

FROM CULTURAL GENOCIDE TO CULTURAL INTEGRITY:
INDIGENOUS RIGHTS AND THE CO-OPTATION OF INTERNATIONAL NORMS

By Jeffrey Benvenuto

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written under the direction of

Dr. Alexander Laban Hinton

And approved by

Dr. Alexander Laban Hinton

Dr. Jean-Marc Coicaud

Dr. Yale Ferguson

Dr. Andrew Woolford

Newark, New Jersey

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ABSTRACT

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By Jeffrey Benvenuto

Dissertation Director: Alexander Laban Hinton

There lies a hidden history beneath the official language of Article 8 of the 2007 UN Declaration on the Rights of Indigenous Peoples, which defines the right to cultural integrity. The genealogy of this norm goes back to the lost concept of “cultural genocide,” or the destruction of a group’s unique characteristics. This latter concept was originally stillborn while drafting the 1948 Genocide Convention because a majority of countries assumed that assimilation, or the absorption of outsiders into dominant structures, was something normal and desirable in the construction of modern nation-states. Yet this old assumption fell out of date by the 1970s, as evidenced by the shift in the International Labor Organization from the 1957 Indigenous and Tribal Populations Convention (No. 107) to the 1989 Indigenous and Tribal Peoples Convention (No. 169). The abandoned norm of “cultural genocide” (also perplexingly referred to as “ethnocide”) was revived in this broader intellectual context. These two keywords were actually used in the original draft of what became Article 8 of the 2007 Declaration, but they were explicitly redacted from the final text due once again to more powerful interests. This hidden history exposes a paradox in international norm dynamics between competing currents of continuity and change. On the one hand, the 2007 Declaration is the outcome of what I describe as *settler colonial globalism*, or the logics of sovereignty

and capitalism in the contemporary era of neoliberalism. Such an ideological filter was responsible for the carefully scripted wording of this international legal instrument. On the other hand, even with its textual redactions, Article 8 remains rooted in a spirit of Indigenous survival and resistance, not to mention the productive capacity of non-state actors to affect change in global affairs. The articulation of cultural integrity as a human right symbolizes a definitive break with the historical patterns that I identify as the *normalcy of assimilation*. In order to problematize the apparent “progress” of international norms in relation to certain continuities of power in global governance, however, I employ a theory of co-optation, defined as the incorporation of resistant elements into a dominant structure.

ACKNOWLEDGEMENTS

I would like to begin by acknowledging, first and foremost, that this dissertation was completed in *Lenapehoking*, which is the ancestral homeland of the Lenape people, and which is, moreover, an occupied territory upon which I have made my home.¹ It is further necessary for me to admit my own biased standpoint in this geographical and political context. I am a settler American who has been scholarly trained by a land-grant institution of higher education. The land-grant system dates back to a federal statute passed by the Thirty-seventh Congress (1861-1863) as part of a number of bills that transferred massive amounts Indigenous territories to the settler colonial public domain.² As such, my experience is implicated in a larger structure of domination, for in no uncertain terms, I am personally benefitting from the legacies of settler colonialism. My school, Rutgers, the State University of New Jersey, is a land-grant institution in *Lenapehoking* that was founded in 1766, although my campus (Newark) was incorporated in 1946. Not that this late arrival makes it any better. In fact, Rutgers-Newark is less than ten miles from a forgotten historical site of the Pavonia Massacre of 1643, in which at least 80 Lenape men, women, and children were murdered by Dutch soldiers.³ My acknowledgement of this forgotten massacre serves as a reminder as to how settler colonialism implicates my personal subject position, which in turn structures the

¹ Emma Kowal, "Welcome to Country: Acknowledgement, Belonging and White Anti-Racism," *Cultural Studies Review* 21, no. 2 (2015): 173.

² For the Thirty-seventh Congress's historical role in American settler colonialism, see Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of US-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007), 33-34.

³ For a legal history of the settlement of Newark in the late 17th century, see Blake A. Watson, "John Marshal and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery," *Seton Hall Law Review* 36, no. 2 (2006): 540-549. On the Pavonia Massacre, see Herbert C. Craft, *The Lenape-Delaware Indian Heritage: 10,000 BC to AD 2000* (Elizabeth, NJ: Lenape Books, 2001), 412-416.

ways in which I am inclined to see (and, inversely, the ways in which I do not see) the reality that I am studying.⁴

With that said, this project has been a long time coming. First and foremost, my deepest thanks are due to Dr. Alex Hinton, who invited me to apply to the Division of Global Affairs in the first place. The Center for the Study of Genocide and Human Rights was an amazing intellectual home, and my sincere thanks to all of the amazing people there, especially Nela Navarro and Steve Bronner. My thanks as well to Jean-Marc Coicaud, who was an intrepid leader of the Division of Global Affairs and whose erudition was second to none. Thank you as well to Yale Ferguson. Even though he's officially "retired," his continued service to the Division of Global Affairs is immeasurable. My sincere thanks extend to Andrew Woolford. As an external reviewer, he was under no professional obligation to serve on my committee, yet he did so without hesitation and to great effect.

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⁴ This personal reflection is inspired by the practice of feminist standpoint theory. See Mary Hawkesworth, *Feminist Inquiry: From Political Conviction to Methodological Innovation* (New Brunswick: Rutgers University Press, 2006), 56-57, 73-74, 176-179, and 201-206.

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INTRODUCTION

Three Spotlights in History

This dissertation examines the nearly century-long historical process in which the norm against *cultural genocide* was first conceived and almost immediately abandoned before it was eventually replaced by the nascent human right to *cultural integrity*. To help set up the parameters of this process of international norm dynamics, we can point to three crucial discursive events in the contemporary history of global affairs. By “discursive event,” I do not mean to suggest that the following examples are somehow like monuments in a presumably well-established and continuous line of historical evolution. Rather, following Michael Foucault, we understand discursive events to be crucial moments of potentially radical discontinuity. These are moments of intervention that rupture pre-established patterns of knowledge, providing evidence not only of the ever shifting boundaries of possibility, but also of the limits to freedom.¹ In this vein, we can begin outlining this dissertation’s “history of the present” by spotlighting the three following discursive events as documentary artifacts of an apparent process of normative change from cultural genocide to cultural integrity.

Paris: October 25, 1948

The first spotlight is when the United Nations General Assembly (GA) decided to abandon the idea of *cultural genocide*. This decision was made at the 83rd meeting of the GA’s Sixth Committee (Legal), which was busy at the time preparing what would soon become the 1948 United Nations Convention on the Prevention and Punishment of the

¹ On “discursive events,” see Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (Trans. A.M. Sheridan Smith) (New York: Pantheon, 1971), 74. On the following “history of the present,” see idem, *Discipline and Punish: The Birth of the Prison* (Trans. Alan Sheridan) (New York: Vintage, 1977), 31.

Crime of Genocide (hereafter, the 1948 Convention). The crucial issue at stake on this particular day was over a basic conceptual issue: essentially, how broad or narrow should genocide be defined?² *Cultural genocide*, defined as acts “destroying the specific characteristics” of protected groups, was originally conceived as part of a generic typology of group-destructive techniques, ranging from “physical genocide” at the sharper end of the conceptual spectrum to “biological genocide” in the middle and “cultural genocide” at the broader end.³ Such a capacious conceptual framework traced directly back to Raphael Lemkin, a co-author of the first draft of the 1948 Convention and an early advocate for the protection of cultural diversity as an international norm. It was his big idea that was on the line during this particular meeting of the Sixth Committee.

Lemkin may have eventually succeeded with the adoption of the 1948 Convention, but he lost the battle over *cultural genocide*. Political powers much stronger than him ultimately prevailed in adopting a measure that would exclude a provision against cultural genocide from the scope of the convention.⁴ This omission was an outcome of legalization. Generally speaking, as new the norm against genocide completed the process of international legalization – that is, as it became a precisely elaborated and binding rule with delegated powers for implementation, interpretation, and application – it was also necessarily filtered through the dominant, state-centric structure

² See the Official Records of the Third Session of the General Assembly, Sixth Committee, “Eighty-third meeting,” UN Doc. A/C.6/SR.83 (25 October 1948), reproduced in Hiram Abtahi and Philippa Webb, eds., *The Genocide Convention: The Travaux Préparatoires* (Vol. 2) (Boston: Martinus Nijhoff), 1501-1519

³ United Nations Secretary-General, “Draft Convention on the Crime of Genocide,” UN Doc. E/447 (26 June 1947).

⁴ When the Sixth Committee took a final vote on that fateful day as to whether or not a provision against *cultural genocide* should be retained, the opposition prevailed with 25 votes to 16. See Sixth Committee, “Eighty-third meeting,” in Abtahi and Webb, eds., *The Genocide Convention*, 1518.

of global governance.⁵ In this hegemonic context, certain powerful states, especially the United States and France, feared that a more inclusive definition of genocide might be self-incriminating, as it would have possibly implicated otherwise “normal” domestic policies of assimilation and national integration. In the face of this strong opposition, Lemkin’s autobiography reveals the strategic rationale for giving up this definitional battle:

This idea [i.e. *cultural genocide*] was very dear to me. I defended it successfully through two drafts. ... But there was not enough support for this idea in the committee. ... In this issue the wind was not blowing in my direction. After having overcome so many hurdles and with the end of the Assembly in sight, I questioned the wisdom of engaging in still another battle. Would it endanger the passage of the convention? ... So with a heavy heart I decided not to press for it.⁶

In the end, the 1948 Genocide Convention’s definition was enclosed by a more restrictive legal definition that honed in on the *physical* and *biological* categories of the crime, leaving the broader idea of *cultural genocide* outside its definitional boundaries.

Geneva: September 20-23, 1977

Flash forward to our second historical spotlight nearly three decades later. It was September 1977 when delegations of Native Americans arrived in Geneva, Switzerland. They were attending the International NGO Conference on Discrimination against Indigenous Peoples of the Americas (hereafter, the 1977 NGO Conference), which was being hosted under the auspices of the United Nations (UN) at the illustrious *Palais des Nations* in Geneva. Even though they lacked the official institutional status to positivize a new set of international legal standards, these Indigenous diplomats nevertheless

⁵ Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, “The Concept of Legalization,” *International Organization* 54, no. 3 (2000): 401.

⁶ Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze (New Haven: Yale University Press, 2013), 172-3.

demonstrated the productive power to appropriate and creatively reimagine normative discourse at the global level. To be sure, the outcome document of the 1977 NGO Conference, known as the “Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere,” does not fit into the positivist paradigm of international law.⁷ To the extent that it has been produced by non-state actors, the 1977 Declaration lacked any “real” compulsory authority to influence, let alone command the rules of global governance. With that said, this semi-official monument of international law represented an important genesis (or perhaps re-genesis) of contemporary Indigenous rights discourse. Although it was entirely non-binding, the 1977 Declaration demonstrated the productive power of human rights in international norm dynamics.

It is notable, however, that the semi-formal final wording of the 1977 Declaration avoided any use of “genocide” or its associated keywords, including Lemkin’s abandoned notion of “cultural genocide,” or what was then becoming the more fashionable term – “ethnocide.” Such an absence is surprising when considered in relation to the published notes of the conference proceedings. Many participants of the 1977 NGO Conference evidently seemed comfortable in explicitly calling out what they saw as ongoing genocides against Indigenous peoples in the Americas. In this vein, and often within the same breath, they also frequently spoke of “ethnocide.” As suggested, this was a relatively recent semantic innovation that at least tacitly covered the same conceptual terrain as “cultural genocide.” Yet although these terms were missing from the final text

⁷ International Indian Treaty Council, “International NGO Conference on Discrimination against Indigenous Population in the Americas, 20-23 September 1977,” *Treaty Council News* 1, no. 7 (1977): 25-26.

of the 1977 Declaration, the underlying issue of normative concern was nevertheless present. It was instead addressed under the alternative label of “national and cultural integrity.” The relevant provision stated that:

It shall be unlawful for any state to make or permit any action or course of conduct with respect to an indigenous nation or group which will directly or indirectly result in the destruction or disintegration of such indigenous nation or group or otherwise threaten the national or cultural integrity of such nation or group, including, but not limited to, the imposition and support of illegitimate governments and the introduction of non-indigenous religions to indigenous peoples by non-indigenous missionaries.⁸

This reference to “destruction or disintegration” resonates with the genealogy of “cultural genocide,” even if this specific terminology is lacking. Moreover, this provision foreshadowed later developments in international law (especially Article 8 of the 2007 Declaration, profiled momentarily). Yet this particular statement should not be confused with the dominant understanding of human rights. Considered within the larger structure of the 1977 Declaration, the proposed right to cultural integrity underpinned a more radical set of claims built around what was essentially a declaration of independence for Indigenous peoples. Indeed, apart from the preamble, the 1977 Declaration does not identify any further with the concept of “human rights,” per se, as it spoke to an altogether different discursive strand. In fact, the opening operative paragraph of the document reproduced the international legal rules for personhood, arguing that “Indigenous peoples shall be accorded recognition as nations, and proper subjects of international law.”⁹ The implications of this were certainly radical, insofar as the 1977 Declaration envisioned a global redistribution of sovereignty. As such, the provision

⁸ Ibid, 26.

⁹ Ibid, 25.

“national and cultural integrity” was as much about decolonization as it was human rights.

New York: November 28, 2006

Flash forward yet nearly another 30 years to our third and final opening spotlight to late November 2006 at UN headquarters in New York. A second draft version of the UN Declaration on the Rights of Indigenous Peoples had recently been prepared for consideration by the UN General Assembly, which eventually adopted it less than a year later with an overwhelming consensus (144 votes in favor, 4 against, and 11 abstention).¹⁰ Yet the ultimate success of this legislative process was by no means preordained. In fact, at this particular moment in late November 2006, just as the process entered its final drafting stage, the entire enterprise was in jeopardy of indefinitely stalling. During a meeting of the Third Committee of the UNGA, a bloc of 53 member states led by Namibia and other African countries successfully voted to defer any further consideration and action on the draft Declaration in order to “allow time for further consultations.”¹¹ As it turned out, the African bloc eventually came around in favor of the draft Declaration, leaving the CANZUS bloc of Canada, Australia, New Zealand, and the United States as the only remaining holdouts when the instrument was ultimately adopted in September 2007. Nevertheless, these final negotiations imposed a series of political demands that served to reinforce the state-centric constraints of the legalization process.

¹⁰ United Nations General Assembly, “General Assembly Adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Forward’ towards Human Rights for All, Says President,” (17 September 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

¹¹ United Nations Department of Public Information, “Third Committee Approves Draft Resolution on right to Development; Votes to Defer Action Concerning Declaration on Indigenous Peoples,” 28 November 2006, available at <http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm>.

Although they were assuaged soon enough, the African bloc's November 2006 argument against the draft Declaration was reflective of these state-centric constraints. For example, the absence of a definition of the term "Indigenous peoples" was said to exacerbate ethnonational tensions and instability within sovereign states. Moreover, it was argued that self-determination claims could be misused to confer the apparent right of secession to sub-state ethnic groups pretending to be "Indigenous." This not only contradicts a number of African countries' constitutional provisions, it was argued, but also a basic norm of the international system concerning the inviolability of state sovereignty.¹² Ultimately, the African bloc was acquiesced through a last-minute revision that was inserted into Article 46 of what became the 2007 Declaration, which stated that "nothing in this Declaration may be interpreted ... or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the *territorial integrity* or political unity of sovereign and independent States."¹³ Against the silenced objections from Indigenous organizations, who protested against this one-sided textual revision that was made without their consent, UN member states were able to shape the final language in order to serve their own interests.

Article 46 was not the only power-laden instance of "wordsmithing" in order to manufacture international "consensus" behind the "agreed-upon" language of the 2007 Declaration.¹⁴ This was also evident in the final text of Article 8, which reads that

¹² Draft Aide Memoire, African Group, United Nations Declaration on the Rights of Indigenous People, 9 November 2006. See also Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples," *Vanderbilt Journal of Transnational Law* 41 (2008): 1159-1166.

¹³ Article 46, United Nations General Assembly resolution 61/295, "United Nations Declaration on the Rights of Indigenous Peoples," (13 September 2007).

¹⁴ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), 38-42.

“Indigenous peoples and individuals have the right not to be subjected to *forced assimilation or destruction of their culture*.” It adds that states shall prevent and provide redress for “any action which has the aim of depriving [Indigenous peoples and individuals] of their *integrity* as distinct peoples,” thereby tapping into the spirit of the 1977 Declaration.¹⁵ As such, this represents an important innovation in human rights law that steadfastly rejects earlier international standards that normalized the assimilation and elimination of Indigenous peoples.

Yet if we dig beneath the final language behind Article 8, back to the first draft version of this provision that was directly prepared by Indigenous actors at the entry level of the UN organization during the late 1980s and early 1990s, we find a subtly different statement: “Indigenous peoples have the collective and individual right not to be subjected to *ethnocide and cultural genocide*.”¹⁶ From this original language to the final text, not much changed to this specific provision during the drafting process. Apparently, the particular terminology of “ethnocide and cultural genocide” was too controversial and was thus replaced by the more descriptive statement of “forced assimilation or destruction of their culture.” Once again, Lemkin’s abandoned idea was forsaken once again. Strictly speaking, the concept of “cultural genocide” (and its apparent synonym, “ethnocide”) are as invalid today as they were in 1948.

But the underlying idea is not altogether dead. As noted, not much else changed in the drafting history behind Article 8 of the 2007 Declaration. Apart from replacing these controversial keywords with more descriptive language, the rest of the provision

¹⁵ Art. 8(1) and Art. 8(2) of the 2007 Declaration.

¹⁶ Art. 7 of Sub-Commission on the Prevention of Discrimination and Protection of Minorities Resolution 1994/45, “Draft United Nations Declaration on the Rights of Indigenous Peoples.”

remained intact. Moreover, it has already been suggested the proclamation of this new norm – what we are calling “cultural integrity” – represents an important innovation in the development of cultural rights as a category of human rights.

So what are we to make of this apparent shift from “cultural genocide” to “cultural integrity”? In what looks to be an historical process of normative transformation, how can we parse out the crucial continuities and changes at stake here? To what extent does the introduction of potentially radical new norms threaten pre-existing power structures, and what are the implications for strategic bargaining in the promotion of these new norms? Conversely, how do pre-existing power structures react to challenging norms? These are the theoretical questions at the core of this dissertation.

The Genealogy of Norms

These three discursive events – the decision to abandon “cultural genocide” in the 1948 Convention, the conception of “cultural integrity” at the 1977 NGO Conference, and the near abortion of the 2007 Declaration – are dispersed fragments of a general history. That is to say, they are disparate episodes that can be examined across multiple layers or strata of history, representing different historical contexts and opportunity structures. Nevertheless, they all speak to an ongoing transnational normative discourse of global ethics. At the risk of oversimplifying things, we could fashion a relatively optimistic narrative for this general history, as we explore how Lemkin’s abandoned concept of cultural genocide was contested and transformed into the nascent norm of cultural integrity. According to this relatively positive impression, the jurisprudential imagination and the apparent willingness to generate new international norms led to

Article 8 of the 2007 Declaration filling the conceptual gap left behind by the narrow definitional enclosure of the 1948 Convention.

Indeed, in the nearly six decades in between 1948 and 2007, there appears to have been a monumental shift in global attitudes regarding Indigenous peoples and cultural diversity. This apparently progressive change in attitudes is further apparent considering the two other international legal instruments covered in this dissertation, namely Indigenous and Tribal Peoples Convention of 1957, otherwise known as the International Labour Organization (ILO) Convention No. 107, and the Indigenous and Tribal Peoples Convention of 1989, also known as ILO Convention No. 169. The 1957 Convention (No. 107) was originally geared towards the “protection and integration of Indigenous and other tribal and semi-tribal populations in independent countries.”¹⁷ However, as a result of multiple intersecting transformations in global affairs after the 1970s, these original aims were fundamentally questioned and ultimately replaced by new sets of cultural values and normative beliefs. As a result, a revised instrument was provided in the form of the 1989 Indigenous and Tribal Peoples Convention (No. 169), the preamble of which explicitly sets forth “a view to removing the assimilationist orientation of the earlier standards.”¹⁸ The starkness of this denunciation cannot be overstated, as this was meant to be a clear break with the past. Therefore, in only a matter of decades, once dominant norms and assumptions regarding the “protection and integration” of Indigenous peoples,

¹⁷ The 1957 Indigenous and Tribal Populations Convention was adopted at the 40th session of the International Labour Conference. It is otherwise known as Convention No. 107 of the International Labour Organization. The official subtitle of the 1957 Convention is the “Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.”

¹⁸ Preambular paragraph 2, 1989 Indigenous and Tribal Populations Convention, which was adopted at the 76th session of the International Labour Conference. It is also referred to as ILO Convention No. 169 and the “Convention concerning Indigenous and Tribal Peoples in Independent Countries.” For an authoritative account, see Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (New York: Oxford University Press, 2005).

or what I refer to as the “normalcy of assimilation,” were forced to give way to an emerging normative framework built around the cultural rights of Indigenous peoples.

Nevertheless, apart from this apparent shift in attitudes, how much has actually changed over the course of this general history? As far as the structure of the contemporary global order is concerned, to what extent is it still governed according to traditional state-centric prerogatives? Likewise, to what extent are Indigenous peoples still prohibited from the international decolonization regime? Stated differently, what is the status of Indigenous sovereignty? Indigenous peoples are still denied the full benefits of self-determination, as their freedoms remain subordinated to the structural imperatives of a state-centric global order that has been shaped in the image of “settler sovereignty.”¹⁹ Classically defined as “power absolute and perpetual,” “supreme,” and “subject to no law,” sovereignty in the strict sense of the term remains off-limits to Indigenous peoples as a source of personhood in international law, although questions remain as to whether subaltern interpretations of sovereignty are under construction in the early 21st century, or even whether this Eurocentric concept should be retained at all as a central pursuit of Indigenous rights.²⁰

Thus, there is another way to approach this general history that is more critical and circumspect, if not downright pessimistic. On the surface, Article 8 of the 2007 Declaration may look like a monumental achievement, but if we look beneath the surface,

¹⁹ Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, MA: Harvard University Press, 2010), pp. 16, 157, and 187.

²⁰ This description of sovereignty is from the 16th century political philosopher Jean Bodin, quoted in Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2011), 31. On evolving notions of Indigenous sovereignty, see Lorie M. Graham and Siegfried Wiessner, “Indigenous Sovereignty, Culture, and International Human Rights Law,” *South Atlantic Quarterly* 110, no. 2 (2011): 403-427. For a critical question of “sovereignty,” see Taiaiake Alfred, “Sovereignty,” in *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, ed. Joanne Barker (Lincoln: University of Nebraska Press, 2005), 33-50.

not just at the hidden drafting process of this particular instrument, but at the broader intellectual historical context as well, we see a much messier and more complicated story. Values and dispositions may have evolved, and the cultural integrity norm may have emerged as a promising legal invention, but at a deeper level, the state-centric structure of the global order has not been upended, and the unequal distribution of sovereignty between Indigenous peoples and settler states has yet to be displaced. Domestic systems of domination and resistance are still in place. Besides, as noted above, the fact of the matter is that the precise terminology of “cultural genocide” is still officially relegated to the outskirts of international legal idiom. The cultural integrity norm is perhaps the next best thing in the contemporary normative landscape of global affairs, although there is no clear or unbroken connection between the two. With that said, even the cultural integrity norm that was written into Article 8 of the 2007 Declaration is strictly non-binding and aspirational at best, and it is too soon to say whether it will eventually harden into a monument of international human rights law.

We are thus faced with a paradox between simultaneous and competing currents of normative change and institutional continuity. Since at least the 1970s, there has indeed been a global shift in attitudes favoring Indigenous peoples and the values of cultural diversity, but this is not the whole story, for beneath the shifting movements on the surface level of history are underlying ideological continuities that remain embedded in the “deep structure” of the law.²¹ Stated differently, we can chart a progressive and upward trajectory of normative development across the four international legal

²¹ The term “deep structure” is borrowed from A. Dirk Moses, “Genocide and Settler Society in Australian History,” in *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, ed. Idem (New York: Berghahn, 2004), 30-31.

instruments highlighted in this dissertation: (1) the 1948 Convention; (2) the 1957 Indigenous and Tribal Populations Convention (No. 107); (3) the 1989 Indigenous and Tribal Peoples Convention (No. 169); and (4) 2007 Declaration. At the same time, these four monuments of international law are underpinned by a shared discursive substratum. In terms of the critical theoretical jargon inherited from Foucault, we could say that these are multiple “ruptures” or moments of discontinuity that are otherwise part of a general “regularity” involving “the construction of a series of instances that exist as a group by virtue of their difference from one another.”²² The goal of this dissertation is to map out this discursive history of ruptures and regularity.

Some preliminary definitional, philosophical, and methodological remarks are thus in order. First, what is meant by a *norm*? The sociological definition of a *norm* is a rule or collective expectation that specifies the appropriate behaviors reflective of the social values or standards by which a group defines itself.²³ With that said, how do we study norms? It is difficult because norms are not stable objects that remain intact over time. We will come back to this point momentarily, as there is a tendency in the relevant scholarly literature to treat norms as “things” rather than as processes.²⁴ In any case, norms are also difficult to detect, at least at the surface level of history, because they are behavioral expectations. That is to say, they are designed to be taken for granted and internalized by actors. Moreover, they are hidden multiple layers of inherited biases, assumptions, and predispositions. According to some popular theories of norm dynamics,

²² David Webb, *Foucault's Archaeology: Science and Transformation* (Edinburgh: Edinburgh University Press, 2013), 58. See also Foucault, *Archaeology of Knowledge and the Discourse on Language*, 37.

²³ See James M. Henslin, *Essentials of Sociology: A Down-to-Earth Approach* (11th ed.) (New York: Pearson, 2015) 49.

²⁴ Mona Lena Krook and Jacquie True, “Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality,” *European Journal of International Relations* 18, no. 1 (2012): 103-127.

it is as if actors supposedly acquire stable, pre-conceived, and already existent social rules that have been provided ahead of time. Yet, following the philosophy of Friedrich Nietzsche, we must critically question the presumption that social values and standards are somehow natural, and instead see morality and ethics as entirely artificial constructions.²⁵

The hidden history beneath Article 8 of the 2007 Declaration represents one such artificial construction. In conjunction with seeing this particular provision as the outcome of a legalization process, we can also see it as the outcome of a normalization process, referring to how “contingent social and political formations come to be naturalized and rendered commonsensical.”²⁶ The dominant assumption that Article 8 is up against is that cultural genocide is somehow less important than “real” genocide. This assumption goes all the way back to October 25, 1948, at the aforementioned debate in the UN GA, where the Danish delegation, for example, maintained that “it would show a lack of logic and a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries.”²⁷ Since then there has been no shortage of scholars in the historiography of genocide that have maintained such a sharp categorical distinction between cultural genocide and “real” genocide.²⁸ It continues to be assumed that “real” genocide necessarily involves the irreversibly physical and biological destruction of a

²⁵ Friedrich Nietzsche, *On the Genealogy of Morality* (Trans. Carol Diethe) (New York: Cambridge University Press, 2006 [1887]); and Paul J.M. van Tongeren, “Nietzsche and Ethics,” in *A Companion to Nietzsche*, ed. Keith Ansell Pearson (Malden, MA: Blackwell, 2006), pp. 390-396.

²⁶ Ben Golder, *Foucault and the Politics of Rights* (Stanford: Stanford University Press, 2015), 58.

²⁷ Mr. Federspiel (Denmark), in United Nations General Assembly, “Official Records of the Third Session of the General Assembly, Sixth Committee: Sixty-fifth Meeting,” UN Doc. A/C.6/SR.83 (25 October 1948), in *The Genocide Convention*, 1508.

²⁸ Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven: Yale University Press, 1990), 23; Berel Lang, “The Concept of Genocide,” *Philosophical Forum* 16, nos. 1-2 (1984-85): 8; and Scott Straus, “Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide,” *Journal of Genocide Research* 3, no. 3 (2001): 364.

people, whereas the effects of cultural genocide are mostly “symbolic.”²⁹ When set against the authoritative canon of the international law against genocide, cultural genocide is thus rendered as nothing more than “a ‘wannabe’ concept.”³⁰

From this dominant perspective, the term “cultural genocide” fundamentally lacks any real legal status and therefore tends to be dismissed as a mostly rhetorical artifact that should be disregarded because it is too ambiguous or confusing. This is the argument, for example, of Payam Akhavan, a prominent Canadian legal scholar who once worked on the International Criminal Tribunal for the former Yugoslavia, and who was recently dismissed cultural genocide as “more of a ‘mourning metaphor’ than an accurate legal label, more a ‘song of bereavement’ than a specific indictment under international laws.”³¹ Akhavan is the most recent proponent of the so-called “commonsensical” position that downgrades the conceptual status of “cultural genocide” beneath the stricter legal categories of “physical” and “biological” destruction. It is not that this position rejects the underlying issue of Indigenous sufferings in terms of assimilation and cultural destruction. Rather, the problem is strictly terminological, insofar as the attempt to reduce these harms into “a precise legal taxonomy” generates a sense of conceptual confusion that apparently muddies “the present challenge of reconciliation with Canada’s Indigenous peoples.”³²

²⁹ Irving Horowitz, *Taking Lives: Genocide and State Power* (Fourth Edition) (New Brunswick: Transaction Publishers, 1997), 41.

³⁰ Payam Akhavan, “Cultural Genocide: Label or Mourning Metaphor?” *McGill Law Journal* 62, no. 1 (2016): 254.

³¹ Joseph Brean, “‘Cultural Genocide’ of Canada’s Indigenous Peoples is a ‘Mourning Label,’ former War Crimes Prosecutor Says,” *The National Post* (15 January 2016), available at <http://news.nationalpost.com/news/canada/cultural-genocide-of-canadas-indigenous-people-is-a-mourning-label-former-war-crimes-prosecutor-says>.

³² Akhavan, “Cultural Genocide,” 266 and 269.

This contested truth-claim potentially obscures deeper and more unsettling issues related to genocide, Indigenous peoples, and settler colonialism. In reproducing the dominant interpretation that encloses the law of genocide around physical and biological (not cultural) destruction, Akhavan recommits to the “commonsensical” position that rejects the concept of “cultural genocide.” Indeed, he even goes so far as to deliver what ostensibly amounted to an obituary notice, saying that the cultural genocide concept “had a short life” before it flickered out and was discarded.³³ To a certain extent, this is not an entirely unfair point. As noted, the fact of the matter is that cultural genocide is still officially excluded from the idiom of international law. However, such dismissive reasoning should not be taken too far. As noted by one scholarly proponent of the concept, “acknowledging that ‘cultural genocide’ does not fall within the scope of the [final draft of the 1948 Convention] does not mean that we cannot remain alive to the concerns which that concept is invoked to address.”³⁴ This begs the question as to the general relationship between the abandoned category of cultural genocide and the ostensibly “new” norm of cultural integrity that appears as Article 8 in the 2007 Declaration.

This dissertation pursues a genealogical analysis that connects the concepts of cultural genocide and cultural integrity in order to problematize the dominant assumptions represented in Akhavan’s argument. As inspired by the French philosopher Michel Foucault (who in turn followed Nietzsche), genealogy is a method of critical

³³ Payam Akhavan, “Cultural Genocide: When We Debate Words, We Delay Healing,” *The Globe and Mail* (10 February 2016), available at <http://www.theglobeandmail.com/opinion/cultural-genocide-when-we-debate-words-we-delay-healing/article28681535/>.

³⁴ Robert van Krieken, “Cultural Genocide in Australia,” in *The Historiography of Genocide*, ed. Dan Stone (New York: Palgrave Macmillan, 2008), 131.

discourse analysis that problematizes taken-for-granted “truths” by uncovering the power-laden structures of knowledge that prop up dominant ideas, practices, and institutions that are too easily taken for granted.³⁵ This methodology helps expose the hidden relations of power and resistance that underpin the ongoing contestation of norms. Foucault originally imagined genealogy to be a “diagnosis” or a “history of the present,” insofar as it seeks to analyze how the dominant ways of thinking and doing in the contemporary world only came to fruition because of artificial (that is to say, *social* as opposed to natural) circumstances.³⁶ As summarized by one scholar, the purpose of this approach “is to problematize the present by revealing the power relations upon which it depends and the contingent processes that have brought it into being.”³⁷ Or as Foucault himself put it, this method “disturbs what was previously considered immobile,” thereby critically challenging from below certain forms of knowledge that might otherwise be taken for granted.³⁸ We can use this approach to question dominant “truths” and to render visible their underlying power effects.

The genealogical method also provides a nuanced approach to intellectual history, one that is useful for tracing the emergence and descent of international norms. Its purpose, however, is not to search for precise origins of things in the form of “a single point or event, but as a long process or history.”³⁹ The genealogical method historicizes the messy discursive ruptures and regularities that undergird the contemporary usage of

³⁵ Michel Foucault never explicitly set forth a methodology of “genealogy.” Cf. Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (Thousand Oaks, CA: SAGE, 1999), 21-56.

³⁶ Michel Foucault, “Nietzsche, Genealogy, History,” in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 80 and 89-90; and idem, *Discipline and Punish*, 31.

³⁷ David Garland, “What is a ‘History of the Present’? On Foucault’s Genealogies and their Critical Preconditions,” *Punishment and Society* 16, no. 4 (2014): 372.

³⁸ Foucault, “Nietzsche, Genealogy, History,” 82.

³⁹ Robert Guay, “The Philosophical Function of Genealogy,” in *A Companion to Nietzsche*, 356.

socially prominent ideas, while also opening up the various and often contradictory possibilities of meaning-making.⁴⁰ According to historian Quentin Skinner, “when we trace the genealogy of a concept, we uncover the different ways in which it may have been used in earlier times. We thereby equip ourselves with a means of reflecting critically on how it is currently understood.”⁴¹ As such, we can use this approach to not only map the conceptual histories of cultural genocide and cultural integrity, but also to parse out its related semantic field that includes notions such as ethnocide, assimilation, cultural diversity, and other keywords (including, but not limited to, decolonization, sovereignty, settler colonialism, Indigenous peoples, nations, and rights).

The Dilemma of Normative Change and Structural Continuity

This dissertation uses a genealogical approach to critically understand the apparent paradox between simultaneous and competing currents of normative change and institutional continuity. We have already noted the contrast between the shifting movements on the surface level of history and underlying continuities in the deep structure of international law. Before we set up the concept of “co-optation” as a theoretical tool capable of accounting for this paradox, as well as situating such a conception within the constructivist literature on norm dynamics in IR theory, it is first worth fleshing out these divergent narrative trends towards relative degrees of hopeful optimism and critical pessimism. Great strides have been made in recent decades towards expanding the scope and content of international human rights law, as Indigenous peoples have carved out space for cultural and collective rights, thereby achieving certain gains in

⁴⁰ Foucault, “Nietzsche, Genealogy, History,” 80-86.

⁴¹ Quentin Skinner, “A Genealogy of the Modern State,” *Proceedings of the British Academy* 162 (2009): 325. Quoted in David Armitage, *Civil Wars: A History in Ideas* (New Haven: Yale University Press, 2017), 16-17.

terms of recognition and autonomy. At the same time, even with the legalization of Indigenous rights, the state-centric prerogatives of the international system have been reproduced in such a way as to perpetuate domestic systems of domination and resistance. As the popular saying goes, the more things change, the more they stay the same.

Because they can operate at the same time, patterns of normative change and continuity produce a strong tension. In our case, this is especially evident in the wide range of perspectives evident in the growing body of scholarship on Indigenous rights. The literature ranges from an optimistic spirit on the one hand, to a deeply circumspect and critical stance on the other. These two competing tendencies are not mutually exclusive, but are rather opposite positions across a shared spectrum of interpretations. In order to map out this interpretive continuum, we can highlight three prominent contributors to this literature. James Anaya, who from 2008 to 2014, was the Special Rapporteur on the Rights of Indigenous Peoples at the UN, represents the spirit of optimism. The opposing critical stance is represented by Sharon Venne, an accomplished First Nations lawyer who has been active in Indigenous rights discourse since the 1970s. Finally, the connective tissue between these two competing perspectives is highlighted by Jeff Corntassel, a political scientist and Tsalagi (Cherokee) delegate to important UN proceedings from the 1990s into the 2000s.

In the first place, the optimistic position is represented by James Anaya, a highly regarded international legal scholar of Apache and Purepecha background who recently worked in an important expert position at the UN.⁴² Thus working from within the

⁴² Explaining his original interests in the field to an interviewer, Anaya responded: “Well, I am of indigenous ancestry myself, Apache and Purepecha. So, of course, I’ve sort of grown up with concern about

institutional machinery of global governance, this position understands the need for working with the rules of the system in order to progress over the long term. Such an upward historical trajectory is evident in the following excerpt from Anaya, which captures a possibly liberal belief in progressive international norm change:

The [2007] Declaration really should be seen as simply representative of a series of broader developments. We can go back to the ILO Convention 169 on Indigenous and Tribal Peoples, a multilateral treaty adopted by the international organization in 1989, which was a revision of an earlier treaty that was adopted by the ILO in 1957. The contemporary era of indigenous activity at the international level began in the 1970s, with increasing demands made at the international level to institutions within the UN by indigenous representatives who were literally arriving at the doorstep of the UN offices in Geneva, presenting their cases and demanding attention to their situations. And this generated a shift in attitudes toward indigenous peoples. Before this, the international system regarded indigenous peoples as simply in need of being assimilated into larger societies and making sure that their rights as citizens were equal to all others. But the indigenous peoples were saying, “No, we see a different model, in which we are part of the larger society, but at the same time we remain a distinct people, and our rights as such must be recognized—we must be recognized as distinct sovereigns, as having the capacity of self-governance, within the framework of the states within which we reside.”⁴³

According to this model, the *external* sense of self-determination (“defined as the right to freedom from a former colonial power”) is safely off the table, and all that is left is self-determination in an *internal* sense (“meaning autonomy or federalism for a distinct people within a state”).⁴⁴ Given the apparently positive results over recent decades in

indigenous peoples. And when I studied law, I became interested in devoting my career to this issue and was fortunate in being able to land a job right out of law school where I was working, representing Indian tribes.” See his 2012 interview with NPR News at <http://unsr.jamesanaya.org/visit-to-usa/un-explores-native-american-rights-in-us-interview-npr-news>.

⁴³ James Anaya, “Remarks by James Anaya,” *Proceedings of the Annual Meeting (American Society of International Law)* 106 (2012): 528. Emphasis added.

⁴⁴ On “external self-determination,” see Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), 49. On “internal self-determination,” see Audrey Jane Roy, “Sovereignty and Decolonization: Realizing Indigenous Self-Determination at the United Nations and in Canada,” (MA Thesis: University of Vitoria, 1998), 27.

terms of legalization efforts, this payoff seems to have been worth it. According to Anaya's favorably disposed version of current history, the progressive expansion of cultural rights has arguably been secured by working within the status quo parameters set forth by the international system. Anaya thus says that Indigenous peoples' claim to cultural integrity can be effectively secured under "the model of a multicultural state," whereby cultural differences are recognized, albeit under the purview of the dominant sovereign authority of states.⁴⁵

Other scholars, however, have treated the outcome of the 2007 Declaration with critical circumspection. This is the perspective of Sharon Venne, for instance, a legal scholar of the Cree Nation who participated in many important UN proceedings in Geneva and New York that will later be covered in Chapter Three. Unlike Anaya's official work as part of the UN system, however, Venne's position in the field represents a radical subjectivity, one that rejects the conditions and limitations of the status quo. This outsider status is evident in the following excerpt from Venne, who situates the intellectual-history of Indigenous rights discourse around the important 1977 NGO Conference, an event that was brought forth above at the very outset:

When Indigenous peoples arrived at Geneva's Palais des Nations in 1977 for the NGO Conference ... Indigenous peoples were living under colonial domination, as is the case to this day. We could not use international mechanisms then in existence to decolonize ourselves, because the United States, Canada and other states refused to allow Indigenous peoples to use the UN Committee on Decolonization. ... We were offered a carrot that was taken. The NGO conference [of 1977] gave an opportunity for Indigenous peoples to push for our recognition. ... If we could have used other mechanisms to decolonize ourselves, we would have used them. The human rights route was open, and we decided to explore our

⁴⁵ Anaya, "Remarks by James Anaya," 528. See also idem, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State," *Arizona Journal of International and Comparative Law* 21, no. 1 (2004): 13-61. Anaya's relevant citation here references the work of an important liberal political theorist, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995).

options – it was very simple. Now we are being tarred with the brush that we only wanted our human rights. That is completely false. We wanted our rights to our territories, our lands, our resources, our treaties and our right to self-determination to be recognized and accepted by the other nations of the world as set out in the UN Charter.⁴⁶

As above with Anaya, Venne clearly faces the difficult payoff between the politically challenging claims for decolonization and a relatively easier discourse centered on culture and human rights. But unlike Anaya's optimistic impression of the relative gains made by shifting from an external to internal sense of self-determination, Venne is more inclined to see the negative outcome of this strategic dilemma. The danger at risk of being realized here is that the legalization of Indigenous rights in fact benefits settler states as much as it does Indigenous peoples. We noted already the last-minute "escape clause" inserted in part of Article 46 of the 2007 Declaration, regarding "the territorial integrity or political unity of sovereign and independent States" as a condition for Indigenous rights discourse.⁴⁷ Indeed, over the course of this dissertation, the latter will be a recurring theme, as the right of settler states to territorial integrity provides a constant limiting factor that disciplines and regulates the limits of possibility in Indigenous rights discourse. As such, Venne and others reasonably conclude that the 2007 Declaration is nothing more than "an instrument which ensures the continuance of the colonial project and is intent upon the assimilation of Aboriginal peoples."⁴⁸

⁴⁶ Sharon H. Venne, "The Road to the United Nations and Rights of Indigenous Peoples," *Griffith Law Review* 20, 3 (2011): 564.

