, no. 2 (2017): 445-504.

[45] See, eg, the dynamic account of First Nations law in Australia developed in Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Abingdon: Routledge, 2015).

Tracing Forms of Transnational Migration Law

Alongside these different *sites, actors* and *subjects* of regulation, new transnational *modes* of regulation have emerged that transform *how* the relationship between authority and mobile people are constructed and governed. These include, but are not limited to, what I shall call the *technologization, privatization*, *and securitization* of transnational migration law. To illustrate, I elaborate briefly on each of these forms of regulation below, focusing in particular on how these forms increasingly mediate the relationship between the state as a dominant actor of migration law and the mobile person. In doing so, they not only change the patterns and practices of migration, but also transform understandings and practices of modern statecraft.

Technologization: It is almost trite to state that technology is rapidly reshaping the practices and forms of the transnational regulation of migration. From biometric passports to mobile phones, technology has transformed the modes through which state institutions assert their control over mobile people as well as how migrants themselves might resist and subvert such practices of control. Stephan Scheel argues that while the "digitisation and datafication of border control practices" should be seen as the "continuation and refinement" of earlier practices of controlling and sorting potential migrants through visa regimes that operate within and beyond a state's borders, he argues that it also important to account for "technological imperfections of biometric recognition systems, the trade-offs implicated in their implementation, the painstaking work it requires to make them work, the discretion of border control authorities on the ground and, most crucially, the capacity of those whose mobility they serve to control to compromise and circumvent biometric recognition systems".[46] Technological systems then are yet another site at which the contestations over migration control play out. Yet the technologization of migration law also provides possibilities for forms of increased accountability, with, for instance, certain so-called "migrant-sending" states using technology to seek to increase the effective operation of migrant worker rights. Since 2016, for example, Pakistani migrant workers have been able to lodge complaints via an online system about their recruitment and employment to the Pakistani Ministry of Overseas Pakistanis and Human Development, thereby increasing the reach of the Pakistani state but also changing

[46] Stephan Scheel, *Autonomy of Migration?: Appropriating Mobility within Biometric Border Regimes* (Abingdon: Routledge, 2019). While many states such as those in the European union has implemented biometric identification systems at border points, more recently, Australian airport and immigration officials have announced a new trial that will scan a traveller's face, without the need to present their passport when passing through Australian immigration controls. Here, the traveller's body becomes the space onto which regulation through technology is projected and authorised forms of movement are coded.

practices of diplomatic protection, governmental responsibility and diaspora engagement.[47] The potential and effectiveness of such technological forms of accountability for addressing and remedying migrant worker exploitation remain under-examined.

Privatization: the enrolment of private for-profit non-state actors in the regulation and control of human mobility has resulted in the outsourcing of state responsibility and diffusion of accountability for the regulation and control of mobile people. For example, the rise of immigration detention for people arriving without state authorisation or overstaying and/or breaching their visa conditions in places such as North America, Europe and Australia has empowered private actors and corporations who run such places of detention. Multinational corporations such as G4S (the world's largest security company) and Serco (a U.K. company that manages prisons and immigration detention centres in the U.K. and Australia) have become key global players in this immigration detention complex. For transnational corporations, migration control has "become business, big business" both in terms of profiting off individual migrant's desires to move and the state attempts to control such movement.[48] One prominent effect of the regulation of human mobility through privatisation has been the intensification of the carceral state by entrenching the relationship between criminal modes of punishment and immigration law (referred to in migration scholarship as "crimmigration") while also embedding private for-profit corporations into the disciplining of human mobility.[49]
Securitization: the "securitization" of migration through various state forms of control has long been documented and analysed by scholars. Increasingly, such securitization practices have come to be enacted through a transnational military prism, resulting in the routine deployment of military tactics, personnel and technology such as drones to patrol state borders and to treat the arrival of unauthorized migrants as a form of transnational organized crime. In recent years, the UN Security Council, too, has authorized states to take military action against people categorized as "people smugglers" in an effort to combat human trafficking.[50] Such resolutions have facilitated naval patrol operations in the southern central Mediterranean Sea, mandated

