Symposium on Reconceptualizing IEL for Migration: Migration and Inter-National Economic Laws that do not Erase Colonialism

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Since our time and space is limited here, we will leave the definition of IEL to those who are better qualified! And instead focus our attention on different ways of framing the intersection of migration, Aboriginal and Indigenous law with IEL, which is characterized by multiplied marginalization that forms an invisibilized core at the center of interlinking systems of economic exclusion. With the important caveat that we are both non-Indigenous scholars, we will mention some examples from in and around Turtle Island (which includes what is currently known as Canada, Mexico, and the United States). These examples are just some of many that speak to 'fugitive movements' that have already reimagined IEL even if (with some exceptions) this sub-discipline of international law has not always noticed or cared.

The intersection of migration, Aboriginal, and Indigenous law with international economic law arises at multiple points and a variety of perspectives. In this short essay, we will start with 'development', given that "IEL scholarship is concerned, in one way or another, with development." Even though some accounts reckon IEL's emergence as recently as post-WWII only, notions of development have of course been around for much longer. As noted in Volume 1 of the Final Report of the Canadian Truth and Reconciliation Commission into Indian Residential Schools (in a section on 'Treaty-making and betrayal'): "In 1820, in a precursor to what became known as the 'civilization policy,' Lieutenant-Governor Maitland proposed an economic development and education plan for Aboriginal people at the Grand and Credit rivers." This historical view is important for a number of reasons, including the fact that we are writing this reflection on fraudulently taken lands near these stolen waters, in and around Toronto/Tkaronto on the Dish with One Spoon territory.

This account is also important because it tracks how the proposed economic development and education plan (the establishment of boarding schools) coincided with the introduction of treaty provisions to establish reserves for First Nations, marking "the entrenchment of another long-term element of Canadian Aboriginal policy: the separation and isolation of Aboriginal people from Canadian society." This desire to separate is not necessarily unique to settler colonialism, but also speaks to the layers of material and discursive separation that permeate so much of our lives and international economic law, too. This logic includes the desire to separate the international/economic from the domestic/social, productive labour from social reproduction, and the economy from the environment and beyond. If it is important to reimagine IEL for migration, it is also imperative that we do so without forgetting that migration is inextricably tied to racial capitalism and colonialism (including settler colonialism). This way our efforts might interrupt the logic of separation and erasure and re-center what has been removed and invisibilized.

One way to proceed in this reimagining would be to follow the lead of scholars in other areas of international law and in other disciplines altogether. For example, Riley and Carpenter's intervention on the jurisgenerative role of Indigenous peoples in international law also coincides with efforts to show how migrants can make international law, too. These jurisgenerative accounts further coincide with views of migration as decolonization that understand that

the specificity of place and land are integral to all of these movements. When taken all together, it is well past time that international law (including international economic law) be capable of viewing Indigenous peoples as both hosts *and* migrants acting in accordance with their own Indigenous laws and against the state. Following Riley and Carpenter in a different article, this decolonizing view must also resist entrapping these same peoples under the logic of the "too settled/too mobile" thesis that dominates both state Aboriginal and migration laws.

While one of us has examined the topic of Indigenous peoples and nations as *hosts* stymied by settler colonialism, we focus in the balance of this short essay on one example where Indigenous peoples are migrants across state borders in the context of inter-state international law (though in some cases they are simply moving from one place to another within their own traditional territories and occupy dual roles).

Mohawk (Kanien'kehá:ka) Peoples and the Canada-US Border

Among other scholars, we rely here on the work of Kahnawà:ke Mohawk (Kanien'kehá:ka) political anthropologist, Audra Simpson. As noted in her 2014 book, Kahnawà:ke village was founded in 1620 by Christian Mohawks who moved from Mohawk valley (today, New York state) to the south shore of Montreal along the St. Lawrence River. Their deliberate movement to the lowlands was grounded in a continuance of Mohawk culture with a collective commitment to Haudenosaunee ideals. Trade along the St. Lawrence river was a vital source of economic and cultural activity for Kahnawà:ke. In fishing, delivering food, and guiding sea-faring explorers, Kahnawà:ke people were regarded as brave, strong and tenacious in expertly navigating the rivers.