⁴⁷ Art. 46(1), United Nations Declaration on the Rights of Indigenous Peoples.

⁴⁸ Irene Watson and Sharon Venne, "Talking up Indigenous Peoples' Original Intent in a Space Dominated by State Interventions," in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* eds. Stephen Allen and Alexandra Xanthaki (Portland, OR: Hart, 2011), 88.

The historical narratives represented here by Anaya and Venne pull in opposite directions. On the one hand, there has indeed been a very real “shift in attitudes toward indigenous peoples,” as Anaya put it, especially after the 1970s.⁴⁹ The advancement of Indigenous rights discourse has benefited from the post-1970s “breakthrough” in international human rights highlighted by historian Samuel Moyn and others.⁵⁰ After this important turning point, Indigenous peoples were able to potentially co-opt the institutional machinery of the UN human rights system. For instance, Indigenous peoples have succeeded in carving out an institutional space for them at the UN by forcing an exception to official rules that regulate outside participation.⁵¹ The organizational advancement of Indigenous rights at the UN reflects broader cultural changes signified by the spread of multiculturalism and cultural diversity. As a result, real progress has been achieved through the legalization of Indigenous rights discourse.

On the other hand, we are nevertheless confronted with the “the continuance of the colonial project” recognized by Venne, who instead critically exposes the institutional and discursive limits imposed on Indigenous rights discourse.⁵² Indeed, a critical reading of the drafting process behind the 2007 Declaration, as provided in Chapter Four, unearths a number of controversial and contested arguments over the final text, including not just those behind Article 8 on *cultural integrity* but also Article 46 on *territorial*

⁴⁹ Anaya, “Remarks by James Anaya,” 528.

⁵⁰ Jan Eckel and Samuel Moyn, *The Breakthrough: Human Rights in the 1970s* (Philadelphia: University of Pennsylvania Press, 2014).

⁵¹ On the exceptional participatory space of Indigenous peoples through the UN, see Elsa Stamatopoulou, “The Challenge of Time and Responses of International Human Rights Law,” in *Indigenous Peoples’ Access to Justice, Including Truth and Reconciliation Processes*, eds. Wilton Littlechild and Elsa Stamatopoulou (New York: Institute for the Study of Human Rights, 2014), 205: “States allowed the birth of exceptional, unprecedented and extensive participatory procedures for Indigenous Peoples – which, in turn, increased the numbers of Indigenous representatives at the UN as well as their overall political impact.”

⁵² Watson and Venne, “Talking up Indigenous Peoples’ Original Intent,” 88.

integrity. From this critical perspective, the “language game” involved with the drafting process were colored by a deeper or underlying structure of hegemony. At the very least, the legalization process tends to have a systemic bias towards perpetuating the basic structure of the status quo. As discussed further below, rights can thus be dispensed as a “gift” of symbolic violence.⁵³ In this way, the state recognition of Indigenous rights can create a lasting hold over Indigenous peoples themselves. The appearance of positive norm change may just be superficial, as the underlying continuity of Indigenous-state relations remains largely the same as before.

Despite their tension, the competing perspectives symbolized by Anaya and Venne are not mutually exclusive. As noted, they share the same conceptual space across a range or continuum of interpretations. Our third representative, Jeff Corntassel, exemplifies the connective tissue between the competing perspectives of Anaya and Venne. We can zoom in on this connective tissue by highlighting two representative publications by Corntassel in the esteemed academic journal, *Human Rights Quarterly*, the first of which is from 1995 and the second from 2007. In the first article, Corntassel and his co-author reflect upon the strategic dilemma of post-1970s Indigenous rights discourse. In order to remove a key source of anxiety regarding the specter of secession, this 1995 article eschewed the type of rights discourse associated with sovereignty and decolonization, instead favoring the relatively easier discourse centered on culture and human rights. Along the lines of reasoning modeled by Anaya, the authors urged greater

⁵³ In the Bourdiean sense, a “gift” can operate as a form of symbolic violence, or that “gentle, invisible form of violence, which is never recognized as such.” Pierre Bourdieu, *Outline of a Theory of Practice* (Translated by Richard Nice) (New York: Cambridge University Press, 1977), p. 192. See also Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Toronto: University of British Columbia Press, 2005), 36.

focus “on the right of ‘cultural integrity’ rather than ‘self-determination’ as currently defined under international law.”⁵⁴

Yet by the time of Corn tassel’s second article in 2007, his perspective had shifted further from Anaya and more towards Venne’s end of the spectrum, where the concern is how the legalization of Indigenous rights has effectively reproduced forms of colonial power. Published twelve years later, Corn tassel’s second piece was no longer concerned with the potential blowback behind the choice to co-opt the political-legal vocabulary of sovereignty and self-determination. Rather, the concern here was the more general harm involved with the co-optation of Indigenous rights within the UN system. Later we will examine how Corn tassel’s two articles illustrate two distinct theories of co-optation (the so-called *liberal theory of co-optation* is evident in the first one, whereas the *critical theory of co-optation* is present here in the second piece). The theoretical distinction here signifies the multiple dimensions of power and resistance that are involved with the process of absorbing outside actors into dominant institutions.

In sum, these three scholarly positions raise an inherent tension in Indigenous rights discourse between the quest for emancipation and the struggle against domination. Whereas the former is illustrated by Anaya’s liberal sense of optimism, the latter is covered Venne’s radical sense of critique. Although these two perspectives tend to pull in opposite directions, they are not mutually exclusive. After all, it might be possible to maintain hopeful while remaining couched in resistance. In any case, the inherent connection between these two perspectives is captured by transformation of Corn tassel’s approach to the dangers of co-optation. As such, we have come to a crucial question of

⁵⁴ Jeff J. Corn tassel and Thomas Hopkins Primeau, “Indigenous ‘Sovereignty’ and International Law: Revised Strategies for Pursuing ‘Self-Determination’,” *Human Rights Quarterly* 17, no. 2 (1995): 363.

this dissertation: For all of the promises inspired by normative change, to what extent are there broader or underlying systemic continuities?

Power and International Norm Dynamics

Stated differently, is it possible that the 2007 Declaration is both a promising step in the advancement of rights, as well as a subtle instrument of continued domination?

This is not necessarily an “either-or” conundrum. As hinted at before, the complex historical dynamics involved with ongoing structures of power and resistance belie any simple Manichean calculation between good and bad. International norms are simply too complex to be entirely one way or another. Human rights discourse is especially “Janus-faced,” given the internal contradiction between its egalitarian universalism on the one hand, and its reliance on the compulsory power of particular legal systems on the other.⁵⁵ As discussed later in the Introduction, rights can be “simultaneously liberatory and subjectifying” and “both emancipatory and regulatory.”⁵⁶ Faced with this conundrum, we will eventually set forth a theoretical framework of co-optation in order to face this perplexing dilemma of normative change and continuity.

In order to situate the forthcoming analysis of the co-optation of international norms, this dissertation speaks to a growing constructivist body of IR literature on *norm dynamics*. This refers to the process in which norms “emerge, diffuse, become internalized, and, once established, become subject to change resulting in their strengthening, weakening, or even erosion.”⁵⁷ Although this body of scholarship is based

⁵⁵ On the “Janus face of human rights,” see Jürgen Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights,” *Metaphilosophy* 41, no. 4 (2010): 464.

⁵⁶ Golder, *Foucault and the Politics of Rights*, 22 and 91.

⁵⁷ Carmen Wunderlich, “Theoretical Approaches in Norm Dynamics,” in *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice*, eds. Harald Müller and Carmen Wunderlich (Athens: University of Georgia Press, 2013), 20.

in a relatively small corner of the much larger tradition of IR theory, it speaks to a fundamental concern in the discipline about the various forms and uses of *power*, both in the material and ideational dimensions of the term.⁵⁸ Thus, to help map out the location of this particular research program within the larger discursive formation of IR theory, we can outline the historiography of the discipline while tracing over a multifaceted theoretical framework behind the concept of *power*.

The following discussion thus brings together a popular constructivist account of power in global governance with a postcolonial critique of IR theory as a discursive formation. In the first place, there is Michael Barnett and Raymond Duvall's four-part typology of power in global governance which broadly track with the "family tree" of the entire discipline, covering the dominant paradigms of realism, liberalism, Marxism, and constructivism.⁵⁹ Secondly, Anna M. Agathangelou and L.H.M. Ling have imagined the disciplinary structure of IR theory as like a "colonial household," thereby foregrounding the role of power (and resistance) in the constitution of knowledge.⁶⁰ By bringing together these two conceptual maps of the discipline, we will then be ready to situate a theory of co-optation as part of the constructivist literature on norm dynamics.

⁵⁸ "Power is the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate." Michael Barnett and Raymond Duvall, "Power in Global Governance," in *Power in Global Governance*, eds. Michael Barnett and Raymond Duvall (New York: Cambridge University Press, 2005), 3.

⁵⁹ The metaphor of IR theory as a "family tree" is not used by Barnett and Duvall, or any of the other related works cited here. It is instead used here more as a nod to Wiggstein. See James J. Snow, "'Don't Think but Look': Using Wittgenstein's Notion of Family Resemblances to Look at Genocide," *Genocide Studies and Prevention* 9, no. 3 (2016): 161-164.

⁶⁰ Anna M. Agathangelou and L.H.M. Ling, "The House of IR: From Family Power Politics to the *Poiesies* of Worldism," *International Studies Review* 6 (2004): 21-49.

Forms of Power in the “Colonial Household” of IR Theory

As we proceed to outline a discursive map of the discipline, we begin with perhaps the most extreme (if not the most familiar) form of power, particularly the power of a state to kill and destroy on a massive scale. This basic image of raw power was essentially naturalized by classical realism, which refers to a body of seminal mid-20th century works that is traditionally positioned at the head of the “colonial household” of IR theory.⁶¹ Realism takes for granted what Barnett and Duvall identify as *compulsory power*, defined simply as one’s direct control over another.⁶² This is power in its rawest, most direct form. As said by Hans Morgenthau (one of the “founding fathers” of realism), “when we speak of power, we mean man’s control over the minds and actions of other men.”⁶³ Power is understood here as control over something, as in to the power to dominate, subjugate, and destroy on a massive scale. Genocide, in its most extreme form, is perhaps the ultimate example of compulsory power. Yet even with the subtler forms of group destruction implied by the category of “cultural genocide,” or even with more general pressures for erasing cultural differences as part of the “normal” state process of integrating outsiders, compulsory power still exists as a form of direct control of one over the other. In this image, power is differentially appropriated according to a zero-sum logic which can only be measured through material resources, especially in terms of the strategic capacity to wage violence. As suggested, such foundational violence was largely assumed and taken for granted by realism, where non-material factors such as ideas were

⁶¹ Ibid, 23.

⁶² Barnett and Raymond Duvall, “Power in Global Governance,” 13-15.

⁶³ Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1949), 13.

only said to matter to the extent in which they naturalize the compulsory power exercised by modern states.⁶⁴

The canonization of realism in the “colonial household” of IR will be further analyzed in Chapter One, when we examine the historical context of mid-20th century transformations in global governance. There we will trace the naturalization of sovereignty as a state-centric norm at the heart of international organizations, including both the League of Nations and the UN. According to the institutional rules and regulations put into place by this systemic legacy, sovereign status and recognition has been put off limits to Indigenous peoples. During this foundational period, moreover, it seemed to be entirely “natural” for Indigenous peoples to be relegated under the domestic jurisdiction of states, just as practices of assimilation were deemed to be normal policies for the modern state of the mid-20th century. Indeed, the direct control of states over Indigenous peoples (as well as other minority populations) is ultimately backed by compulsory power. Yet during this historical period, such power was hidden from view, thereby setting forth a long-standing institutional bias towards the preservation of the state as the primary and exclusive agent of power in world politics. According to Barnett and Duvall, realism’s straight-forward perspective of compulsory power has since become so privileged in the discipline of IR that it has created a “theoretical tunnel vision that causes scholars to overlook other forms and effects of power.”⁶⁵

Yet realism was not alone in perpetuating a systemic bias towards the fundamentally state-centric structure of the contemporary global order. Complementing

⁶⁴ Cf. Michael C. Williams, “Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics,” *International Organization* 58, no. 4 (2004): 634.

⁶⁵ Michael Barnett and Raymond Duvall, “Power in International Politics,” *International Organization* 59, no. 1 (2005): 40.

the strict, paternalistic command of “*pater* realism” was the softer touch of “*mater* liberalism.”⁶⁶ Whereas the former ruled through the “iron fist,” the latter operates through the “velvet glove” of persuasion.⁶⁷ Moreover, to the extent that “*pater* realism” looks outward to international arena of great power politics, “*mater* liberalism” is more open to domestic concerns. Together this spousal companionship was responsible for jointly naturalizing the intrinsic violence behind state-Indigenous relations, for whereas “*pater* realism” has denied Indigenous peoples’ entry to the international sphere of global governance, “*mater* liberalism” has subsumed Indigenous peoples under the domestic sphere. In that sense, the historical origins of Indigenous rights discourse, as covered in Chapter Two, were strictly conceived as an internal policy issue of states. So despite crucial difference between the raw force assumed by “*pater* realism” and the relatively gentler form favored by “*mater* liberalism,” both were nevertheless in sync with a common commitment to preserving the status-quo international system, as defined by the rules of sovereignty and capitalism.

Still, the different approaches to power from “*pater* realism” and “*mater* liberalism” are revealing. Rather than the direct application of compulsory power that is championed by the former, the latter opts for a more indirect approach referred to as *institutional power*. This is seen, for example, in the liberal commitment to international organizations that serve to strengthen interdependence and facilitate the convergence of interests, thereby serving the positive-sum gains promised by the pursuit of economic growth. In Chapter Two, the disciplinary tradition of liberalism will be set against the

⁶⁶ Agathangelou and Ling, “The House of IR,” 24.

⁶⁷ Quintin Hoare and Geoffrey Nowell Smith, “Introduction,” in Antonio Gramsci, *Selections from the Prison Notebooks* (Trans. Quintin Hoare and Geoffrey Nowell Smith) (New York: International, 1971), xxxvi.

emergence of developmentalism and the language of “integrationism” that dominated the formation of the ILO regime in Indigenous rights discourse.

Yet when Chapter Three turns to the crucial post-1970s turning point, we will see how these new keywords – *development* and *integration* – were challenged and altered in the context of neoliberalism. Agathangelou and Ling identifies the latter as one of “the good daughters of the House of IR,” reproducing the market-based approach inherited from “*mater* liberalism” but with a new face, hence the prefixed term, *neoliberalism*. As we will see, the revision of the ILO regime in the late 1980s can be set against contemporaneous mutations in the structure of the global political economy. Coincidentally, the post-1970s turn to neoliberalism was accompanied by the sudden “breakthrough” of human rights as a powerful (yet contradictory) force in global affairs.⁶⁸ On the one hand, this concurrent transformation of the global economic structure as well as the normative landscape of world politics opened an opportunity for Indigenous rights advocates to organize at the international level and begin pressuring for institutional reform. On the other hand, this opportunity structure was still couched within the parameters set forth by the head of the “colonial household.”

These conundrums set forth by the post-1970s turning point can be registered in terms of what is called *structural power*. According to this position, the basic capacity of a subject to do anything is conditioned by their position in larger social structures.⁶⁹ The inherent inequality that defines these structured conditions have been called out by the “rebel sons” of the “colonial household,” as a significant branch of the IR “family tree”

⁶⁸ Samuel Moyn, “A Powerless Companion: Human Rights in the Age of Neoliberalism,” *Law and Contemporary Problems* 77, no. 4 (2014): 147-169.

⁶⁹ Barnett and Duvall, “Power in International Politics,” 18.

has followed in the tradition of Marxism.⁷⁰ According to this paradigm, the essence of structural power is epitomized by the master-slave dialectic, as well as the relationship between capital-labor. In the spirit of neo-Gramscianism, which is a particularly important limb from this part of the IR “family tree,” these unequal and oppressive systems are maintained by “the velvet glove” as well as “the iron fist.”⁷¹ That is to say, systems of domination are reproduced not simply through the overt imposition of compulsory power from above, but rather through more or less subtle nudges towards greater complicity from below.⁷² Agathangelou and Ling call this intellectual tradition the “rebel son” of the discipline, insofar as it stands against the apparent hubris of the *pater-mater* couple at the head of the IR “household” by critically questioning the arbitrary rules that define the status quo. This tradition is *critical* because it seeks “to liberate human beings from the circumstances that enslave them.”⁷³

This materialist critique of political economic structures sets up Chapter Four, which marks the final stage of the co-optation thesis highlighted below. As the intellectual-historical developments under review here culminated in the adoption of the 2007 Declaration, with its all-important innovation in the form of Article 8, structural power remained at work in reproducing the unequal relationship between settler states and Indigenous peoples. So while the value of Indigenous peoples in terms of cultural diversity, as well as the corollary right to cultural integrity, have both become accepted as

⁷⁰ Agathangelou and Ling, “The House of IR,” 28.

⁷¹ Quintin Hoare and Geoffrey Nowell Smith, “Introduction,” in Antonio Gramsci, *Selections from the Prison Notebooks* (Trans. Quintin Hoare and Geoffrey Nowell Smith) (New York: International, 1971), xxxvi.

⁷² T.J. Jackson Lears, “The Concept of Cultural Hegemony: Problems and Possibilities,” *American Historical Review* 90, no. 3 (1985): 567-593; and Robert W. Cox, “Labor and Hegemony,” *International Organization* 31, no. 3 (1977): 387.

⁷³ Max Horkheimer, *Critical Theory* (New York: Seabury Press, 1982), 244.

part of international human rights discourse, the basic underlying structures of settler colonialism remain in place. We thus return to a recurring theme of this dissertation, that rights are not only tools of emancipation but of social control as well. Faced with this conundrum, this dissertation thus remains crucially committed to the emancipatory spirit alluded to above. At the same time, I am cautious not to take that commitment too far, wary as I am of the possibility that Indigenous rights discourse is essentially an ideological form of “false consciousness.”

Although this latter argument poses as a very real threat in the form of co-opting rights discourse, such a negative outcome is not necessarily preordained or overly deterministic. At this point in my argument, we thus turn to the final category in our four-part typology of power: *productive power*. As with the previous category of structural power, the latter category seen here is also concerned with the ways in which political economic structures determine the differential capabilities of subjects within the system. However, whereas the former category shows how structural power works directly to specify subject positions, *productive power* concerns the ways in which diffuse social relations, discourses, and processes of meaning-making not only produce the very identities of subjects but also determine their capabilities.

As agents of productive power, Indigenous peoples are ambiguously positioned within the “colonial household” metaphor. Following Agathangelou and Ling, we could describe Indigenous peoples as “native informant servants” who were relegated to the basement of the “household” as some kind of “domestic Other.”⁷⁴ While this may have historically been the case, at least until recently, it was not always like that, nor must it be

⁷⁴ Agathangelou and Ling, “The House of IR,” 30.

in the future. After all, there is a deep history of “Indigenous diplomacies” that long predates the arrival of colonialism.⁷⁵ In some cases, Indigenous diplomacies carried over into relations with European empires and sometimes even settler colonial states, as evidenced by the history of treaty relations in the United States, Canada, and New Zealand. In this sense, Indigenous peoples have been (and are perhaps once again becoming) autonomous, self-determining subjects who stand altogether outside of the “colonial household.” From this outsider position, beyond the purview of settler states and as more or less independent actors in world politics, Indigenous peoples have been active participants in the creation of international norms. Thus, in response to the fears implied by the “false consciousness” suggestion, we can at the very least say that Indigenous rights discourse represents an important counter-current against the status quo.

Before turning to the constructivist literature on norm dynamics, as well as where the theory of co-optation fits in, one final word about *power* is necessary. As noted, this dissertation is employing a Foucauldian approach towards genealogy in order to describe the conditions in which norms both mutate across historical contexts. Accordingly, a brief review of Foucault on power and resistance is in order. Power is thus understood not as a possessive thing but as a facility, or a way of doing things, one that permeates all social relationships.⁷⁶ The omnipresence of power may seem like it forecloses the possibility of resistance. If knowledge and power are continuously reproduced through social structures, then it seems impossible to escape such structures without reproducing them.

⁷⁵ J. Marshall Beier, ed., *Indigenous Diplomacies* (New York: Palgrave, 2009).

⁷⁶ Foucault, “The Subject and Power,” *Critical Inquiry* 8, no. 4 (1982): 788-789.

As Foucault said, “resistance is never in a position of exteriority in relation to power.”⁷⁷

That is to say, resistance does not operate outside of the systems of power against which it is positioned. So if resistance is necessarily constrained within dominant relations of power, then is resistance doomed to defeat?

This will remain an open question for the time being, as the forthcoming discussion on co-optation provides a suitable framework with which to address this apparent conundrum. Yet the more conceptual point here concerns the co-dependent relationship between power and resistance, as the latter is an inevitable symptom of the former. Relations of power and resistance are necessarily unequal and asymmetrical, but it is never a one-way street, as the behaviors of both the dominator and the dominated are constrained by pressures from one another.⁷⁸ Following Lila Abu-Lughod, we can thus use evidence of “resistance as a *diagnostic* of power.”⁷⁹ That is to say, resistance can “help detect historical shifts in configurations or methods of power.”⁸⁰

In sum, Barnett and Duvall’s four-part typology of power is reflected in Agathangelou and Ling’s illustration of IR theory as a “colonial household,” thereby setting up the bigger picture behind the apparent dilemma of normative change and continuity. Next we will review the constructivist literature on international norm dynamics. Not only will the following discussion describe how productive power is realized through norms, but we will further establish the forthcoming co-optation thesis that gets to the heart of this Janus-faced paradox of rights discourse.

⁷⁷ Michel Foucault, *History of Sexuality*, Vol. I. *An Introduction* (translated by Robert Hurley) (New York: Vintage, 1990 [1978]), 95.

⁷⁸ “Where there is power, there is resistance.” Ibid. See also James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990).

⁷⁹ Lila Abu-Lughod, “The Romance of Resistance: Tracing Transformations of Power through Bedouin Women,” *American Ethnologist* 17, no. 1 (1990): 42, emphasis original.

⁸⁰ Ibid, 48.

The Study of International Norms

The preceding analysis of power did not focus exclusively on norms, as our primary goal was to the broader intellectual background of IR theory. Now we are ready to proceed more specifically into a particular branch of the IR “family tree” that derives from *constructivism*. This paradigm does not easily fit into the image of IR theory as a colonial household. Although the first wave of constructivist literature during the 1990s reconciled the dominant *pater-mater* pairing of realism and liberalism, more recent iterations of this research program have taken a more critical edge. As such, the following historiographical review will briefly trace the emergence of constructivism and the subsequent expansion of research into international norm dynamics. As we trace the contours of the constructivist research program on norm dynamics, let us first situate the question of why and how norms matter within the broader discipline.

Turning back to the “family tree” of IR, the familiar starting point is once again realism, a paradigm that is built on the premise that the international system is anarchical, meaning that a central authority is absent. Accordingly, realists argue that states will rationally pursue their own interests. State power is the primary, if not the only, variable in the rational pursuit of interests. Realism offers little insight into the dynamics of normative change, per se, as it is more concerned with how the balance of power between sovereign states maintains order and stability in an anarchical international system. If considered at all, norms and rules are seen as instruments to be used in pursuit of the self-interests of states.⁸¹ States will supposedly only endorse human rights accords because it is perceived to be in their interests to do so. For example, there may be reputational

⁸¹ Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (Second ed.) (New York: Harper & Row, 1964 [1946]), 81; and Kenneth N. Waltz, *Theory of International Politics* (Reading, Mass.: Addison-Wesley, 1979), 200.

benefits to be earned or costs to be avoided.⁸² Thus, the realist explanation of norms are based on a “logic of expected consequences,” whereby decisions are made as a result of a rational calculating behavior.⁸³

By the early 1990s, the dominance of realism in IR theory was challenged by the emerging paradigm of constructivism. Whereas the realism tends to take the identities and interests of states as given, constructivism asks how these identities and interests are socially constructed. In contrast to the rationalist underpinning of the former, which is based on a “logic of expected consequences,” the social theories that make up constructivism are based on a different logic of action. Referred to as the “logic of appropriateness,” actors behave in accordance with certain “identities, rules, and institutions.”⁸⁴ Rather than the single-minded pursuit of rational self-interest, this logic of action is shaped by “collective expectations for the proper behavior of actors with a given identity.”⁸⁵ Insofar as this first wave of constructivism was forced to argue with the once dominant realist paradigm, early contributions simply contended “that norms matter.”⁸⁶ Early works in constructivism empirically demonstrated the effectiveness of norms across a variety of issue areas, including national security, human rights, and foreign aid.⁸⁷ This

⁸² Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 122; and Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), 107-34.

⁸³ James G. March and Johan P. Olsen, “The Institutional Dynamics of International Political Orders,” *International Organization* 52, No. 4, (1998): 949.

⁸⁴ *Ibid.*, 951.

⁸⁵ Peter J. Katzenstein, “Introduction: Alternative Perspectives on National Security,” in *The Culture of National Security: Norms and Identity in World Politics*, ed. Peter J. Katzenstein (New York: Columbia University Press, 1996), 5.

⁸⁶ Jeffrey T. Checkel, “International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide,” *European Journal of International Relations* 3, no. 4 (1997): 473.

⁸⁷ Katzenstein, ed., *The Culture of National Security*; Audie Klotz, *Norms in International Relations: The Struggle against Apartheid* (Ithaca: Cornell University Press, 1995); and David H. Lumsdaine, *Moral Vision in International Politics: The Foreign Aid Regime, 1949-1989* (Princeton: Princeton University Press, 1993).

first wave of constructivist norm research, otherwise referred to as *conventional constructivism*, provided a number of theoretical models that explain how norms influence the behavior of actors in world politics.

Perhaps the most prominent theory from conventional constructivism is Finnemore and Sikkink's three-stage "life cycle" model of norms. Norm emergence is the first stage of this evolutionary model, which begins with the work of "norm entrepreneurs," or inspiring individuals who attempt to persuade a critical mass of states and other actors to adopt new prescriptive rules for how they ought to behave. For example, Chapter One positions Raphael Lemkin as a "norm entrepreneur" who sought to convince states to respect peoples' basic right to existence. Similarly, the post-1970s turning point behind the contemporary Indigenous rights movement can be seen as a pioneer in the emergence of a new normative framework. In cases such as these, once a certain level of international consensus is reached, the norm "life cycle" hits a tipping point, which in turn ushers in the second phase of the process, referred to as a "norm cascade." At this stage of the "life cycle" process, as more and more states endorse the new norm, a dynamic of socialization is said to take hold. Once the new norm is widely accepted, they can achieve a certain "taken-for-granted" quality. At this third and final stage of the "life cycles," norms are said to be "internalized" by international actors.⁸⁸ The prohibition of genocide has presumably reached this point, given its status as customary law, although the internalization of Indigenous rights remains to be seen.

A number of other similarly structured theories have followed Finnemore and Sikkink's "life cycle" model. For example, the so-called "boomerang effect" and the

⁸⁸ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887-917.

“spiral model” both explain the process in which norms emerge and become effective through an interplay between the domestic and international levels of analysis.⁸⁹ The conventional constructivist research program on norm dynamics also includes a number of other less well-known but equally relevant contributions, such as theories of norm “regress” and “degeneration,” which conversely explain how once dominant beliefs and behaviors are revised, replaced, or even rejected by new arguments and ideas.⁹⁰ As they pertain to the specific international norm represented by Article 8 of the 2007 Declaration, for example, these theoretical tools can potentially explain the positive “life cycle” of the norm against cultural genocide as an outcome of the “norm death series” of previous assimilationist standards in Indigenous rights discourse.⁹¹ In other words, the apparently successful rise of the new international norm of cultural integrity was presumably made possible by the concurrent fall of older expectations related to the normalcy of assimilation.

Yet these alternative explanations from the constructivist literature fail to offer a satisfactory account of the puzzle of simultaneous normative change and continuity, as described above with the opposing perspectives represented by Anaya and Venne. How is it possible that the emergence of contemporary Indigenous rights discourse involves the

⁸⁹ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); and Thomas Risse and Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practices: Introduction,” in *The Power of Human Rights: International Norms and Domestic Change*, eds. Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (New York: Cambridge University Press, 1999), 1-38.

⁹⁰ Ryder McKeown, “Norm Regress: US Revisionism and the Slow Death of the Torture Norm,” *International Relations* 23, no. 1 (2009): 5-25; Diana Panke and Ulrich Petersohn, “Why International Norms Disappear Sometimes,” *European Journal of International Relations* 18, no. 4 (2011): 719-742; and Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (New York: Oxford University Press, 2009).

⁹¹ For the “norm death series” as the inversion of the “norm life cycles,” see McKeown, “Norm Regress,” 6.

progressive transformation of international norms on the one hand, and the hegemonic reproduction of colonial power on the other hand? The right of Indigenous peoples to be free from forcible assimilation and cultural destruction may have become successfully institutionalized in the overlapping fields of international law, human rights, and global governance, but that does not necessarily mean that this development has entirely overturned the once dominant patterns of assimilation and integration. As noted, however, this is not an either/or situation, in which an emergent norm like Article 8 either succeeds or fails to radically change the status quo. Rather, this is an example of an ongoing contestation of norms. What is needed, therefore, is a theoretical framework that can describe and explain this underlying normative ambiguity.

Given the limitations of conventional constructivism in dealing with the dilemma of normative change and continuity as an element of power relations, an emerging body of scholarship referred to as *critical constructivism* has emerged over the past decade or so. This work has developed multiple avenues of critiques. For example, conventional constructivists tend to censor material factors, accounting for normative change at the expense of the continuation or reproduction of power relations.⁹² Similarly, the first wave of constructivist research was biased towards progressive or “good” norms, such as human rights and democracy, thereby tacitly suggesting a normative teleology reminiscent of the late 19th century “civilizing mission.”⁹³ Finally, the dominant models

⁹² Laura K. Landolt, “(Mis)Constructing the Third World? Constructivist Analysis of Norm Diffusion,” *Third World Quarterly* 25, no. 3 (2004): 582-585.

⁹³ Stephan Engelkamp, Katharina Glaab, and Judith Renner, “Office Hours: How (Critical) Norm Research Can Regain Its Voice,” *World Political Science* 10, no. 1 (2014): 61-89; Charlotte Epstein, “Stop Telling Us How to Behave: Socialization or Infantilization?” *International Studies Perspectives* 13, no. 2 (2012): 135; and Naeem Inayatullah and David Blaney, “The Dark Heart of Kindness: Norms Constructivism as Deflection,” *International Studies Perspectives* 13, no. 2 (2012): 164-175.

of conventional constructivism are too often overly linear, assuming a one-way causal process of socialization that fails to account for resistance or contestation.⁹⁴

This dissertation follows critical constructivism in treating norms not as fixed, stable entities, but as dynamic and contentious processes. In other words, in order to register the ambiguity of normative change and continuity as two sides of the same coin, so to speak, it is helpful to see norms not as *things*, per se, which have stable boundaries and a uniform set of features. Rather, norms are *processes* that are intrinsically unstable and often essentially contested.⁹⁵ To the extent that they define the rules to fields like international law, human rights, and global governance, international norms may be considered instrumental objects, but only in the sense that they are in a perpetual state of becoming, as multiple actors can use these instruments to different political ends. The status of international norms as objects in global affairs is thus neither permanent nor universal, as the process of defining the rules of the world is constantly shifting as a result of ongoing relations of power and resistance. Accordingly, international norms like Article 8 of the 2007 Declaration are inherently ambivalent. Indeed, all forms of rights, including the entire corpus of human rights and Indigenous rights, can simultaneously operate as instruments of social control *as well as* emancipation.⁹⁶

A Theoretical Framework of Co-optation

We are thus faced with the tensions produced by opposing pressures for normative change and continuity that have been at stake in the intellectual-historical

⁹⁴ Landolt, "(Mis)Constructing the Third World?" p. 586; Epstein, "Stop Telling Us How to Behave," p. 139; and Alan Bloomfield, "Norm Antipreneurs and Theorising Resistance to Normative Change," *Review of International Studies* 42, no. 2 (2016): 313-314.

⁹⁵ Antje Wiener, "Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations," *Review of International Studies* 35, no. 1 (2009): 175-193; Krook and True, "Rethinking the Life Cycles of International Norms."

⁹⁶ Golder, *Foucault and the Politics of Rights*, 91.

transition from cultural genocide to cultural integrity. Previously this was referred to as the Janus-faced paradox of human rights, insofar as rights can operate simultaneously as tools of emancipation as well as domination. This tension was further evident in the positions highlighted above by Anaya and Venne, both of which remain valid perspectives in the historiography of Indigenous rights despite their apparent disagreement. Our third example from above, Jeff Corntassel, covered both ends of the interpretative spectrum, and his intellectual-biographical shift revealed important insights into the multiple dimensions of co-optation.

Thus, we finally arrive at the crucial theoretical and argumentative juncture that threads together the entirety of the dissertation, which seeks to address the hidden mechanisms that might explain this Janus-faced paradox. This is where the concept of *co-optation* can potentially address both sides of the coin by accounting for both positive gains made by international norm dynamics, while also identifying the risks of reproducing and perpetuating ongoing systems of power and resistance. In order to unpack this concept, we can sketch out its intellectual career across at least four theoretical traditions, or what we are calling the *organizational, liberal, critical, and dynamic theories of co-optation*. By the end of this section, we will have thus outlined the multiple dimensions of co-optation as a mechanism that mediates the intrinsic relationship between power and resistance.

The Organizational Theory

In the first place, the concept of co-optation descends from a classic study in organizational theory published over a half-century ago, when it was first defined as “the process of absorbing new elements into the leadership or policy-determining structure of

an organization as a means of averting threats to its stability or existence.”⁹⁷ This definition of comes from the seminal work from the late 1940s by American sociologist Philip Selznick, who sought to explain relations between the Tennessee Valley Authority (TVA), a federally owned corporation established in 1933 as part of the New Deal, and important local institutions in the rural communities where it served. As a “living social organization,” Selznick explain, the TVA was “caught up in and shaped by its institutional environment.”⁹⁸ Following this organic model, he presented co-optation as an institutional self-defense mechanism in which recalcitrant outsiders from the grassroots level were absorbed into the overall command structure of the TVA.

Although an institutional history of the TVA is somewhat removed from our focus on international human rights law, this example does tap into an ongoing thread of analysis concerning developmentalism and modernization theory. A product of his times, Selznick largely took these ideologies for granted. A more critical (and current) approach towards this discursive strand is inspired by James C. Scott’s *Seeing Like a State*. In fact, Scott specifically identified the TVA, which he called “the granddaddy of all regional development projects” in the United States, as a quintessentially “high-modernist experiment.”⁹⁹ According to Scott, “high-modernism” was an ideology that

is best conceived as a strong, one might even say muscle-bound, version of the self-confidence about scientific and technical progress, the expansion of production, the growing satisfaction of human needs, the mastery of nature (including human nature), and, above all, the rational design of social order commensurate with the scientific understanding of natural laws.¹⁰⁰

⁹⁷ Philip Selznick, “Foundations of a Theory of Organization,” *American Sociological Review* 13, no. 1 (1948): 34; and idem, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (Berkeley: University of California Press, 1949), 13 and 259.

⁹⁸ Ibid, 12.

⁹⁹ James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), 6.

¹⁰⁰ Ibid, 4.

The spirit of “high-modernism” provides a crucial subtext behind the organizational theory of co-optation. After all, the mid-20th century intellectual-historical context of American sociology in which Selznick emerged was broadly modeled to reflect the contemporaneously dominant paradigm of mass production and economic growth.¹⁰¹

In light of this intellectual background, it should be noted that the organizational theory of co-optation has an inherent institutional or systemic bias towards the status quo. Selznick’s classic study, *TVA and the Grass Roots*, was not at all written as a handbook for radicals. Such a critical approach would emerge only later, in the context of the post-1970s turning point, as discussed below. Rather, the organizational theory of co-optation shows how powerful bureaucracies sometimes adapt in response to changes in its institutional environments. Indeed, co-optation was conceived as a self-defense mechanism in which a centralized authority adaptively responds to potential challenges by bringing recalcitrant outsiders into the internal policymaking system of an institution. In other words, when the legitimacy of organization is questioned, co-optation serves an administrative means of survival, as challengers are incorporated into the dominant system. This internalization of outsiders is key to the logic of self-preservation. As Selznick explained, co-optation involves “the process of absorbing new elements into the leadership or policy-determining structure of an organization as a means of averting threats to its stability or existence.”¹⁰² Thus, the basic strategy behind the organizational

¹⁰¹ George Steinmetz, “American Sociology before and After World War II: The (Temporary) Settling of a Disciplinary Field,” in *Sociology in America: A History* (Chicago: University of Chicago Press, 2007), 314.

¹⁰² Selznick, “Foundations of a Theory of Organization,” 34; and idem, *TVA and the Grass Roots*, 13 and 259.

theory of co-optation is to preserve the dominant system of power by (counterintuitively) bringing in the opposition.

As a self-defense mechanism, Selznick said that co-optation works two ways. On the one hand, what he called “formal” co-optation involves the public sharing of responsibility for and participation in “the exercise of authority ... *with or without the actual redistribution of power itself*.”¹⁰³ Clarifying this emphasized portion, he added that, “in general, the use of formal cooptation by a leadership does not envision the transfer of actual power.”¹⁰⁴ In other words, formal co-optation may (but not necessarily) possibly result in nothing more than superficial gestures towards the inclusion of recalcitrant outsiders. On the other hand, however, “informal” co-optation involves a relatively more secretive or tacit arrangement, one that entails greater costs and concessions on behalf of the dominant organization, as outside elements are brought into more serious roles in the policymaking process, thereby possibly resulting in more substantive changes. As he summarized, “coöptation [his spelling] which results in an actual sharing of power will tend to operate informally, and correlatively, coöptation oriented towards legitimization or accessibility will tend to be effected through formal devices.”¹⁰⁵ These two types suggests a crucial metric of the effects of co-optation in the relative terms of superficial versus substantive changes.

This dilemma is built into the very concept of co-optation, thereby positioning it as a mechanism that mediates relations of power and resistance. Selznick’s organizational theory of co-optation thus provides a suitable starting point in the historiography of the

¹⁰³ Ibid, 260. Emphasis added.

¹⁰⁴ Ibid, 14.

¹⁰⁵ Ibid, 260.

concept. Thus, on the one hand, corresponding with Selznick's notion of formal co-optation described above, this concept often carries a negative connotation that is suggestive of political emasculation and cultural hegemony. As one scholar puts it, "co-optation means to disarm threatening elements by giving them a hearing in the decision making process," thereby rendering them harmless.¹⁰⁶ We will see this connotation more fully reflected in the third theory of co-optation (critical) outlined below. On the other hand, however, as suggested by Selznick's notion of informal co-optation, this is a multifaceted and complex process with often contradictory and unintended consequences. While it can serve as a form of social control intended to preserve the institutional order of the status quo, co-optation can also encourage at least some degree of reform that may amount to serious changes in the status quo, if only in the long term. As seen momentarily, the second theory of co-optation (liberal) reflects this informal dimension of co-optation.