[47] See Farbenblum and Nolan, *supra* note 42. Other states such as the Philippines have used social media as a way of holding recruiters and employers more publicly accountable to migrant workers and their families.
[48] Thomas Gammeltoft-Hansen and Ninna Nyberg Sorensen*, The Migration Industry and the Commercialization of International Migration* (Abingdon: Routledge, 2013), 2.
[49] On "crimmigration", see, e.g., Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," *American University Law Review* 56, no. 2 (2007): 367-420; Katja Franko Aas and Mary Bosworth, eds., *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013).
[50] See UN Doc S/RES/2240 (2015) and UN Doc S/RES/2380 (2017).

by decisions of the Council of the European Union.[51] To date, this has included the boarding and push-back of boats carrying migrants from Libya to southern Europe as well as the destruction of boats that have been or may be used in such people smuggling operations. While such actions may be seen to be consistent with certain international instruments such as the *Protocol against the Smuggling of Migrants by Land, Sea and Air*,[52] these operations have been routinely criticized for their severe breaches of international human rights standards, and for the logics of deterrence, containment and migrant exclusion that such practices enact.[53] Seen in this vein, practices of "transnational migration law" are not only about channelling human mobility and seeking to prevent coerced and unfree forms of migration, but conversely are also about authorizing violence against people transgressing state borders and producing states of entrapment and stasis for certain would-be migrants, thus affecting whether people can move in the first place and which migrants are deemed worthy of the protections of human rights law.

To conclude, this brief overview of the regulation of human mobility in a world of plural, and potentially rival, law-making authorities has demonstrated the necessity of denaturalizing the state as the privileged "container" through which to understand human mobility.[54] Instead, I have provided a glimpse into how the state has come to be constituted and contested in and through its regulation of mobile people. As Joel Quirk and Darshan Vigneswaran have argued:

> human mobility has long played a foundational role in determining what states look like as spatial and political entities, how they accumulate power and resources, what types of policies and strategies they pursue, and how they relate to their peers and other political, social, and economic actors. In short, mobility makes states.[55]

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[51] EC, *Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in Southern Central Mediterranean (EUNAVFOR),* [2015] OJ, L 122. See Glenda Garelli and Martina Tazzioli, "The Biopolitical Warfare on Migrants: EU Naval Force and NATO Operations of Migration Government in the Mediterranean," *Critical Military Studies* 4, no. 2 (2018): 181-200.

[52] *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004).

[53] Jørgen Carling and María Hernández-Carretero, "Protecting Europe and Protecting Migrants? Strategies for Managing Unauthorised Migration from Africa," *The British Journal of Politics and International Relations* 13, no. 1 (2011): 42-58.

[54] Andreas Wimmer and Nina Glick Schiller, "Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences," *Global Networks* 2, no. 4 (2002): 301-34.

[55] Joel Quirk and Darshan Vigneswaran, "Mobility Makes States," in *Mobility Makes States: Migration and Power in Africa*, eds. Darshan Vigneswaran and Joel Quirk (Philadelphia: University of Pennsylvania Press, 2015), 1-34, 2.

Paying attention to the productive dimensions of human mobility thus allows for questioning the standard legal typologies for framing migration, while also avoiding what Andreas Wemmer and Nina Glick Schiller have called "methodological nationalism".[56] Methodological nationalism in the context of migration law scholarship denotes approaches that take state borders as empirical facts, and fail to interrogate or historicize how migration has fed into processes of state construction, and vice versa. Yet, in developing an understanding of transnational migration law, it is also important also not to slip into what I shall term "methodological internationalism" that adopts the "global" as the ideal perspective and that see the international system of states as the "proper" and most optimal way of organizing the world. Such an approach of "methodological internationalism" fails to question how various international institutions and transnational processes including the increased circulation of capital and goods act to shore up and entrench this global ordering that has resulted in uneven and racialized production and distribution of wealth, resources and mobility in the world. After all, to conceive of the world only in terms of formal states is, as Manu Karuka has put it, to "naturalize colonialism".[57] Instead, this chapter suggests that in order to properly comprehend the construction, operation, dynamics and effects of transnational migration law, we must be attentive to the way *how* practices of state migration law and regulation intersect with and are sustained by, and in turn sustain, a racialized global ordering of people that enable certain forms of precarity, exploitation and abuse on the basis of a person's state-attributed "status" within a state's territory.