At the end of the Seven Years war in 1762, half of Kahnawà:ke was given to the French by the British as consolation for the latter's victory. Further dispossession from the 18th and 19th century onward culminated in an estimated 95% loss of land by 1900. Passage of the *St. Lawrence Seaway Act* in 1951 facilitated further dispossession of land in developing the critical infrastructure of the St Lawrence Seaway (a 3,700 km binational "marine highway" from the Great Lakes to the Atlantic Ocean, facilitating over 200 million tonnes of cargo travel per year). No consultation was conducted and

before compensation had been discussed, community members were forced to leave. The compensation formula eventually developed was comparatively low, including "plus ten percent for forcible taking" (and despite the billions of dollars that the seaway generates for settler state economies per year).

Notwithstanding the taking of Indigenous lands to pacify both inter-imperial rivalries and settlers' later appetite for infrastructure, hydropower, and trade, Haudenosaunee relationships with the land and mobility across it were important then and remain so to this day. The ability to cross the US-Canada border is governed by differing conceptions of land and identity under both Kahnawà:ke and state legal systems. The Haudenosaunee Confederacy still view their traditional territory as governed by the "linking of arms" when Peacemaker joined the hands of the original nations through the Great Law of Peace (Kayanerenkó:wa). The ability to cross the border was also recognized by the Two-Row Wampum.

The first test of this recognition in settler courts came in the case of *United States ex rel. Diabo v. McCandless* (1927). The Indian Citizenship Act of 1924 made "Indians" in the United states citizens, while Canadian "Indians" were considered "aliens". The plaintiff, Paul Diabo, was a Kahnawà:ke Mohawk who travelled down to the United States as an ironworker, as he had done for ten years. Mohawks who historically lived along both sides of the border assumed they would have free reign to pass as "Indigenous nationals rather than as 'aliens'". The court recognized this right as preceding the Jay Treaty, acknowledging differing perspectives on the spatialization of land: "the contracting parties agreed with each other that each would recognize [the right]…From the Indian view point, he crosses no boundary line. For him this does not exist". Mohawks on the Canadian side of the border were recognized as having the right to cross through their traditional territories as a sovereign nation without a colonial border.

But in 1934, another legal form of recognition was imposed through the Indian Reorganization Act. The US imposed a 50 percent blood quantum requirement for "Indians" from Canada to cross the border, thus further restricting Haudenosaunee interpretations of their own mobility. In contrast, Canada developed a culturalist form of recognition. To claim a right pursuant to section 35 of the Canadian Constitution, a claimant would need to show that their

activity was integral to their culture which maintained continuity prior to European contact. In 2001, the Supreme Court of Canada *Mitchell* case would test the Jay Treaty in reverse – travelling from the United States to Canada. Based on the culture test, the Court did not find that trade north of the St. Lawrence River was a significant part of Mohawk culture prior to European contact. As noted by Anishnaabe legal scholar John Borrows among many others, Akwesasne Mohawk Grand Chief Michael Mitchell's ample trial evidence and testimony on Mohawk cross-border mobility and trade was largely disappeared from the Federal Court and the Supreme Court of Canada, because it was seen to be "sparse, doubtful, and equivocal" by a Court that was unconvinced of the trustworthiness of Indigenous knowledge.

In stepping back from these disputes as discrete moments-in-time for settler courts, the larger picture is one where Mohawk lands have been taken by an influx of settlers and, later, a border and massive infrastructure have been instituted by the dispossessing states on these same lands. Whether talking about bridges, seaways, or continental free trade agreements, this border and infrastructure regime has redounded to the great benefit of those states and their settlers. Concurrently, Haudenosaunee laws and relationships to the lands and waters (which include holistic and integrated approaches to economy, society, governance, and *mobility*) have been denied credence by the dispute resolution mechanisms of the dispossessing states. And all the while, billions of dollars continue to flow past the Mohawk Nation annually, even as their members literally built up further infrastructure on both sides of the border, whether doing iron work on bridges in Quebec or the financial skyline of New York City. Apart from migration studies' own lacunae (with exceptions of course), scholarship at the intersection of international economic law and migration has yet to properly contend with how settler-colonial sovereignty arrests cross-border Indigenous trade (and mobility more broadly).

Conclusion

Apart from important recent examples that will be formative, we believe it is long past time for international economic law to take stock of its hidden heritage (including settler colonialism) and how this ongoing legacy invariably intersects with IEL's impoverished notions of economy, as well as its impoverishing approach to migration.

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