Yet despite these promising points, the organizational theory of co-optation is critically limited. For one thing, the theory is too static due to its status quo bias, or the tendency to favor the basic organizational structure already in place. As noted, American sociology in the mid-20th century was basically designed to help maintain and improve existing structures of society, and Selznick's concept of co-optation was designed to help powerful organizations actively respond to outside challengers, thereby ensuring their institutional survival. This is an important insight, insofar as the promise of change can actually be used to perpetuate and reproduce the status quo, although if taken too far, this

¹⁰⁶ Lief Christian Jensen, "Norwegian Petroleum Extraction in Arctic Waters to Save the Environment: Introducing 'Discourse Co-optation' as a New Analytical Term," *Critical Discourse Studies* 9, no. 1 (2012): 30.

idea may cynically cut short the potentially multiple strategies transformative appeal of resistance. Nevertheless, the point here is that the organizational theory of co-optation remains committed to the general preservation of the status quo. This point will be emphasized in Chapter One, which covers the 1948 Genocide Convention, as well as the early UN discourse on decolonization, as these developments serve as backdrops to the status quo arrangement power in the contemporary global order.

The Liberal Theory

While as our first theory of co-optation (organizational) will be highlighted in Chapter One, our second theory (liberal) will be presented in Chapter Two. It should be noted that this opening pair of chapters each cover the same broad historical parameters, roughly from the interwar period of the 1920s and 1930s to the height of the Cold War during the 1950s and 1960s. As outlined below, the overlapping periodization in Chapters One and Two will reveal a common set of background conditions and dominant assumptions shared by the 1948 Genocide Convention and the 1957 Indigenous and Tribal Populations Convention (No. 107). Separated by less than a decade, these two instruments stand come from the same period in which the UN was founded upon the crystallization of the nation state as the sole bearer of international legal personhood. At the very least, these two important milestones in our genealogy from cultural genocide to cultural integrity share many of the same racist prejudices towards Indigenous peoples as “backwards” and in need of protection.

At a deeper analytical level, therefore, the issues covered in Chapters One and Two stand on the same side of the status quo arrangement of power (and resistance) in the contemporary global order. Thus, as we move from the organizational theory of co-

optation to the liberal theory, we see the same status quo bias that effectively perpetuates and reproduces the state-centric rules of global governance. Recall the spousal couple at the head of the “colonial household” of IR theory discussed earlier, where the compulsory power of “*pater* realism” was said to be balanced by the softer touch of “*mater* liberalism.” For all of their differences, these two historiographies in IR theory were more or less in sync with a common commitment towards preserving the basic structure of the contemporary system defined by the rules of sovereignty and capitalism. Similarly, what we are identifying as the organizational and liberal theories of co-optation both share the same institutional or systemic bias towards the status quo. In other words, both are designed to avoid any stirrings of resistance that can potentially rupture or unsettle the dominant rules of the world.

Admittedly, compared to the canonical status assumed by Selznick’s classic study as emblematic of the organizational theory, there is no singularly defined liberal theory of co-optation. With that said, we can distinguish the latter as a distinct body of scholarship that generally corresponds with what we called above the *conventional constructivist* research on norm dynamics. Recall that whereas the rationalist foundations of realism are based on a “logic of expected consequences,” the social theories that make up constructivism are based on the “logic of appropriateness,” wherein actors behave in accordance with certain “identities, rules, and institutions.”¹⁰⁷ Rather than the single-minded pursuit of rational self-interest, the logic of appropriateness is shaped by “collective expectations for the proper behavior of actors with a given identity.”¹⁰⁸ It is in the latter sense that a distinctly liberal theory of co-optation appears as a mechanism

¹⁰⁷ March and Olsen, “The Institutional Dynamics of International Political Orders,” 951.

¹⁰⁸ Peter J. Katzenstein, “Alternative Perspectives on National Security,” 5.

designed to facilitate the penetration of international human rights into the domestic structures of states.

Perhaps the most explicit example of the liberal theory of co-optation comes from Andrew Moravcsik, who uses the concept while trying to explain the conditions in which states actively comply with international human rights law. Compliance, he argues, does not depend on the threat of external sanctions from outside powers at the international level of politics, as much as it does on internal pressures from civil society at the domestic level of politics. Of these two levels of politics – international and domestic – the liberal theory stresses the latter as key to where the particular logic of appropriateness needs to be activated. Moravcsik puts it, state compliance depends less on “international pressures” and more on “domestic calculations.”¹⁰⁹ As put forth by another study that is emblematic of this approach, “the cooptation hypothesis argues that partnerships will magnify the effectiveness of local political cultures in influencing agencies and the firms they regulate, further ... increasing compliance and enforcement actions in liberal ones.”¹¹⁰ Accordingly, co-optation is identified as a mechanism designed to pressure for change from below.

Stated simply, the liberal theory of co-optation “seeks to promote international human rights by coopting domestic political institutions, particularly courts and legislatures, in such a way as to shift the domestic balance of power in favor of human rights protection.”¹¹¹ This version of the concept deals with the institutional means

¹⁰⁹ Andrew Moravcsik, “Explaining International Human Rights Regimes: Liberal Theory and Western Europe,” *European Journal of International Relations* 1, no. 2 (1995): 160.

¹¹⁰ John T. Scholz and Cheng-Lung Wang, “Cooptation or Transformation? Local Policy Networks and Federal Regulatory Enforcement,” *American Journal of Political Science* 50, no. 1 (2006): 83.

¹¹¹ Moravcsik, “Explaining International Human Rights Regimes,” 175.

through which pressures for change emanating from the international level may alter the political calculations between states and civil society at the domestic level. For example, Moravcsik looks at the how the European Court of Justice has co-opted domestic courts and legislatures in order to enforce its judgments, as well as slow process in which the European Convention on Human Rights has been incorporated by the political and juridical functions of states. In other words, a logic of appropriateness that comes from the international level may be able to co-opt structures at the domestic level, thereby possibly enhancing the prospects for greater state compliance with international human rights law.

The liberal theory may provide a useful account of the conditions in which international human rights are successful, but it nevertheless fails to confront the Janus-faced paradox of rights discourse. There are three reasons for this. First, the liberal theory of co-optation falls into the familiar status quo bias mentioned earlier. Whereas the organizational theory was geared towards the self-preservation of institutions, the liberal theory is premised upon shoring up the legitimacy of the state as the organizing principle of the global order. The realist foundations of the system are taken for granted by this liberal approach, which instead is geared towards incentivizing greater international cooperation between pre-existing states and other types of actors in global affairs. The very existence and continuity of the status quo is entirely presupposed in this theory, as it is simply assumed that international norms are necessarily screened through the state-centric filter of the global order. As Moravcsik points out, the conditions in which international human rights law successfully co-opts domestic structures are very specific “rely on prior sociological, ideological and institutional convergence toward common

norms.”¹¹² In other words, international norms are most effective where they resonate with already existing cultural habits and ideas. This means that in order for Indigenous rights discourse to come in from the “outside,” it has to be screened through the dominant rules that matter on the “inside.”

The second reason why the liberal theory fails to confront the possibility that rights discourse may be used as an instrument of continued domination is because it is trapped in “a reductionist focus on socialization.”¹¹³ As it is used here, the concept of *socialization* refers to the process in which states learn to become members of a purported “international society.” As this keyword emerged as part of the classical vocabulary of sociology by the mid-20th century, it basically referred to the assimilation of individuals into groups. The traditional notion of assimilation as a “one-way street” has been overturned by recent sociological literature on immigration which instead points to the complex multi-directional dimensions involved with the dynamics of cultural change. Yet the constructivist scholarship on international norms are behind the curve when it comes to the otherwise abandoned notion of socialization. Moravcsik’s model, for example, is such a “one-way street,” insofar as the basic trajectory involved with the internalization of norms is from the international to the domestic levels.

Finally, the third problem with the liberal theory of co-optation is what can be called the “good norm” bias. This theory, as well as the conventional constructivist literature on norm dynamics from which it emerged, overestimates the diffusion of liberal norms as necessarily a good thing.¹¹⁴ The faulty notion of socialization just mentioned

¹¹² Ibid, 178.

¹¹³ Epstein, “Stop Telling Us How to Behave,” 139

¹¹⁴ Landolt, “(Mis)Constructing the Third World?” 580

also assumes that the teleological endpoint of the process is “peaceful and voluntary internalization. There is no hint of coercion.”¹¹⁵ In other words, the liberal theory neglects the roles of power and resistance in the international system. This is not surprising, given its aforementioned status quo bias, for just as *mater* Liberalism is complicit in naturalizing the inherent violence of *pater* Realism, so too does the liberal theory of co-optation take for granted the continued domination of states over Indigenous peoples.

The Critical Theory

The next approach in our four-part theoretical framework is the so-called *critical theory of co-optation*. Whereas the prior two variants (i.e. the organizational and liberal theories) were both situated within the general historical parameters of the mid-20th century (from roughly the 1920s through the 1950s), our third version (i.e. *the critical theory*) must be seen within a particular historical context. The crucial period in this context centers on the “long” decade of the 1970s, which is understood here in light of Samuel Moyn’s revisionist historiography of human rights.¹¹⁶ This period is called the “long” decade of the 1970s because it was immediately preceded by broader developments during the 1960s at one end of the chronology, while also laying the way for positive institutional outcomes by the 1980s at the other end. This was an absolutely crucial moment era of change in our genealogy, as evidenced by the outcome of how the 1989 Indigenous and Tribal Peoples Convention (No. 169). As we will see in Chapter Three, this statement of international law represented, in the spirit of Anaya, a potentially global “shift in attitudes toward Indigenous peoples.”¹¹⁷ At the same time, in light of

¹¹⁵ Inayatullah and Blaney, “The Dark Heart of Kindness,” 169.

¹¹⁶ Samuel Moyn, “The Return of the Prodigal: The 1970s as a Turning Point in Human Rights History,” in *The Breakthrough*, 3-4.

¹¹⁷ Anaya, “Remarks by James Anaya,” 528. Emphasis added.

Venne's critique about the historical continuity of dominating structures, we will also see how this particular instrument operated within the "realistic" constraints of the global order.¹¹⁸

The inverted commas used here in relation to the keyword "realism" is deliberately meant to indicate an ironic sense, thereby conveying the opposite of the term's literal meaning. A critical theoretical approach to international norm dynamics is thus premised upon the exposure of the hidden historical-intellectual process in which "reality" is socially constructed and structured through relations of power and resistance. In is in this sense that the so-called critical theory of co-optation is indeed "critical," insofar as it is based on a deep questioning of the taken-for-granted rules of the world. Unlike the organizational and liberal theories of co-optation, both of which are more or less geared towards the perpetuation of institutional arrangements, the critical theory does not fall into the same type of status quo bias. Indeed, this approach critically distances itself from its progenitors and intellectual forbearers. Instead, the critical theory of co-optation rejects the normalized subordination of Indigenous peoples under the oppressive constraints of settler colonialism.

There is a small body of scholarship in Indigenous studies that is representative of such a view. The most relevant example comes from the aforementioned 2007 article by Jeff Corntassel, where he provided "a critical, comparative perspective on the dynamics of co-optation."¹¹⁹ Recall his previous 1995 publication in which he cautiously argued

¹¹⁸ Quoting Mr. Helms (Government adviser, Denmark, and rapporteur of the Committee on Convention No. 107) in International Labour Conference, *Seventy-Sixth Session, Geneva 1989: Record of Proceedings* (Geneva: International Labour Office, 1990), p. 31/1.

¹¹⁹ Jeff Corntassel, "Towards a New Partnership? Indigenous Political Mobilization and Co-Optation during the First UN Indigenous Decade (1995-2004)," *Human Rights Quarterly* 29, no. 1 (2007): 164.

that Indigenous rights discourse should focus on the relatively easier and more conciliatory set of claims based on *cultural integrity*, rather than advancing more radical claims for *sovereignty*. Yet his 2007 article struck a much different tone, one that was far more critical and suspicious. If the earlier article had any hope of effecting change from within the system, the latter publication argued that such trust was misplaced. This shift in tone was informed by Corn tassel's own personal experience as a Tsalagi (Cherokee) delegate at relevant UN proceedings during the late 1990s and early 2000s. His self-critical reflections are revealing:

Since first writing about global Indigenous rights in 1995, the author has urged Indigenous delegates to find effective strategies to identify and promote remedial forms of justice both inside and outside UN forums. In a 1995 *Human Rights Quarterly* article, it was pointed out that the debate over the ratification of the Draft Declaration on the Rights of Indigenous Peoples centered too much on semantic battles, preventing delegates from addressing the truly substantive issues of Indigenous self-determination. However, these proposed strategies focused too much on avoiding "the volatile and intractable responses of host states" and not enough on asserting Indigenous powers of self-determination on our own terms.¹²⁰

There is one particular incident from Corn tassel's professional experience that especially highlights the deeply problematic continuity of settler colonialism in contemporary Indigenous rights discourse. It was at a 1999 conference at the UN where he was informed by a US State Department official that the concerns of Indigenous peoples should be dealt with through "domestic" channels. The inherent contradiction of this encounter was striking: "a US State Department official speaking at a UN global forum in Geneva, Switzerland was informing a Tsalagi nation delegate of the domestic nature of his claims."¹²¹ The sense of indignation behind this story is an important

¹²⁰ Ibid, 144.

¹²¹ Ibid, 142.

sentiment that makes this particular theory of co-optation distinctly “critical,” insofar as it is infused with a strong sentiment against the imposed “realities” of the status quo. In this moment of awareness, settler colonialism appears to operate in the background of Indigenous rights discourse, acting like an invisible boundary of “reality” that sets limits to what can be said in the fora of global governance. On a normative level, there is an important spirit of resistance and a deep commitment to the resurgence of Indigenous peoples behind Corn tassel’s critical theory of co-optation, which is itself based on an underlying rejection of “reality.” In this sense, our third theory can be starkly distinguished from the status quo bias that affected the previous two theories.

Let us look closer at Corn tassel’s precise usage of the co-optation concept. The thesis of his 2007 article is that the process of “mainstreaming” of Indigenous rights within the UN system has effectively reproduced structures of domination.¹²² This manipulative effect is what he has in mind by the concept of co-optation, defined here as “the power of state and institutional entities to frame rights agendas.”¹²³ He theoretically situates this concept in relation to Keck and Sikkink’s aforementioned models for evaluating the effectiveness of transnational advocacy networks.¹²⁴ Whereas this popular model of norm dynamics was teleological in pushing for the socialization of states and other international actors to new norms, the argument here is that the process of norm dynamics can backslide as it struggles to escape the gravitation forces of the status quo.¹²⁵ What is missing from Keck and Sikkink, and which Corn tassel provides with the

¹²² Cf. Corn tassel and Primeau, “Indigenous ‘Sovereignty’ and International Law.”

¹²³ Corn tassel, “Towards a New Partnership?” 164.

¹²⁴ Keck and Sikkink, *Activists beyond Borders*, 25.

¹²⁵ Andrew T. Guzman and Katerina Linos, “Human Rights Backsliding,” *California Law Review* 102 (2014): 603-654.

concept of co-optation, is a critical analysis of the hidden power effects involved with the “mainstreaming” of international norms. “A co-optation variable,” he explains, “reverses the direction of the analysis by assessing the potential impact of institutional structures on transnational Indigenous networks.”¹²⁶ Adding this concept to the mix thus “allows for a clearer and more realistic picture of the evolution of transnational advocacy network goals and how their agendas have been framed by institutional and state actors.”¹²⁷

In order to unpack the critical theory of co-optation, it is helpful to follow up on the other works cited by Corntassel. For example, he quotes one of his close colleagues and occasional co-author, Taiaiake Alfred, a prominent Indigenous political theorist and Kahnawake Mohawk author, educator, and activist. Alfred also uses the concept of co-optation in his 1999 book, *Peace, Power, Righteousness: An Indigenous Manifesto*, where the keyword is used with a strong connotation of political manipulation. Co-optation in this sense is a form of deradicalization, as the most threatening elements of resistance are neutralized and brought under control once more by the prevailing forces at large. This is a form of political emasculation, whereby the original goals and aspirations of a movement are cut down to size and subsumed within the dominant constraints of the status quo. In this sense, the concept is essentially negative or something bad that should be avoided. Alfred thus describes “the co-optation of our political leadership [as] a subtle, insidious, [and] undeniable fact,” as Indigenous leaders are pressured to “rationalize and participate actively in their own subordination.”¹²⁸ Elsewhere, Alfred and Corntassel use

¹²⁶ Corntassel, “Towards a New Partnership?” 161.

¹²⁷ Ibid, 164.

¹²⁸ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Second ed.) (New York: Oxford University Press, 2009 [1999]), 97.

the concept to critically lament what they see as “the emptiness of the UN’s rhetoric.”¹²⁹ Across multiple publications, they have railed against what they describe as a “‘politics of distraction’ that diverts energies away from decolonizing and regenerating communities and frames community relationships in state-centric terms.”¹³⁰ As such, the critical theory of co-optation brings to the surface what are otherwise hidden power effects in the international normative landscape.

Whereas these references from Alfred highlight the underlying sentiment of indignation that is behind the critical theory of co-optation theory, a closer look at the specific mechanisms of this concept comes from an older and relatively more obscure reference. The citation here leads to an isolated contribution from the 1980s by Michael Lacy, an American sociologist who provided a small but relevant contribution to the literature on American Indian policy. According to Lacy (who in turn cited Selznick), “co-optation occurs if, in a system of power, the power holder intentionally extends some form of political participation to actors who pose a threat.”¹³¹ In other words, the concept of co-optation depends upon the perception of outside actors as a threat to the status quo, thereby bringing to the surface the underlying power-resistance dynamics that were otherwise glossed over and ignored by the two previous theories. Lacy also provides two precise mechanisms by which such threats are defused: *blunting* and *channeling*.¹³² As interpreted by Corntassel, “blunting simply means that an Indigenous political agenda is

¹²⁹ Taiaiake Alfred and Jeff Corntassel, “A Decade of Rhetoric for Indigenous Peoples,” *Indian Country Today* (11 May 2004), available at http://www.corntassel.net/print_rhetoric.htm.

¹³⁰ Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary Colonialism,” *Government and Opposition: An International Journal of Comparative Politics* 40, No. 4 (2005): 600.

¹³¹ Michael G. Lacy, “The United States and American Indians: Political Relations,” in *American Indian Policy in the Twentieth Century*, ed. Vine Deloria, Jr. (Norman: University of Oklahoma Press, 1985), 83.

¹³² *Ibid.*, 86.

shifted and altered to fit the dominant norms of existing institutional structures,” whereas “channeling effects occur when members of Indigenous groups, having accepted representation via global forums, confine their activities solely within these official structures and cease other forms of political mobilization outside of the UN system.”¹³³ Like Corntassel, we can use these ideas from Lacy to unpack the process of co-optation.

Yet there are at least a couple of drawbacks to the critical theory of co-optation provided by Corntassel (and by extension, Alfred and Lacy as well). For one thing, this version suffers from the same drawback behind the conventional constructionist account of norm dynamics. Recall Keck and Sikkink’s popular model of the “norm life cycle,” which refers to a three-stage process in which norms evolve and potentially influence state behavior.¹³⁴ The desired teleological endpoint of this socialization process was “internalization,” whereby governments enforce meaningful policy changes in light of new international norms.¹³⁵ This notion of internalization reflected older sociological notions of socialization, or the process in which individuals learn to become members of a society. Yet Keck and Sikkink’s work has been criticized for tending to promote “a unilinear, liberal understanding of progress that is highly problematic.”¹³⁶ Although Corntassel’s theory provides a multidirectional account of normative backsliding as well as an explicit rejection of liberal notions of progress, his decision to insert the co-optation concept into this popular model of norm dynamics thus came with intellectual baggage.

¹³³ Corntassel, “Towards a New Partnership?” 140.

¹³⁴ Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 895-896.

¹³⁵ *Ibid.*, 904.

¹³⁶ Epstein, “Stop Telling Us How to Behave,” 136. See also Krook and True, “Rethinking the Life Cycles of International Norms,” 104.

Indeed, if Keck and Sikkink's model was too teleological and naïve to believe in the ostensibly progressive evolution of international norms, there is perhaps a danger with taking the critical theory of co-optation too far. To be clear, I am by no means making such an accusation against Cornthassel (and Alfred) specifically. Nor am I implying that this critical perspective (which includes our previous scholarly spotlight on Venne) is unduly pessimistic or fatalistic. Far from it, insofar as these Indigenous scholars have emphasized an agenda built around the idea of "resurgence," thereby turning the focus inward within Indigenous communities themselves rather than the conflictual outward stance that is provoked by the prevailing powers of global governance. Still, as far as our conceptual refinement of co-optation is concerned, there is a problem with placing too much emphasis on the negative side of the moral ledger. This point requires elaboration, for I do not wish to sell short this critical perspective. Of course, following Lacy, we understand threat as a defining feature of co-optation. Without any source of resistance that threatens the status quo, the concept no longer applies. But whether or not co-optation results in the neutralization of resistance is beside the point. This nuanced insight, which is also derived from Lacy, risks getting overlooked by the critical theory of co-optation.

The Dynamic Theory

Although the critical theory of co-optation can explain the backslide effect in norm dynamics, its heavy emphasis on the negative side of the moral ledger leaves something to be desired at the other end of the spectrum. It leaves open the question of how much is (or can be) either lost or gained throughout the ongoing process of norm dynamics. This brings us to our fourth and final spot in our discussion concerning the

dynamic theory of co-optation. A key premise here is provided by IR theorists Mona Lena Krook and Jacqui True, who present “a dynamic picture of norm adoption and implementation” in contrast to “a static view of norm content” that is evident in the conventional constructivist literature (including the aforementioned Keck and Sikkink). The perspective favored here “views norms as ‘processes,’ as works-in-progress, rather than as finished products. The ongoing potential for contestation means, in turn, that co-optation, drift, accretion and reversal of a norm – including disputes over whether it is a norm at all – are all constant possibilities.”¹³⁷ It is the essentially contested nature of norms that make them historical dynamic and subject to change.

We can situate the dynamic theory of co-optation in contrast to some of our other theories. Unlike the liberal theory highlighted above by Moravcsik, which emphasize the constitutive and regulative roles of international norms, the dynamic theory spotlighted here emphasizes the inherent contestability of norms. The specific content of any particular norm is never static. Whether it is in regards to gender mainstreaming or the legalization of Indigenous rights, no one ever really has the final say. The meaning(s) of any given norm is contingent upon certain historical contexts and social practices. IR theorist Antje Wiener notes that “cultural practices play a key role for the project of uncovering hidden meanings of norms which deviate from the texts of legal documents.”¹³⁸ Such deviations emerge against the grain of historical continuities, as periodic crises open up the possibility for the production of new normative meanings. Insofar as the “meaning-in-use” of norms is constantly subject to change, the dynamic

¹³⁷ Ibid, 103-104.

¹³⁸ Antje Wiener, “Enacted Meaning-in-Use,” 181.

theory of co-optation counter-balances the risk of the critical theory from becoming too fatalistic.

Yet following the critical theory of co-optation, we must not throw the baby out with the bathwater. A dynamic perspective can thus balance both sides of the moral dilemma between the competing tensions of normative change and continuity. Picking back up our previous example, Krook and True are critical of how the “mainstreaming” of gender norms at the UN “has drifted over time towards a more ‘integrationist’ discourse, which includes gender in policy-making without disturbing existing agendas.” The original goals of the movement “have been shrunk to fit in with the neoliberal imperatives of a globalizing economy and an international politics emphasizing state security over equality or justice.”¹³⁹ Such a critique dovetails with the critical theory of co-optation. However, the dynamic theory temporarily brackets the question of whether or not the outcome is nothing more than an emasculating “illusion of inclusion.” Indeed, this insight goes back to the work of Lacy, but it was nevertheless absent in Corn tassel’s analysis.¹⁴⁰

Corn tassel’s model of co-optation is a very helpful contribution, but it is incomplete. A closer look at the word’s etymology and definition reveals a more complex concept. The root word behind “co-optation” derives from the Latin *cooptāre*, which combines the prefix *co-*, meaning “together,” and the verb *optare*, meaning “to choose” or “wish.” Thus, the original Latin word meant “to choose as a colleague, friend, or

¹³⁹ Krook and True, “Rethinking the Life Cycles of International Norms,” 120-121.

¹⁴⁰ On the need to bracket the question of whether or not co-optation results in political neutralization, see Lacy, “The United States and American Indians,” 85. Cf. Corn tassel, “Towards a New Partnership?” 161-163.

member of one's tribe or family" or "to elect into a body."¹⁴¹ That is to say, the word had a closer connotation to familial adoption than cultural or political assimilation. In time, the ancient practice of *cooptāre* evolved into the public sphere of governance. Even today, the primary meaning of "co-opt" is to "to elect into a body by the votes of its existing members."¹⁴² Although this necessarily involves a form of incorporation, it leaves aside any judgments regarding the ethical consequences of such a process. In fact, only recently in the historical semantics of the term, particularly towards the end of the 20th century, did a secondary definition of "co-opt" emerge with a more negative connotation, meaning to take over, appropriate, or divert from an original purpose. As such, there is a tension between the term's primary meaning, which remains open-ended, and its secondary meaning, which forecloses any positive interpretation.¹⁴³

This is admittedly an unsettling argument, insofar as it questions the extent of the critical theory of co-optation. Above I stressed that the works of Cornstassel, Alfred, Venne, and other critical Indigenous scholars cannot be accused of fatalism or undue pessimism. Although the productive power of settler colonialism has possibly mutated into the form of Indigenous rights discourse, thereby imposing the limits of "reality," critical Indigenous scholars nevertheless remain committed to an agenda of Indigenous resurgence. They are rightfully wary of the possibly negative outcomes of co-optation. Indeed, there are very real risks involved when social movements engage in formal institutional politics. Yet, as Rhiannon Morgan suggests in regards to the global

¹⁴¹ "Co-opt, v." *OED Online* (Oxford University Press, June 2017). Note that the Oxford English Dictionary (OED) spelling includes a hyphen, rather than "coopt" or "cooptation." This dissertation conforms to the OED spelling.

¹⁴² *Ibid.*

¹⁴³ Pablo Lapenga, "The Problem with 'Cooptation'," *States, Power, and Societies* 20, no. 1 (2014): 7.

Indigenous movement at the UN, this negative outcome cannot be simply assumed.¹⁴⁴

Again, we must bracket the question of whether or not co-optation necessarily results in a negative outcome. She argues that “indigenous representatives have been able to resist deradicalization by transforming a challenging claim into a legitimate one via its attachment to and articulation alongside essential and familiar norms and resources from within the UN’s legal corpus.”¹⁴⁵

In order to determine the potential validity of such a conceptualization in terms of Indigenous rights, this dissertation will apply the stage model of social movement co-optation proposed by Patrick Coy and Timothy Hedeem.¹⁴⁶ According to this model, the process of co-optation begins with the inception of a social movement that challenges the vested interests that are protected by the state. By demanding changes and establishing alternative norms and institutions, the resistant social movement presses the need for reform. This can lead to the appropriation of the language and techniques of the movement, even if their values are initially dismissed by the dominant power structure. Challengers are nevertheless able to participate in policymaking, thereby leading to some level of institutionalization for new norms. While this co-optation may lead to a transformation of the social movement’s original goals, the challengers may also respond by buffering or insulating themselves from hegemonic forces. As such, social movements

¹⁴⁴ Rhiannon Morgan, “On Political Institutions and Social Movement Dynamics: The Case of the United Nations and the Global Indigenous Movement,” *International Political Science Review* 28, no. 3 (2007): 274.

¹⁴⁵ *Ibid.*, 285.

¹⁴⁶ Patrick G. Coy and Timothy Hedeem, “A Stage Model of Social Movement Co-optation: Community Mediation in the United States,” *Sociological Quarterly* 46, no. 3 (2005): 405-435.

can operate within “oscillating spaces” that are simultaneously engaged with and distanced from formal institutions of power.¹⁴⁷

Coy and Hedeem are aware with the theoretical problems with the notion of “stages.” They admit that “the overall process and the progression between stages depicted in our [model] as somewhat linear. But, in reality, there are often loop-backs, mutually or unilaterally aborted processes, and both short-term as well as extended periods without significant new developments.”¹⁴⁸ That is to say, these “stages” are conceptually discrete parts of a dynamic, non-linear process. Moreover, Coy and Hedeem guard against the assumption of teleology (a critique which could be leveled against the critical theory): “The social dynamics of co-optation are not made up of some inexorable force progressing toward a preordained and complete coopting of challenging movements.”¹⁴⁹ This is the key point, insofar as co-optation is like the veritable “double-edged sword,” an idiom which expresses how the negative or unfavorable consequences of something are inseparable from its positive or favorable consequences, or vice versa. As it applies here, co-optation is like a double-edged sword because while the act of engagement between the status quo system and the challenging movement can result in the political emasculation of the latter, it also can expand the world of possibilities. “Thus, even in the face of substantial degrees of overall movement co-optation, there will long remain practical exemplars of the values and ideals that originally drove a challenging movement.”¹⁵⁰

¹⁴⁷ Ibid, 427; and Andrew Woolford and R.S. Ratner, “Nomadic Justice? Restorative Justice on the Margins of Law,” *Social Justice* 30, no. 1 (2003): 188.

¹⁴⁸ Coy and Hedeem, “A Stage Model of Social Movement Co-optation,” 409.

¹⁴⁹ Ibid, 426.

¹⁵⁰ Ibid.

Recent contributions to social movement theory suggest that co-optation is not a one-way street towards social control. The decision by social movement organizations to access mainstream institutions is not necessarily a *fait accompli*, and these organizations can move between contentious and mainstream politics when the needs suits them.¹⁵¹ For example, in Chapter Four we will see that in 2004 many Indigenous organizations resorted to a hunger strike at the UN offices in Geneva to protest last minute changes to the final text of what would become the 2007 Declaration. After two decades of negotiations in relative good faith, there was a danger at this time that the drafting process could have been fatally stalled and gotten lost in committee, never to see the light of day in the UN General Assembly. It is possible that this direct action prevented this from happening, ensuring that the issue would not go away. When the 2007 Declaration was passed, many (though not all) Indigenous organizations rallied behind it, and ever since they have continued to engage with the regular workings of the UN human rights system, even carving out for themselves a lasting institutional space known as the UN Permanent Forum on Indigenous Issues.

Similarly, political philosopher James Tully has charted two paths of Indigenous resistance against settler colonialism (or what he calls internal colonization). On the one hand, there are the relatively more absolutist demands which he refers to as “Indigenous struggles *for* freedom,” that is, struggles “against the structure of domination as a whole and for their freedom as peoples.”¹⁵² On the other hand, there are “Indigenous struggles

¹⁵¹ David S. Meyer and Sidney Tarrow, “A Movement Society: Contentious Politics for a New Century,” in *The Social Movement Society: Contentious Politics for a New Century*, eds. David S. Meyer and Sidney Tarrow (Lanham, MD: Rowman & Littlefield, 1998), 24.

¹⁵² James Tully, “The Struggles of Indigenous Peoples for and of Freedom,” in *Political Theory and the Rights of Indigenous Peoples*, eds. Duncan Ivison, Paul Patton, and Will Sanders (New York: Cambridge University Press, 2000), 50.

of freedom” which “seek to transform internal colonization obliquely from within ... with the aim of modifying the system in the short term and transforming it from within the long term.”¹⁵³ Rather than directly confronting the enduring structures of settler colonial domination (i.e. “Indigenous struggles *for* freedom”), this latter approach (i.e. “Indigenous struggles *of* freedom”) involves “mostly quotidian acts of protecting, recovering, gathering together, keeping, revitalizing, teaching and adapting entire forms of indigenous life that were nearly destroyed.”¹⁵⁴ In this sense, although the mutation of criminal prohibition of cultural genocide into the nascent international norm of cultural integrity was an outcome of co-optation, it nevertheless has resulted in the legalization of a tool for Indigenous survival and resistance.

Chapter Outline and Keywords

It is necessary to identify and define the central keywords that are central components to the structure of body chapters in this dissertation. Each chapter focuses on a particular keyword, or socially prominent terminology that have gone through various historical modulations and are polysemous; that is, capable of concurrently bearing more than one connotation.¹⁵⁵ The multiplicity of meanings makes these words highly contestable and open to interpretation, thereby compounding their social and political significance. The intellectual task of defining such vocabulary is thus not a neutral or value-free exercise. In this sense, it has become almost trite to cite Foucault’s famous

¹⁵³ Ibid, 42 and 50.

¹⁵⁴ Ibid, 59. See also Sheryl R. Lightfoot, “Indigenous Mobilization and Activism in the UN System,” in *Handbook of Indigenous Peoples’ Rights*, eds. Corinne Lennox and Damien Short (New York: Routledge, 2016), 254.

¹⁵⁵ Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Revised ed.) (New York: Oxford University Press, 1983 [1976]).

dictum that “power produces knowledge.”¹⁵⁶ With that said, to quote the title of a recent monograph from the critical constructivist literature, we must nevertheless appreciate “the power of words in international relations.”¹⁵⁷

With such a discursive approach in mind, this dissertation is structured around a series of important keywords: genocide, Indigenous peoples, settler colonialism, and rights. Following the four-part organizational structure discussed above with reference to the typology of power and co-optation theory, each of these four keywords will be highlighted in Chapters One through Four, respectively. In a nutshell, Chapter One will thus uncover the abandoned idea of *cultural genocide* during the post-War War II period, whereas Chapter Two will unearth the hidden process in which the *Indigenous* identity label was formally introduced into the lexicon of global governance during the interwar period under the ILO and the League of Nations. Chapter Three marks the crucial post-1970s turning point in which contemporary forms of Indigenous rights discourse developed in critical response to ongoing processes of *settler colonialism*, whereas Chapter Four explores how the abandoned concept of cultural genocide has been transformed into the emergent norm of *cultural integrity*. It is crucial to explain at the very outset what we mean by these emphasized terms.

Genocide

Genocide has been widely noted as an “essentially contested concept.”¹⁵⁸ There is no singularly true meaning of the term upon which all agree, although perhaps the closest

¹⁵⁶ “There is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.” Foucault, *Discipline and Punish*, p. 27.

¹⁵⁷ Charlotte Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (Cambridge, MA: MIT Press, 2008).

¹⁵⁸ W. B. Gallie, “Essentially Contested Concepts,” *Proceedings of the Aristotelian Society* 56 (1955-1956): 167-198. See also Christopher Powell, *Barbaric Civilization: A Critical Sociology of Genocide* (Ithaca:

thing available is the 1948 Convention. Yet this reminds us that definitions are in fact “matters of convention, not empirical propositions, and thus cannot be true or false,” at least not in any essential or universal sense.¹⁵⁹ The inherent subjectivity of conceptual thought is thus completely unavoidable. Moreover, evaluative concepts like genocide are especially troublesome because they are often loaded with ideological baggage and other preexisting normative values.¹⁶⁰ At this deeper level of meaning and identification, genocide is stereotyped as the “ultimate crime” or the “crime of crimes.”¹⁶¹ It is something depicts the absolute worst of our species, something that is supposedly uncivilized and barbaric, an “odious scourge” of humanity.¹⁶² Going back to Raphael Lemkin and the origins of the 1948 Convention, such a civilizational self-image has been deeply imbued in the concept of genocide, and the enduring vitality of this myth obscures deeper webs of complicity associated with the precipitous decline of global cultural diversity over the past five centuries and counting.¹⁶³

McGill-Queen’s University Press, 2011), 66-70; and Martin Shaw, *What is Genocide?* (Second ed.) (Malden, MA: Polity, 2015 [2007]), 4-5.

¹⁵⁹ David Moshman, “Conceptions of Genocide and Perceptions of History,” in *The Historiography of Genocide*, ed. Dan Stone (New York: Palgrave, 2010), 88. See also Michael Freeman, “The Theory and Prevention of Genocide,” *Holocaust and Genocide Studies* 6, no. 2 (1991): 186; and Henry C. Theriault, “Against the Grain: Critical Reflections on the State and Future of Genocide Scholarship,” *Genocide Studies and Prevention* 7, no. 1 (2012): 124-125.

¹⁶⁰ David Moshman, “Conceptual Constraints on Thinking about Genocide,” *Journal of Genocide Research* 3, no. 3 (2001): 432; and Christopher Powell, “What do Genocides Kill? A Relational Conception of Genocide,” *Journal of Genocide Research* 9, no. 4 (2007): 529.

¹⁶¹ Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (New York: Cambridge University Press, 2012), 7; and William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Second ed.) (New York: Cambridge University Press, 2009 [2000]), 11, fn. 32.

¹⁶² On genocide as an “odious scourge,” see preambular paragraph 3, 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

¹⁶³ A. Dirk Moses, “Conceptual Blockages and Definitional Dilemmas in the ‘Racial Century’: Genocides of Indigenous Peoples and the Holocaust,” *Patterns of Prejudice* 36, no. 4 (2002): 7-36.

As far as I understand it, genocide is a form of group destruction that is more or less intentional. There are three general principles to this basic understanding.¹⁶⁴ First, genocide is intentional, or purposeful, more or less. That is to say, the requisite notion of genocidal intent matters, but only to a certain extent, speaking imprecisely. It is widely assumed that genocide cannot happen by accident or through neglect. Many scholars thus follow a very strict and narrow interpretation known as “specific” or “special intent,” whereby a perpetrator commits genocide with the specific purpose of destroying a group.¹⁶⁵ Yet the imperative to locate the “special intent” of individual perpetrators also obscures more deeply embedded structural dynamics. Even in retrospect, it is very hard to objectively determine genocidal intent, and a high definitional benchmark here can be misconstrued as a form of denialism. The widespread assumption that genocide cannot happen accidentally is questionable. At the very least, the presumed imperative to locate the “special intent” of individual perpetrators can hide the structural dynamics that remain deeply embedded in the contemporary global order.

The second definitional principle is that genocide targets groups. As we will see in greater detail in Chapter One, the international legal definition provided by Article 2 of the 1949 Convention specifies four specific types of groups – national, ethnical, racial, and religious – on the basis of their supposed immutable features as ascribed identities, although the fallacious reasoning behind these narrow construal has been thoroughly

¹⁶⁴ Andrew Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States* (Lincoln: University of Nebraska Press, 2015), 31-40; and Benjamin Meiches, “Genocide: A Political Genealogy,” (PhD Dissertation: Johns Hopkins University, 2015), 46-212.

¹⁶⁵ Schabas, *Genocide in International Law*, pp. 206-256. Cf. Alexander K. A. Greenawalt, “Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation,” *Columbia Law Review* 99, no. 8 (1999): 2262.

critiqued from a cultural anthropological perspective.¹⁶⁶ Group identities are not static and essentialized categories, but rather dynamic sets of relations that remain open to contestation.¹⁶⁷ In fact, processes of group-formation (as well as inverse processes of group destruction) are so dynamic that genocidal violence can actually produce new identities as an unintended consequence. For example, as we will argue in Chapter Two, the so-called “Indian problem” across the Americas constructed a new subjectivity that eventually transformed into the contemporary identity of “Indigenous peoples.”

The third and final definitional principle is destruction. Genocide is the intentional “killing” of groups. “Killing” is underscored here in order to stress that, contrary to popular assumptions, the physical killing of individuals is not a requisite standard of genocide. Even in the official legal definition put forth in Article 2 of the 1948 Convention, it is only one of five qualified types of actions. Lemkin was far more forthright in originally proposing a more capacious and generic conception, whereby genocidal violence covered a broad spectrum of destructive techniques. As noted at the very outset of this Introduction, the category of “cultural genocide” emerged in the early stages of drafting the 1948 Convention, but it was ultimately rejected by the end of the legislative process, thereby leaving a critical gap in the international legal protection of the right to group existence. From the perspective of “*pater* Realism,” I argue in Chapter One that the omission of cultural genocide served to legitimize what I call the *normalcy of assimilation* as part of the fundamentally state-centric prerogatives of the international

¹⁶⁶ Paul J. Magnarella, “Recent Developments in the International Law of Genocide: An Anthropological Perspective on the International Criminal Tribunal for Rwanda,” in *Annihilating Difference: The Anthropology of Genocide*, ed. Alexander Laban Hinton (Berkeley: University of California Press, 2002), 310-320.