DECOLONIZING TRANSNATIONAL MIGRATION LAW

If we as scholars of transnational migration law take such critiques seriously, then how might we think about the regulation of human mobility alongside struggles for and projects of decolonization and global justice in our academic work and praxis? How can and should transnational migration law and scholarship respond to the vast and increasing global inequalities in our contemporary world produced through European colonialism and capitalism and maintained – or even exacerbated – through contemporary transnational legal regimes around trade, finance, property and food, to name but a few examples? How do we understand the global ordering of people in relation to the present-day uneven sharing of wealth, resources

[56] Wimmer and Glick Schiller, *supra* note 54.
[57] Manu Karuka, *Empire's Tracks* (Oakland: University of California Press, 2019), xii.

and opportunity, and state attempts to monopolize authority through legal forms of sovereignty?

Global Justice, Inequality and Migration

Importantly, E. Tendayi Achiume has called on scholars of international law to reconceive of *migration as decolonization*, where the migration of Third World citizens to First World states "can be understood to enact an important step in … the pursuit of a long overdue geopolitical reordering of benefits of a global order".[58] Achiume's normative argument is based on demonstrating that citizens of First World and Third World states are "not political strangers" to each other.[59] Rather, for Achiume, the First and Third Worlds exist in relationships of co-sovereignty and interdependence forged through practices of imperial exploitation and extraction established during the colonial period and continued long after the national liberation of formerly colonised people through forms of contemporary neocolonialism. Such historic interconnections and ongoing injustices mean that First World states therefore should have "no more right to exclude Third World persons than they do their own citizens" and, conversely, citizens of formerly colonised places have a particular right of admission into First World states as a mode of redressing the "colonial advantage" that First World states have gained through colonialism and that is maintained in and through contemporary international (legal) frameworks. Such individual migration, Achiume argues, should be viewed as a legitimate, ethical and importantly *remedial* personal response to conditions of neo-colonial subordination and as a "matter of corrective distributive justice" on a global scale. Third World migration thus constitutes a valid form of "opportunity-enhancement" behaviour for Third World citizens, even if it should not necessarily guarantee them the same rights of citizenship or permanent belonging in First World states as enjoyed by First World citizens. Whilst Achiume realises that such "postcolonial" migration is a "remarkably personal circumvention of the nation state", nonetheless, for Achiume, it necessitates a fundamental reimagining of sovereignty as a legal concept and holds the possibility of "different construction of the baseline relationship between political-economic migrants and the receiving sovereign."[60]

[58] E. Tendayi Achiume, "Reimagining International Law for Global Migration: Migration as Decolonization?" *AJIL Unbound* 111 (2017): 142-146, 145.
[59] E. Tendayi Achiume, "Migration as Decolonisation," *Stanford Law Review* 71 (2019): 1509-1574.
[60] Ibid.

Achiume's intervention in the field of international migration law is timely and much needed, as it reminds us to foreground the power and potential of Third World migration as a matter of material redistribution and global justice. It provides a politically useful legal argument for expanding the prevailing practices of belonging, notions of entitlements and spheres of inclusion on the basis of historically-produced rights and relations in First World states as a strategy of responding to colonial injustices. It thus makes the historically-constructed borders of states the "perennial objects" of accountability.[61] However, in thinking about the transformative potential of migration in an individualised way (albeit on a mass scale), Achiume's proposal still leaves intact the existing international order of states that rests upon the logic of state borders as both the makers and markers of determining questions of belonging, entitlement and difference.[62] This is particularly problematic in the context of settler-colonial states, where the imposition and maintenance of state borders enable the ongoing colonization and appropriation of Indigenous lands and function as a mechanism for seeking to subordinate prior and ongoing Indigenous forms of sovereignty over land and peoples.[63]