¹⁶⁷ Woolford, *This Benevolent Experiment*, 32.

system, insofar as cultural differences have since the mid-20th century been seen as obstacles to be overcome in processes of forming nation-states as “imagined communities.”¹⁶⁸

As discussed in Chapter Three, the keyword “ethnocide” was (re-)introduced in the 1970s as a way of filling the void left behind from the omission of cultural genocide in international law. This is attributed to the French ethnologist Pierre Clastres, who understood ethnocide as “the systematic destruction of the modes of life and thought of a people who are different from those who carry out this destructive enterprise.”¹⁶⁹ According to him, both genocide and ethnocide are based on the same ethnocentric vision of “the other.” But whereas “the genocidal mind ... wants purely and simply to deny difference,” ethnocide actually “admits a relatively of evil in difference: the others are bad, but they can be improved, by obliging them to transform themselves to the point of total identification, if possible, with the model proposed to or imposed on them.”¹⁷⁰ In short, unlike the genocidal intent to exterminate (or to utterly destroy), the goal of ethnocide is to assimilate (or to erase all cultural and ethnic differences). The end result is the same, according to this argument; what is different are the respective means to the same end.

Yet the concept of ethnocide did not widely take hold, at least not in the Anglo-centric literature on genocide studies. Since the early 2000s, a more Lemkinian approach

¹⁶⁸ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New ed.) (New York: Verso, 2006 [1983]); and Liisa Malkki, “National Geographic: The Rooting of Peoples and the Territorialization of National Identity Among Scholars and Refugees,” *Cultural Anthropology* 7, no. 1 (1992): 24–44.

¹⁶⁹ Pierre Clastres, “On Ethnocide,” (trans. by Julian Pefanis and Bernadette Maher) *Art & Text* 28 (1988): 52

¹⁷⁰ *Ibid.*

has returned to genocide studies as part of the field's "colonial turn."¹⁷¹ Much of this work has been directed towards Patrick Wolfe's notion of the "logic of elimination." As explained momentarily, this refers to a certain structural tendency of settler colonial formations that sometimes converges with genocide but is otherwise distinct. This conceptualization enables Wolfe to "regard assimilation as itself a form of destruction" without having to make the case for genocide, per se, while also avoiding what he sees as the awkwardness of the term cultural genocide.¹⁷² Other scholars, like Damien Short, go further in suggesting the possibility that forcible assimilation is a sufficient condition for genocide, while Dirk Moses represents a more moderate position, contending that cultural destruction must be accompanied by physical and biological attacks in order to qualify as genocide.¹⁷³ Even within the colonial genocide studies literature, then, there is disagreement as to how forced assimilation and cultural destruction fit into the conceptual framework of the field. Nevertheless, this scholarship has pushed towards a conception of genocide as a form of group destruction rather than simply the mass murder of individuals.¹⁷⁴

Nevertheless, the dominant construal of genocide remains the narrow perspective that excludes Indigenous experiences of (more or less) intentional group destruction. As with the concept of "ethnocide," the term "cultural genocide" is still cast beyond the

¹⁷¹ Michael A. McDonnell and A. Dirk Moses, "Raphael Lemkin as Historian of Genocide in the Americas," *Journal of Genocide Research* 7, no. 4 (2005): 501-529.

¹⁷² Patrick Wolfe, "Structure and Event: Settler Colonialism, Time, and the Question of Genocide," in *Colony, Empire, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. A. Dirk Moses (New York: Berghahn, 2008), 105 and 116.

¹⁷³ Damien Short, "Australia: A Continuing Genocide?" *Journal of Genocide Research* 12, nos. 1-2 (2010): 48-49; and A. Dirk Moses, "Empire, Colony, Genocide: Keywords and the Philosophy of History," in *Colony, Empire, Genocide*, 13.

¹⁷⁴ See Moshman, "Conceptions of Genocide and Perceptions of History," 88-89; and A. Dirk Moses, "The Field of Genocide Studies," in *The Discipline of Genocide Studies*, Vol. I, *Genocide*, ed. A. Dirk Moses (New York: Routledge, 2010), 1-23.

realm of acceptable discourse in international law. I argue in Chapters Three and Four that the gap left behind by Article 2 of the 1948 Convention was reconceived in the form of cultural human rights, thereby transforming into the nascent international norm of cultural integrity. By transforming, I mean to emphasize the dramatic change in form or appearance of this sort of normative discourse. “Cultural genocide” and “cultural integrity” are not at all the same. Instead, it is possible to see them as inverse from one another, insofar as cultural genocide is a *negative right* (peoples should be *free from* intentional group destruction) and cultural integrity is a *positive right* (people should be *free to* maintain their cultural identities). Moreover, they work within different domains of international law. The 1948 Convention is a monument in the field of international criminal law, whereas the 2007 Declaration is part of international human rights law. Nevertheless, it is no accident that the drafting history behind Article 8 of the Declaration referenced both cultural genocide and ethnocide. The goal of this dissertation is to parse out these semantic connections.

Indigenous Peoples

As a non-Indigenous student in the scholarly field of Indigenous studies, I favor capitalizing “Indigenous peoples” as a proper noun to refer to a contemporary and global category of identity. As it is used here, the notion of “Indigenous peoples” is referenced from what is now a scholarly tradition over half a century old, stretching from Vine Deloria Jr.’s 1969 classic, *Custer Died for Your Sins: An Indian Manifesto* to Taiaiake Alfred’s more recent work in political theory, as encapsulated in *Peace, Power, Righteousness: An Indigenous Manifesto* (originally published in 1999, revised a decade

later).¹⁷⁵ The respective subtitles here indicate an important shift in terminology over the past half-century, as a distinctly *Indian* manifesto that was rooted in the Native American experience (primarily in North America) of the mid-20th century opened up by the end of the 20th century into the more generalizable and global category of identity referred to as “Indigenous peoples,” per se. Throughout this dissertation, I have decided to capitalize this subject as a proper noun and conjoin it with the specific term “peoples,” the latter of which has a certain connotation in international law that is inherently related to self-determination claims.

Yet this language is inherently problematic, given its Eurocentric etymology. Originally coined in English around the mid-17th century, this adjective derived from the Latin *indigena*, meaning “born in a country, native.”¹⁷⁶ Originally, the word was used to describe flora and fauna, as in a plant or animal that is indigenous or native to a certain environment, but its meaning was eventually extended in order to identify the non-European peoples encountered through the imperial expansion of Europe. So-called “natives” or “aborigines” were widely assumed to be ontologically different from the Europeans said to have “discovered” them. Especially in the “civilizing” discourse of settler colonialism, what we refer to today as Indigenous peoples were once (and in some cases, still are) seen as “savages,” in the etymological sense of being wild, untamed, and “of the woods,” something exploitable that is merely as part of the landscape.¹⁷⁷ As we will see in Chapter Two, it was only around the 1930s when the term “indigenous” was

¹⁷⁵ Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* (Norman: University of Oklahoma Press, 1988 [1969]); and Alfred, *Peace, Power, Righteousness*.

¹⁷⁶ “Indigenous, adj.,” *OED Online* (Oxford University Press, March 2017). Interestingly, the Latin root word *gingere*, meaning “to beget,” shares a connection with the Greek word *genos*, which, as seen below and in Chapter 1, provided the key root word for “genocide.” In sum, “indigenous” and “genocide” are etymologically related.

¹⁷⁷ “Savage, adj. and n.1.,” *OED Online* (Oxford University Press, March 2017).

introduced into the Anglophonic discourse of global governance, as it was adopted from the Francophonic legal artifact of the *travailleur indigène* (“native worker”). Indeed, the term had a colonial connotation insofar as it was used to mark and organize subordinate positions in a system of domination.¹⁷⁸

In this historical context, the ILO was responsible for introducing the “indigenous” identity category into international law in the form of Article 1 of the 1957 Convention (No. 107) as a label of (settler) colonial governance. We will momentarily turn to the Indigenous-settler co-constitution, as well as the genealogy of colonialism, but the point here is that the original connotation of “indigenous” in international law was imbued with Eurocentrism. Article 1 of the 1957 Convention thus defined “members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage. ... For the purposes of this Convention, the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.”¹⁷⁹ This reference to integration reflected what we are calling the normalcy of assimilation that became a global set of assumptions by the mid-20th century.

Yet since the 1970s, the term “Indigenous” has been appropriated, retooled, and even co-opted by to reflect more contemporary sensibilities regarding cultural diversity. It is presently used to connote a global category of identity. It is global in the sense that it covers the entire planet, but the contemporary concept of Indigenous peoples is not at all a universal category. Far from it. Rather, this identity category embodies the cultural anthropological notion of cultural relativism, thereby fundamentally rejecting all

¹⁷⁸ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 5.

¹⁷⁹ Article 1, 1957 ILO Convention No. 107.

pretenses involved with social evolutionist ideologies.¹⁸⁰ As such, Indigenous peoples are defined by their highly varied historical particularities. Indeed, it is the outstanding diversity of Indigenous peoples that makes them so important in the world today. It has been estimated that there are as many as 5,000 distinct groups of Indigenous peoples worldwide, amounting to more than 370 million Indigenous individuals on every inhabitable continent.¹⁸¹ In individualist terms, this represents less than 5% of the total global population, although in the collectivist sense, Indigenous peoples comprise an overwhelming share of the so-called “ethnosphere,” or “the totality of all living human cultures on Earth at any given moment,” perhaps as much as 95% of the world’s cultural diversity.¹⁸² Although there is a risk of flattening the diversity of these highly varied population under a single generic label, the final “s” in the appellation “Indigenous peoples” must be emphasized. Doing so fosters respect for the plurality of these groups while also acknowledging their global solidarity with one another based on their relatively common experiences and collective aspirations.¹⁸³

As it emerged out of the “long” decade of the 1970s, the contemporary meaning of Indigenous peoples has assumed a considerable degree of political power. In her recent study, *Global Indigenous Politics: A Subtle Revolution*, IR theorist and Anishinaabe scholar Sheryl Lightfoot describes this post-1970s political vision as “a fundamental

¹⁸⁰ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Los Angeles: University of California Press, 2003), 3.

¹⁸¹ Cæcilie Mikkelsen and Lola García-Alix, “Editorial,” in *The Indigenous World 2014*, ed. Cæcilie Mikkelsen (Edison, NJ: Transaction, 2014), 11.

¹⁸² Originally coined by anthropologist Wade Davis, the quote here is from Christopher Powell, “Revitalizing the Ethnosphere: Global Society, Ethnodiversity, and the Stakes of Cultural Genocide,” *Genocide Studies and Prevention* 10, no. 1 (2016): 44.

¹⁸³ Andrew Gray, *Indigenous Rights and Development: Self-Determination in an Amazonian Community* (Providence, RI: Berghahn Books, 1997), 127-133; Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed.) (New York: Palgrave Macmillan, 2012 [1999]), 4 and 6-7; and Niezen, *The Origins of Indigenism*, 160-165.

transformative shift away from the state-centric norm space” that defines the existing international system to a “new imagining of global order,” the latter of which would effectively involve a “post-colonial completion project of the remnant colonial structures” that we refer to below as the “settler colonial present.”¹⁸⁴ In this context, the contemporary political act of being Indigenous is relational and oppositional, insofar as it refers to a people who maintain the prior occupancy of a territory presently occupied by a modern state, and who maintain cultural differences from the national society that dominates that territory. As we will see in the following section, being “Indigenous” is necessarily co-constituted in relation to the ongoing practice of settler colonialism, insofar as the identity of the “settler” refers to foreign or “alien” peoples who have colonized Indigenous territories.¹⁸⁵ Over the past half-century at least, the keyword *Indigenous* has thus been reappropriated as a sign of resistance, especially as it is now commonly conjoined with the keyword “peoples,” a term whose meaning in international law relates to the right to self-determination.¹⁸⁶

Settler Colonialism

Contemporary Indigenous rights discourse thus emerged out of the transnational struggle against settler colonialism in the Americas, Oceania, and even in Scandinavia, where the Sami people of the far north have been subsumed under the sovereign domains of Norway, Sweden, and Finland. By settler colonialism, I am referring to “a global and

¹⁸⁴ Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (New York: Routledge, 2016), 16-17. It should be noted that Lightfoot does not strictly use the settler colonial analytic. Cf. Lorenzo Veracini, *The Settler Colonial Present* (New York: Routledge, 2015).

¹⁸⁵ Gray, *Indigenous Rights and Development*, 8; Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of US-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007), ix; and Veracini, *The Settler Colonial Present*, 58.

¹⁸⁶ Jeff J. Corntassel, “Who is Indigenous? ‘Peoplehood’ and Ethnonationalist Approaches to Rearticulating Indigenous Identity,” *Nationalism and Ethnic Politics* 9, no. 1 (2003): 75-100.

transnational phenomenon” that is “as much a thing of the past as a thing of the present.”¹⁸⁷ Specifically, the concept refers to a type of sovereign formation that was built on top of the conquest of Indigenous peoples. Indeed, I argue that the settler colonial construction of sovereignty was crystallized into the dominant structure of global governance. As discussed momentarily, this argument is expressed by my notion of *settler colonial globalism*, a concept which I propose demonstrates how the rules of sovereignty that were written into the structures of global governance in the mid-20th century came at the behest of settler colonial states that were anxious to legitimize their dispossession of Indigenous lives and territories.

Before we elaborate this notion, let us first begin with the historical semantics of these conjoined words: “settler” and “colonialism.” According to the Oxford English Dictionary, the etymology of the verb “to settle” traces back over a millennium, from the Old English into Middle English periods, when it meant to seat, fix, or place things in order, “so as to be undisturbed for a time.”¹⁸⁸ By the 17th century, it was used to refer to a particular type of migrant that sought “to establish a permanent residence, take up one’s abode, [and] become domiciled.”¹⁸⁹ In other words, by identifying a particular type of individual who was on the move, the term *settler* also involves a particular process or pattern of subject formation. Although settler colonialism is not conceptually dependent upon the notion of imperialism (as discussed momentarily), historically speaking it is true to say that “settlers” were people moving through the global circuits of modern

¹⁸⁷ Edward Cavanagh and Lorenzo Veracini, “Editors Statement,” *Settler Colonial Studies* 3, no. 1 (2013): 1.

¹⁸⁸ “Settle, v.,” *OED Online* (Oxford University Press, March 2017). See also Corey Snelgrove, Rita Kaur Dhamoon, and Jeff Corntassel, “Unsettling Settler Colonialism: The Discourse and Politics of Settlers, and Solidarity with Indigenous Nations,” *Decolonization: Indigeneity, Education & Society* 3, no. 2 (2014): 27-28.

¹⁸⁹ “Settle, v.”

imperialism. In this sense, the term “settlers” thus first intersected with the objective sense of governance implied by the other keyword here – *colonialism* – which during the 16th century also denoted “a body of people who settle in a new locality, forming a community subject to or connected with their parent state.”¹⁹⁰ Accordingly, the historical semantics of settler colonialism formed across two levels, both as a process of subject formation as well as a mode of governance.¹⁹¹

The important conceptual work of settler colonial studies helps to distinguish the “family relations” with other forms of colonialism, as well as with the more general notion of imperialism. As suggested, settler colonialism is a compound term that is made up of two co-dependent keywords. This conceptual structure shows that the latter term – *colonialism* – is a generic concept, and “settler” is the qualifying type. Indeed, scholars have provided a typology of *colonialism*, as there are other forms of colonialism that do not involve settlers, such as planter colonialism, which involves the use of slaves or indentured servants to produce staple crops, or extractive colonialism, which involves the exploitation of raw materials.¹⁹² Although they have mutated over time, these multifaceted forms of colonialism continue to exist in the world today. For example, although the transatlantic plantation system concluded with the apparent successes of 19th abolition movements, the practice of *plantation* as the industrialization of farming continues apace.¹⁹³ Similarly, the industrial practice of *extraction* continues to operate in global economic production processes. Finally, the process of “settling” also remains in

¹⁹⁰ “Colony, n.,” *OED Online* (Oxford University Press, March 2017).

¹⁹¹ Snelgrove, Dhamoon, and Cornthassel, “Unsettling Settler Colonialism,” 5.

¹⁹² Nancy Shoemaker, “A Typology of Colonialism,” *Perspectives on History* 53, no. 6 (2015), available at <https://www.historians.org/publications-and-directories/perspectives-on-history/october-2015/a-typology-of-colonialism>.

¹⁹³ Anna Lowenhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton: Princeton University Press, 2005), 167.

effect, for although people are no longer being moved as pawns through global imperial circuits, non-Indigenous “settlers” continue to enact forms of Indigenous dispossession.¹⁹⁴

Historically speaking, the multifaceted practices of colonialism went global with the expansion of European empires over 500 years ago. In this broad context, we refer to imperialism as a certain set of historical background conditions, whereas settler colonialism refers to one among many types of social practices. This sets up a crucial distinction, for whereas European overseas empires were dismantled in the post-World War II era, settler colonialism continued to be reproduced up through the late 20th and early 21st centuries. Over the course of this dissertation, we will uncover this underlying continuity in terms of the rules of sovereignty. In Chapter Three especially, we will see how even with the important post-1970s shift in global attitudes towards Indigenous peoples, they remained subsumed within the settler colonial structures of sovereignty that were used to piece together the contemporary global order of nation-states out of the prior historical framework of European overseas empires.

This conceptual distinction needs further parsing out, for although the genealogy of settler colonialism is rooted in the history of imperialism, they are nevertheless different ideas. Once again, their respective historical semantics provide a clue:

The term colony comes from the Latin word *colonus*, meaning farmer. This root reminds us that the practice of colonialism usually involved the transfer of population to a new territory, where the arrivals lived as permanent settlers while maintaining political allegiance to their country of origin. Imperialism, on the other hand, comes from the Latin term *imperium*, meaning to command. Thus, the term imperialism draws attention to the way that one country exercises power

¹⁹⁴ Alyosha Goldstein, “Toward a Genealogy of the US Colonial Present,” in *Formations of United States Colonialism*, ed. Alyosha Goldstein (Durham: Duke University Press, 2017); and Robert Nichols, “Theft is Property! The Recursive Logic of Dispossession,” *Political Theory* 46, no. 1 (2018): 3-28.

over another, whether through settlement, sovereignty, or indirect mechanisms of control.¹⁹⁵

While the difference here is suggestive, it is perhaps confusing that the terms “settlers” and “settlement” fall on either side of the *colonus-imperum* distinction. On the one hand, the connection here makes sense if we understand settler colonialism as a particular type of social practice within the broader history of European overseas empires. After all, many of the classic examples of settler colonial countries – such as the so-called CANZUS bloc (Canada, Australia, New Zealand, and the United States) – were founded by the British Empire. On the other hand, however, European overseas empires were eventually dismantled by the mid-20th century, yet the CANZUS countries continue to exist as settler colonial structures. The permanence of the latter is a key distinguishing point, as noted by another: “Colonialism refers to that form of intergroup domination in which settlers in significant numbers migrate permanently to the colony from the colonizing power. Imperialism is a form of inter-group domination wherein few, if any, permanent settlers from the imperial homeland migrate to the colony.”¹⁹⁶ Thus, whereas imperialism fell by the wayside, settler colonialism continues to exist.

The broader conceptual distinction here underscores the objective dimension of the settler colonial concept as an enduring structure of governance. Insofar as the classic idea of imperialism (i.e. *imperum*) projects an outward or geopolitical perspective in terms of foreign relations, this way of thinking was made obsolete by the official decolonization process managed by the UN up through the 1960s. Yet even now, in the

¹⁹⁵ Margaret Kohn, “Colonialism,” in *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Spring 2014 Edition), available at <https://plato.stanford.edu/entries/colonialism/>.

¹⁹⁶ Ronald J. Horvath, “A Definition of Colonialism,” *Current Anthropology* 13, No. 1 (1972): 47.

early 21st century, settler colonialism remains present. This is because the basic idea here (i.e. *colonus*) implies a more domestic or inward approach towards the consolidation of sovereignty and the construction of modern statehood. In other words, whereas the former concept (i.e. *imperum*) has an external implication, the latter idea (i.e. *colonus*) is decisively construed in an internal matter. As we will see, the dominant rules of sovereignty have locked into place an extremely sharp boundary based on the external-internal binary. Chapter One will introduce the so-called “blue-water doctrine,” otherwise known as the “salt-water thesis,” that has strictly regulated the official UN process of decolonization to the former possessions of overseas European Empires, thereby legitimizing settler colonial structures of sovereignty. This sets up an important theme that will be traced all the way through to Chapter Four, where we return once again to the *territorial integrity* norm that is presented in Article 46 of the 2007 Declaration.

Likewise, in Chapter Three, this discursive thread is analyzed with specific reference to the “peoples” versus “populations” debate during the ILO revision process of the late 1980s. Although the 1989 Indigenous and Tribal Peoples Convention (No. 169) openly rejected the integrationist foundations behind the 1957 Indigenous and Tribal Populations Convention (No. 107), the change in language from “populations” to “peoples” elicited a major controversy from certain states jealously guarding their sovereign right to territorial integrity from the political implications of “peoples” in relation to self-determination and decolonization claims. As a forced compromise, the final text of the 1989 Convention (No. 169) came with a caveat: “The use of the term peoples in this Convention shall not be construed as having any implications as regards

the rights which may attach to the term under international law.”¹⁹⁷ To the extent that this apparently unassuming provision actually limits any such self-determination and decolonization claims by Indigenous peoples, this important legal artifact of the post-1970s turning point is nevertheless marked by an underlying strand of historical continuity.

The settler colonial presumption of permanence is crucial to the argument that contemporary rights discourse is reproducing underlying structures of domination. However, as noted above in reference to the critical theory of co-optation, there is a danger of taking this critique so far that it become immobilizing. Indeed, the settler colonial analytic has been critically received by some Indigenous studies scholars who remain suspicious of this terminology’s presumptuous implications.¹⁹⁸ For instance, in contemporary legal idiom, the practice of “settling” assumes a certain degree of fixity, as in settling a dispute between parties as a means of securing payment, property, or title.¹⁹⁹ In this light, there is a risk of fatalistically overstating the settler colonial critique as something that is inevitable, as if the seemingly inexorable “logic of elimination” is accepted as *fait accompli*.²⁰⁰ This follows a more general warning against of a rigid and overbearing structuralist methodology that ends up reifying social formations as fixed, stable, and constant across historical time.

¹⁹⁷ Art. 1(3) 1989 Indigenous and Tribal Peoples’ Convention.

¹⁹⁸ Snelgrove, Dhamoon, and Cornthassel, “Unsettling Settler Colonialism,” 8-9.

¹⁹⁹ “Settle, v.”

²⁰⁰ Tim Rowse, “Indigenous Heterogeneity,” *Australian Historical Studies* 45, no. 3 (2014): 300. To be fair, neither Wolfe nor Veracini assume that the seemingly inexorable logic of elimination is a *fait accompli*. See Patrick Wolfe, “From Patrick Wolfe,” *Tequila Sovereign Blog*, 27 April 2011, available at <https://tequilasovereign.wordpress.com/2011/04/28/from-patrick-wolfe/>; and Veracini, “Defending Settler Colonial Studies,” *Australian Historical Studies* 45, no. 3 (2014): 311-316.

Settler colonial studies thus has to emphasize its critique without taking it too far. Veracini has attempted to balance these constraints while clarifying the field's commitment to the emancipatory politics of decolonization. As noted, settler colonialism has been remarkably resistant to the official decolonization process that is managed by the UN, as the inscription of the "salt-water" thesis in the official rules of sovereignty effectively left out Indigenous peoples under the domains of independent states. To the extent that nearly all settler colonial countries in the world today are themselves products of "decolonization" (strictly conceived), it is apparently unimaginable that these countries would themselves go through another round of decolonization (as broadly conceived beyond the "salt-water" thesis). In other words, the rules of sovereignty have foreclosed the possibility for the complete decolonization of Indigenous peoples.

At the same time, beyond this conceptual constraint, Veracini also points to a personal underlying commitment at the normative level. He is adamant that the settler colonial analytic can be used "to further decolonizing agendas. I am a settler," the author admits, "but Indigenous resurgence is in my interest."²⁰¹ Moreover, the "logic of elimination" has by no means been completely successful. On the contrary, it has had certain unintended consequences to the extent that it provided a rationale for the production of contemporary Indigenous rights discourse. Veracini explains that "the definitional apparatus of settler colonial studies and its emphasis on elimination is dialectically linked to its opposite: let's call it the colonial logic of reinscription, the ongoing reproduction of colonial difference ... A drive towards elimination and a focus

²⁰¹ Lorenzo Veracini, "Decolonizing Settler Colonialism: Kill the Settler in Him and Save the Man," *American Indian Culture and Research Journal* 41, no. 1 (2017): p. 2.

on the reproduction of colonial difference remain dialectically linked.”²⁰² Thus, in light of our dynamic theory of co-optation, even if the legalization of contemporary Indigenous rights discourse involves the reproduction of settler colonialism at one level, it also involves the performance of resistance and resurgence at another level.

Rights

The settler colonial analytic thus sets up a critique of rights discourse, as we will see momentarily. We tend to think of rights as something that is unmistakably good and appealing. This is evident in the primary definition of the term, which is “that which is considered proper, correct, or consonant with justice.”²⁰³ We can trace this meaning through its historical semantics. The closest term to it in ancient Greek is *dikaion*, which is roughly translatable as something that is just and impartial, although this language is now obscure.²⁰⁴ The ancient Roman word *ius*, which is translatable as both “right” and “law,” has a relatively closer connection to the present, as in the so-called “law of nations” (*jus genitum*).²⁰⁵ Yet the fact that Indigenous peoples have been excluded from the “law of nations” belies the otherwise optimistic sentiment carried by the keyword *rights*. We will turn to this critique by the end of this sub-section, only after we have addressed the following preliminary questions.

First, we have the political philosophical question: what are rights and who are they for? Are rights for “individuals,” “groups,” and/or other, more controversial types of

²⁰² Ibid, pp. 3-4.

²⁰³ “Right, n.,” *OED Online* (Oxford University Press, March 2017).

²⁰⁴ John Finnis, *Natural Law and Natural Rights* (Second ed.) (New York: Oxford University Press, 2011 [1980]), 165; and Leif Wenar, “Rights,” in *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Fall 2015 Edition), available at <https://plato.stanford.edu/entries/rights/#3>.

²⁰⁵ Emer de Vattel, *The Law of Nations; Or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Trans. Joseph Chitty) (Philadelphia: T. & J. W. Johnson, 1844 [originally 1758]).

modern rights-bearing subjects, such as animals, fetuses, or corporations?²⁰⁶ In order to examine the social construction of “Indigenous peoples” as the distinct bearers of “Indigenous rights,” this dissertation follows a critical historiography of human rights in order to set the historical formation of “indigenous rights” against the backdrop a liberal political philosophical tradition from which it at least partly emerged.²⁰⁷ As we will see, the post-1970s emergence of contemporary Indigenous rights discourse benefitted from the discursive space opened up by the sudden global prominence of human rights around the same time.

With that said, Indigenous rights are not human rights. This insight derives from the scholarly subfield of legal anthropology, which applies the methodological principle of cultural relativism to the study of law.²⁰⁸ Cultural relativism is simply the idea that beliefs and behaviors should be understood within the context of the culture in which it occurs, rather than be judged according to outside or pseudo-universal standards. This principle is crucial in order to appreciate the varied sources of Indigenous legal traditions. According to the Anishinaabe legal scholar, John Borrows, “the underpinnings of Indigenous law are entwined with the social, historical, political, biological, economic, and spiritual circumstances of each group.”²⁰⁹ Other scholars and jurists, especially in Canada, have similarly argued that the customary rights of Indigenous peoples are grounded in the local relationships of peoples and places.²¹⁰ To a certain extent, therefore,

²⁰⁶ Duncan Ivison, *Rights* (New York: Routledge, 2008), 10.

²⁰⁷ Francesca Merlan, “Indigeneity: Global and Local,” *Current Anthropology* 50, no. 3 (2009): 304.

²⁰⁸ Sally Engle Merry, “What is Legal Culture? An Anthropological Perspective,” *Journal of Comparative Law* 5, no. 2 (2012): 40-58; and Sally Engle Merry, “Anthropology and Law,” in *The Sage Handbook of Social Anthropology*, eds. Richard Fardon, Olivia Harris, Mark Nuttall, Trevor Marchand, Chris Shore, and Richard A. Wilson (Volume 1) (New York: Sage Publications, 2012), 105-120.

²⁰⁹ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 23-24.

²¹⁰ Peter Kulchiyski, “Aboriginal Rights are not Human Rights,” *Prairie Forum* 36 (2011): 33-53.

the sources of what is now referred to as “Indigenous rights” are rooted in, and inherently derive from, the sacred laws which flow from particular belief systems.

Secondly, we tap into the historiography of human rights by asking when, where, and under what conditions did Indigenous rights emerge? In particular, this dissertation builds off of the revisionist historiography of Samuel Moyn, who disputes the often romanticized narrative of international human rights that supposedly achieved prominence after World War II and the Holocaust. Instead, he argues that the idea of human rights as a supranational protection of individuals from the state only occurred after the “long” decade of the 1970s. Human rights emerged as the “last utopia,” after alternative programs of internationalism has failed (socialism, decolonization, etc.) has largely failed or concluded. In the context of the Cold War détente, moreover, human rights were promoted because its moralistic impulse appeared to be post-political.²¹¹ It was in this context that the contemporary Indigenous rights movement took hold.

At the same time, however, this dissertation problematizes the historiography of Indigenous rights discourse. Many observers point to the aforementioned 1977 NGO Conference as the inauguration of global Indigenous politics.²¹² To be sure, we can trace a line of continuity from that point to the 2007 Declaration. Yet the archaeology of Indigenous rights discourse reveals much deeper roots. For instance, when we turn to the 1957 Indigenous and Tribal Populations Convention (No. 107), we will trace the origins of the ILO regime back to the 1920s, when there were a number of unspoken assumptions that were inherited from colonial discourses of the 19th century and beyond. In particular,

²¹¹ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010).

²¹² Ingrid Washinawatok, “International Emergence: Twenty-One Years at the United Nations,” *New York City Law Review* 3 (1998): 41-42; and see Lightfoot, *Global Indigenous Politics*, 38.

these deep discursive strands are entangled with the “civilizing mission,” or “the grand project that justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe.”²¹³ Indeed, we can dig even deeper, going back to the 16th century Spanish friar, Bartolomé de las Casas, who only valued Indigenous cultures to the extent that such respect would facilitate religious conversions to Christianity.

Finally, we must ask, what do rights do? The keyword “right” is not simply a discursive artifact; it is also a social practice.²¹⁴ Rather than simply think of “rights” as a thing, per se, as in the grammatical form of a noun, “rights” can also be understood as a social practice, as in the form of a verb. Rights are social in the sense that they are something people do in order to achieve some form of justice. In the Western tradition of political philosophy, the practice of rights date back to decline of feudalism in the late medieval and early modern periods, when a complex of ideas, institutions, and practices associated with the bourgeoisie converged to clear a path to parliamentary democracy.²¹⁵ According to this tradition of classical liberalism, rights have been won through political struggles against arbitrary rulers and secured through the constitution of modern nation states.²¹⁶

²¹³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2004), 3.

²¹⁴ Richard Ashby Wilson, “Afterword to ‘Anthropology and Human Rights in a New Key’: The Social Life of Human Rights,” *American Anthropologist* 108, no. 1 (2006): 79.

²¹⁵ Barrington Moore, Jr., *Social Origins of Dictatorship and Democracy* (Boston: Beacon Press, 1966), 413-432.

²¹⁶ Charles Tilly, “Where Do Rights Come From?” in *Democracy, Revolution, and History*, ed. Theda Skocpol (Ithaca: Cornell University Press, 1998), 55.

Yet there is a danger here concerning the possessive quality of rights and the dispensary role assumed by the sovereign state, the latter of which is presumed to be the primary responsibility for ensuring rights. Following Hannah Arendt's well-worn argument, there has historically developed an "umbilical connection" rights and sovereignty.²¹⁷ But if a right is something that one owns or possesses by virtue of their citizenship, then it is also something can be revoked or dispossessed by the state. Given that that the realization of Indigenous rights (as with human rights, more generally) ultimately depends on the willingness of states to comply with international law, then the adoption of rights can be critically analyzed as a "gift." In the Bourdiean sense, a "gift" can operate as a form of symbolic violence, or that "gentle, invisible form of violence, which is never recognized as such."²¹⁸ In this way, the state recognition of Indigenous rights can create a lasting hold over Indigenous peoples.²¹⁹ The appearance of positive norm change may just be superficial, as the underlying continuity of Indigenous-state relations remains largely the same as before.

My argument here is that the language and social practice of *rights* has a tendency to be employed according to the settler colonial "logic of elimination." As reviewed earlier, there have historically been a wide variety of eliminatory strategies, and the application of rights to Indigenous peoples has been one of them. This dovetails with recent critiques of settler "reconciliation" processes that are ostensibly designed to reckon

²¹⁷ Moyn, *The Last Utopia*, 38.

²¹⁸ Bourdieu, *Outline of a Theory of Practice*, 192. See also Woolford, *Between Justice and Certainty*, 36.

²¹⁹ See Charles R. Hale, "Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala," *Journal of Latin American Studies* 34, no. 3 (2002), 497-498; Colin Samson and Damien Short, "The Sociology of Indigenous Peoples' Rights," in *Rights: Sociological Perspectives*, ed. Lydia Morris (New York: Routledge, 2006), 180-182; and Isabelle Schulte-Tenckhoff and Adil Hasan Khan, "The Permanent Quest for a Mandate: Assessing the UN Permanent Forum on Indigenous Issues," *Griffith Law Review* 20, no. 3 (2011): 698.

with historical injustices, but also end up reproducing the assimilationist agenda of the settler colonial state.²²⁰ Similarly, the “recognition” initiatives of liberal multicultural states that grant certain rights to Indigenous peoples further cements the ongoing settler colonial dynamic of usurping Indigenous sovereignty. This is because the act of recognition is inherently asymmetrical and unjust, meaning that settler states have the ultimate power to either bestow or extinguish the rights of Indigenous peoples.²²¹ Moreover, it is problematic that Indigenous rights discourse can only obtain legal force when it is uttered the language of the colonizers. This poses discursive limits to Indigenous rights, insofar as they only acquire legitimacy within the very system that has historically been responsible for the conquest, dispossession, and attempted destruction of Indigenous peoples.

Thus, we return to our fundamental paradox of rights discourse, which can be used both as a means of social control as well as a tool of human emancipation. On the one hand, powerful forces are able to set “realistic” limits to the scope of possibility. Thus, an international criminal prohibition of “cultural genocide” has been deemed unrealistic, just as Indigenous peoples’ demands for decolonization have been proscribed. On the other hand, there is nothing natural or preordained about the discursive limits of realism, as the “weapons of the weak” often include the “masters’ tools” being used

²²⁰ Damien Short, “Australian ‘Aboriginal’ Reconciliation: The Latest Phase in the Colonial Project,” *Citizenship Studies* 7, no. 3 (2003): 291; Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave, 2010), pp. 50-51; and Andrew Woolford, “Nodal Repair and Networks of Destruction: Residential Schools, Colonial Genocide, and Redress in Canada,” *Settler Colonial Studies* 3, no. 1 (2013): 69.

²²¹ Samson and Short, “The Sociology of Indigenous Peoples’ Rights,” p. 180; Alfred, *Peace, Power, Righteousness*, pp. 81-82; and Glen S. Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada,” *Contemporary Political Theory* 6, no. 4 (2007): 438-439.

against themselves.²²² Thus, Indigenous peoples have been able to take advantage of the global expansion of human rights discourse by offering the nascent norm of “cultural integrity” as a positive innovation in international law. In sum, this intellectual history is like a double-edged sword. A dynamic and multifaceted theory of co-optation will explain this strategic dilemma.

²²² James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press, 1985).

CHAPTER ONE

Enclosing the Meaning of Genocide (1900-1950s): The 1948 United Nations Convention for the Prevention and Punishment of the Crime of Genocide

Historical Spotlights

Chapter One uses the biography of Raphael Lemkin (1900-1959) as a contextual framework to begin our genealogy of cultural genocide. This should be expected. After all, the concept originated with him, and his background as a Polish Jew during the first half of the 20th century and as a survivor of the Holocaust established the necessary conditions for the creation of the notion that the specific characteristics of a group should be protected. Yet we already know that the idea of cultural genocide was doomed, and below we will see just how far it was deemed to be beyond the boundaries of acceptable international discourse. Thus, in order to uncover and analyze the imposed discursive limits that forced the abandonment of cultural genocide, we must de-center Lemkin by considering an altogether separate and distinct historical example from this same historical context. But first, let us return to Lemkin in order to set the stage.

Paris: December 9, 1948

At the 179th plenary meeting of the Third Session of the United Nations General Assembly, a roll-call vote was taken on the final draft of the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter, the 1948 Convention). It passed with unanimous consent, 56 votes to none. The President of the General Assembly (GA), Mr. H.V. Evatt of Australia, lauded this as “an epoch-making event,” as international safeguards were now established in order to protect “the fundamental right

of a human group to exist as a group.”¹ Raphael Lemkin, a “totally unofficial man” who worked tirelessly behind the scenes in order to reach this milestone, suddenly found himself in the spotlight.² His autobiographical account of this moment was brief and understated:

Dr. Evatt strolled from the podium with a radiant face, and with his and around my arm took a picture with me. The world was smiling and approving, and I had only one word in answer to all that: “Thanks.” It was [a] short word for acknowledging this new partnership between two worlds: my own world of long, frustrating efforts, hopes, and agonizing fears, and this new official world which now made a solemn pledge to preserve the life of the peoples and races of mankind.³

Lemkin’s story can be retold through the constructivist lens in IR theory. “Norms do not appear out of thin air,” note Martha Finnemore and Kathryn Sikkink, in their now classic statement in this body of research. The historical example of Lemkin fits into what Finnemore and Sikkink called “norm entrepreneurs,” which refers to the originating agent of the “norm life cycle.”⁴ These are enterprising individuals who promote causes and issues which may, under certain conditions, lead to “tipping points” where more and more people internalize new values and beliefs. As sources of positive inspiration, norm entrepreneurs are often celebrated as visionaries of moral progress, and Lemkin is one such cherished figure. As a Polish-Jewish lawyer whose family was lost in the Holocaust, he found refuge in America during World War II, and in the immediate postwar context of the Nuremberg Trials and the early years of the UN, he changed the normative

¹ United Nations General Assembly, “Hundred and Seventy-Ninth Plenary Meeting,” UN Doc. A/PV.179 (9 December 1948), in *The Genocide Convention: The Travaux Préparatoires*, eds. Hiram Abtahi and Philippa Webb (Botson: Martinus Nijhoff, 2008), 2084.

² Anonymous, “The Crime of Genocide,” *New York Times* (20 October 1957), E10.

³ Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze (New Haven: Yale University Press, 2013), 177.

⁴ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, no. 4 (1998): 896-897; and Cass R. Sunstein, “Social Norms and Social Roles,” *Columbia Law Review* 96, no. 4 (1996): 909.

landscape of the world. It has been said of him that “never in the history of the United Nations has one private individual conducted such a lobby.”⁵ Although he was forgotten in the few decades following his 1959 death, Lemkin’s legacy has since been revived. Today he is often revered by many as the “father” of the 1948 Genocide Convention and the original “pioneer of genocide studies.”⁶

Yet we should be wary of possibly canonizing or fetishizing Lemkin.⁷ Norm entrepreneurs do not exist in isolation from the forces they seek to change. As they confront the problems of the world, these individuals necessarily operate within already existing normative landscapes and knowledge systems. As individual actors, they are embedded in larger social structures that have their own in-built logics towards ideological reproduction and continuity. However much norm entrepreneurs try to push social values and beliefs into new directions, they still have to struggle against forces of the status quo. The “realities” of world politics thus end up imposing ethical limits to what is possible.⁸ Insofar as norm entrepreneurs are always caught up in broader relations of power, co-optation is a common mechanism in which status quo forces absorb or

⁵ John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (New York: Transnational, 1984), 54; quoted in Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (New York: Cambridge University Press, 2012), 89.

⁶ Yascha Mounk, “The Father of Genocide: Review of *Totally Unofficial: The Autobiography of Raphael Lemkin*,” *Wall Street Journal* (23 July 2013), available at <http://www.wsj.com/articles/SB10001424127887323936404578580092983234064>; Samuel Totten and Steven Leonard Jacobs, eds., *Pioneers of Genocide Studies* (New Brunswick, NJ: Transaction Publishers, 2002).

⁷ Alexander Laban Hinton, “Critical Genocide Studies,” *Genocide Studies and Prevention* 7, no. 1 (2012): 5-6; and Henry C. Theriault, “Against the Grain: Critical Reflections on the State and Future of Genocide Scholarship,” *Genocide Studies and Prevention* 7, no. 1 (2012): 124-125.

⁸ Richard Price, “Moral Limit and Possibility in World Politics,” *International Organization* 62, no. 2 (2008): 191-220.

deflect such challenging movements. Beneath the ethical heroism of norm entrepreneurs lies their “complicity in the very forces they resist.”⁹

Geneva: 1923-1924

In order to de-center the place of Lemkin in our genealogy of cultural genocide and cultural integrity, the historical analysis that is narrated below actually begins not with Lemkin but with Chief Deskakeh (1873-1925), an Iroquoian diplomat who dramatically yet unsuccessfully appealed to the League of Nations for the recognition of Indigenous sovereignty. Levi General Deskakeh was a chief of the Young Bear Clan of the Cayuga Nation in lower Ontario, near the border with New York. The Cayuga are one of the six constituent nations of the Haudenosaunee, otherwise known as the Iroquois Confederacy, and it was in this capacity that Deskakeh famously visited Geneva, Switzerland, from 1923 to 1924 in order to petition the League of Nations against the claims of sovereignty by Canada. Ultimately Deskakeh failed in his appeal for Indigenous self-determination against Canadian settler colonialism, but his intervention did become a minor *cause célèbre* at the time. As a young professional at the time, Lemkin could have possibly heard or read about this controversial episode in passing, although there is no evidence that he was aware of this episode.

Nevertheless, the Deskakeh episode highlights the status quo bias that later imposed ethical limits to Lemkin’s role as a norm entrepreneur. We will thus highlight the parallels between the failure of Deskakeh’s appeal for Indigenous self-determination

⁹ Naeem Inayatullah and David L. Blaney, “The Dark Heart of Kindness: The Social Construction of Deflection,” *International Studies Perspectives* 13, no. 2 (2012): 164.

and the failure of Lemkin's campaign to include cultural genocide in international criminal law. By juxtaposing the story of Deskakeh in Geneva with the intertwined biographies of Lemkin and the 1948 Genocide Convention, Chapter One sets up the dominant logic behind the institutional self-preservation of sovereign states in world politics. Although there is no direct connection between Deskakeh and Lemkin, they both attempted to push the discursive limits of the status quo, and both faced the similar constraints of the state-centric "reality" that defines the rules of the international system. The purpose of Chapter One is to highlight the limiting conditions of possibility that frame the perpetual dynamics between power and resistance.

In order to forefront how the global rules of sovereignty and the limits to self-determination were solidified by the League of Nations, our discussion below starts with the case of Deskakeh. We then turn to Lemkin, whose intellectual history is used to introduce his original conceptual framework that introduced cultural genocide as one of the multiple techniques of "*genos*-killing." Next we explore the cosmopolitan ethics that underpinned the original conceptualization of cultural genocide, as Lemkin and his allies after World War II were committed to protecting global cultural diversity as part of the common heritage of humanity. This positive moral vision is then set in contrast to the imposed "realities" involved with the preparation of the 1948 Genocide Convention, during which time the international legal definition was enclosed around a much narrower and legalistic conception of genocide. The conceptual exclusion of cultural genocide reflected the assumptions of what I call "settler colonial globalism," or the UN-based system of global governance that is organized according to the principles of sovereignty. In conclusion, I reflect on how settler colonial globalism produced the

“normalcy of assimilation,” or a widespread assumption regarding the normative goodness of assimilative practices as a natural function of modernity and nation-state building.

Compulsory Power and the Organizational Theory of Co-optation

Before we embark on the historiographical connection between Chief Deskakeh and the League of Nations with Raphael Lemkin and the UN, we must first briefly revisit and elaborate the theoretical framework provided in the Introduction. Recall our discursive mapping of IR theory based on the “colonial household” image and a four-part typology of power (compulsory; institutional; structural; and productive).¹⁰ Recall as well our four general theories of co-optation (organizational; liberal; critical; and dynamic). Here in Chapter One, we will be examining the first of these parallel four-part structures, as the following analysis of *compulsory power* at the conceptual is complimented by a focus on what is called the *organizational theory of co-optation*. In order to situate this analysis, we must first turn to the mid-20th century transition in global governance from the League of Nations into the United Nations. It was in this general historical context in which the dominant (yet contested) rules of global governance were formally established. These rules will persist as a constant set of background conditions all four body chapters of this dissertation.

Here in Chapter One, we are introduced to this mid-20th century historical turning point through the prism of classical realism, or what Agathangelou and Ling imagine as “*pater* Realism,” the “founding father” in “The House of IR.” Emblematic of this seminal body of theorists is Hans Morgenthau, who like Lemkin also happened to be a Jewish

¹⁰ Anna M. Agathangelou and L.H.M. Ling, “The House of IR: From Family Power Politics to the *Poiesies* of Worldism,” *International Studies Review* 6 (2004): 21-49.

intellectual-refugee during World War Two. Morgenthau's realism was premised upon a fundamentally subjective belief about inherently flawed and conflict-prone "nature" of humanity. All politics is a "struggle for power," because "man" was assumed to be an "innately selfish creature with an insatiable urge to dominate others."¹¹ Violence was thus naturalized as an inherent condition of the world. As we will see, Lemkin did not share such a pessimistic assumption about "human nature," but this is what he was up against, insofar as Morgenthau's principles of realism perfectly aligned with the consolidation of sovereignty as the defining principle of world politics.

When looked at through the perspective of Lemkin's entrepreneurial quest in international law, the philosophy of "*pater* Realism" can be seen as defining the dominant background conditions, or "the constellation of existing rules, which provide the normative structure within which actors choose what to do, decide how to justify their acts, and evaluate the behavior of others."¹² As Lemkin made his appeal for change, he faced an uphill battle in challenging dominant assumptions about the nature of sovereignty. The international law of genocide was meant to impose at least some limits on the presumed right of states to non-interference. Yet this aspiration was little match for the dominant realist principle of anarchy, which "assumes that international politics is composed of sovereign nation-states and that these sovereign nation-states are beholden to no higher power."¹³ This myth served an ideological function in naturalizing and

¹¹ Martin Griffiths, Steven C. Roach, and M. Scott Solomon, *Fifty Key Thinkers in International Relations* (New York: Routledge, 2009), 51.

¹² Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (New York: Oxford University Press, 2007), 10.

¹³ Cynthia Weber, *International Relations: A Critical Introduction* (Second ed.) (New York: Routledge, 2005 [2001]), 14.

legitimizing what the crystallization of the sovereign nation-state as the principle actor in the international system.

In order to begin setting up this hidden process of naturalizing and legitimizing the nation-state, we must first carefully work out the concept of *compulsory power*. This denotes how one actor directly controls or influences the circumstances of another. A key premise of this category is that power works through the interaction of “pre-constituted social actors.”¹⁴ As we will see in Chapter Two, this is also the case with the *institutional power*, as both positions understand power as a possessive attribute or resource that can be obtained by different actors. Yet the key distinction between the compulsory and institutional forms of power concerns the specificity of interactivity between social actors. Whereas *compulsory power* involves the direct control as a mode of power over others, *institutional power* is mostly indirect, as powers over others are mediated by larger, impersonal structures. We will turn to such indirect effects of power later, but in the first place, the direct exchange of power basically involves the ability of one actor to get another what it would otherwise not do. As noted earlier, perhaps the most extreme example of compulsory power is genocide, although as we will see, within the concept of genocide we see varying degrees of such power.

Finally, we must recall the four-part theoretical framework of co-optation that was also provided in the Introduction. Here in Chapter One we focus on the first of these, namely, the organizational theory of co-optation provided by the mid-20th century American sociologist, Philip Selznick, who used the concept to explain how a powerful social engineering program such as the TVA was able to last as long as it did because of

¹⁴ Michael Barnett and Raymond Duvall, “Power in Global Governance,” in *Power in Global Governance*, eds. Michael Barnett and Raymond Duvall (New York: Cambridge University Press, 2005), 9.

its function of incorporating recalcitrant outsiders under its domain. Insofar as the institutional as a whole was forced to adjust in order to deal with possible opposition or resistance from local power sources, Selznick identified this function as co-optation. Recall that he also distinguished between two dimensions to co-optation. What he called “formal” co-optation involved the dominant institution only appearing to alter its exercise in authority, “with or without the actual redistribution of power itself.”¹⁵ The alternative notion of “informal” co-optation entailed more furtive and tacit arrangements that may be more likely to redistribute power internally within the institution. This tension between superficial versus substantive change was emphasized as being built into Selznick’s original conceptualization of co-optation.

The organizational theory of co-optation outlined by Selznick provides a crucial lens for critically excavating the ideological origins of the UN out of the failed experiment with the League of Nations. *Power Realism* helps to understand the rules of global governance as they were written into the mid-20th century foundations of the contemporary global order. As seen below, there was a moment of opportunity immediately after World War II to rewrite the rule of sovereignty. Indeed, Lemkin epitomized this fleeting chance, as his belief that peoples’ basic rights to existence mandated certain constraints upon independent sovereign states. Moreover, as far as the organizational theory is concerned, Lemkin represented a recalcitrant outsider. He was famously obstinate and a constant thorn in the sides of powerful delegations at the UN. As we trace the drafting process behind the 1948 Genocide Convention, we will consider both the “formal” and “informal” dimensions of co-optation.

¹⁵ Philip Selznick, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (Berkeley: University of California Press, 1949), 260. Emphasis added.

In sum, the inherited legacy left by “*pater* Realism” shows how the norm of sovereignty crystallized as it was written into the basic rules of global governance during the mid-20th century. This legacy served an ideological function by legitimizing the nation-state as the principle actor in world politics, as well as by naturalizing the rawest and most extreme forms of compulsory power assumed by sovereign states, such as the presumed right of a state to destroy groups of people within its own borders. Although the international law against genocide tried to rein in this presumed right, prevailing powers were nevertheless able to limit the scope of the 1948 Genocide Convention, thereby locking into place the status quo.

The Constraints of Sovereignty

We are not simply interested in uncovering the conceptual origins of cultural genocide by tracing the intellectual history of Lemkin and the 1948 Convention. More crucially, Chapter One as a whole is geared towards exposing the dominant constraints of international law that were responsible for forcing the abandonment of this promising concept in the first place. As subsequent sections flesh out the story of Lemkin and the co-optation process during the drafting of the 1948 Convention, we will ultimately explain how the contemporary status quo of the international system came into place over the course of the mid-20th century. In the immediate section, however, we will sketch out the broader historical background conditions surrounding Lemkin and the conceptual origins of genocide discourse. Stated differently, this section describes the social problem at stake with genocide, namely, the presumed “right” of a sovereign state to essentially do whatever it wants to people within its own territorial confines. This basic normative principle hardened during the first half of the 20th century, and as we will see later, it

crystallized into the rules of sovereignty that were eventually established by the UN in the post-World War Two period.

But first we must focus on the pre-World War Two context at a deeper level from the historical present. Discussion imminently returns to the 1923-24 Chief Deskakeh episode. As noted, although this episode is not directly unrelated to Lemkin, it nevertheless touches upon crucial issues related to what we call settler colonialism, Indigenous peoples, and the question of genocide. Next, leading up to World War Two, we look at the systemic failure minority rights regime under the League of Nations, which ultimately ended up being co-opted by the Nazis and the political issue of ethnic German minorities in Eastern Europe. Finally, we turn to Lemkin's early intellectual endeavors and his first foray in the creation of international law, as his 1933 proposal for the international criminalization of "barbarism" and "vandalism" was ultimately rejected by the international community.

From Chief Deskaheh in 1923-4 Geneva to the 1933 Montevideo Convention

It was just noted that Chapter One is not solely concerned with the intellectual biography of Lemkin and the 1948 Convention, or even with the conceptual origins of cultural genocide. Rather, our ultimate focus is on the limits to discourse that have been imposed by "*pater* Realism," the dominant intellectual tradition that legitimized the presumed sanctities of state sovereignty, including the apparent right to eliminate sub-state alterities from within the body politic. The enormous powers of the state were mostly normalized by the international community of sovereign states in the early 20th century. In this this historical context, the classic image of sovereignty as "power absolute and perpetual," "supreme," and "subject to no law" became institutionalized as a

basic function of global governance.¹⁶ It is no surprise that the norms of statehood were produced at this time as a result of the International Conference of American States, which produced the 1933 Montevideo Convention on the Rights and Duties of States, which essentially positivized the rules of sovereignty. We will return to substance of this international law momentarily.

The observation that the rules of sovereignty emerged from the inter-American regional system of global governance is significant because it intersects with issues related to settler colonialism, Indigenous peoples, and the question of genocide. As noted in the Introduction, settler colonialism is a global and transnational phenomenon, one that stretches from North America to Latin America and beyond. We will see in greater detail in Chapter Two how the so-called “Indian problem” was present across the entire hemisphere. Just before the turn of the 20th century, at least some countries apparently felt little compunction over using the extreme compulsory powers of the state to physically eliminate Indigenous peoples. Consider the United States’ “Indian Wars” that lasted through the 1890s, or the Argentinian military campaign in the 1870s known as the “Conquest of the Desert,” for example. Quite simply, this was a time in which the domination of settler colonial states over Indigenous peoples became normalized by the international system. The enormous weight of settler colonial states in dictating the rules of the game of international diplomacy becomes evident in the case of Chief Deskakeh.

In the summer of 1923, a traditional Haudenosaunee chief named Deskakeh travelled to Geneva, Switzerland, as a diplomatic representative of his people. The Haudenosaunee is the autonym of the Iroquois Confederacy, which is made up of six

¹⁶ The 16th century political philosopher Jean Bodin, quoted in Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2011), 31.

interrelated Indigenous nations, including the Mohawk, Seneca, Onondaga, Oneida, Cayuga, and Tuscarora Nations. Chief Deskakeh was of the Cayuga Nation, and he came from a reservation in lower Ontario that the Canadian government has designated as the Six Nations of the Grand River. Seeking an audience at the League of Nations, Chief Deskakeh traveled to Europe so he could deliver a prepared text entitled “The Red Man’s Appeal to Justice.” Although this document does not explicitly use the precise language of “self-determination” (a term that was itself only recently popularized), it was essentially a plea international recognition. This is evident at the very outset of the text, where Deskakeh identifies his own Indigenous political body in relation to the nascent rules of sovereignty.

Under the authority vested in the undersigned, the Speaker of the Council, and the sole deputy by choice of the Council, composed of forty-two chiefs, of the Six Nations of the Iroquois, *being a State within the purview and meaning of Article 17 of the Covenant of the League of Nations*, but not being at present a Member of the League, I, the undersigned, pursuant to the said authority do hereby bring to the notice of the League of Nations that a dispute and disturbance of peace has arisen between the State of the Six Nations of the Iroquois on the one hand and the British Empire and Canada, being Members of the League, on the other, the matters in dispute and disturbance of the peace being set out in paragraphs 10 to 17 inclusive hereof. The Six Nations of the Iroquois crave therefore invitation to accept the obligations of membership of the League, for the purpose of such dispute; upon such conditions as may be prescribed.¹⁷

In this excerpt, “The Red Man’s Appeal to Justice” is essentially attempting to co-opt the rules of sovereignty in order to make a demand for what we might recognize as Indigenous rights. After all, the statement is rooted in the Haudenosaunee’s own political history and internal structure of governance. As such, the key premise of “The Red Man’s

¹⁷ Anonymous, “Appeal of the ‘Six Nations’ to the League,” *League of Nations Official Journal* 5, no. 6 (1924): 829.

Appeal to Justice” was that they had never relinquished their “right of independence.”¹⁸ Indeed, the Haudenosaunee had a long tradition of treaty relations, not just with the British Empire, but also Canada as well as the United States. Treaties are of course a standard protocol of international relations, not domestic politics, and the historical fact of the matter is that Haudenosaunee had long been recognized by other international actors as diplomatic equals. Moreover, the Haudenosaunee is itself an international organization that is comprised of six distinct nations. The Mohawk, Seneca, Onondaga, Oneida, and Cayuga were the original five nations that founded the Haudenosaunee before the arrival of Europeans, and the Tuscarora were admitted in the 18th century as the sixth. “The Red Man’s Appeal to Justice” wryly says that the Haudenosaunee is actually “the oldest League of Nations.”¹⁹

Such a mocking and defiant tone was directed particularly at the Canadian government, which in turn prompted then to dismiss the petition for Haudenosaunee membership in the League of Nations as “a hopeless project.”²⁰ In its public rebuke of “The Red Man’s Appeal to Justice,” the Canadian government claimed that it had never recognized the Six Nations “as having any separate or sovereign rights.”²¹ The Canadian government attempted to legitimize this claim by pointing to the enfranchisement provisions of the Indian Act, a Canadian federal law dating back to the 1876 that establishes its authority to govern the affairs and day-to-day lives of individuals that can

¹⁸ Ibid, 835.

¹⁹ Ibid, 829. See also Francis Jennings, William N. Fenton, Mary A. Druke, and David R. Miller, eds., *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse: Syracuse University Press, 1985); and Neta C. Crawford, “A Security Regime among Democracies: Cooperation among Iroquois Nations,” *International Organization* 48, no. 3 (1994): pp. 345-385.

²⁰ “Appeal of the ‘Six Nations’ to the League,” 831.

²¹ Ibid, 830.

be registered as “Indians.” By extending government assistance through the channels of Canadian citizenship, “this legislation was enacted to stimulate progress among the Indians and to afford them an opportunity for self-development and advancement,” at least according to the self-righteous rationale of the Canadian government.”²² In short, according to the Canadian position, it was ridiculous to even consider the possibility of a state within a state. Quite simply, they saw Indians as domestic subjects, not international interlocutors.

Although Deskakeh’s months-long presence in Geneva became a minor *cause célèbre* that generated at least some measure of support from the international community, it was the Canadian government’s repudiation that ultimately won the day. “One by one, the members of the League of Nations accepted the Canadian version of the international order.”²³ The following argument from Canada thus became an international consensus: “The Six Nations are not a State within the purview or meaning of Article 17 of the Covenant of the League of Nations, being subjects of the British Crown *domiciled within the Dominion of Canada* and owing a natural debt of allegiance to His Majesty’s Government thereof, and are therefore not competent to apply for or receive membership in the League.”²⁴ Note the emphasis here following the word “domiciled,” as in to domesticate, or bring into a “household” in the domestic sense. This keyword identifies a key process of settler colonialism, which as noted in the Introduction is all about domestication, or the internalization of Indigenous peoples under the sovereign rule of

²² Ibid, 834.

²³ Robert Nichols, “Realizing the Social Contract: The Case of Colonialism and Indigenous Peoples,” *Contemporary Political Theory* 4, no. 1 (2005): 43.

²⁴ Anonymous, “Appeal of the ‘Six Nations’ to the League,” 829.

states. By winning the international consensus in the League of Nations, Canada effectively legitimized its settler colonial order.

There is a certain ambivalence surrounding the historical episode of Chief Deskakeh and “The Red Man’s Appeal to Justice.” In some ways, it could be seen as something ahead of its time, prefiguring the core claim of self-determination in contemporary Indigenous rights discourse. Indeed, many intellectual-historical accounts of Indigenous rights discourse typically begin with a quick reference to Chief Deskakeh before skipping ahead about a half-century to the more lasting developments in the post-1970s period. But this misses the point. For one thing, “The Red Man’s Appeal to Justice” was not an appeal for “Indigenous peoples,” per se, especially considering the fact that the idea had not yet been invented. It was not even an appeal for all “Native Americans” or “Indians” in North America. There was no explicit gesture towards universality, at least not in the language of human rights, which would only emerge later in different historical circumstances. At the same time, we can see the Chief Deskakeh episode as giving definite or concrete form to what we have been referring to as the “status quo” of the international system. That is to say, the official repudiation of “The Red Man’s Appeal to Justice” underscores the enduring dominance of settler colonial states in the defining the rules of global governance.

This particular discursive event is not only significant because it represented a radical departure from the status quo, although it was quite unprecedented for an Indigenous actor to make such an international impression. Rather, it is significant because it indicates what would become an enduring institutional continuity in global governance. As noted, the Deskakeh episode also registers in the midst of a larger

contemporaneous shift in international legal thought. After all, this was at a time during the interwar era that was marked by the normative diffusion of state sovereignty, the rules of which were becoming increasingly positivized in international law. A key moment in this process was in 1933, when the Seventh International Conference of American States met in Montevideo, Uruguay, to design and ultimately agree to a treaty that expressed the declarative theory of statehood as part of customary international law. Known as the Montevideo Convention on the Rights and Duties of States, this instrument defines a state according to four criteria: a permanent population; a clearly defined territory; an effective government; and a capacity to engage in international relations.²⁵ The fact that the rules of sovereignty came from American states is significant, as we will see at various points throughout this chapter features of what I call *settler colonial globalism*.

Looking ahead to Chapter Three, where settler colonialism becomes the focus, we will even see the return of the 1933 Montevideo Convention on the Rights and Duties of States as a target of co-optation at the 1977 NGO Conference, which was highlighted in the Introduction. As we will see, Article 1 of the 1977 Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere used the four criteria for statehood to press a demand for the international recognition of Indigenous peoples as nations. Just as Chief Deskakeh attempted to co-opt the membership rules of the League of Nations, so too did the 1977 Declaration attempt to co-opt the 1933 Montevideo Convention. In principle, at least, it would appear that many Indigenous peoples, especially the Haudenosaunee, meet the criteria. Yet in practice, these strategic appeals for the inclusion of Indigenous peoples in the international system have been shut

²⁵ Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents," *Columbia Journal of Transnational Law* 37 (1999): 414.

down by the rules of sovereignty inscribed by settler colonial countries. Again, to recall our critical question at the outset of this dissertation, apart from any apparent shift in attitudes, how much has actually changed in terms of the structured relationships between settler colonial states and Indigenous peoples?

Before moving on, there is one last thing to note about Deskakeh and “The Red Man’s Appeal to Justice.” It charged that “the manifest purpose on the part of the Dominion Government [referring to the Canadian federal government] to destroy all *de jure* government of the Six Nations ... and to subjugate the Six Nations peoples [referring to the Haudenosaunee],” adding that “these wrongful acts have resulted in a situation now constituting a menace to international peace.”²⁶ This charge – that the Canadian government was intending to politically destroy the independent governments of the Six Nations – marks an important form of argumentation that prefigures Lemkin’s theory of genocide as the usurpation of sovereignty, as discussed below. More conspicuously, the Deskakeh episode conveys “fear that the settler state will use any opening or opportunity to interfere in the life of the community and destroy its collective fabric and that over time the community will literally cease to exist.”²⁷ For Deskakeh, as well as for contemporary Indigenous rights discourse more generally, the quest for rights is a matter of great urgency that is driven by “a very sensible anxiety over a corporeal and political disappearance” of Indigenous territories and cultures.²⁸ As we will see, there are parallels

²⁶ Anonymous, “Appeal of the ‘Six Nations’ to the League,” 834.

²⁷ Matthew Wildcat, “Fearing Social and Cultural Death: Genocide and Elimination in Settler Colonial Canada – An Indigenous Perspective,” *Journal of Genocide Research* 17, no. 4 (2015): 396.

²⁸ Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham: Duke University Press, 2014), 108, as quoted in Wildcat, “Fearing Social and Cultural Death,” 396.

to be drawn here with Lemkin's later idea of genocide involving the usurpation of sovereignty.

In sum, we have thus seen how the rules of sovereignty were put into place during the interwar period by American states through the institutions of global governance. This reflected the dominant assumption that settler states should deal with Indigenous peoples in the realm of domestic affairs, not international relations. Since the late 19th century, when settler colonialism consolidated in both Canada and the United States through processes of domestication, Indigenous peoples were expected to be assimilated. We will come back to the normalcy of assimilation later on in this chapter, but the point here is that the rules of sovereignty that were positivized during the early to mid-20th century strictly precludes Indigenous claims for freedom. Self-determination was off-limits. As seen momentarily, this new norm only applied to the new states in Central and Eastern Europe that were created after World War One, not to colonized peoples elsewhere in the world. This was as true for colonized peoples under overseas European empires in Asia and Africa as it was for Indigenous peoples under settler colonial countries in the Americas and Oceania. At least in the case of what would become called the Third World, there were percolating independence movements that would eventually culminate in the official UN-managed decolonization process post-World War Two. Yet for Indigenous peoples, the possibility of full self-determination was made impossible. As the Canadian delegation put it in response to Chief Deskakeh, the claim for Indigenous sovereignty was utterly "hopeless."²⁹

²⁹ Anonymous, "Appeal of the 'Six Nations' to the League," 831.

The Minority Rights Tradition

This leads us to our next background context concerning the minority rights tradition during the interwar period, a context which is more proximal to the intellectual biography of Lemkin. To be clear, Chief Deskakeh was not making a claim for minority rights.³⁰ Instead, “The Red Man’s Appeal to Justice” was more akin to a declaration of independence, or at the very least an international airing of grievances between two ostensibly equal parties. Of course, Canada and the rest of the world did not see it that way. Nevertheless, Chief Deskakeh struck a resonant chord at the time by describing the situation between the Canadian federal government and the Haudenosaunee as “a menace to international peace.”³¹ Such language was rife in this historical context, coming only a few years after the 1919 Paris Peace Conference, which was a meeting of the victorious Allied Powers that settled the terms for peace after World War I. The 1919 Paris Peace Conference led to a number of important decisions in 20th century global history, including the establishment of the League of Nations, the transfer of Ottoman and German overseas possessions as “mandates” under the supervision of dominant Western powers, and the formation of new sovereign states in Eastern and Central Europe.

This latter factor is especially pertinent. After World War I, the great land empires of the Eurasian heartland all collapsed, including the German Empire, the Austro-Hungarian Empire, the Russian Empire, and the Ottoman Empire. As a result of the 1919 Paris Peace Conference, the geopolitical map of this part of the world was fundamentally redrawn in order to reflect the new norm of national self-determination. We will describe

³⁰ Indigenous rights and minority rights are distinguishable discourses that nevertheless share a familial relation. See Will Kymlicka, “Beyond the Indigenous/Minority Dichotomy?” in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, ed. Stephen Allen and Alexandra Xanthaki (Portland, OR: Hart, 2011), 183-208.

³¹ Anonymous, “Appeal of the ‘Six Nations’ to the League,” 834.

this norm momentarily, but first it is necessary to appreciate the significance of this historic transformation. Whereas the human geography of this region was once a culturally diverse mosaic of different peoples living together as neighbors, hereafter the imperatives of modern statehood pushed for greater national homogeneity. In the totalizing classificatory grid of modern statehood, some 25 to 30 million people were suddenly labeled “minorities.”³² Many of these minorities had compatriots in home countries. For example, the largest minority in interwar Eastern Europe was actually ethnic Germans, and with the rise of Nazism just on the horizon, the threat of irredentism and territorial aggrandizement underscored just how much of a security threat was posed by the “problem” of minorities. Population politics in interwar Europe was a precarious business, and it is little surprise that the minority rights system eventually failed so spectacularly during World War II.

In order to put this situation into context, we can use historian Mark Levene’s recent delineation of what he calls the European “rimlands,” or a region that stretches from the Balkans in the south, to the Caucasus, Black Sea, and Anatolia to the east, and the Baltic, Belorussia, Ukraine, and Poland to the west. From 1912 (the beginning of World War I) to 1953 (the death of Stalin), this was a large-scale “zone of genocide.”³³ Lemkin’s biography emerged out this tumultuous historical context. He was born in 1900 to a Polish-Jewish family near a farming village that was then part of the western borderlands of Tsarist Russia. Like most other parts of this continental region, this was a culturally diverse landscape where peoples of various nationalities and religions lived

³² Mark Levene, *The Crisis of Genocide*, Vol. I, *Devastation: The European Rimlands, 1912-1938* (New York: Oxford University Press, 2013), 181.

³³ *Ibid.*, 1-32.

amongst each other. This particular area was occupied by the German army in 1914 and the Lemkin family farm suffered from shelling during World War I. As a result of the Paris Peace Conference, this territory was transferred to the newly re-established Polish nation-state. Immediately after the war, however, from 1918 to 1919, just as the Paris Peace Conference was underway, there was a rash of anti-Jewish riots or pogroms in Poland.³⁴ Although Lemkin may not have been directly or personally affected at this time, it certainly did not portend well for the future.

Indeed, Poland was a crucial flashpoint in the post-World War I international security environment. After all, it would later be the Nazi invasion of Poland in 1939 that ignited World War II. Over twenty years earlier, in President Woodrow Wilson's famous 1918 address to the US Congress, he singled out the promotion of an independent Polish state "which should include the territories inhabited by indisputably Polish populations."³⁵ For Wilson, the self-determination of the Polish people was more a strategic consideration than anything else. In this context, self-determination, or more specifically, *national* self-determination meant the creation of new independent and self-governing nation states. Yet the promise of admission into the League of Nations was only extended to Poland and other countries in the European "rimlands" because the geopolitical stakes in this specific region. In fact, the promise of Polish independence "was originally put forward by Imperial Russia and then the Central Powers as wartime psychological warfare."³⁶ Meanwhile, self-determination became a fixed feature of

³⁴ John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York: Palgrave MacMillan, 2008), 13.

³⁵ See Point 13 in "President Woodrow Wilson's Fourteen Points," available at http://avalon.law.yale.edu/20th_century/wilson14.asp.

³⁶ Allen Lynch, "Woodrow Wilson and the Principle of 'National Self-Determination': A Reconsideration," *Review of International Studies* 28, no. 2 (2002): 428.

socialist and revolutionary thought after Lenin's 1914 essay, *The Right of Nations to Self-Determination*. It was only after such adversarial deployments of self-determination discourse that President Wilson began using it within a certain and strictly limited geographical scope.³⁷

Like opening Pandora's box, the struggle for national self-determination in the European "rimlands" had a deeply-rooted and systemic malfunction, as the ideal of homogenous nations as the basis for the modern form of statehood produced the social "problem" of minority populations and their supposed rights. Of course, the genealogy of minority rights has its own deep history, dating back to the post-Napoleonic Concert of Europe, if not earlier to the 1648 Peace of Westphalia.³⁸ As the 1919 postwar settlement unleashed the self-determination as a new international norm, the minority rights tradition emerged as an option for contending with the consequences. It was already noted that some 25 to 30 million people in the European "rimlands" suddenly fell into the problematic label of "minorities."³⁹ The situation in the newly independent Polish Republic was especially precarious. According to the 1921 census, only 69.2% of the population was identified as Polish. The rest were Ukrainians, Jews, Belorussians, Germans, Lithuanians, Russians, Czechs, Tartars, and Karaites.⁴⁰ To put this in perspective, looking ahead to the 1950s, the percentage of ethnic Poles in Poland rose to the top 95 percentile, having thus effectively "solved" the so-called "problem" of

³⁷ Eric D. Weitz, "Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right," *American Historical Review* 120, No. 2 (2015), 485; and Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), 28.

³⁸ Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon, 1991), 25-37.

³⁹ Levene, *Devastation*, 181.

⁴⁰ Kenneth C. Farmer, David Crow, and Richard Blanke, "National Minorities in Poland, 1919-1980," in *Eastern European National Minorities: A Handbook*, ed. Stephan M. Horak (Littleton, CO: Libraries Unlimited, 1985), 37.

minorities. Lemkin's fateful emigration during the early stages of World War II was a product of such circumstances.

The interwar minority rights system was a more immediate result of this context, as the principle of self-determination was strictly limited to the European "rimlands." The Allied Powers were hesitant to fully embrace the corollary norm of minority rights, however. Although President Wilson pushed for a specific provision in the League of Nations Covenant that would require all new states, including Poland, to bind themselves to minority rights in order to secure recognition as independent states, he was rebuffed, as the final text of the Covenant makes no mention of minority rights.⁴¹ Nevertheless, it was agreed at the 1919 Paris Peace Conference that some form of protection was needed for all new states seeking admission into the League. Far from promoting any general or universal agenda for minority rights, what was instead created was a series of state-by-state treaties. The first such instrument was Polish Minorities Treaty, signed by the principle allied and associated powers and Poland at Versailles in June 1919. In turn, this served as a model for over a dozen other country-specific treaties in this region.

Of course, we have just noted that the protection of minorities in Poland (as elsewhere in the "rimlands") eventually became an abject failure by the outbreak of World War II. The "problem" of minorities in the geopolitical climate of organic nationalism and state building proved too much to bear. As tensions rose over the 1930s, the entire League of Nations collapsed under the extreme pressure. The normative status of minority rights was tarnished by its co-optation by Nazi Germany in justifying the annexation of Austria and the Sudetenland.⁴² Even by that point, the minority rights

⁴¹ Thornberry, *International Law and the Rights of Minorities*, 38.

⁴² Mark Mazower, "The Strange Triumph of Human Rights," *Historical Journal* 47, no. 2 (2004): 384.

system was already moribund, especially after Poland denounced its treaty obligations in 1934.⁴³ Looking ahead to the post-World War II turning point, the eventual decision to embrace an individualist conception of rights versus the collectivist dimension of minority rights was influenced by recent memory.

In retrospect, the League's minority rights system was an utter failure, but it paved the way for Lemkin's intellectual development. For one thing, it opened up a crucial opportunity structure, especially for someone like him who happened to fall into the "minority" category. In particular, although the Polish Minorities Treaty was short lived, it at least temporarily guaranteed equal treatment of minorities under the law. It was in this context that Lemkin grew into a young professional. In the early 1920s he attended university in Lwow, Poland, where he originally studied linguistics before taking up law and earning a degree in 1926.⁴⁴ A few years later he became a public prosecutor in Warsaw and soon developed a growing reputation in the budding international legal community. As such, from a sociology of knowledge perspective, the minority rights system provided an important background condition that eventually led to the gestation of Lemkin's idea.

Barbarism and Vandalism

By the monumental year of 1933, when the Nazi Party seized power in Germany, Lemkin perceived the need for new international legal prohibitions. Although his breakthrough eventually came in 1944, when he was a Jewish intellectual refugee in America and published what became his magnum opus, *Axis Rule in Occupied Europe*,

⁴³ Idem, "Minorities and the League of Nations in Interwar Europe," *Daedalus* 126, no. 2 (1997): 54.

⁴⁴ Ryszard Szawłowski, "Diplomatic File – Raphael Lemkin: The Polish Lawyer who Created the Concept of 'Genocide'," *Polish Quarterly of International Affairs* 2 (2005): 103.

his first significant intervention in this regard occurred eleven years prior, when he was a budding international legal expert from Poland. In absentia from an important international criminal law conference in 1933 Madrid, he introduced “barbarism” and “vandalism” as a pair of distinct criminological concepts that were so harmful and heinous that they invoked the principle of universal jurisdiction, which “allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim.”⁴⁵ As we will see, of these two concepts, the proposed crime of “vandalism” is especially relevant in our genealogy from cultural genocide to cultural integrity. Nevertheless, at the time, Lemkin’s proposition failed to gain traction and was quickly forgotten. The significance of this early intervention is only evident in retrospect.

Lemkin embarked upon his international legal career during the interwar period around the same time when the rules of sovereignty were falling into place at the League of Nations. In this context, he began critically questioning and problematizing the status quo social ordering of the international system around the state-centric principles of territorial integrity and non-intervention. “Barbarism” and “vandalism” were rhetorical responses to a perceived exigence, that is, “a defect, an obstacle, something waiting to be done, a thing which is other than it should be.”⁴⁶ In this case, the major exigence in world politics was that the rules of sovereignty apparently implied the presumed “right” of states to destroy people within their territorial boundaries. During the first half of the 20th century, this presumed “right” was intellectually normalized by “*pater* Realism,” which

⁴⁵ Kenneth C. Randall, “Universal Jurisdiction in International Law,” *Texas Law Review* 66, no. 4 (1988): 785.

⁴⁶ Quoted in Perry S. Bechky, “Lemkin’s Situation: Toward a Rhetorical Understanding of Genocide,” *Brooklyn Law Review* 77, no. 2 (2012): 563.

naturalized the monopoly of violence and compulsory power as defining features of statehood. Lemkin faced off against this dominant logic over the course of his entire career.

According to his autobiography, Lemkin supposedly became aware of this perceived exigence early on in his intellectual development. A formative moment was in 1921, just as he was beginning law school in Lvov, when an Armenian operative named Soghomon Tehlirian assassinated a man named Talaat Pasha in Berlin as a form of retaliation for the recent Armenian genocide. Pasha was a former minister of the interior in the Turkish government and one of the main perpetrators of the genocide, and he had escaped punishment after World War I and lived in exile in Weimar Germany. It was instead Tehlirian who was put on trial for murder, as Pasha had otherwise enjoyed impunity from the law. “Why is a man punished when he kills another man,” Lemkin remembered asking, “yet the killing of a million is a lesser crime than the killing of an individual?”⁴⁷ He posed this ethical conundrum to his law school professor, who reportedly responded with the following analogy: “Consider the case of a farmer who owns a flock of chickens. He kills them and this is his business. If you interfere, you are trespassing.”⁴⁸ This concisely captured the essence of Lemkin’s problem with the absolute right to sovereignty. For him, sovereignty implied the positive responsibilities of states for the general welfare of people. This involved duties like the “building of schools, [the] construction of roads,” etc. Sovereignty, he argued, “cannot be conceived as the right to kill millions of innocent people.”⁴⁹ Such an assumption struck him as

⁴⁷ Lemkin, *Totally Unofficial*, 19.

⁴⁸ Quoted in Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Harper Collins, 2003), 17.

⁴⁹ Lemkin, *Totally Unofficial*, 20.

profoundly wrong and intolerable, and it aroused in him a sense of moral indignation that inspired his quest to establish a new criminological concept.

During the 1920s, Lemkin's early academic work focused on comparative criminal law before shifting more generally into international law. From 1926 to 1929, he published a series of books in Polish on penal codes in the Soviet Union and Italy.⁵⁰ By then, in addition to his scholarly pursuits, he had established a stable professional career as a public prosecutor in Warsaw. He also taught comparative criminal law at the Free Polish University in Warsaw, where worked with Emil Stanisław Rappaport (1887-1965), who was a leading figure in the Polish section of the *Association internationale de droit penal* (International Association of Penal Law), "an organization largely dominated by specialists of criminal law from France, Belgium, Spain and some of the new Eastern European countries, who were strongly influenced by legal teaching from France."⁵¹ This can best be described as an "epistemic community," or a network of professional experts in a particular issue-area that produces policy-oriented knowledge.⁵² The goal of this community of jurists was to push for the unification of international criminal law around a class of offenses known as *delicta juris gentium*, or crimes that "threaten to undermine the very foundations of the enlightened international community as a whole."⁵³ This category of crimes including things like piracy, counterfeiting, human trafficking,

⁵⁰ Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2016), 38-39; and Ana Filipa Vrdoljak, "Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law," *European Journal of International Law* 20, no. 4 (2010): 1174-1175.

⁵¹ Daniel Marc Segesser and Myrian Gessler, "Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919-1948)," *Journal of Genocide Research* 7, no. 4 (2005): 456.

⁵² Peter M. Haas, "Introduction: Epistemic Communities and International Policy Coordination," *International Organization* 46, no. 1 (1992): 2.

⁵³ Randall, "Universal Jurisdiction in International Law," 829.

narcotics, and even pornography, acts which were said to be so wrong and destabilizing that they invoked universal jurisdiction.