Instead, scholars of decolonization from Indigenous standpoints have argued that decolonization requires a more fundamental unsettling of settler colonialism – in all its epistemological, material and psychological forms – and a recognition of and reckoning with Indigenous sovereignties and forms of sociality. Writing from Turtle Island (North America),

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[61] Sara Dehm, "'Accusing Europe': Articulations of Migrant Justice and a Popular International Law," in *Peoples' Tribunals and International Law*, eds. Andrew Byrnes and Gabrielle Simm (Cambridge: Cambridge University Press, 2018), 157-81, 180, quoting Craig Borowiak, *Accountability and Democracy: The Pitfalls and Promise of Popular Control* (Oxford: Oxford University Press, 2011), 9.

[62] Recall Étienne Balibar's words of how contemporary state borders function as sites for rendering earlier colonial practices of racial differentiation and exclusion internal to the category of national citizenship. Étienne Balibar, *Politics and the Other Scene* (London: Verso 2002), 85.

[63] Achiume does recognize the particular place of Indigenous peoples in settler-colonial states that are "founded on the colonial extermination and subordination of sovereign indigenous peoples"; however, she suggests that her general argument about Third World inclusion and equality through First World citizenship "may be moot" in relation to Indigenous peoples who may already hold formal citizenship of settler-colonial states of the Global North, even if this formal status may still enable "fundamental substantive inequality" (*Supra* note 59, 1563). Achiume writes that:

> Of course, the subordinate status of many Fourth World peoples who are formal First World citizens speaks to the fundamental substantive inequality that is compatible with formal citizenship status. My point here is simply that formal citizenship status is preferable to undocumented status (*Supra* note 59, 1563).

As a result, in positioning the settler-colonial state as the proper and principle authority for granting recognition and inclusion, this is a form of decolonial politics that risks taking place at the expense of Indigenous political authority, legal orderings and peoples.

Eve Tuck and K. Wayne Yang, in particular, have argued that decolonization must necessarily also entail a material redistribution of *authority* over space, people and resources, and the "repatriation of Indigenous land and life". Indeed, to think of decolonization otherwise would mean that Third World migration to settler colonial states of the 'First World' risks intensifying the practices of dispossession and logic of elimination at work in settler colonialism. Tuck and Yang write:

> People of color who enter/are brought into the settler colonial nation-state also enter the triad of relations between settler-native-slave. We are referring here to the colonial pathways that are usually described as 'immigration' and how the refugee/immigrant/migrant is invited to be a settler in some scenarios, given the appropriate investments in whiteness, or is made an illegal, criminal presence in other scenarios.[64]

Thinking with this triangulation of settler-native-slave reveals how as result of paradoxical logics of assimilation and differential practices of racialization, '[s]ome labor becomes settler, while excess labor becomes enslavable, criminal, murderable'. Decolonization, for Tuck and Yang, then means the undoing of the settler nation in order to reorient toward Indigenous sovereignties and futurities, through an embrace of an "ethics of incommensurability".[65] Put more simply, what decolonization requires is clear, through the work of Indigenous theorists; what form decolonization may take and how decolonization will occur in settler colonial states is more open to historical contingency and not knowable in advance.

Recognizing and seeking to address the unequal access to and distribution of citizenship in the world – and its implications for the ability of people to travel in authorized, less dangerous and less exploitative ways – is only one element in comprehending global injustice then. Migrant struggles for justice must be thought alongside Indigenous practices of self-determination and nationhood in order to adequately and meaningfully account for global justice in the present. How we as migration law scholars narrate transnational migration law must be engaged in such endeavours. This means taking seriously past and present Indigenous mobility practices and Indigenous legal techniques for authorizing and making lawful certain forms of mobility.[66]