Significantly, this heinous list of offenses also including the “intentional use of any instrument capable of producing a public danger.”⁵⁴ This issue was taken up at international conferences for the unification of criminal law in 1930 Brussels and 1931 Paris, where many Eastern European delegates proposed the keyword “terrorism” as a generic classificatory term for this type of offense. Rappaport and Lemkin disagreed with this terminological move, and Lemkin was appointed to a commission on the issue.⁵⁵ It was in this regard that Lemkin framed his 1933 intervention on the basis of rejecting the categorization of “terrorism” as “useless and superfluous.” Besides, the terminology of “terrorism” was tainted by association with the rhetoric of perpetrators defining targets for elimination. Lemkin wanted to avoid the political pitfalls of this language in order to not lose sight of the underlying normative concern with what was otherwise described as a “common” or “public danger.” In this regard, Lemkin preferred an even broader and more general concept that he called a “transnational danger.”⁵⁶

In the lead up to the 1933 conference in Madrid, Lemkin’s argument was dropped from the commission’s final report. Moreover, due to the increasingly dangerous political turn back at home in Poland, Lemkin was unable to attend the meeting. “He was advised informally by Rappaport that the government had blocked his attendance for fear that his

⁵⁴ Raphael Lemkin, “Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations,” *5th Conference for the Unification of Penal Law in Madrid* (1933), translated by Jim Fussell, available at <http://www.preventgenocide.org/lemkin/madrid1933-english.htm>. See also William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Second ed.) (New York: Cambridge University Press, 2009 [2000]), 30.

⁵⁵ Segesser and Gessler, “Raphael Lemkin and the International Debate on the Punishment of War Crimes,” 456-457.

⁵⁶ Lemkin, “Acts Constituting a General (Transnational) Danger Considered as Offences against the Law of Nations.”

proposal would antagonize the new Nazi regime and fuel an anti-Semitic backlash in the Polish popular press.”⁵⁷ Nevertheless, he was able to present his own paper in absentia, which was entitled “Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations.” It proposed to adoption of “acts of barbarity” and “acts of vandalism” as part of *delicta juris gentium*. Here is how he defined the first of these two crimes: “Whoever, out of hatred towards a racial, religious or social collectivity or with the goal of its extermination, undertakes a punishable action against the life, the bodily integrity, liberty, dignity or the economic existence of a person belonging to such a collectivity, is liable, for the offense of barbarity.” This also included “all sorts of brutalities which attack the dignity of the individual” as a means of endangering the very existence of “the collectivity in which the victim is a member.”⁵⁸

And here is the second crime defined by Lemkin, “vandalism,” which for our purposes is perhaps more relevant, insofar as it prefigures the concept of cultural genocide: “Whoever, either out of hatred towards a racial, religious or social collectivity or with the goal of its extermination, destroys works of cultural or artistic heritage, is liable, for the offense of vandalism.” Whereas the concept of barbarism attacks the individuals that provide the basis for a group’s collective existence, the concept of vandalism attacks the cultural forms that provide the intersubjective basis for the identity of a victim group. As Lemkin put it, “an attack targeting a collectivity can also take the form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and

⁵⁷ Vrdoljak, “Human Rights and Genocide,” 1177. See also Segesser and Gessler, “Raphael Lemkin and the International Debate on the Punishment of War Crimes,” 458.

⁵⁸ Lemkin, “Acts Constituting a General (Transnational) Danger Considered as Offences against the Law of Nations.”

literature. ... The destruction of a work of art of any nation must be regarded as acts of vandalism directed against world culture.”⁵⁹ In this sense, the distinct harm caused by vandalism was not simply directed towards a particular collectivity or group, but humankind as a whole.

This was an insightful and nuanced point in Lemkin’s argument, insofar as his proposed criminological concepts transcended the individualist-collectivist binary by introducing a third option. “There are offences which combine these two elements,” he reasoned, in reference to the individualist-collectivist binary. “We find that some offences concern attacks on individual human rights (when they are of such importance that they interest the entire international community), while other offences relate to the relations between the individual and the collectivity, as well as the relationship between two or more collectivities.” The crime of “barbarism” included both the individualist and collectivist dimensions, as extermination campaigns targeted collectivities through the application of extreme compulsory power on the individual bodies of group members. In contrast, the crime of “vandalism” concerns not just the collectivities themselves but also what Lemkin called “world culture as a whole.”⁶⁰ The anthropological connotations of this idea correlated with the notion of “cultural diversity,” an expression that would later take shape in the early 1940s as a wartime slogan. Nevertheless, the idea of “vandalism” prefigured important developments in the contemporary field of cultural rights.

Lemkin believed that the outlawing of “barbarism” and “vandalism” would be important steps in what he considered to be the “interdependent struggle of the civilized

⁵⁹ Ibid.

⁶⁰ Ibid. See also Christopher Macleod, “An Alternative Approach to the Harm of Genocide,” *Politics* 32, no. 3 (2012), 200-201; and Shmuel Lederman, “A Nation Destroyed: An Existential Approach to the Distinctive Harm of Genocide,” *Journal of Genocide Research* 19, no. 1 (2016): 113.

world community against criminality.” Together, these types of offensives harmed individual human rights as well as the collective existence of groups. Additionally, and more importantly, these crimes also threatened to undermine the social order of the international community as a whole. For example, acts of barbarity could lead to a mass population exodus that imposes enormous costs and risks to neighboring countries. At an even deeper level of collective self-identification, Lemkin also maintained that these crimes violated the moral interests of the international community as well, as “barbarism” and “vandalism” were said to be “the opposite of the culture and progress of humanity.” Acts such as these harken “back to the bleak period of the Middle Ages.” As such, they were said to “shock the conscience of all humanity.”⁶¹ This latter phrase would later be recycled in Lemkin’s campaign at the UN during the late 1940s.

By then, the earlier concepts of “barbarism” and “vandalism” were synthesized into a unified conception of “genocide.” We will turn to this momentarily. But first Lemkin’s chosen vocabulary here – “barbarism” and “vandalism” – need to be unpacked. Considering the ideological baggage of these terms, historian Dirk Moses notes that “the genocide keyword grew out of, and was inserted into, a semantic field that includes terms laden with meanings from the history of western colonialism, namely the familiar trinity of savagery, barbarism and civilization.”⁶² For Lemkin, crimes such as these represented an atavistic scourge and a reversion to more primitive and baser instincts. This position was epitomized by one of Lemkin’s contemporaries, Norbert Elias (1897-1990), whose classic work, *The Civilizing Process* (originally published in 1939), depicted the

⁶¹ Lemkin, “Acts Constituting a General (Transnational) Danger Considered as Offences against the Law of Nations.”

⁶² A. Dirk Moses, “Genocide,” *Australian Humanities Review* 55 (2013): 25

teleological metanarrative or core mythology geared towards the hegemony of “Western civilization.”⁶³ The deep etymological roots of “barbarism” and “vandalism” reflected the inverse of this supremacist self-image. After all, “barbarism” derived from ancient Greek references to non-Greek peoples as “foreigners,” whereas “vandalism” comes from the Latin appropriation of an ancient Germanic tribal name that was used to connote the senseless destructiveness wrought by a horde of roving wanderers. We will return to this point at the end of Chapter One, when we considering the underlying ideological implications of Lemkin’s personal investment into the civilizational “self-image” of the international community.

To conclude this section, we have been identifying the broad set of intellectual-historical background factors leading up to Lemkin’s eventual coinage of “genocide” and the ultimate adoption of the 1948 Convention. More crucially, we have begun sketching out how the contemporary status quo of the international system came into place over the course of the mid-20th century. At the most general background level, the Chief Deskakeh episode and the 1933 Montevideo Convention signify how the rules of sovereignty, including the territorial integrity norm and the principle of non-intervention, were locked into place by American states, thereby tacitly embedding the logic of “settler sovereignty” into the formation of institutions for global governance.⁶⁴ At a more pertinent level of analysis, we also discussed the internationalization of the self-determination norm in the context of the 1919 Paris Peace Conference and the subsequent minority rights system. Yet the impending failure of this treaty-based system soon

⁶³ Idem, “Genocide and Modernity,” in *The Historiography of Genocide*, ed. Dan Stone (New York: Palgrave, 2008), 159-160.

⁶⁴ Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, MA: Harvard University Press, 2010), 16, 157, and 187.

opened the opportunity for new normative frameworks. In this context, Lemkin's specific proposal for the crime of "vandalism" marked an early gestation of what would soon be categorized as cultural genocide.

The Conceptual Structure of Genocide

Lemkin drew a crucial lesson from the failures of "barbarity" and "vandalism." For one thing, it indicated that his underlying message needed tailoring. He eventually came to the conclusion that "new conceptions require new terms."⁶⁵ It was not that the underlying acts themselves were new. They were as old as history. Indeed, we have already noted that, for Lemkin, such acts were an atavistic reversion towards a more primitive or uncivilized stage of humanity. The problem was that the already existent vocabulary at his disposal was just too limited. "Terrorism," "barbarism," and "vandalism" were all loaded with ideological baggage. As such, he reasoned, "it was necessary to coin [a] new word because the accumulation of this evil and its devastating effects became extremely strong in our own days. New words are always created when a social phenomenon strikes at our conscience with great force."⁶⁶ As far as Lemkin's life was concerned, the larger historical context behind the conception of genocide was the upheaval caused by World War II.

Lemkin's personal story in this regard was especially dramatic, beginning with an escape from the dual Nazi-Soviet invasion of Poland in September 1939, fleeing first to Lithuania and then to Latvia, before finding temporary refuge in Sweden by early 1940.

⁶⁵ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, Division of International Law, 1944), 79.

⁶⁶ Raphael Lemkin, "The New Word and the New Idea," in *Lemkin on Genocide*, ed. Steven Leonard Jacobs (New York: Lexington, 2012), 20-21.

In early 1941, he secured the necessary visas to travel through the Soviet Union and Japan in order to ultimately make his way across the Pacific to America. His initial destination was Durham, North Carolina, where he briefly guest lectured at Duke University. By the summer of 1942, he was invited to work at the Board of Economic Warfare, which was part of the United States War Department in Washington, D.C. It was here where he conceived the word “genocide” in the context of a scholarly project for the Carnegie Endowment for International Peace, a prominent non-profit organization that we would now describe as a foreign policy “think tank.” His study was published in 1944 as *Axis Rule in Occupied Europe*.⁶⁷ Amounting to nearly 700 pages, this was a comprehensive legal and political study of Axis occupation policies on a country-by-country basis. Lemkin had begun researching this as far back as 1940, when he was an asylum seeker in Stockholm, Sweden. While waiting for his international sponsors to come through in order to complete the necessary visa applications, he began collecting documents related to Nazi occupation policies. It was in this context that his previous notions of “barbarism” and “vandalism” were synthesized into the unified concept of genocide.

At this point, we arrive at the conceptual structure of genocide. As noted in the Introduction, genocide is an example of an essentially contested concept. There will never be a consensus on the meaning of the idea, although these disagreements nevertheless converge upon three core definitional elements. First, there is the group element, insofar as the target of this crime is the collective existence of a culture-bearing people, or the so-called *genos*, which for Lemkin fit into a cosmopolitan vision of global

⁶⁷ Idem, *Axis Rule in Occupied Europe*.

cultural diversity. Secondly, there is the destructive element that comprise the criminal acts, as denoted by the suffix *-cide*, meaning “to kill.” As we will see, it was in this specific element that the underlying idea beneath the discursive shift from “vandalism” to “cultural genocide” was initiated, although the precise linguistic formulation of the latter would only emerge later during the drafting of the 1948 Convention. Finally, there was the issue of intent, or the mental element of the crime, which was also more a creation of the 1948 Convention rather than Lemkin himself. In the third and final sub-section below, we will briefly touch back upon the 1923-24 Deskakeh episode in order to highlight Lemkin’s conception of genocide involving the usurpation of sovereignty.

The Group Element (Genos)

Our first question was aptly put in the title of a 2007 article by sociologist Christopher Powell, “What Do Genocides Kill?”⁶⁸ When Lemkin combined the less familiar classic Greek word *genos* with the more familiar Latin suffix *-cide*, he was essentially defining genocide as the killing of a *genos*. What is a *genos*? That is to say, what is the object or target of genocide? Lemkin’s notion of the *genos* was a refinement of his 1933 proposals, where he frequently referred to the term “collectivity” in both the singular and plural form in order to go beyond the individualist-collectivist binary and make the normative leap to the interests of humankind as a whole. Such an ontology was reinforced in *Axis Rule in Occupied Europe*. Much like his earlier notion of “barbarism,” “genocide is directed against the ... group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the ...

⁶⁸ Christopher Powell, “What do Genocides Kill? A Relational Conception of Genocide,” *Journal of Genocide Research* 10, no. 4 (2008): 527-547.

group.”⁶⁹ Yet Lemkin’s underlying normative argument went one step further, as it did with the previous idea of “vandalism,” saying that “the destruction of a nation ... results in the loss of its future contributions to the world.”⁷⁰ The unified concept of genocide thus covered multiple ontological dimensions, insofar as individuals are targeted on the basis of their identification with a certain group or collectivity, thereby representing a threat to the global sum of cultural diversity.

Lemkin’s ontological perspective was geared towards collectivities; that much is already clear. What is less clear is precisely how he understood the collective existence of the *genos*. As we will see momentarily, this language has a biologizing connotation that is perhaps unsettling for a contemporary reader. Indeed, given the dominant social scientific assumptions of the mid-20th century, we are left wonder as to what extent did Lemkin’s notion of the *genos* assume the “real” or objective existence of peoples in terms of the biophysical capacity to reproduce? Conversely, to what extent did his understanding prefigure more contemporary ideas about social constructivism and the intersubjective formation of “reality”? This is the conundrum at the root of the genocide concept’s primary definitional element – the protected group.

As he presented the neologism of “genocide” in Chapter 9 of his seminal 1944 book, Lemkin’s conceptualization was highly dependent upon the terminology of the “nation” to identify the protected group. The opening paragraph of this chapter is on page 79, which is easily the most well-known and highly cited portion of the book. On this

⁶⁹ For the moment, we will bracket the issue represented by the pair of ellipses in this quote, insofar as they are both the redaction of the same keyword – “national.” Lemkin, *Axis Rule in Occupied Europe*, 79.

⁷⁰ Ibid, 91.

page alone, some variant of the word “nation” is used altogether a total of 16 times.⁷¹ However, he never clearly defined what exactly constitutes a nation, and he confusingly slipped into other related terminology without making any clear distinctions between different possibilities.⁷² For example, he said, “by ‘genocide’ we mean the destruction of a nation or of an ethnic group,” thereby throwing a new keyword into the mix. As well, in an oft-overlooked footnote on page 79, Lemkin even suggested the terminology of “ethnocide” as an etymological alternative to what he had in mind.⁷³ Such a proposition made sense. In fact, the classic Greek word *ethnos* was used to denote something like a (foreign) nation or a people.⁷⁴ Given how much he depended upon the keyword “nation,” it is not surprising that Lemkin paused to consider the more familiar language of the *ethnos*.

In contrast, his favored etymological choice of the *genos* was far less recognizable, even within the relevant text of *Axis Rule in Occupied Europe* itself. Lemkin translated *genos* as “race, tribe,” but neither of these keywords recurred nearly as much as “nation” did throughout the entire text of Chapter 9. In Lemkin’s own authorial voice, the keyword “race” only reappeared one more time, although it also showed up in over a half-dozen times in footnotes that were all direct quotes from others, mostly from Hitler. Likewise, the term “tribe” only reappeared one more time, it too in a quoted footnote from Hitler. To put this into perspective, recall that the keyword “nation” was used a total of 16 times. Lemkin was clearly more comfortable using this language, so it

⁷¹ This is out of a total of more than 360 words on the entire page. Lemkin, *Axis Rule in Occupied Europe*, 79.

⁷² Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 84.

⁷³ Lemkin, *Axis Rule in Occupied Europe*, 79, fn. 1.

⁷⁴ See “ethno-, comb. form.,” *OED Online* (Oxford University Press, June 2017). See also Jonathan M. Hall, *Ethnic Identity in Greek Antiquity* (New York: Cambridge University Press, 2000), 34-35.

is confusing why did not favor the more relevant connotations of the *ethnos* rather than the more problematic meanings of the *genos*.

Despite this, there may be a good reason for Lemkin's apparent discomfort or lack of an inclination towards the *ethnos*, insofar as the ancient Greeks used this language to label foreign and "barbarous" nations that were definitely not-Greek. In other words, it is a highly prejudicial discursive projectile used to mark "others" as being beyond the pale of "civilization." Of course, Lemkin's translation of the *genos* as "race" or "tribe" imbued its own ideological baggage, but at a deeper etymological level this language had a generative essence. Considering his predilection for linguistics, he was probably aware of the paleo-Indo-European root *genə-*, meaning "to give birth or beget."⁷⁵ The conceptual scope of this etymological construction had multiple connotations, beginning with its original meaning in terms of a "house, hearth, or family," and with subsequent iterations scaling upwards to much larger levels of group identity, such as a clan or tribe.⁷⁶ As with the *gens* in ancient Roman society, the *genos* was the basic kinship structure at the heart of ancient Greek society, and it was used as a template for more general community bonds. According to one historical dictionary, this identity was primarily determined by birth and equally denoted either "the closest natural ties of a common family or the widest natural ties of the race or nation."⁷⁷

The *genos* was thus a generative concept because it used a familial template as a basis for broader scales of collective identity or peoplehood. Unlike the *ethnos*, the *genos*

⁷⁵ Compare "genocide, n.," *OED Online* (Oxford University Press, June 2017); and "genus, n." *OED Online* (Oxford University Press, June 2017).

⁷⁶ George Grote, *History of Greece* (Vol. III) (Boston: John P. Jewett & Co., 1852), 54-55.

⁷⁷ William Smith, William Wayte, and G. E. Marindin, *A Dictionary of Greek and Roman Antiquities* (London: John Murray, 1890), 903.

did not imply being labelled by outsiders. Rather, the *genos* was produced and created from within a group. Indeed, as Moses notes of Lemkin, the concept of genocide implies a certain understanding of ethnogenesis.⁷⁸ At the same time, this opened up its own problem, for the basic image of the *genos* in terms of familial reproduction lent itself to a biologizing connotation, as if the *genos* was a seemingly all natural product. As critically noted by Martin Shaw,

Lemkin's error was to describe the imagined communities of large-scale societies using a concept based on a hypothetical kin-based past. He implies that modern "nations," "races" and "tribes" developed in an evolutionary manner from small, kin-based groups in which human beings existed before large-scale civilizations developed. However it is not clear that even small groups of hunter-gatherers were simply "enlarged family units," and even if they were, it would be misleading to present complex modern collectivities as basically similar. In human social life, it has always been the social construction of biological relations that has counted.⁷⁹

Yet recent research on Lemkin suggests a more nuanced understanding of the *genos*, less in terms of biologizing essentialism and more in line with social constructivism. For example, there is evidence that Lemkin understood the formation of nations as "families of mind."⁸⁰ As he said in his autobiography, such groups have been "originally conceived as an enlarged family unit having the conscience of a common ancestor – first real, *later imagined*."⁸¹ There was nothing essential or organic about the *genos*. Towards the end of his life, he even noted that genocide could be directed against

⁷⁸ A. Dirk Moses, "Genocide and Settler Society in Australian History," in *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, ed. idem (New York: Berghahn, 2004), 21.

⁷⁹ Martin Shaw, *What is Genocide?* (Second ed.) (Malden, MA: Polity, 2015 [2007]), 21.

⁸⁰ Raphael Lemkin, "Genocide," NYPL, Reel 4, Box 3, Folder 1-2, p. 1, as quoted and cited in Douglas Irvin-Erickson, "Genocide, the 'Family of Mind' and the Romantic Signature of Raphael Lemkin," *Journal of Genocide Research* 15, no. 3 (2013): 278. See also Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 218; and Shaw, *What is Genocide?*, 21.

⁸¹ Lemkin, *Totally Unofficial*, 181. Emphasis added.

a wide variety of human groups. “It could be directed in a community, for example, against those who play cards, or those who engage in unlawful trade practices or in breaking up unions. Human mind can conceive easily various types of human groups which might be the object of extraction.”⁸² This example of a group of card players is somewhat outlandish, as it is a far cry from even the most generic or descriptive connotation of the word “nation.” Indeed, it stretches the boundaries of how far or broadly we are willing to go in opening up the ontological dimensions to the group element of the crime.

Before moving on to the next definitional element, it is necessary to make a final point about Lemkin’s commitment to the preservation of as “world culture as a whole.” Moses argues that Lemkin was driven by “the imperative cultural survival via the multi-ethnic/linguistic ideal” that was central to East-Central European Jewish thinking prior to the Second World War.⁸³ Recent scholarship has elaborated the extent to which Lemkin’s thinking here was informed by the image of “national-cultural autonomy” that was popularized by the famous Jewish historian Simon Dubnow (1860-1941).⁸⁴ Moreover, Moses argues that Lemkin’s normative concern reflect “the experience of persecuted, occupied and exiled peoples for whom cultural obliteration is as threatening as physical insecurity.”⁸⁵ For Lemkin, the international criminalization of genocide was not primarily intended to save individual lives from physical annihilation, but rather to ensure the

⁸² Raphael Lemkin, “The Nature of Genocide,” no date, box 2, folder 2, p. 14,-15, from the Raphael Lemkin Collection, P-154, American Jewish Historical Society (AJHS), New York.

⁸³ A. Dirk Moses, “From Central Europe to Australia: Civilisational Ideals and Minority Survival,” in *State of the Nation: Essays for Robert Manne*, ed. Gwenda Tavan (Melbourne: Black Inc., 2013), 226.

⁸⁴ Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, pp. 58-69.

⁸⁵ Moses, “Genocide,” 31.

existence of human collectivities. As he sentimentally put it, the basic normative purpose of his concept was to protect the fundamental elements of the “human cosmos.”⁸⁶

In many ways, this cosmopolitan vision corresponded with what we would today call “cultural diversity,” a phrase that Lemkin used only rarely. In one of his unpublished manuscripts, for instance, he noted that “most anthropologists have developed a keen appreciation for the cultural diversity they have found, but they recognize both the functional reasons for diversity and its intrinsic value as an enrichment of human life through the presentation of various answers to common challenges of human life.”⁸⁷ Here Lemkin made reference in a footnote to Ruth Benedict (1887-1948), an American anthropologist and proponent of cultural relativism, which Lemkin said “can be a doctrine of hope rather than despair.”⁸⁸ By “despair,” Lemkin was probably referring to the 1947 American Anthropological Association’s critique of the universalism of human rights discourse from a cultural relativist standpoint.⁸⁹ Yet he was less concerned with this as much as he was inspired by the normative value of cultural diversity. In this latter regard, the normative purpose of genocide was to protecting the global sum of human cultures as part of the common heritage of mankind.⁹⁰

The Destructive Element (–cide)

Genocide thus involved the intentional destruction or “killing” of the *genos*. The emphasis here on the verb “to kill” is meant to problematize our conception of this definitional element. How exactly can a *genos* be killed? There is an inherent

⁸⁶ Raphael Lemkin, “Introduction to Genocide,” in *Lemkin on Genocide*, 3.

⁸⁷ Idem, “The Concept of Genocide in Anthropology,” in *Lemkin on Genocide*, 42.

⁸⁸ Ibid, citing Ruth Benedict, *Patterns of Culture* (New York: Houghton Mifflin Co., 1934), 251-278.

⁸⁹ Karen Engle, “From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999,” *Human Rights Quarterly* 23, no. 3 (2001), 536-559.

⁹⁰ Lemkin, *Axis Rule in Occupied Europe*, 91.

interdependency between the way we understand the first two elements of our definition; that is, the group element (i.e. *genos*) and the destructive element (i.e. *-cide*). As noted just now, there are two general ways of approaching the *genos*, which we can now use to analogize two general understandings of the destructive element. For example, the narrow and reductive construal of the *genos* as a biophysical entity based upon the familial unit of reproduction sets up a relatively limited focus on the explicitly biophysical methods of destruction, such as mass murder or starvation. In contrast, if the *genos* is opened up as an intersubjective and social constructed formation of collective existence, then the techniques of genocide cover a relatively broader framework that includes social and cultural methods of destruction, such as the prohibition of certain cultural activities and policies of forced assimilation.

Although questions remain about Lemkin's interpretation of the *genos* and whether he favored the biophysical over the intersubjective dimension of group existence, or whether he struck a balance between these two ontological levels of analysis, it is clear that his understanding of the *genos* was holistic. In turn, this corresponded with a capacious categorical framework for the *-cide* element, which covered covered a vast array of possible techniques. In fact, according to him, genocide does not always involve physical annihilation: "Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups."⁹¹ In other words, the "essential foundations" of group life at the level of the *genos* could be

⁹¹ Ibid, 79

destroyed in multiple ways.⁹² This is evident in the preface to *Axis Rule in Occupied Europe*, where he broadly illustrates the genocide concept with reference to the Nazi occupation methods:

Genocide is effected through a synchronized attack on different aspects of life of the captive peoples: in the political field (by destroying institutions of self-government and imposing a German pattern of administration, and through colonization by Germans); in the social field (by disrupting the social cohesion of the nation involved and killing or removing elements such as the intelligentsia, which provide spiritual leadership ...); in the cultural field (by prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, which the occupant considers dangers because it promotes national thinking); in the economic field (by shifting the wealth to Germans and by prohibiting the exercise of trades and occupations by people who do not promote Germanism ‘without reservations’); in the biological field (by a policy of depopulation and by promoting procreation by Germans in the occupied counties); in the field of physical existence (by introducing a starvation rationing system for non-Germans and by mass killings, mainly of Jews, Poles, Slovenes, and Russians); in the religious field (by interfering with the activities of the Church, which in many countries provides not only spiritual but also national leadership); in the field of morality (by attempts to create an atmosphere of moral debasement through promoting pornographic publications and motion pictures, and the excessive consumption of alcohol).⁹³

There is a wide gamut of criminal acts within this single sentence, ranging from the distribution of pornography at the broadest end of the destructive spectrum to mass murder at its narrowest. This vast spectrum of destructive techniques reflected the multiple ontological dimensions of the group element.

Yet the term “destruction” (from Latin, meaning “to tear down, demolish”) can have multiple connotations. On the all-important page 79 of his book, Lemkin even uses the verb “to cripple” to open up a broader understanding of this element.⁹⁴ In *Axis Rule in*

⁹² Ibid.

⁹³ Ibid, xi-xii.

⁹⁴ Ibid, 79.

Occupied Europe, he outlines such “crippling” effects in terms of the cultural technique of genocide. It is important to note that the precise linguistic formulation of “cultural genocide,” per se, was not yet introduced, as this would arrive a few years later in the context of the 1948 Convention’s drafting process. Nevertheless, in Chapter 9 he described how under Nazi occupation the “local population [was] forbidden to use its own language in schools and in printing.” In certain occupied regions open to Germanization, such as Alsace-Lorraine or Luxembourg, educators were brought in “to ensure the upbringing of youth in the spirit of National Socialism.” Students elsewhere in occupied Europe, like Poland, which the Nazis had intended to destroy altogether, “were excluded from the benefit of liberal arts studies ... in order to prevent the expression of the national spirit.” The destruction of libraries and cultural centers were also referenced, highlighting for example the tarnishing of the once great Jewish Theological Seminary in Lublin, Poland. These cultural methods, however crippling or indirectly lethal they may have been, were part of a “coordinated plan” for group destruction.⁹⁵

Lemkin’s cultural methods of destruction was informed by an organic image of the *genos*. This was based on his personal study of the functionalist theory of anthropology. He was especially indebted to Bronislaw Malinowski (1884-1942), another English-speaking intellectual expatriate from Poland.⁹⁶ Malinowski was a leading figure of British social anthropology and a major proponent of functionalism, a theoretical paradigm which posited that social institutions are based on the primary biological needs of an individual, such as nutrition and reproduction. “After all,” Malinowski explained,

⁹⁵ Ibid, 79 and 84-85.

⁹⁶ A. Dirk Moses, “Lemkin, Culture, and the Concept of Genocide,” in *The Oxford Handbook on Genocide Studies*, eds. Donald Bloxham and A. Dirk Moses (New York: Oxford University Press, 2010), 25. See also Lemkin, “The Concept of Genocide in Anthropology,” 40.

“human beings are an animal species. They have to conform to the elementary conditions which have to be fulfilled so that the race may continue, the individual may survive, and the organism be maintained in its working order.”⁹⁷ According to this functionalist theory, culture was said to attend to basic psychological and social needs of individuals, including the needs for security and a sense of belonging. Culture thus served a fundamentally integrative function in the maintenance of societal bonds.⁹⁸ Following these insights, Lemkin understood that the destruction of culture can critically injure the ability of the *genos* to provide the basic needs for the perpetuation of its own existence. “If the culture of a group is violently undermined,” he reasoned, then “the group itself disintegrates.”⁹⁹

Over the course of his career, Lemkin refined his theoretical framework of the –*cide* element. At a certain point in between the publication of *Axis Rule in Occupied Europe* and the Lemkin’s co-authorship of the first draft behind the 1948 Convention, he boiled down the conceptual framework of the –*cide* element into 3 categories: physical, biological, and cultural. As suggested above, and as further analyzed in the following section, the semantic construction of “cultural genocide” is ultimately more confusing than his original presentation of the cultural techniques of genocide. Nevertheless, for the sake of parsimony, there is perhaps good reason for him to have reduced the number of destructive categories from 8 to 3. Moreover, the tripartite definition framework that Lemkin eventually settled upon happened to bear a close resemblance to Malinowski’s

⁹⁷ Bronislaw Malinowski, *The Dynamics of Culture Change: An Inquiry into Race Relations in Africa* (New Haven: Yale University Press, 1945), 42.

⁹⁸ Idem, *A Scientific Theory of Culture and Other Essays* (New York: Oxford University Press, 1960 [originally 1944]), p. 132.

⁹⁹ Lemkin, “The Concept of Genocide in Anthropology,” 40-41.

integrated image of culture involving a “material base, social ties, and symbolic acts.”¹⁰⁰

These were the sub-elements in Lemkin’s holistic understanding of the *genos*, and they nearly corresponded with his conception of genocide that was “based upon the treatment of a human group as an organic entity,” including its “physical existence, [its] biological continuity through procreation and through raising children ... [and its] spiritual life.”¹⁰¹

Before moving on, it is necessary to come back to the point that the actual phrase, “cultural genocide,” was not yet introduced in *Axis Rule in Occupied Europe*. We will see how this confusing semantic construction was born out of controversy. Indeed, the introduction and eventual omission of this category was one of the most controversial aspects of the 1948 Convention’s drafting process. To this day, there remains an enduring debate in genocide studies over the meaning of cultural genocide and whether or not to include within the master concept of genocide. An older generation of scholarship from the 1990s tended to deny the relevance of this category altogether, and although the concept has regained currency after the “colonial turn” since the early 2000s, there is still a contest over what it actually means. For example, sociologist Damien Short makes a strong revisionist argument that considers forcible assimilation as a sufficient condition for genocide. Moses, the intellectual historian just cited above, offers a relatively softer or more moderate argument, contending that cultural destruction must be accompanied by physical and biological attacks in order to qualify as genocide.¹⁰²

¹⁰⁰ Lemkin, “The Concept of Genocide in Anthropology,” 40; see also Malinowski, *A Scientific Theory of Culture*, 150.

¹⁰¹ Lemkin, “The Nature of Genocide,” 1.

¹⁰² Damien Short, “Australia: A Continuing Genocide?” *Journal of Genocide Research* 12, nos. 1-2 (2010): 48-49; and Moses, “Empire, Colony, Genocide,” 13.

The evidence lends weight to Moses' argument, as Short's position overlooks Lemkin's tacit acceptance of the normalcy of assimilation. I will return to this point at the end of Chapter One. Moses points to this excerpt in particular from *Axis Rule in*

Occupied Europe:

Many authors, instead of using a generic term, use currently terms connoting only some functional aspect of the main generic notion of genocide. Thus, the terms "Germanization," "Magyarization," "Italianization," for example, are used to connote the imposition by one stronger nation (Germany, Hungary, Italy) of its national pattern upon a national group controlled by it. The author believes that these terms, are also inadequate because they do not convey the common elements of one generic notion and because they treat mainly the cultural, economic, and social aspects of genocide, leaving out the biological aspect, such as causing the physical decline and even destruction of the population involved.¹⁰³

At an ontological level, this suggests that the concept of genocide necessitated a certain biophysical approach to group destruction. Without this dimension, in cases that strictly involved the intersubjective formation of targeted groups, then the genocide concept did not apply. As we will see below, in the context of preparing the first draft of the 1948 Convention, Lemkin was even more explicit in excluding from the scope of genocide any situations involving ostensibly "normal" practices of assimilation and state-building. Indeed, this is an important limitation in his conception of the *-cide* element, insofar as the boundary between assimilation and the cultural techniques of group destruction remain unclear. In this sense, looking ahead to Chapter Three, the post-1970s revival of the "ethnocide" concept was introduced to make up for the limitation of Lemkin's conception of genocide.

¹⁰³ Lemkin, *Axis Rule in Occupied Europe*, 80.

What about Intent?

Intent is the third and final definitional element, but it is something of an anomaly in our analysis of Lemkin, as it really only became an issue in the legislative process behind the 1948 Convention. As far as *Axis Rule in Occupied Europe* was concerned, any variation of the word “intent” was used only four times in Chapter 9, although never in the sense of “genocidal intent,” per se. The first two usages of the word identify Lemkin’s authorial intent in coining this neologism as well as describe a certain type of Nazi occupation policy.¹⁰⁴ The other two relevant parts of the text are actually from footnotes, where he provided a pair of quotations regarding “Hitler’s oft-repeated intention to exterminate the Jewish people in Europe.”¹⁰⁵ Strictly speaking, therefore, the keyword “intent” was at first not featured much at all. With that said, Lemkin did factor in the mental element of the crime. On the all-important page 79, for example, he referred to genocide as “a coordinated plan,” and several paragraphs later he described how the Nazis had “elaborated a system to destroy nations according to a previously prepared plan.”¹⁰⁶ He only seems to have adopted the idea of “intent” after his 1944 book, as he was preparing for what became the 1948 Convention.¹⁰⁷

Axis Rule in Occupied Europe presented genocide as a purposeful set of different actions that were systematically organized and synchronized according to a general scheme or plan. The goal of genocide is evident in what is one of the most oft-quoted passages from page 79: “Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the

¹⁰⁴ Ibid, 79 and 87.

¹⁰⁵ Ibid, 89, fn. 45. See also ibid, 86, fn. 29.

¹⁰⁶ Ibid, 79 and 81.

¹⁰⁷ Idem, “Genocide as a Crime under International Law,” *American Journal of International Law* 41, no. 1 (1947): 147.

oppressor.”¹⁰⁸ In other words, the first phase of genocide involved the demographic and social displacement of the targeted group, whereas the second phase involved a process of biological and political replacement by the perpetrators. Much has been made of the very next line from the quote: “This imposition, in turn, may be made upon the oppressed population which is allowed to remain or upon the territory alone, after removal of the population and the colonization by the oppressor's own nationals.”¹⁰⁹ Dirk Moses and others thus suggest that Lemkin “defined the concept as intrinsically colonial.”¹¹⁰ At the very least, genocide was conceived as an outcome of military occupation, understood as the conquest or forcible acquisition of other places, as well as the absolute compulsory power over subjugated peoples.

This “two phases” quote suggests that the strategic purpose of genocide involved an important spatial or territorial aspect. In *Axis Rule in Occupied Europe*, the demographic and social destruction of captive peoples is just one of the many different means to the same end, which in this case was driven by the ideological vision of *Lebensraum*, or “living space” for the German people.¹¹¹ Some Nazi ideologues justified the realization of this vision by idealizing the virtues of “the forming will of a gardener ... [who] ruthlessly eliminates the weeds which would deprive the better plants” of their racist metaphorical vision of the human “garden.”¹¹² Nearly a half-century after Lemkin, Zygmunt Bauman noticed that “modern genocide is genocide with a purpose ... Modern genocide is an element of social engineering, meant to bring about a social order

¹⁰⁸ Idem, *Axis Rule in Occupied Europe*, p. 79.

¹⁰⁹ Ibid.

¹¹⁰ Moses, “Empire, Colony, Genocide,” 9.

¹¹¹ There is only one reference to “Lebensraum” in Lemkin, *Axis Rule in Occupied Europe*, x.

¹¹² Richard Walther Darré, “Marriage Laws and the Principles of Breeding,” in *Nazi Ideology before 1933: A Documentation*, eds. Barbara Miller Lane and Leila J. Rupp, eds., (Austin: University of Texas Press, 1978), 115.

conforming to the design of the perfect society.”¹¹³ Such a critical perspective can be read into parts of *Axis Rule in Occupied Europe*. For example, the Nazi occupation system was described as “a synchronized attack on different aspects of life of the captive peoples” according to “a gigantic scheme to change, in favor of Germany, the balance of biological forces between it and the captive nations.”¹¹⁴ In this regard, Lemkin took Hitler’s worldview seriously, considering how many times he directly quoted and cited *Mein Kampf*.

As a means to an end, genocide was thus defined by the combined process of destruction and conquest. In the “two phases” quote we see yet another instance of the interconnectedness between the definitional elements of genocide, insofar as the first phase (the “destruction of the national pattern of the oppressed group”) denotes the *-cide* element, whereas the second phase (“the imposition of the national pattern of the oppressor”) indicates the mental or intentional element.¹¹⁵ This conceptual linkage is evident in a 1947 article of Lemkin’s from the *American Journal of International Law*, where he referenced “the criminal intent to destroy or to cripple permanently a human group.”¹¹⁶ We have already noted the more general connotation of the verb “to cripple,” which suggests a slower but no less deliberate way of killing a *genos* than the most extreme forms of physical destruction, such as mass murder. This has also been described as “slow death” or “genocide by attrition.”¹¹⁷ In contrast to more immediate and extreme

¹¹³ Zygmunt Bauman, *Modernity and the Holocaust* (Ithaca: Cornell University Press, 1989), 91.

¹¹⁴ Lemkin, *Axis Rule in Occupied Europe*, xi.

¹¹⁵ *Ibid.*, 79.

¹¹⁶ Lemkin, “Genocide as a Crime under International Law,” 147.

¹¹⁷ Secretary-General, “Draft Convention on the Crime of Genocide: Comments on the Draft Convention,” 25; and Sheri P. Rosenberg and Everita Silina, “Genocide by Attrition: Silent and Efficient,” in *Genocide Matters: Ongoing Issues and Emerging Perspectives*, eds. Joyce Apsel, Ernesto Verdeja (New York: Routledge, 2013), 106-126.

forms of annihilation, such as death squads and gas chambers, these slower forms of destruction were simply different means to the same end or goal of conquest.

We have already mapped out Lemkin's capacious categorical framework for the *-cide* element, which included the cultural techniques of genocide. However he categorized the various methods of intentional group destruction, his conception here reflected the interpretive spectrum of the *genos* in its biophysical and intersubjective dimensions of group existence. Following this conceptual framework, the manifold types of genocidal actions all fell under the same rubric with the mental element of the crime; that is to say, they were all considered to be different means to the same end. There had to be a certain level of intentionality or purposefulness for the concept of genocide to matter, even in the broader construal of cultural genocide. For example, later in his career, Lemkin said that genocide could be accomplished through the "surgical operations on cultures."¹¹⁸ The use here of the word "surgery" not only evokes yet another broad and open-ended connotation of the *-cide* element, but also the relative purposefulness of *genos*-killing, in all of its multiple dimensions.

The cultural techniques of genocide were part of a strategy for permanent occupation and colonization by an oppressive force. In Chapter 1 of *Axis Rule in Occupied Europe*, which discusses the role of administrative techniques of Nazi occupation policies, Lemkin argued that this involved the "usurpation of sovereignty."¹¹⁹ To usurp is to unlawfully or unjustly seize the properties and lives of others. This worked one of two ways in the administrative structures of Nazi occupied Europe. Firstly, there were non-incorporated areas like central and southern Poland, which was administered as

¹¹⁸ Raphael Lemkin, "Importance of the Project," in *Lemkin on Genocide*, 12

¹¹⁹ Lemkin, *Axis Rule in Occupied Europe*, 12.

the General Government, or the Protectorate of Bohemia and Moravia following the German occupation of Czechoslovakia. These were foreign territories that were taken over and governed by Nazi Germany as autonomous administrative units. Secondly, there were other occupied territories such as Austria, the Sudetenland, and the western part of Poland that were fully annexed into the German Reich. The Nazi system fully incorporated and domesticated these territories through “the complete assimilation of a given area with the political, cultural, social, and economic institutions of the Greater Reich. This is effected through the destruction of the national pattern of the area and the imposition of a German pattern instead.”¹²⁰

This latter quote raises the question of how to factor in the notion of assimilation as it relates to the cultural techniques of genocide? A close reading here demonstrates only the qualified usage of the term, as in “the complete assimilation of a given area.” In this case, Lemkin mostly talked about assimilation in a strictly territorial sense, as in the political “absorption” and annexation of occupied territories.¹²¹ To be clear, he was not talking about assimilation as an intersubjective process of cultural change. Elsewhere in *Axis Rule in Occupied Europe*, he again referred to the term only in a more territorial sense, such as with reference to the formerly French territory of Alsace-Lorraine, which was “directed toward the complete assimilation of the political, cultural, and social institutions, as well as the economy of the two provinces, with those of the Greater German Reich.”¹²² In other words, he did not use the keyword “assimilation” in relation to the cultural techniques of genocide, at least not yet. As we will see below, the

¹²⁰ Ibid, 8-9.

¹²¹ Ibid, 8.

¹²² Ibid, 171.

categorical distinction between cultural genocide and assimilation only emerged while drafting the 1948 Convention.

Nevertheless, Lemkin's notion of the "usurpation of sovereignty" recalls our previous discussion of Chief Deskakeh. Recall that "The Red Man's Appeal to Justice" (1924) charged that the Canadian federal government with intending "to destroy all *de jure* government of the Six Nations."¹²³ Although it predates *Axis Rule in Occupied Europe* by an entire generation, Deskakeh's account makes sense according to the two phases of Lemkin's conception, insofar as the Canadian government intended to eliminate the Haudenosaunee as a means towards achieving its vision of "perfect settler sovereignty."¹²⁴ As we saw, the Canadian government dismissed this issue as an entirely domestic concern, and the rest of the international community agreed, thereby setting up a process of consolidating the rules sovereignty as the history of global governance entered the mid-20th century.

This sense of sovereign entitlement, or the presumed right of a state to destroy groups of people within its own borders, was the key normative target of Lemkin's project to criminalize genocide. To quickly summarize his conception, we have broken down his neologism of genocide into three conceptually interdependent definitional elements. A holistic understanding of the *genos* opened up a capacious categorical framework of the *-cide* as a wide range of destructive or crippling techniques, which in turn opened up a relatively broad notion of the mental element. Indeed, *Axis Rule in Occupied Europe* goes pretty far in labelling the entire German nation as guilty for

¹²³ Anonymous, "Appeal of the 'Six Nations' to the League," 834.

¹²⁴ Ford, *Settler Sovereignty*, p. 53.

benefiting from and contributing to the Nazi's large-scale system of conquest.¹²⁵ This went beyond the narrow definitional confines of criminal intent, instead opening up a broader and more sociological interpretation of collective responsibility.¹²⁶ In this regard, Lemkin's approach did not easily translate into the categorical language implied by the mental element of the crime.

Omitting Cultural Genocide from the 1948 Convention

Lemkin's proposed law against genocide was a strong response his old law professor's hen house analogy of sovereignty. To his enormous credit, his political project effectively problematized the inviolability principle of state sovereignty just at the crucial historical moment when this principle was written into the core rules of global governance. As he explained in a 1947 article, "the practice of the National Socialist Government in Germany resulting in destruction of entire human groups gave impetus to a reconsideration of certain principles of international law. The question arose," he added, "whether sovereignty goes so far that a government can destroy with impunity its own citizens and whether such acts of destruction are domestic affairs or matters of international concern."¹²⁷ As the rules of the world were being rewritten in the immediate postwar context of the formation of the UN, Lemkin's project was briefly afforded a favorable opportunity structure.

Yet Lemkin's achievement in positivizing a new norm into law came at a cost, as much of the sociological conception that was originally put forth in *Axis Rule in Occupied* was about to be sacrificed at the behest of politics. In order to obtain the

¹²⁵ Lemkin, *Axis Rule in Occupied Europe*, xiii-xiv.

¹²⁶ Tony Barta, "He in Whose Interest It Was, Did It': Lemkin's Lost Law of Genocide," *Global Dialogue* 15, no. 1 (2013): 12-23.

¹²⁷ Lemkin, "Genocide as a Crime under International Law," 145-146.

requisite consensus amongst member states of the General Assembly, the definition of genocide had to be filtered through the dominant discursive formation that ruled international law. This reflects an ethical paradox at the heart of the concept. On the one hand, Lemkin's law challenged the taken-for-grantedness of the inviolability principle of state sovereignty. On the other hand, the extent of this challenge was limited by how far the international constituency of states were willing to adopt his neologism. To the extent that Lemkin's law posed a normative threat to the status quo arrangement in the global order, I argue that his project became a site of co-optation. In order for its successful incorporation into international law, the broad open-endedness of his original conception had to be disciplined according to the state-centric prerogatives that set the "realistic" constraints of acceptable discourse. As such, we are about to see just how far the concept of "cultural genocide" was deemed to be beyond the pale of acceptability, as it failed to overcome more dominant attitudes related to the normalcy of assimilation.

In light of our theoretical approach to co-optation, what follows is a process tracing analysis of the 1948 Convention that identifies and explains the causal mechanisms responsible for the introduction, debate, and ultimate omission of the cultural genocide category.¹²⁸ Covering the course of nearly 24 months, from December 1946 to December 1948, this historical process can be periodized and broken down according to the three distinct drafts at stake. Firstly, what is known as the Secretariat draft was the original framework co-authored by Lemkin and two other experts in international law. At this early stage, we already see the strong contestability of cultural genocide. Secondly, as the process moved up the institutional hierarchy of the UN, the

¹²⁸ Jeffrey T. Checkel, "Process Tracing," in *Qualitative Methods in International Relations: A Pluralist Guide*, eds. Audie Klotz and Deepa Prakash (New York: Routledge, 2008), 114-127.

subtext behind the so-called Ad Hoc Committee draft was framed by an emerging consensus over the normalcy of assimilation. Finally, the process was wrapped up by the Sixth Committee of the UN General Assembly, which made the final decision about omitting cultural genocide from the official text.

The Secretariat Draft: Original Framework

In order to begin tracing this process tracing, let us pick back up on Lemkin's biographical history. As noted, he had arrived in Washington, D.C. by mid-1942, at which point he began working as an advisor for a United States government agency known as the Board of Economic Warfare. By the time *Axis Rule in Occupied Europe* was published by late 1944, discussions were already underway in the United States regarding the forthcoming post-war transition. In this context, Lemkin suddenly achieved a considerable degree of prestige and political clout. In spring 1945, he was appointed to the War Crimes Office at the Pentagon, and soon thereafter he was sent to London to advise Robert Jackson, the chief American prosecutor at the forthcoming International Military Tribunal (IMT) in Nuremberg. In fact, Lemkin's neologism made it into the indictment of the most important political and military leaders of Nazi Germany, thereby becoming the first reference to "genocide" in international law.¹²⁹ Yet despite the promising relevance regarding the cultural techniques of genocide, the actual concept itself was not included in the IMT's final verdict in October 1946.

By that point, Lemkin gained access to a relatively more favorably inclined organizational platform with the newly established UN. The General Assembly was then meeting in Lake Success, New York, where he established himself as a persuasive

¹²⁹ *Trial of the Major War Criminals before the International Military Tribunal, 14 November-1 October 1946*, vol. I (Nuremberg: International Military Tribunal, 1947), 43-44.

lobbyist, trying to convince the member state delegations to draft a new international legal convention against the crime of genocide. Unlike the dominant realpolitik that Lemkin faced in 1933, the “multilateral moment” in the immediate postwar transition period afforded him a far more promising climate.¹³⁰ The construction of a new international order saw an expanded role for international institutions and rules. Moreover, the animating spirit of the UN as an embodiment of an “imagined international community” aligned with Lemkin’s cosmopolitanism.¹³¹ This institutional context provided a promising opportunity structure for the advancement of his normative agenda. Having established himself in the local setting of UN meeting halls, he adeptly forged a “transnational advocacy network” that included various nongovernmental organizations, civil society groups, research foundations, the media, faith-based communities, diplomats, and agents of the newly-created UN.¹³² His success in marshalling such a movement cannot be underestimated.

The institutional process of turning his normative agenda into law began in December 1946, when Lemkin managed to secure sponsorship for a non-binding resolution calling for the UN to employ the necessary measures for adopting an international legal convention against genocide. The resulting General Assembly resolution 96(I) did not offer a specific definition of genocide, strictly speaking, but its descriptive language evoked Lemkin’s conceptual structure. “Genocide,” it began, “is a

¹³⁰ Power, “*A Problem from Hell*”, 77. See also Adam Jones, *Genocide: A Comprehensive Introduction* (2nd ed.) (New York: Routledge, 2011 [2005]), 456. See also G. John Ikenberry, *After Victory: Institutions, Strategic Restraint and the Rebuilding of Order after Major Wars* (Princeton: Princeton University Press, 2009), 163-214.

¹³¹ Liisa Malkki, “Citizens of Humanity: Internationalism and the Imagined Community of Nations,” *Diaspora: A Journal of Transnational Studies* 3, no. 1 (1994): 41-68.

¹³² Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 1998, 2

denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings.”¹³³ Although some delegates later misunderstood this to imply that genocide should be specifically restricted to mass murder, the analogy here between the group and a human being recalled Lemkin’s organic conception of the *genos*, whereby the group was understood as a living organism. The importance of protecting the cultural core of the *genos* was further implicit in the resolution, which stated that genocide “results in great losses to humanity in the form of cultural and other contributions represented by these groups.” This, of course, was Lemkin’s fundamental normative concern, going all the way back to his 1933 proposal of the crime of “vandalism.”

In March 1947, the UN Secretary-General appointed three experts in international law, one of whom was Lemkin, to prepare an initial draft convention. The panel was advised to construct their draft, referred to as the Secretariat draft, as broadly as possible. Indeed, compared with the following two drafts, this initial version was by far the most capacious, covering most of the techniques originally included in *Axis Rule in Occupied Europe*. As noted above, it was at this stage where Lemkin’s original 8 categories of genocidal techniques were boiled down into three categories: “‘physical’ genocide (destruction of individuals), ‘biological’ genocide (prevention of births), and ‘cultural’ genocide (brutal destruction of the specific characteristics of a group).”¹³⁴ Significantly, this marks the very first time the actual term “cultural genocide” appeared in published form. It is not definitively clear whether or not this language came from Lemkin himself,

¹³³ United Nations General Assembly resolution 96(I), “The Crime of Genocide” (11 December 1946).

¹³⁴ Secretary-General, “Draft Convention on the Crime of Genocide: Comments on the Draft Convention,” 17.

or even whether or not he favored it. One recent analysis suggests that “he had never intended to divide his concept into ‘cultural genocide’ or ‘physical genocide’ and that the concept of ‘cultural genocide’ had been invented by the United States and France as a ruse.”¹³⁵ This is certainly a possibility, but without further evidence it is not certain where this precise language actually came from. At the very least, we have already suggested that the semantic construction of “cultural genocide,” per se, was more confusing than the alternative formulation of the cultural techniques of genocide. This confusion would soon spell doom for the fate of the concept.

Nevertheless, the operative text of the Secretariat draft provides the very first definition of “cultural genocide,” or the destruction of “the specific characteristics of a group.” It further included the five following acts:

- a) forced transfer of children to another human group; or
- b) forced and systematic exile of individuals representing the culture of a group; or
- c) prohibition of the use of the national language even in private intercourse; or
- d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
- e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.¹³⁶

Apart from the first act – the “forced transfer of children” – the category as a whole generated an immediate controversy in the three-personal panel of experts. Lemkin’s two colleagues, Donnedieu de Vabres of France and Vespasian Pella of Romania, believed that this category represented “an undue extension of the notion of genocide.” What was left unsaid here was what was meant by such a presumably

¹³⁵ Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 161.

¹³⁶ Article 1.2.3, United Nations Secretary-General, “Draft Convention on the Crime of Genocide,” UN Doc. E/447 (26 June 1947).

commonsensical “notion,” although it seems as if they veered towards the sharper end of the destructive spectrum. The forcible removal of children was likely agreed upon because it had the most “biological” impact of these otherwise “cultural” acts, insofar as it directly impacted individual lives, whereas the other four acts were mostly symbolic. Moreover, Lemkin’s opponents said that the provision as a whole “amounted to reconstituting the former protection of minorities.”¹³⁷ As noted earlier, by now the League of Nations minority rights regime was widely noted as an abject failure, and Lemkin’s insistence on collective cultural rights set him apart from an international normative landscape that was shifting from minority rights to universal human rights.¹³⁸

To his credit, Lemkin’s broader construal prevailed in the Secretariat draft, where he defended the concept of cultural genocide by explicitly making the case for “a group’s right to existence.” In light of his holistic conception of the *genos*, he reasoned that a targeted group “cannot continue to exist unless it preserves its spirit and moral unity.” Moreover, picking up on a central theme in Lemkin’s entire career, from his 1933 proposal for “vandalism” as an international crime to the 1944 publication of *Axis Rule in Occupied Europe*, he added that “a group’s right to existence was justified ... from the point of view of the value of the contribution made by such a group to civilization generally. If the diversity of culture were destroyed, it would be as disastrous for civilization as the physical destruction of nations.”¹³⁹ This was the distilled essence of

¹³⁷ United Nations Secretary-General, “Draft Convention on the Crime of Genocide: Comments on the Draft Convention,” 27.

¹³⁸ Mira L. Siegelberg, “Unofficial Men, Efficient Civil Servants: Raphael Lemkin in the History of International Law,” *Journal of Genocide Research* 15, no. 3 (2013): 302.

¹³⁹ United Nations Secretary-General, “Draft Convention on the Crime of Genocide: Comments on the Draft Convention,” 27.

Lemkin's underlying normative argument in favor of including cultural genocide as part of the 1948 Convention's normative framework.

Yet there were limits to how far Lemkin was willing to go with the capacious notion of cultural genocide. Even in *Axis Rule in Occupied Europe*, we have already seen that Lemkin's notion of the *-cide* element was qualified by the biophysical dimension of group destruction. As noted above, he rejected terms like "Germanization," "Magyarization," and "Italianization," for example, as limited and insufficient.¹⁴⁰ Moreover, as we will see below, Lemkin was keen to distinguish the specific idea of "cultural genocide" and the broader phenomenon of "cultural change." As far as the Secretariat draft was concerned, Lemkin felt compelled to once again draw a distinction between the broadest forms of genocidal destruction and otherwise normal processes of assimilation. He thus argued that "cultural genocide was much more than just a policy of forced assimilation by moderate coercion," the implication here being that "forced assimilation by moderate coercion" was ostensibly normal or tolerable, at least compared to the more heinous acts of genocide.¹⁴¹ He even went so far as to say that compulsory assimilative policies, in and of themselves, did not meet the definitional threshold of genocide, even if they "may result in the total or partial destruction of a group of human beings."¹⁴² As we will see in the final section below, Lemkin's rationale here was underpinned by an assumption about the presumed normalcy of assimilation as part of the modern developmental process in the contemporary global order.

¹⁴⁰ Lemkin, *Axis Rule in Occupied Europe*, 80.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, 23.

The Ad-Hoc Committee Draft: Conceptual Splitting

By the end of summer 1947, the Secretariat draft was returned to the ECOSOC, where the matter lost some of its momentum and took a critical turn towards political expediency. It was not until early spring 1948 when the ECOSOC created an Ad Hoc Committee in order to prepare a second draft convention. Chaired by an American, John Maktos, the Committee included delegates from the United States, France, Venezuela, Lebanon, China, Poland, and the Soviet Union. As opposed to the previous Secretariat draft, which was written primarily by a panel of expert jurists, the Ad Hoc Committee was comprised of men who were, first and foremost, diplomats representing national interests. Such proximal political impulses substantially changed the tone of the proceedings. Leo Kuper, an early pioneer in genocide studies, conceded that “it is very depressing to read the reports” of the committee debates from this point forth. “One can see, in the controversies about the wording of the Convention, many of the forces which have rendered it so ineffective.”¹⁴³

This was very much the case regarding the continued debate over the cultural genocide provision, which became a politically contentious issue that was at least tacitly framed by the emerging Cold War dynamic.¹⁴⁴ As such, the opposition to cultural genocide was led by France and the United States. On the other side of the debate were several Soviet bloc countries, which throughout the entire drafting process were keen to use such a notion to undermine the normative authority of the Western bloc. In turn, the Western bloc attempted to use a parallel debate over whether or not to include political

¹⁴³ Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven: Yale University Press, 1982), 24.

¹⁴⁴ For a summary of the debate, see United Nations Economic and Social Council, “Ad Hoc Committee on Genocide: Commentary on Articles Adopted by the Committee,” UN Doc. E/AC.25/W.1 (26 April 1948), in *The Genocide Convention*, 982-983.

groups under the group element of the crime. Yet we should be careful not to overstate this impending Cold War dynamic, which was in any case still in gestation. Besides, France and the United States were in the minority in the Ad Hoc Commission, for besides Poland and the Soviet Union, the remaining delegations (including Venezuela, Lebanon, and China) all favored inclusion.

Even so, the Western bloc's opposition is revealing, insofar as it demonstrates that the cultural genocide concept was up against the normalcy of assimilation. After all, looking ahead, it was the opposition that ultimately won out, as the clinching logic was that, "from a practical point of view, the inclusion of cultural genocide in the Convention might prevent many countries from becoming parties."¹⁴⁵ The French delegate added that some of the acts included under the category of cultural genocide "might have a lawful basis," and that "current legislation acknowledged the right of States to impose certain restrictions on the use of the national language of minority groups living in their territory." There was a danger, he concluded, in broadening the definition of genocide "in such a way as to incriminate States exercising their powers in a normal way."¹⁴⁶ Once again, the concern was that such a broader notion would interfere with states' presumed rights as sovereign entities to administer programs of assimilation.

The French delegation's reasoning here represented a point of consensus, even for those on the other side of the issue in the Ad Hoc Committee. For instance, the Polish delegation, which ultimately supported the retention of the cultural genocide provision,

¹⁴⁵ United Nations Economic and Social Council, "Report of the Committee and Draft Convention Drawn up by the Committee," UN Doc. E/794 (May 24, 1948), in *The Genocide Convention*, 1127.

¹⁴⁶ Mr. Ordonneau (France), in United Nations Economic and Social Council, "Ad Hoc Committee on Genocide, Summary record of the Fourteenth Meeting," UN Doc. E/AC.25/SR.14 (27 April 1948), in *The Genocide Convention*, 889.

also agreed that certain assimilatory practices were legitimate and should not be prohibited. As with Lemkin's counterparts in the Secretariat draft, the Polish delegate "attached great importance to the notion of cultural genocide, as his country had suffered more especially from that particular crime." However, he reasoned that "cultural genocide was closely related to the problem of the protection of minorities. ... That was essentially a political question which would give rise to great difficulties and as its practical result, it would decrease considerably the number of adherences to the proposed Convention."¹⁴⁷ Moreover, he argued "that the purpose of the proposed convention was not to interfere with *the natural evolution of humanity*, or the inevitable absorption of certain minority groups into the national whole, but rather to prevent the violence, persecution and excesses which aroused the conscience of mankind."¹⁴⁸ As with Lemkin's earlier rationale, proponents of the cultural provision contended that this category involved something more than policies of compulsory assimilation.

At this point in the proceedings, any discussion of Indigenous peoples was notably absent. For example, while submitting comments on the Ad Hoc Committee draft before it was passed on the General Assembly, the Canadian delegation attempted to justify its position against the cultural genocide provision. Its representative claimed that his country abhorred "any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group." Incredulously, he had the audacity to say this despite his country's ongoing project to eliminate Aboriginal

¹⁴⁷ Mr. Rudzinski (Poland), in United Nations Economic and Social Council, "Ad Hoc Committee on Genocide, Summary record of the Fifth Meeting," UN Doc. E/AC.25/SR.5 (16 April 1948), in *The Genocide Convention*, 728.

¹⁴⁸ Mr. Rudzinski (Poland), in United Nations Economic and Social Council, "Ad Hoc Committee on Genocide, Summary record of the Fourteenth Meeting," 890. Emphasis added.

identities through residential schools, a project which very likely would have been implicated under the cultural genocide provision. The delegate added that “Canada was a country with two main and abiding cultural traditions,” referring to the English and French traditions, not Aboriginal, and that there was no other nation-state that was “more concerned to ensure the preservation of the culture, language or religion of a minority group or groups.”¹⁴⁹

Ultimately, the Ad Hoc Committee decided to retain a provision against cultural genocide, but as a compromise it was agreed to split this provision off into a separate article, thereby distinguishing it from the physical and biological modes of genocide.¹⁵⁰ Article II of the Ad Hoc Committee draft thus covered the unified category of physical and biological genocide, whereas Article III redefined cultural genocide as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.¹⁵¹

The conceptual splitting of cultural genocide from physical and biological genocide was not the only important departure from the first draft. By shrinking the number of subparagraphs from five to two, the Ad Hoc Committee draft substantially reduced the definitional content of cultural genocide. As a result of these changes, a major step was

¹⁴⁹ Mr. Stephens (Canada), in Economic and Social Council, “218th Meeting,” UN Doc. E/SR.218 (26 August 1948), in *The Genocide Convention*, 1224.

¹⁵⁰ Economic and Social Council, “Ad Hoc Committee on Genocide, Summary record of the Fifth Meeting,” p. 731; and Economic and Social Council, “Ad Hoc Committee on Genocide, Summary record of the Tenth Meeting,” UN Doc. E/AC.25/SR.10 (16 April 1948), in *The Genocide Convention*, 842.

¹⁵¹ Economic and Social Council, “Draft Convention on Prevention and Punishment of Genocide,” UN Doc. E/AC.25/12 (12 May 1948).

made towards jettisoning it from the Convention altogether. So although the cultural genocide provision managed to survive the second round of drafting, its time was limited.

The Sixth Committee: Final Edits

By the end of summer 1948, the ECOSOC presented the Ad Hoc Committee draft to the Third Session of the UN General Assembly, which was then about to be held in Paris. This session was ultimately responsible for adopting not only the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, but exactly one day later, on December 10, 1948, it also adopted the Universal Declaration of Human Rights. Indeed, just as the Sixth Committee of the General Assembly was debate whether or not to retain the provision against cultural genocide, the question of a minority rights provision in the Universal Declaration was at stake in the Third Committee. Ultimately, both provisions were omitted, thereby suggesting how deeply embedded the normalcy of assimilation probably was at this time.

Nevertheless, as Johannes Morsink has detailed, the overlap between their two respective drafting process “helps why neither of those documents directly addresses the crime of cultural genocide.”¹⁵² As far as the Sixth Committee was concerned, the issue of cultural genocide came to a head on October 25, as highlighted at the very outset of this dissertation.¹⁵³ With the Communist and Arab delegations favoring its inclusion and the American states against it (Venezuela being the one significant exception), the Western European delegations were left in the balance. They ultimately agreed with the

¹⁵² Johannes Morsink, “Cultural Genocide, the Universal Declaration, and Minority Rights,” *Human Rights Quarterly* 21, no. 4 (1999): 1009.

¹⁵³ United Nations General Assembly, “Official Records of the Third Session of the General Assembly, Sixth Committee: Eighty-third Meeting,” UN Doc. A/C.6/SR.83 (25 October 1948), in *The Genocide Convention*, 1501-1519.

Americans, concluding that the problem of cultural genocide could be more appropriately dealt with elsewhere, as they promised to support a like-minded provision in the Universal Declaration. When a roll call vote on the cultural genocide provision was taken in the Sixth Committee, 25 delegations opted for its exclusion, outnumbering the 16 votes in favor of its retention.¹⁵⁴ Yet when the time came for the corresponding minority rights provision in the Universal Declaration, these delegations failed to live up to their promises. Cultural genocide was thus a victim of political compromise in both deliberative proceedings.

Yet even within this debate in the Sixth Committee, there was nevertheless once again an apparent consensus on the normalcy of assimilation. For example, the representative from Brazil said that “care should be taken ... not to favor minority movements which would tend to oppose *the legitimate efforts made to assimilate* the minorities by the countries in which they were living.”¹⁵⁵ Even countries that were against excluding a cultural genocide provision agreed with this point. For instance, according to the records, “the Egyptian delegation had also expressed the fear that the concept of cultural genocide might hamper *a reasonable policy of assimilation* which no State aiming at national unity could be expected to renounce.”¹⁵⁶ Finally, the representative from the Philippines argued that certain parts of the cultural genocide

¹⁵⁴ Ibid, p. 1518. *In favor of exclusion*: South Africa, UK, USA, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Dominican Republic, France, Greece, India, Iran, Liberia, Luxembourg, Netherlands, New Zealand, Norway, Panama, Peru, Siam, Sweden, Turkey. *Against*: USSR, Yugoslavia, Byelorussian SSR, China, Czechoslovakia, Ecuador, Egypt, Ethiopia, Lebanon, Mexico, Pakistan, Philippines, Poland, Saudi Arabia, Syria, Ukrainian SSR.

¹⁵⁵ Mr. Amado (Brazil), in United Nations General Assembly, “Official Records of the Third Session of the General Assembly, Sixth Committee: Sixty-third Meeting,” UN Doc. A/C.6/SR.63 (30 September 1948), in *The Genocide Convention*, 1291. Emphasis added.

¹⁵⁶ Mr. Raafat (Egypt), in “Official Records of the Third Session of the General Assembly, Sixth Committee: Sixty-third Meeting,” in *The Genocide Convention*, 1293. Emphasis added.

provision “could be interpreted as depriving nations of *the right to integrate* the different elements of which they were composed into a homogenous whole as, for instance, in the case of language.”¹⁵⁷ In these emphasized portions, we see how deeply entrenched the normalcy of assimilation was at this time.

In any case, once this contentious issue and others were resolved, on December 1 the Sixth Committee passed the Convention onto the General Assembly for approval. Despite a futile eleventh-hour effort by Pakistan and the Soviet Union to reinsert some vestige of a provision against cultural genocide, the final draft of the Convention was unanimously passed without it on December 9, 1948. Article II of the Convention’s final draft thus defined genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such”:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.¹⁵⁸

Curiously, sub-paragraph (e) made its way back into the final draft, having been originally included in the Secretariat draft but omitted from the Ad Hoc Committee draft. The act of “forcible transferring children” was reinserted at the behest of the Greek delegation, as thousands of Greek children were kidnapped by Communist forces in the midst of their ongoing civil war. This provision was even supported by those delegations

¹⁵⁷ Mr. Paredes (Philippines), in United Nations General Assembly, “Official Records of the Third Session of the General Assembly, Sixth Committee: Sixty-fifth Meeting,” UN Doc. A/C.6/SR.65 (2 October 1948), in *The Genocide Convention*, 1315. Emphasis added.

¹⁵⁸ United Nations General Assembly Resolution 260(III), “Prevention and Punishment of the Crime of Genocide,” UN Doc. A/RES/3/260 (9 December 1948).

that otherwise opposed including the category of cultural genocide, such as the United States, albeit under the condition that it constituted a form of physical or biological genocide rather than cultural.

Nevertheless, apart from this reconceived provision, the category of cultural genocide was entirely excised from the final draft, much to Lemkin's dismay. As he observed this final drafting stage from the sidelines of the General Assembly, he became resigned to the fact that "there would be more obstacles, and some smaller ones should be left alone. I would fight only the big battles, those of real importance to the convention."¹⁵⁹ Lemkin's autobiography thus rationalized the omission of cultural genocide as a strategic concession.

This idea was very dear to me. I defended it successfully through two drafts. ... But there was not enough support for this idea in the committee. ... On this issue the wind was not blowing in my direction. After having overcome so many hurdles and with the end of the Assembly in sight, I questioned the wisdom of engaging in still another battle. Would it endanger the passage of the convention? ... So with a heavy heart I decided not to press for it.¹⁶⁰

With that said, Lemkin's role in the drafting process was already very well diminished by this point, so his concession was not necessarily a primary factor in the omission of cultural genocide. Rather, following William Schabas, I argue that the cultural genocide provision was omitted because "the issue had hit a nerve with several countries who were conscious of problems with their own policies towards minority groups, specifically indigenous peoples and immigrants."¹⁶¹ This "raw nerve" has been analyzed here in

¹⁵⁹ Lemkin, *Totally Unofficial*, 163.

¹⁶⁰ Ibid, 172-173.

¹⁶¹ Schabas, *Genocide in International Law*, 184.

terms of what I have been calling the normalcy of assimilation, the idea of which I conclude with below.

Inserting the Colonial Clause

Before concluding, however, one last note must be made regarding a last minute insertion into the final text. In mid-October 1948, the United Kingdom delegation proposed an amendment known as the “colonial clause,” which concerned the territorial application of the Convention.¹⁶² This resulted in Article 12 of the 1948 Convention, which reads: “Any Contracting Party may at any time ... extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.” In non-legalese language, this clause gave signatories the freedom to choose whether or not the scope of the 1948 Convention would be extended to overseas colonial possessions. In other words, this was essentially an opt-out clause, as signatory states were not obliged to apply the Convention to their overseas colonial possessions.

This provision was inserted to appease European imperial powers, including not just the United Kingdom but also Belgium, which as we will see in the next chapter mounted a defense of the “civilizing mission” of European imperialism by co-opting the nascent form of Indigenous rights discourse during the 1950s. Indeed, the colonial clause was very much an artifact of the first-half of the 20th century, when global governance

¹⁶² Ibid, 605-608; Marko Milanovic, “Territorial Application of the Genocide Convention and State Succession,” in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (New York: Oxford University Press, 2009), 474-476; and Tamara Starblanket, “‘Kill the Indian in the Child’: Genocide in International Law,” in *Indigenous Peoples as Subjects of International Law*, ed. Irene Watson (New York: Routledge, 2016), 180-184.

was still aligned with the classic mode of European overseas imperialism. For example, a similar opt-out clause could be found in the 1926 Slavery Convention that was created under the auspices of the League of Nations, as well as the 1950 European Convention on Human Rights.¹⁶³ Indeed, the policy of the British Foreign Office at the time was that it would not support any treaty without such a clause.¹⁶⁴

Yet the international normative landscape was shifting out of favor of European overseas empires, and the colonial clause became the target of an incipient anti-colonial mood at the UN. Moreover, the issue became fodder in the moral diplomacy of the emerging Cold War. For example, the delegation from the Soviet Union decried that “colonial policy had been a dark page in history even in pre-fascist times. The [Sixth] Committee did not wish to see those dark pages prolonged by a failure to extend the provisions of the convention on genocide to the colonial territories.”¹⁶⁵ In response, the “United Kingdom delegation denied the moral authority of the Soviet Union Government to make any such statement, or to set itself up as a model of conduct before the world.”¹⁶⁶

The colonial clause is important insofar as it registers with the ideological origins of the UN as an outgrowth of the internationalism of British imperial thought. In Mark Mazower’s recent revisionist account of global governance in the mid-20th century, there was a continuity from the discredited League of Nations to the newly established UN,

¹⁶³ Ralph Wilde, “The Extraterritorial Application of International Human Rights Law on Civil and Political Rights,” in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (New York: Routledge, 2013), 638; and Yuen-Li Liang, “Notes on Legal Questions Concerning the United Nations,” *American Journal of International Law* 45, No. 1 (1951): 108-109.

¹⁶⁴ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (New York: Oxford University Press, 2004), 534.

¹⁶⁵ Mr. Morozov (Union of Soviet Socialist Republic), in United Nations General Assembly, “Official Records of the Third Session of the General Assembly, Sixth Committee: Hundred and Seventh Meeting,” UN Doc. A/C.6/SR.107 (15 November 1948), in *The Genocide Convention*, 1817.

¹⁶⁶ Mr. Fitzmaurice (United Kingdom) in *ibid*, 1822.

especially with regards to the “protection” of less “developed” peoples. He argues that “the United Nations started out life not as an instrument to end colonialism, but rather ... as the means to preserve it.”¹⁶⁷ After World War II, European powers like the United Kingdom rushed to reassert their control over the euphemistically labeled “non-self-governing territories,” and the United States was willing to condone this rush in the interest of maintaining the Western alliance in the new Cold War dynamic. Such acquiescence is evident in the insertion of the colonial clause in the 1948 Convention.

At the same time, the very fact that there was a debate over the colonial clause indicates that the conventional practice of overseas imperialism was controversial and that its time was coming to an end. The move towards decolonization at the UN came suddenly and swiftly over the course of the 1950s into the 1960s, although the project of decolonization was strictly limited to European overseas empires in Asia and Africa. This is what was referred to as the “salt-water” thesis in the Introduction. As we will see in the following chapter, in the context of the so-called “Belgian thesis,” the incipient form of Indigenous rights discourse that came together by the 1950s was framed as part of a rear-defense effort by European imperial powers to legitimize their “civilizing mission.”

This brings us back to Lemkin, who condoned the excesses of colonialism without repudiating the Eurocentric biases that inhered the contemporaneous discourse of global governance. We do not know what he thought of the colonial clause in particular. Yet his general writings on colonialism are enigmatic. On the one hand, when considering the generative forces of genocide, he remarked quite frankly that

¹⁶⁷ Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), 31.

“colonialism cannot be left without blame.”¹⁶⁸ Moreover, towards the end of Lemkin’s life, in the late 1950s, Lemkin wrote a memo that condemned the French counterinsurgency in Algeria.¹⁶⁹ On the other hand, Dirk Moses argues that Lemkin “did not oppose colonization or empire per se.”¹⁷⁰ Although he began his career as a minority in interwar Poland, in the end Lemkin was “a white male member of the European legal elite that condoned empire while criticizing its excesses.” Like other liberals of the early 20th century, he believed that “empire could be supported on humanitarian grounds if it served the interests of ‘civilization’.” After all, imperialism, however brutal at times, had also brought the spread of international law that Lemkin regarded as the central civilizational instrument to combat genocide.”¹⁷¹

Lemkin’s intellectual biography thus reflects the dualistic ambiguity of normative change and continuity that is problematized by this dissertation. Recall from the Introduction that the conventional constructivist account in IR theory tends to be geared towards triumphant narratives about the progressive advancement of “good” norms, while concomitantly downplaying “the darker, colonial side of modern ethical life.”¹⁷² As argued by Naeem Inayatullah and David Blaney, such a bias tends to obscure the fact that scholars and activists, even those like Lemkin who work towards progressive moral change, are nevertheless often embedded in unjust social structures. Unfortunately, however, most norm entrepreneurs fail “to face their complicity in the very forces they

¹⁶⁸ Lemkin, “Description of Project,” in *Lemkin on Genocide*, 5.

¹⁶⁹ Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 217-218.

¹⁷⁰ Moses, “Empire, Colony, genocide,” 11.

¹⁷¹ Moses, “Genocide,” 37.

¹⁷² Charlotte Epstein, “Stop Telling Us How to Behave: Socialization or Infantilization?” *International Studies Perspectives* 13, no. 2 (2012): 137-138; and Naeem Inayatullah and David Blaney, “The Dark Heart of Kindness: Norms Constructivism as Deflection,” *International Studies Perspectives* 13, no. 2 (2012): 164.

resist.”¹⁷³ In the case of Lemkin and the 1948 Genocide Convention, this complicity was evident with the prevailing attitudes at the time regarding the normalcy of assimilation.

The Normalcy of Assimilation

This chapter has traced the emergence of an idea from “vandalism” in 1933, to the “cultural techniques of genocide” in 1944, and finally to “cultural genocide” in 1947. Moreover, as we have outlined the legalization process behind the 1948 Convention, we have seen how the meaning of Lemkin’s moral cause was transformed as it became positivized into law. Specifically, we have seen how the broad construal of genocide involving the cultural destruction of groups was highly contested and ultimately omitted. Since then, the dominant interpretation of genocide has been construed to mean destruction in the physical or biological sense of the term.¹⁷⁴ There is at least one reasonable explanation for such a narrow construal. The crime of genocide presumably needs a rigorous definition in order to facilitate successful criminal prosecution. As such, the law focuses on the sharper end of the genocidal process because it includes the most overt and obvious forms of annihilation. The underlying assumption here is that definitional specificity is necessary for the concept to be legally effective.

Yet this neither fully explains nor justifies the enclosure of the narrowly enclosed international legal definition, as much deeper and more cynical reasons lie beneath the surface. To put it bluntly, the drafters made sure the Convention was narrow enough in

¹⁷³ Ibid.

¹⁷⁴ Elisa Novic. “Physical-Biological or Socio-Cultural ‘Destruction’ in Genocide? Unravelling the Legal Underpinnings of Conflicting Interpretations,” *Journal of Genocide Research* 17, no. 1 (2015): 64

order to exculpate any possible liabilities of their own states. All of the delegates, especially those from Western countries, clearly had no intentions of allowing the Convention to adopt a broader definition that would possibly ascertain to certain projects committed by their respective nation states. Cultural genocide was thus removed largely because a voting bloc (consisting of delegates from North and South America, Western Europe, and the Anglophone states of the Commonwealth) was concerned that the notion too closely described the historical and ongoing structures of assimilation and nation building in their own countries. Such anxiety was deep and pervasive, even touching upon supporters of a cultural genocide provision, including the Soviet bloc and some Islamic countries as well. And as far as Lemkin was concerned, by the final drafting stages he had already played his major part in the authorial process and was hopeless in preventing its excision. In the end, it was simple political expediency which removed cultural genocide from the 1948 Convention.

Such political expediency has been analyzed here in terms of the normalcy of assimilation. Again, this reflected a broad consensus, including supporters of the cultural genocide prevention. We have already seen that even Lemkin maintained this assumption, careful as he was to distinguish cultural genocide from “forced assimilation by moderate coercion.”¹⁷⁵ Towards the end of his career, he further argued that “cultural genocide is a more or less abrupt process that is it must not be confused with the gradual changes a culture may undergo. Such gradual changes occur by means of the continuous and slow adaptation of the culture to new situations. ... A very common type of adaptation,” he added, “is the assimilation of certain foreign cultural traits” through “the

¹⁷⁵ United Nations Secretary-General, “Draft Convention on the Crime of Genocide: Comments on the Draft Convention,” 27.

process of cultural diffusion.”¹⁷⁶ So whereas cultural genocide “implies complete and violent change,” he said, “diffusion is gradual and relatively spontaneous, although it may lead to the eventual disintegration of a weak culture.”¹⁷⁷ As we will see in the next chapter, this reference to a so-called “weak culture” was normatively loaded, insofar as it alluded to so-called “primitive” peoples who were presumably frozen in time and out of place in modernity.

The normalcy of assimilation was a global assumption. Indeed, looking ahead to Chapter Two’s analysis of the decolonization regime and the formation of new sovereign states in Africa and Asia, the idea that minority populations should be integrated into dominant national units was widely shared in the international community. Nevertheless, I think that the normalcy of assimilation, as well as the associated rules of sovereignty, including the principles of territorial integrity and non-intervention, found its strongest adherents from settler colonial countries. This was evident in the debate over the cultural genocide provision, for even if some Latin American countries were willing to accept its inclusion, at least in limited form, they nevertheless were keen to stress its limits. Consider one last final piece of evidence, this from the Brazilian delegation offering feedback to the Ad Hoc Committee draft. It cautioned that “great care would have to be exercised lest, in the desire to punish such a crime, encouragement were given to the formation of minorities in new nations which had been formed and developed by immigration; such minorities might make use of the Convention to resist their adoptive countries’ *legitimate desire that they should assimilate*.”¹⁷⁸

¹⁷⁶ Lemkin, “The Concept of Genocide in Anthropology,” in *Lemkin on Genocide*, 41.

¹⁷⁷ *Ibid.*

¹⁷⁸ Mr. Guerreiro (Brazil), in Economic and Social Council, “218th Meeting,” UN Doc. E/SR.218 (26 August 1948), in *The Genocide Convention*, 1238.

Again, I argue that such an assumption was widely shared; hence my notion of the normalcy of assimilation. My final point here is that this assumption was driven in large part by another conceptual offering, which I call *settler colonial globalism*. This was referred to earlier in the context of the Canadian government's effective dismissal of Chief Deskakeh's appeal to the League of Nations, as well as the 1933 Montevideo Convention, the latter of which defined the international legal definition of statehood. It is no surprise that the rules of sovereignty and self-determination emerged from settler colonial countries, anxious as they were to consolidate their hold over dispossessed Indigenous territories. As we will see now, turning to Chapter Two, these two themes – the normalcy of assimilation and settler colonial globalism – once again came together in the formation of the 1957 Indigenous and Tribal Populations Convention (No. 107).