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[64] Eve Tuck and K. Wayne Yang, "Decolonization is Not a Metaphor", *Decolonization: Indigeneity, Education & Society* 1, no. 1 (2012): 1-40, 17.
[65] Ibid.
[66] See e.g. Lynn Stephen, *Transborder Lives: Indigenous Oaxacans in Mexico, California, and Oregon* (Durham: Duke University Press, 2007); John Burrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), especially 19-49. For recent historical scholarship on Indigenous mobilities, see Lynette Russell, *Roving Mariners: Australian Aboriginal Whalers and Sealers in the Southern Oceans, 1790–1870* (Albany: SUNY Press, 2012); Fiona Paisley, *The Lone Protestor*: *A M Fernando in Australia and Europe* (Canberra: Aboriginal Studies Press, 2012); Jane Carey and Jane Lydon, eds., *Indigenous Networks: Mobility,*

Telling 'Counter-Stories' as an Academic Praxis

Story-telling is political. Depending on the standpoint of the narrator, the mode of narration and the geopolitical context in which stories are told and received, stories can authorize and reproduce dominant power structures, or intervene in and transform global hierarchies, social imaginaries and collective movements for social change.[67] What stories we tell, pay attention to and foreground as scholars of transnational migration law reveals a great deal about how we conceive of, locate and relate to power and authority, in particular whose laws we recognize and who we deem to be an actor of transnational migration law-making. For many Indigenous scholars, stories hold law, and acts of story-telling can function as acts of legal obligation, transmission and place-making.[68] For non-Indigenous scholars, like myself, foregrounding "counter-stories" of transnational migration law-making to that of the state or market may function as a form of academic solidarity and commitment to projects of anti-racism and decolonization.[69] In this final section, I suggest that stories can have a powerful role to play in the necessary work of undoing colonial borders and state practices of bordering in the present, provided they are told and received within an ethical framework that emphasises the narrator's positionality and an ethics of non-appropriation, permission-seeking and respect.[70]

One possible orientation that such stories can take is to reveal the connections between state treatment of Indigenous peoples and racialized migrants in settler colonial contexts. This may include stories of how both Indigenous peoples and racialized migrants are made exceptional in state law, and subject to similar techniques of state documentation, intrusion and incarceration. Analyzing the use of the plenary power in the United States, Susan Bibler Coutin, Justin Richland and Véronique Fortin, for example, have mobilized personal stories of migrant and Indigenous peoples' encounters with the law to show how such state techniques of claiming

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Connections and Exchange (New York: Routledge, 2014); Rachel Standfield, ed., *Indigenous Mobilities: Across and Beyond the Antipodes* (Acton: ANU Press and Aboriginal History, 2018).

[67] Sujatha Fernandes, *Curated Stories: The Uses and Misuses of Storytelling* (Oxford: Oxford University Press, 2017).

[68] See, e.g., Christine Black, "Maturing Australia through Australian Aboriginal Narrative Law," *South Atlantic Quarterly* 110, no. 2 (2011): 347-62; Sweeney Windchief and Kenneth E. Ryan, "The Sharing of Indigenous Knowledge through Academic Means by Implementing Self-Reflection and Story," *AlterNative* 15, no. 1 (2019): 82-89.

[69] On the politics and anti-racist potential of "counter-stories", see, e.g., Tara J. Yosso, *Critical Race Counterstories along the Chicana/Chicano Educational Pipeline* (New York: Routledge, 2006).

[70] See, e.g. Clare Land, *Decolonising Solidarity* (London: Zed Books, 2015).

jurisdiction "function of granting 'fullness' to the United States while at the same time requiring certain populations to routinely claim exceptionality".[71] In the Australian context, the *Deathscapes* project, led by Suvendrini Perera and Joseph Pugliese, has collated stories of state-perpetrated abuses and custodial deaths of Indigenous people and migrants as a way of documenting, mapping and ultimately resisting contemporary forms of racialized violence across settler colonial locations. Focusing on a variety of sites, including "police cells, prisons and immigration detention centres", these stories seek "not to collapse the differences between racialized groups, or to ignore the presence of other racialized populations in these states, but to address some of the shared strategies, policies, practices and rationales of state violence deployed in the management of these separate categories".[72]

Another orientation that such stories can and do take is to draw attention to the effect of colonial states borders in dividing Indigenous nations and obscuring Indigenous sovereignties. For example, Theresa McCarthy has written about how the Six Nations of the Haudenosaunee Confederacy have historically negotiated the state-imposed border controls that act to divide and marginalise their political authority and communal life. She writes that while "the U.S.-Canada 'border' is a settler construct that is foreign and without meaning to Haudenosaunee cosmology, it has had very real, substantive implications for the social and political coherence of Haudenosaunee people over time". Nonetheless, despite these state borders, she shows how the "inherent sovereignty of Haudenosaunee has been continually articulated as the right to determine citizenship, leadership, and freedom of movement within territorial homelands".[73] This means that state borders have never fully been able to remove Indigenous control over what Amar Bhatia has called Indigenous "re-peopling" powers (that is, Indigenous authority over acts of procreation, marriage, adoption, citizenship, and immigration), despite considerable endeavours to do so.[74] For example, a case presently before the High Court of Australia challenges the Australian government's constitutional powers to deport people who are members of Indigenous nations in Australia but who do not have Australian citizenship

[71] See Susan Bibler Coutin, Justin Richland and Véronique Fortin, "Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law," *UC Irvine Law Review* 4 (2014): 97-120. See also Leti Volpp, "The Indigenous as Alien," *UC Irvine Law Review* 5 (2015): 289-325.

[72] "Deathscapes: Mapping Race and Violence in Settler States," //www.deathscapes.org/about-project.

[73] See, e.g. Theresa McCarthy, *In Divided Unity: Haudenosaunee Reclamation at Grand River* (Tucson: University of Arizona Press, 2016), 210; Michel Hogue, *Metis and the Medicine Line: Creating a Border and Dividing a People* (Chapel Hill: University of North Carolina Press, 2015); Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler State*s (Durham: Duke University Press, 2014).

[74] Amar Bhatia, 'Re-peopling in a Settler-Colonial Context: The Intersection of Indigenous Laws of Adoption with Canadian Immigration Law," *AlterNative* 14, no. 4 (2018): 343-353.

(people who in the legal terminology of the settler colonial state are deemed "Indigenous non-citizens").[75] While the outcome of the current Australian case is unknown, any High Court decision that authorizes the Australian settler colonial state's power to deport Indigenous people who are deemed Australian non-citizens will inevitably conflict with the operation of Indigenous sovereignty and the right to self-determination. As Bhatia writes, "viewing Indigenous nations as self-determining nations means recognizing their inherent rights and power to reproduce their societies through birth and immigration", even if settler colonial states through strategies of elimination seek to submerge and ultimately eliminate such Indigenous forms of authority.[76] Similarly, Louise Boon-Kuo has argued that the current Australian settler colonial state's use of migration law in attempts to deport Indigenous people deemed non-citizens must be understood within a longer colonial history of dispossessing Indigenous peoples, separating Indigenous families and deporting racialized non-citizens: all practices tied to a project of making Australia a "white" nation that was inaugurated upon the foundational and continued denial of Indigenous sovereignty. For Boon-Kuo, such practices of "white possessive sovereignty" remind us of the need for migration scholarship to "engage with the continued existence and state denial of First Nation sovereignties".[77]

A third possible orientation for such stories of transnational migration law can be to foreground Indigenous-to-Indigenous practices of law. Here, for example, the stories of Indigenous uses of the passport as potentially disruptive anti-colonial legal objects can make visible the ongoing practices of sovereignty and recognition of Indigenous nations in the present as well as the failure on the part of settler colonial states to "fully monopolise" the "legitimate means of movement". Audra Simpson, for example, has theorised how Indigenous practices of sovereignty that utilise the passport form, rather than seeking to replicate European or settler colonial border practices, instead exercise a "fundamentally interrupted and interruptive capacity" to the existent settler colonial state and international ordering of political authority.[78] Similarly, Joseph Pugliese has suggested in the Australian context that Indigenous acts of

[75] *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (B43/2018 and B64/2018) //www.hcourt.gov.au/cases/case_b43-2018.
[76] Bhatia, "Re-peopling in a settler-colonial context," *supra* note 71, 348. On settler colonialism's logic of elimination, see Patrick Wolfe, "Settler-Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 387-409.
[77] Louise Boon-Kuo, "'Race', Crimmigration and the Deportation of Aboriginal Non-Citizens," in *Crimmigration in Australia: Law, Politics, and Society*, ed. Peter Billings (Singapore: Springer, 2019), quoting Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015).
[78] Simpson, *Mohawk Interruptus, supra* note 73.

issuing and using Aboriginal passports function as "counter-discursive resignification of the very technology – the passport – deployed by the settler-colonial Australian state in order to consolidate and reproduce the ongoing usurpation of Indigenous sovereignty".[79] In doing so, Pugliese argues, Aboriginal uses of the passport act to "mark Aboriginal people's unceded and unextinguished sovereignty over Country and their right to offer welcome and hospitality within their own lands".[80] Foregrounding such stories in accounts of "transnational migration law" then heeds plural and rival forms of authority over land and people, and works against the dominant logics of settler colonial formations that would seek to eradicate and deny Indigenous sovereignties, nationhoods and futures.

CONCLUSION

This chapter has provided an account of "transnational migration law" as an empirical, methodological and normative inquiry. If "transnational migration law" is the object of investigation of this chapter, I have argued that it is not an already-present phenomenon or readily given object of inquiry. Rather, it is constructed through deploying the terminology of the "transnational" in relation to a politics of recognition. What does or should count as *transnational migration law*? Who is recognized as a lawful authority over human mobility? And what are the implications of this constitutive boundary-drawing exercise, in delimiting what is, and what is not, transnational migration law? At stake in such an exercise is more than merely the task of accurate description or reconstruction. It is rather the possibility of enabling more just coexistences between plural forms of law and the task of thinking through what a transnational migration law might look like that recognizes the necessity of thinking migrant justice within and beyond the settler colonial state.

To conclude, I want to return to another story about passports as documents that can attest to the regulation of human mobility in a world of plural authorities and that opens up the importance of decolonizing approaches to "transnational migration law". In 2013, a Freedom Solidarity Flotilla consisting of a delegation of Aboriginal Elders and West Papuan freedom activists sailed from Naarm/Melbourne to Manokwari in support of the independence struggle

[79] Joseph Pugliese, "Geopolitics of Aboriginal Sovereignty: Colonial Law as 'a Species of Excess of Its Own Authority,' Aboriginal Passport Ceremonies and Asylum Seekers," *Law Text Culture* 19, no. 1 (2015): 84-115, 86.
[80] Ibid., 95.

of the West Papuan people and to denounce the Australian government's support for Indonesia's military interventions. Travelling on his Australian Original Nations Passport as part of the delegation, Gunai man Robbie Thorpe articulated the importance of Indigenous passports as a form of inter-Indigenous sovereign relations and law-making, including in the context of human mobility:

> Aboriginal Passports represent a Global Safe Travel document; Indigenous people of Australia have never invaded or attacked another country, Aboriginal people represent peace and these passports represent a connection between Indigenous people around the world who have suffered at the hands of colonisation. … Who[se] borders are these anyway? Why should we require the white man's documents to travel to West Papua? Our lands were once connected, our cultures entwined for thousands of years, we don't need authority from Australia or Indonesia to do as we have always done. Aboriginal Passports are a real statement about our land, our identity, our lore. Australia and Indonesia can live the lie, but we the Indigenous people don't subscribe to that.[81]

Scholars of transnational migration law thus have a responsibility to recognize and analyze both the multitude of practices, sites, actors and forms of migration control (in all their complexity, violence and exclusion) and to foreground varied rival forms of authority over the regulation of both space and mobile people that present a challenge to the current international ordering of states that is the ongoing product of imperialism and settler colonial formations.

[81] "Aboriginal Passports Grant Authority for Cultural Reunion", *National United Government*, //nationalunitygovernment.org/content/aboriginal-passports-grant-authority-cultural-reunion.

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