CHAPTER TWO

(Mis-)Labelling “Indigenous” (1920s-1960s): The 1957 Indigenous and Tribal Populations Convention (No. 107)

Historical Spotlight: Geneva, June 26, 1957

The 1957 Indigenous and Tribal Populations Convention (No. 107) was adopted by the International Labour Conference with a vote of 179 to 8, with 45 abstentions.¹ As the legislative body of the International Labour Organization (ILO), the International Labour Conference is a peculiar organ of global governance, insofar as it is comprised not only of states, but also of national employers’ and workers’ organizations. Yet on this day, there were no actual Indigenous peoples in Geneva to press their own claims or advance their own cause. Others were making decisions for them. Such a paternalistic mood was evident in the formal subtitle of the 1957 Indigenous and Tribal Populations Convention (No. 107), otherwise known as the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. The stated aims of “protection” and “integration” were loaded with normative and ideological baggage, as this chapter argues that the 1957 Indigenous and Tribal Populations Convention was rooted in the context of colonial discourse.

Unlike the other international legal instruments that are highlighted in this dissertation as milestones, the 1957 Indigenous and Tribal Populations Convention (No. 107) was adopted with relatively little fanfare. Yet this seminal intervention marked the first time that the keyword “indigenous” was specifically identified in international law, and for over thirty years, it was the only set of internationally legally binding standards

¹ Anonymous, “The Fortieth Session of the International Labour Conference,” *International Labour Review* 76 (1957): 232.

concerning this global population.² It is now officially an outdated instrument, having been replaced by the 1989 Indigenous and Tribal Peoples Convention (No. 169). Nevertheless, it still remains in force in 17 countries that have yet to adopt the newer instrument.³ Despite its outdatedness, this original statement of international law influenced later developments that would eventually culminate in the 2007 Declaration. This is not simply by virtue of the very fact that it was the first international legal instrument concerned with “indigenous” peoples. Even more substantively, the 1957 Convention (No. 107) foreshadowed important elements of contemporary Indigenous rights discourse, such as “the right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy,” prefigured important aspects of contemporary Indigenous rights discourse.⁴ In such ways, this particular “discursive event” marks an important yet unsettling possible starting point in the search for the roots of contemporary Indigenous rights discourse.⁵

Such a proposition belies much of the current literature on Indigenous rights, which instead points to the 1970s as a period of origins.⁶ To be clear, I do not disagree with the proposition that the post-1970s period was one of major normative transformation. Looking ahead to Chapter Three, this change is evidenced by the eventual revision and replacement of the 1957 Indigenous and Tribal Populations Convention. In

² Russel Lawrence Barsh, “Revision of ILO Convention No. 107,” *American Journal of International Law* 81 (1987): 756.

³ These countries include Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Syria, and Tunisia.

⁴ Art. 11 of the 1957 Convention. Cf. Art. 26(1) of the 2007 Declaration.

⁵ On “discursive events,” see Siegfried Jäger, “Discourse and Knowledge: Theoretical and Methodological Aspects of a Critical Discourse and Dispositive Analysis,” in *Methods of Critical Discourse Analysis*, eds. Ruth Wodak and Michael Meyer (SAGE, 2001), 47-48.

⁶ Emblematic in this regard is Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (New York: Routledge, 2016), 35.

retrospect, the assumptions behind the 1957 Convention speak more to the 1948 Genocide Convention than the 2007 Declaration. For instance, recall the notion introduced in Chapter One, *the normalcy of assimilation*, which was identified as a reason for the omission of cultural genocide from the 1948 Genocide Convention. This refers to the expectation that Indigenous peoples, other national minorities, and immigrants should be assimilated and integrated into the dominant national units that comprise the international system of sovereign states. Insofar as it perpetuated the normalcy of assimilation, the 1957 Convention represents the once dominant consensus of an older normative framework that has since been rejected and replaced. Stated differently, the underlying values and assumptions of the 1957 Convention, when read alongside the omissions of the 1948 Genocide Convention, represent elements of the prior status quo that were upended by the post-1970s expansion of Indigenous rights discourse.

With that said, we must be careful not to overstate this point, as there remain even deeper underlying continuities in the intellectual-historical roots of contemporary Indigenous rights discourse. Unearthing the discursive layers of beneath this field of international norms reveals some unsettling foundations. After all, as noted in the Introduction, the etymology of “indigenous” is fundamentally European in origin, and it when it was adopted as part of the Anglophonic lexicon of global governance during the interwar period (1919-1939), it was originally understood in Eurocentric terms. As we will see here in Chapter Two, this keyword was first used in relation to the French term, “*travailleur indigene*,” or what at the time was known in English as “native” or “indigenous workers.” At first, this primarily alluded to the exploitation of colonized

workforces in overseas empires, but by the post-World War II period (mid-1940s to the late 1960s), the term “indigenous” expanded to include those in independent and “post-colonial” states as well. Thus, over the span of this historical range, roughly from the 1920s to the pre-1970s, “Indigenous populations” was labelled with reference to classic colonial empires as well as contemporary settler colonial nation-states. In sum, as one authoritative account puts it, “Convention No. 107 was a late product of colonial times. ... International law first defined Indigenous peoples to see them disappear.”⁷ Thus, the very concept of “indigenous” is loaded with problematic implications that are rooted in the enduring histories of colonialism.

Chapter Two thus continues the analysis from Chapter One, focusing on the normalization of assimilation as part of the status quo of the contemporary international system. Discussion begins by highlighting the concept of institutional power and the liberal theory of co-optation. Next we turn to the historical origins of the ILO regime after World War I and the colonial construction of the “native worker,” before turning to the Latin American *Indigenismo* movement, which refers to a political and social movement during the early to mid-20th century that valued only superficial aspects of Indigenous cultures as a means of integrating Indigenous peoples into dominant national units. At this stage we take a brief historical detour to consider the prejudices of the famous 16th century Spanish theologian and “defender of the Indians,” Bartolomé de las Casas, in order to highlight the deep roots of protectionist discourse in Latin American history. With this in tow, we will theoretically unpack the so-called “Indian problem,”

⁷ Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (New York: Oxford University Press, 2005), 139 and 172. Unfortunately, this work fails to utilize the settler colonial analytic. Cf. Veracini 2015.

which was defined in terms of anthropological stage theory, developmentalism, and the limits to post-World War II decolonization. Finally we will turn to the 1957 Indigenous and Tribal Populations Convention (No. 107) itself, focusing especially on how the keyword “indigenous” was defined in relation to the goal of integrationism. In sum, the argument of Chapter Two is that this seminal intervention in international law helped consolidate the settler colonial status quo, thereby setting it up as a target of critique in the post-1970s turning point discussed in Chapter Three.

Institutional Power and the Liberal Theory of Co-Optation

Although the 1948 Genocide Convention and the 1957 Indigenous and Tribal Populations Convention (No. 107) are not directly related to one another in terms of international law, in terms of intellectual history they are broadly similar. After all, these two instruments were only separated by less than a decade, and they both emerged out of a common set of background conditions. More to the point, each of these international legal instruments helped consolidate the basic structure of the international system by tacitly taking for granted the dominant state-centric rubric of this system. By extension, I further argue that these two instruments effectively normalized the domination of settler states over Indigenous peoples. Below we will see that some of the biases, assumptions, and predispositions involved with drafting the 1948 Genocide Convention were uncritically reproduced during the conception of the 1957 Indigenous and Tribal Populations Convention.

Chapter Two thus deals with the broader intellectual-historical context behind the 1957 Indigenous and Tribal Populations Convention (No. 107), but we must first recall

the core analytical threads that tie this dissertation together. We thus return to our ongoing historiography of IR theory that is based on the “colonial household” image of the discipline, as well as a four-part typology of power (compulsory; institutional; structural; and productive).⁸ More importantly, we also revisit our four-part theoretical framework of co-optation (organizational; liberal; critical; and dynamic). Whereas in Chapter One dealt with the concept of compulsory power and the organizational theory of co-optation, Chapter Two turns to the idea of *institutional power* and the so-called *liberal theory of co-optation*. And just as the previous chapter focused on classical realism, here the spotlight turns to liberalism as another body of knowledge in IR theory that was also responsible for the constructing the foundations of the contemporary global system in the mid-20th century.

As this dissertation deploys the concept of *co-optation* to wrestle with the dynamics between power and resistance, both Chapters One and Two fall on the same side of the balance between structural continuity and change. It was noted in the Introduction that realism and liberalism share a systemic bias towards perpetuating the basic structure of the contemporary global order. Whereas realism consolidated the rules of sovereignty, liberalism established the rules of capitalism. By the mid-20th century, these two traditions came together to work hand-in-hand in consolidating the status quo of the modern world system. Returning to the metaphorical “colonial household” of IR theory, “*mater liberalism*” was the devout spouse or counterpart to “*pater realism*.” Whereas the latter proceeded upon the “anarchy myth” that was examined in Chapter

⁸ Anna M. Agathangelou and L.H.M. Ling, “The House of IR: From Family Power Politics to the *Poiesies* of Worldism,” *International Studies Review* 6 (2004): 21-49; and Michael Barnett and Raymond Duvall, “Power in Global Governance,” in *Power in Global Governance*, eds. Michael Barnett and Raymond Duvall (New York: Cambridge University Press, 2005).

One, the former (which is our concern here) is based on the myth of “international society.” Although these myths seemingly point in opposite directions, they have nevertheless worked in tandem to make the status quo seem like a “natural fact.”⁹ More specifically, they both worked together to consolidate the dominant mid-20th century assumption that Indigenous peoples should be subservient to nation-states.

The argument presented here is that the discourse of liberalism was largely responsible for disciplining Indigenous-state relations. To the extent that “*pater* realism” looks outward to international arena of great power politics, the “problems” raised by Indigenous peoples was deemed less important and thus subsumed under the domestic sphere represented by “*mater* liberalism.” The “Indian problem” was only a concern of global governance insofar as domestic policies could be coordinated through international organizations. Hence, it is not surprising that issues related to Indigenous peoples were largely glossed over by the 1948 Genocide Convention and relegated to the lower profiled 1957 Indigenous and Tribal Populations Convention. With that said, the underlying conceptions of power at stake in these two opening body chapters work in tandem. For example, the image of the “iron fist” that is connoted by our earlier discussion of compulsory power is complemented by the metaphorical “velvet glove” of persuasion that is key to the concept of institutional power.¹⁰

In order to elaborate the concept of *institutional power* in the intellectual-historical context of IR theory, it is helpful to consider how it is both similar to and

⁹ Cynthia Weber, *International Relations: A Critical Introduction* (Second ed.) (New York: Routledge, 2005 [2001]), 6-7.

¹⁰ Quintin Hoare and Geoffrey Nowell Smith, “Introduction,” in Antonio Gramsci, *Selections from the Prison Notebooks* (Trans. Quintin Hoare and Geoffrey Nowell Smith) (New York: International, 1971), xxxvi.

different from the concept of compulsory power examined in the previous chapter. In both of these categories of power, a key premise is that power works through the interaction of “pre-constituted social actors.” Moreover, in both cases, as power is seen as a possessive attribute or resource that can be exercised through control over others.¹¹ The crucial difference, however, is the specificity of interactivity between social actors. Following Barnett and Duvall, compulsory power describes a situation in which subject A (for example, settler states) is directly responsible for making subject B (e.g. Indigenous peoples) do what it would otherwise not do. In contrast, the conceptual focus of *institutional power* is on “the formal and informal institutions that mediate A and B, as A, working through the rules and procedures that define those institutions, guides, steers, and constrains the actions (or non-actions) and conditions of existence of others, sometimes even unknowingly.”¹² Thus, *institutional power* can be defined as the indirect control or influence of one actor over another.

Such indirect effects of power are evident in the liberal theory of co-optation. There is very little literature along these lines, although the best example comes from Andrew Moravcsik’s analysis of why states comply with international human rights law. He argues that compliance depends less on “international pressures” than it does on “domestic calculations.”¹³ Co-optation is identified as a mechanism in which such “domestic calculations” are shifted in favor of international norms. Specifically, he argues that the effectiveness of international human rights norms depends on the co-

¹¹ Michael Barnett and Raymond Duvall, “Power in Global Governance,” in *Power in Global Governance*, eds. Michael Barnett and Raymond Duvall (New York: Cambridge University Press, 2005), 9.

¹² *Ibid.*, 15.

¹³ Andrew Moravcsik, “Explaining International Human Rights Regimes: Liberal Theory and Western Europe,” *European Journal of International Relations* 1, no. 2 (1995): 160.

optation of domestic political institutions.¹⁴ In this limited sense, we can see a liberal theory of co-optation at work in the ratification process behind the 1957 Indigenous and Tribal Populations Convention (No. 107), which was only ratified by 27 countries, 14 of which were from Latin America and the Caribbean. As we will see below, insofar as the ILO regime emerged out of the *indigenismo* discourse, there was already a convergence between international and domestic norms in Latin America.

The liberal version of the co-optation concept requires much more critical theorization. There is merit to recasting the concept of co-optation away from its familiar notion as a form of political emasculation (as argued in the critical theory of co-optation) and towards a strategy of effecting positive political change (which is also envisioned by the dynamic theory of co-optation). Yet there are critical limitations to the liberal theory. As noted in the Introduction, it shares with the organizational theory the same institutional or systemic bias towards the status quo. In other words, both are designed to avoid any stirrings of resistance that can potentially rupture or unsettle the dominant rules of the world. As such, it fails to confront the Janus-faced paradox of rights discourse. Rather, it arguably perpetuates it, for to the extent that contemporary rights discourse emerged out of the tradition of liberal political theory, the advancement of rights-based claims must presumably be commensurate with the social and cultural values that historically produced this intellectual legacy. Moreover, as with the organizational theory once again, the liberal theory takes for granted “a reductionist focus on socialization.”¹⁵ In this sense, it bears too close a similarity to the traditional notion of assimilation as a

¹⁴ Ibid, 160.

¹⁵ Charlotte Epstein, “Stop Telling Us How to Behave: Socialization or Infantilization?” *International Studies Perspectives* 13, no. 2 (2012): 139

“one-way street” of cultural change. Finally, the liberal theory of co-optation, much like the intellectual tradition of “*mater* liberalism” from which it emerged, is predisposed towards the so-called “good norm” bias that overestimates the diffusion of liberal norms as necessarily a good thing and underplays the role of coercion, power, and resistance.¹⁶

In sum, the spousal pairing of “*mater* liberalism” and “*pater* Realism” played a key role in normalizing the domination of Indigenous peoples under settler states in the mid-20th century. Whereas the rawest and most extreme forms of compulsory power were legitimized by an international system premised upon the myth of anarchy, the more subtle and gentler form of institutional power attempted to soften and discipline the compulsory power of the state through the regulatory rules and mechanisms of the international society. Again, these two intellectual traditions and forms of power worked in tandem, and together they helped perpetuate the normalcy of assimilation as well as the features of settler colonial globalism.

Origins of the ILO Regime

On the surface, at least, 1957 Indigenous and Tribal Populations Convention (No. 107) was progressive in terms of formally introducing the keyword “indigenous” as a subject of international law, thereby marking a potential starting point in the field of Indigenous rights. Yet this original set of standards arrived with some very problematic ideological baggage. In the decades leading up to this seminal discursive event, the keyword “indigenous” was introduced into the Anglophonic lexicon of global governance

¹⁶ Laura K. Landolt, “(Mis)Constructing the Third World? Constructivist Analysis of Norm Diffusion,” *Third World Quarterly* 25, no. 3 (2004): 580.

as an instrument of colonial knowledge and power. If we dig into the discursive sub-strata of the 1957 Convention (No. 107), we will see that this linguistic innovation of the early 20th century has deeper roots in the intellectual history of Western imperialism from the 19th century and beyond. Particularly as it evolved into ILO policy during the 1920s and 1930s regarding the treatment of “native workers,” we see the hidden discursive strand that undergirds the eventual development of the 1957 Convention (No. 107).

The actual text of the 1957 Indigenous and Tribal Populations Convention (No. 107) will be unpacked much later in this chapter, only after we have unearthed the deeper underlying levels of historical strata. For example, subsequent sections will outline the origins and spread of *Indigenismo* discourse and the globalization of the so-called “Indian problem” as an outgrowth of mid-20th century modernization and developmentalism agendas. Those contexts will take us from the early 16th century to the mid-20th century. However, before we embark on this archaeological excavation, and in order to firmly situate our analysis around the 1957 Convention (No. 107), we must first set up the institutional context in which this instrument was conceived.

As such, the following section begins with the post-World War I formation of the ILO as a part of the League of Nations. We begin by analyzing how the League of Nations attempted to legitimize European overseas empires through the so-called Mandate System, which effectively amounted to the internationalization of the “civilizing mission.” Next we introduce the ILO as an independent agency of the League of Nations that played a partial role in administering the international oversight of the Mandate System. It was in this regard that the keyword “indigenous” was introduced into the Anglophonic lexicon of global governance, insofar as the ILO was concerned with

disciplining the use of colonial workforces. As such, we will see how the genealogy of Indigenous rights traces back to colonial discourses inherited from the 19th century and earlier.

Post-World War I Formation

The ILO was originally created as an agency of the League of Nations. Therefore, in order to understand the role and function of the ILO, we must first provide some broader institutional context. The League of Nations was established as part of the 1919 Treaty of Versailles, which formally ended World War I. Its fundamental purpose was to institutionalize a system of collective security, thereby legally establishing formal mechanisms for the prevention and suppression of intra-state aggression. The statesmen and jurists behind the formation of the League were committed to the spirit of internationalism, believing that the cooperation among nations and the respect for the international rule of law would foster economic and social progress, thereby ensuring global peace and civility.¹⁷ Unlike previous efforts of international organization, such as the Concert of Europe of the early 19th century, the League was an official, legally-sanctioned international institution.

One of the most pressing issues facing the League of Nations was the “colonial problem.” As noted by Antony Anghie, World War I “had not merely devastated Europe, but also severely weakened its claims to moral superiority – and, indeed, to be civilized.”¹⁸ Around the world, nationalist movements were pushing for independence. Meanwhile, as noted in Chapter One, Lenin’s call for national self-determination as early

¹⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (New York: Cambridge University Press, 2004), 170-172; and Mazower, *Governing the World*, 116.

¹⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2004), 138.

as 1914 would inspire anticolonial struggles for the next half-century. We have already noted that President Wilson only took up this principle afterwards as part of his administration's wartime strategy and postwar diplomacy.¹⁹ By the end of the war, there was a scramble amongst the victorious Allied Powers over the annexation of African, Pacific, and Middle Eastern territories seized from the defeated Central Powers. The strongest proponent of this position was General Jan Smuts of South Africa, who first proposed the establishment of a Mandate System that would only be applicable to those European territories formerly under the Russian, Austro-Hungarian, and Ottoman Empires, thereby leaving the non-European territories as the spoils of war.²⁰ In contrast, Wilson favored self-determination for the European territories and the Mandate System for the non-European territories.

Although Smuts was an unabashed proponent of imperialism, whereas Wilson was comparatively less so, the two were not far apart, ideologically speaking. They both shared a similar liberal internationalist sensibility, and both were avowed racists who were committed to white supremacy and the advancement of an Anglo-American "civilization."²¹ As such, a compromise position was reached in the form of Article 22 of the Covenant of the League of Nations, which established the Mandate System:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the

¹⁹ Eric D. Weitz, "Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right," *American Historical Review* 120, no. 2 (2015): 485; and Allen Lynch, "Woodrow Wilson and the Principle of 'National Self-Determination': A Reconsideration," *Review of International Studies* 28, no. 2 (2002): 419.

²⁰ Nele Matz, "Civilization and the Mandate System under the League of Nations as Origin of Trusteeship," *Max Planck Yearbook of United Nations Law* 9 (2005): 53; and Anghie, *Imperialism, Sovereignty and the Making of International Law*, 119.

²¹ Lloyd E. Ambrosius, *Woodrow Wilson and American Internationalism* (New York: Cambridge University Press, 2017), 18.

principle that the well-being and development of such peoples form *a sacred trust of civilization* and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.²²

Article 22 went on to list three classes of mandates determined by their “stage of development.” The first categories, classified as A mandates, included territories of the former Ottoman Empire whose “existence as independent nations can be provisionally recognized ... until such time as they are able to stand alone.” Class B mandates included former German territories in Central Africa, whereas class C mandates included territories in South-West Africa and the Pacific. It was in the latter class that Article 22 explicitly mentioned “the interests of the *indigenous* population.”²³ In a moment we shall explain just how new this keyword was in the Anglophonic lexicon of global governance.

With that said, the notion of “a sacred trust of civilization” had a relatively longer genealogy in the history of European imperialism. For example, the 1885 General Act of the Conference of Berlin Concerning the Congo was an agreement amongst European powers (and the United States) that legitimized the European “scramble for Africa” on the basis of ostensibly ensuring “the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence ... and to make them understand and appreciate the advantages of civilization.”²⁴ This was, in essence, the “civilizing mission.” Such discourse was nothing new. Colonizing powers had long been

²² 1919 Covenant of the League of Nations, Art. 22. Emphasis added.

²³ Ibid. Emphasis added.

²⁴ 1885 General Act of the Conference of Berlin Concerning the Congo, reprinted in *American Journal of International Law* 3, no. 1 (1909), 12.

justifying imperial rule as a means of ostensibly protecting colonized peoples and ensuring their welfare. What was new, however, was that Article 22 of the Covenant provide for international coordination of the “civilizing mission” under the institutional purview of the League of Nations. Under this system, the Allied Powers that took up mandatory obligations were acting on behalf of, and were supposed to be supervised by, the League of Nations. As Susan Pedersen puts it, “Mandatory oversight was supposed to make imperial rule more humane and therefore more legitimate.”²⁵

Similarly, Anghie describes the Mandate System as a form of “progressive, enlightened colonialism, as opposed to the bad, exploitative colonialism of the nineteenth century.”²⁶ The internationalization of imperialism was intended to ensure the “well-being and development” of colonized peoples, understood primarily in economic terms.²⁷ Along such lines, there were two principles that were imposed under the Mandate System.²⁸ First was an “open door” policy, which was intended to ensure access to colonial markets without regard to national origin. Secondly, and more importantly for our considerations, was the principle of “free labor,” as mandatory powers were obliged to suppress the slave trade. As seen momentarily, it was in this context that the situation of “native” and “indigenous” workforces in colonial settings was first included in the agenda of global governance.

Specifically, this issue would fall under the purview of the ILO, which became the first international organization concerned with Indigenous peoples. The ILO was

²⁵ Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (New York: Oxford University Press, 2015), p. 4.

²⁶ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 157.

²⁷ 1919 Covenant of the League of Nations, Art. 22; and Anghie, *Imperialism, Sovereignty and the Making of International Law*, 156.

²⁸ Pedersen, *The Guardians*, 233.

established as part of the 1919 Treaty of Versailles as an independent agency of the League of Nations. In its founding constitution, the ILO promised to pursue the League's goal of "universal peace" through the promotion of "humane conditions of labor."²⁹ Its mission not only responded to long-standing demands for better working and living conditions in industrial societies. Moreover, as one recent historical account explained, "it was [also] created in response to the Bolshevik revolution and amid scares about socialist protests around Europe."³⁰ According to this vision of welfare capitalism, some of the earliest standards adopted by the ILO covered prominent social issues like work hours, unemployment, and child care.³¹

Moreover, given the League's oversight role in managing the "colonial question," the ILO was included as part of the Permanent Mandates Commission. This was the League's supervisory mechanism designed to monitor the compliance of mandatory powers with the governing principles described above, including the principle of "free labor." It was in this capacity that brought the ILO to the issue of "native" and "indigenous workers," thereby setting in motion the institutional and normative process that would eventually culminate with the 1957 Indigenous and Tribal Populations Convention (No. 107).

The Colonial Construction of the "Native Worker"

As early as 1921, soon after joining the League's Permanent Mandates Commission, the ILO took the lead in promoting a "scientific" study on the working

²⁹ 1919 Versailles Treaty, Part XIII (Labour).

³⁰ Guy Standing, "The ILO: An Agency for Globalization?" *Development and Change* 39, no. 3 (2008): 356.

³¹ 1919 Hours of Work (Industry) Convention (ILO Convention No. 1); 1919 Unemployment Convention (ILO Convention No. 2); and 1919 Maternity Protection Convention (ILO Convention No. 3).

conditions of “native workers” in colonial settings. In 1926, the ILO established a Committee of Experts on Native Labour to devise a set of “international standards for the protection of indigenous workers.”³² This led to the adoption of a series of relevant instruments, including the 1930 Forced Labour Convention (No. 29), the 1936 Recruiting of Indigenous Workers Convention (No. 50); the 1939 Contracts of Employment (Indigenous Workers) Convention (No. 58); and the 1939 Penal Sanctions (Indigenous Workers) Convention (No. 65). Just as the Mandate System was not intended as a form of decolonization, but rather a way of making colonialism more humane, so too did these earlier ILO instruments attempt to discipline the exploitation of “native” and “indigenous workers.”³³

For example, consider the 1930 Forced Labour Convention (No. 29), which “sought to regulate rather than suppress forced labor.”³⁴ As stated frankly in the preparatory work behind the 1930 Convention (No. 29), it was recognized “that in certain circumstances compulsory labor may be admissible.”³⁵ Such an exception was guaranteed for large infrastructure projects, such as the construction of railways, roads, irrigation works, and so on. From the point of view of the mandatory powers, projects such as these were supposed to deliver economic development and progress. This, in turn, was supposed to bring about social and cultural changes towards the “advancement” of mandate territories.³⁶ Such discourse infused the ILO’s work on “native workers” during

³² International Labour Office, *Report VI(1): Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)* (Geneva: International Labour Organization, 1988), 3.

³³ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 22.

³⁴ Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Boston: Martinus Nijhoff, 2013), 217.

³⁵ International Labour Conference, *Forced Labour: Report and Draft Questionnaire* (Geneva: International Labour Office, 1929), 9.

³⁶ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 162.

the interwar period. For example, a Belgian delegate speaking at the regular proceedings of the ILO in 1939 reasoned that “intervention by public authorities in favor of the indigenous populations is justified by the purpose of colonization, which is the material, moral and educational development of the native populations.” There was a fundamental “educational purpose” to such colonial interventions, which were said “to encourage among the indigenous workers an appreciation of the need for labor and of the need for discipline in its performance.”³⁷ Once again, we see that the ILO regime during the interwar period was a sort of window dressing for imperialism as a superficially humane form of governance. In the case of the 1930 Forced Labour Convention (No. 29), the exploitation of colonized bodies was ostensibly legitimized as the cost of progress.³⁸

This was the historical context in which the keyword “indigenous” was introduced as part of the Anglophonic lexicon of global governance. We have already seen that this vocabulary was mentioned in Article 22 of the 1919 Covenant of the League of Nations, although its usage by no means consistent, for Article 23 went on to use the phrase “native inhabitants.” Indeed, as noted in the Introduction, the keyword “indigenous” was not at all regularly used in the English speaking world in the early 20th century, when terms like “Indian,” “native,” and “aboriginal” were more frequent. For instance, an important 1921 legal treatise, *The Question of Aborigines in the Law and Practice of Nations*, which was written at the request of the US Department of State, only used the term “indigenous” descriptively, such as with reference to “uncivilized persons

³⁷ International Labour Conference, *Twenty-Fifth Session: Record of Proceedings* (Geneva: International Labour Organization, 1939), 302.

³⁸ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 35.

indigenous to the soil of a certain region.”³⁹ Indeed, prior to this point, the word had a much stronger connotation in the discipline of biology. As it applied to colonized peoples, the keyword was imported from French. By the interwar period, “the legal artifact of the ‘native worker’ (*travailleur indigène*),” notes Luis Rodríguez-Piñero, was “coined by colonial powers and confirmed by international law in order to justify the forceful, ruthless exploitation of the colonial workforce.”⁴⁰

As we will see in greater detail later on in the chapter, once we pick back up on the institutional history of the ILO regime after the 1940s, the original articulation of “indigenous” was normatively loaded with ideological baggage. In particular, this language was informed by Victorian-era anthropological discourses related to stage theory, whereby the scale of human societies was hierarchically arranged from “savage” to “civilization.” According to this framework, “indigenous” was like a code word for “savage,” or at the very least “uncivilized.”⁴¹ Therefore, from an ostensibly humanitarian (albeit racist) perspective, being “indigenous” was a social problem, an obstacle to be overcome in order to deliver the goods of “civilization.” Such ideological baggage would persist in the historical subtext beneath the 1957 Indigenous and Tribal Populations Convention (No. 107).

With that said, there is an important caveat to this discursive continuity from the early- to the mid-20th century construal of “indigenous.” To the extent that the budding ILO regime overlapped with the Mandate System, the concept of “indigenous workers”

³⁹ Alpheus Henry Snow, *The Question of Aborigines in the Law and Practice of Nations* (New York: G.P. Putnam’s Sons, 1921), 8.

⁴⁰ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 5.

⁴¹ *Ibid*, 39.

was tied to the “dependent territories” of ILO member states.⁴² In this context, to be dependent meant to be colonized, primarily in the sense of European overseas colonies.⁴³ For example, in Article 22 of the Covenant of the League of Nations, the term “indigenous” was meant “to distinguish between colonial powers and peoples who were living under colonial domination.”⁴⁴ The term was thus originally meant to apply to colonized populations that were legally differentiated and subordinated. This did not apply to the Indigenous peoples in most American countries, for instance, which by this point had already formally extended citizenship rights to “Indians” as a means of assimilation.⁴⁵ As we will see below, an important discursive shift occurred after World War II with the onset of decolonization, as the term “Indigenous” was opened up to include populations within independent countries. In other words, the term shifted from an imperial context, in the classic sense of the term, to a settler colonial context.

In sum, we have traced the origins of the ILO regime concerning Indigenous peoples back to the Mandate System of the League of Nations, which in turn connects this regime to a deeper history of European overseas imperialism. Indeed the League of Nations was an “eminently Victorian institution,” says historian Mark Mazower, “an instrument for a global civilizing mission through the use of international law.”⁴⁶ Accordingly, the ILO was an instrument of disciplining the exploitation of “native workers,” of making imperialism ostensibly more humane. As such, the keyword

⁴² 1936 Recruiting of Indigenous Workers Convention (No. 50), Art. 2(a).

⁴³ Snow, *The Question of Aborigines in the Law and Practice of Nations*, 56-83.

⁴⁴ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the Concept of ‘Indigenous People,’” UN Doc. E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996), para. 12.

⁴⁵ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 48.

⁴⁶ Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), 21.

“indigenous” was originally used in international legal discourse as an object of colonial power. Such an unsettling (and paradoxical) implication means that the search for origins of Indigenous rights discourse remains deeply embroiled with colonial discourses.

The Colonial and “Postcolonial” Roots of *Indigenismo*

As suggested, an important discursive shift was on the horizon, as the post-World War I ILO regime on the regulation of “native workers” primarily in European overseas empires was eventually extended to cover Indigenous populations in settler colonial countries in the post-World War II period. The key impetus for this shift came from an important series of regional developments in the Americas in the first half of the 20th century known as *indigenismo*, which refers to “a diverse political, economic, and cultural movement that celebrated indigenous people and their traditions, on the one hand, but usually also called for their modernization, assimilation, and ‘improvement,’ on the other.”⁴⁷ These developments emerged in parallel with but outside of the early ILO regime, and they came together by the 1940s, when the ILO co-opted *indigenismo* discourse. As we will see below, the 1957 Indigenous and Tribal Populations Convention (No. 107) was a product of this institutional co-optation.

But in order to understand the meaning(s) of *indigenismo*, we must first provide historical context, as the roots of *indigenismo* run deep in colonial and “postcolonial” Latin America.⁴⁸ We begin by going back to the early 16th century, when the famous Dominican priest and “Defender of the Indians,” Bartolomé de las Casas, critically

⁴⁷ Laura Giraudo and Stephen E. Lewis, “Pan-American *Indigenismo* (1940-1970): New Approaches to an Ongoing Debate,” *Latin American Perspectives* 39, no. 3 (2012): 3.

⁴⁸ As argued below, “postcolonial” is inserted into inverted commas in order to underscore the “settler colonial present” in Latin America. See Lorenzo Veracini, *The Settler Colonial Present* (New York: Routledge, 2015), 54-56.

questioned the moral and legal justifications of Spanish conquests in the Americas.

Although he predated *indigenismo* by some 400 years, he is nevertheless recognized as an important predecessor to the latter. Next we turn to the independence movement in 19th century Latin America and the onset of settler colonialism across the entire hemisphere, as creole elites appropriated the image of the “Indian” as a means of forging new nationalist identities distinct from Spain. Finally, we examine the historical emergence of *indigenismo* itself, especially in the wake of 1910-20 Mexican Revolution, and its internationalization in the form of regional policy planning in the Americas by the 1940s.

Las Casas as “Another Face of Empire”

In order to unpack the meaning of *indigenismo*, with its patronizing acknowledgment of the dignity of Indigenous peoples and its subtle pressures for assimilation, it is necessary to provide some historical context into Latin American thought on Indigenous peoples. At the deepest discursive level, the rationale for Spanish colonial conquest was hashed out in a series of prominent theological debates during the mid-16th century, in which the figure of Bartolomé de las Casas was paramount. Born in 1484, las Casas came to the Americas with Christopher Columbus and arrived in the West Indies in 1501.⁴⁹ In 1513, soon after he was ordained as a priest, las Casas took part in the brutal conquest of Cuba. As a result of his exploits, he was granted an *encomienda*, which was an institution that essentially amounted to a type of involuntary servitude, whereby Indian villages were “entrusted” or “commended” (*encomendar*) under the

⁴⁹ Las Casas’s birth year is often mistaken to be 1474. For a corrective, see Helen Rand Parish and Harold E. Weidman, “The Correct Birthdate of Bartolomé de las Casas,” *Hispanic American Historical Review* 56, no. 3 (1976): 385-403.

lordship of a Spaniard. Yet having seen the brutality of Spanish conquest firsthand, las Casas had a change of heart, and he spent the rest of his life as a “crusader” for justice.⁵⁰

After Charles V ascended to the throne as King of Spain in 1516, the morality of Spanish colonial rule in the Americas became a pressing moral concern. Charles V was not just the King of Spain, but also the Holy Roman Emperor, and as such he assumed the position of the defender and promoter of Catholic Christianity. “In order to safeguard this role,” according to historian Anthony Pagden, “it was crucial that the crown was seen to act on all occasions in strict accordance with Christian ethico-political principles.”⁵¹ Las Casas had returned to Spain in 1517, when he was able to gain audience with the young king. Over the coming decades, las Casas travelled back and forth from the Americas to Spain to campaign against the mistreatment of the Indians. In 1542 he presented to the Council of the Indies, which was the administrative organ of the Spanish Empire, a narrative that would eventually be published as *A Short Account of the Destruction of the Indies*.⁵² As a result of this intervention, in 1542 Charles V proclaimed the *Leyes Nuevas*, or the “New Laws of the Indies for the Good Treatment and Preservation of the Indians,” which strictly regulated the *encomienda* system and reformed the Council of the Indies. This provoked the ire of Spanish landowners in the

⁵⁰ Lemkin paid homage to las Casas as a “humane crusader,” saying that “his name has lived on through the centuries as one of the most admirable and courageous crusaders for humanity the world has known.” See Raphael Lemkin, “Essay on Spanish Colonial Practices,” Raphael Lemkin Collection, Manuscript Collection P-154, American Jewish Historical Society at the Center for Jewish History, New York City, New York, Box 8, Folders 11.

⁵¹ Anthony Pagden, “Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indian,” in *The Language of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (New York: Cambridge University Press, 1987), 80.

⁵² Bartolomé de las Casas, *A Short Account of the Destruction of the Indies* (Translated by Nigel Griffin) (New York: Penguin Books, 1992 [originally 1552]). See also Henry Raup Wagner and Helen Rand Parish, *The Life and Writings of Bartolomé de las Casas* (Albuquerque: University of New Mexico Press, 1967), 35-38 and 109-113.

Americas, as well as their metropolitan supporters in Spain. As a result, in 1550 Charles V took the unprecedented step of suspending all conquests in the Americas until a rationale for imperialism could be devised.⁵³

A prominent group of jurist and theologians was convened in the Spanish city of Valladolid, where a debate was essentially waged over the relative humanness of “Indians.”⁵⁴ The main protagonist in this event was las Casas, who had since been officially appointed the “Protector of the Indians.” His primary interlocutor was the humanist philosopher Juan Ginés de Sepúlveda, who had Aristotle’s work into Spanish and was the official historian of Charles V’s court. Following Aristotle, the premise of Sepúlveda’s argument assumed that humanity was governed according to a series of binary power relationships, such as master over slave, husband over wife, father over children, and so on.⁵⁵ Following this premise, the primary argument proposed by Sepúlveda was that the Indians were “barbarians,” in the sense of being wild beasts or brute animals, fit only for servitude.⁵⁶ As “slaves by nature,” they were compelled to obey their natural superiors. Moreover, he claimed the Indians had provoked God’s wrath by violating natural law through the practices of idolatry, human sacrifice, and

⁵³ Lewis Hanke, *All Mankind is One: A Study of the Disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (DeKalb, IL: Northern Illinois University Press, 1974), 57-67.

⁵⁴ Dale A. Turner, “‘This is Not a Peace Pipe’: Towards an Understanding of Aboriginal Sovereignty,” (PhD diss.: McGill University, 1997), 30; and Tzvetan Todorov, *The Conquest of America: The Question of the Other* (New York: Harper & Row, 1984), 146-167.

⁵⁵ See Lewis Hanke, *Aristotle and the American Indians: A Study in Race Prejudice in the Modern World* (Bloomington: Indiana University Press, 1970 [originally 1959]); Jose A. Fernandez-Santamaria, “Juan Ginés de Sepúlveda on the Nature of the American Indians,” *Americas* 31, no. 4 (1975): 434-451; and Daniel R. Brunstetter, “Sepúlveda, Las Casas, and the Other: Exploring the Tension between Moral Universalism and Alterity,” *Review of Politics* 72, no. 3 (2010): 409-435.

⁵⁶ Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (New York: Cambridge University Press, 1986), 38-39.

cannibalism. Indiscriminate warfare could thus be waged against the Indians, not only to protect innocent souls, but to make way for Christian missionaries.⁵⁷

Given las Casas's stature in the general history of Indigenous rights discourse, his retort to Sepúlveda demands a more critical analysis. For as much as las Casas is celebrated as a champion of Indigenous peoples, he nevertheless shared with Sepúlveda the assumption "that Aboriginal languages, cultures, and traditions did not measure up to the standards of the more civilized European cultures," and that the ultimate goal was their mass conversion to Christianity.⁵⁸ Notably, this shared premise signifies a problematic tendency in Indigenous rights discourse, insofar as even ostensibly progressive positions, like the one adopted by las Casas, are imbued with Eurocentric biases. To begin with, las Casas did not disagree that the Indians were "barbarians," but only "in the loose and broad sense of the word," as in being "uncultured and ignorant of letters and learning."⁵⁹ The Indians, he claimed, "are not ignorant, inhuman, or bestial."⁶⁰ On the contrary, he affirmed that Indians were essentially the same as Christians: "All the races of the world are men, and ... all are made in the image and likeness of God ... Thus

⁵⁷ Juan Ginés de Sepúlveda, *Demócrates Segundo o de las justas causas de la guerra contra los indios*, ed. Angel Losada (Madrid: Consejo Superior de Investigaciones Científicas, 1951 [originally 1547]).

⁵⁸ Turner, "'This is Not a Peace Pipe,'" 31.

⁵⁹ Bartolomé de las Casas, *In Defense of the Indians: The Defense of the Most Reverend Lord, Don Fray Bartolomé de las Casas, of the Order of the Preachers, Late Bishop of Chiapa, Against the Persecutors and Slanderers of the Peoples of the new World Discovered Across the Seas* (Translated by Stafford Poole) (Dekalk: Northern Illinois University Press, 1992 [originally 1552]), 28 and 30.

⁶⁰ *Ibid.*, 42.

the entire human race is one.”⁶¹ This oft-quoted statement has been widely recognized as an important contribution to the historical development of human rights.⁶²

In fact, las Casas went even further in defending the cultural rights of Indians, leading at least one scholar to claim that he even defended the religious freedom and cultural integrity of Indigenous peoples.⁶³ As will be demonstrated momentarily, such a claim – that las Casas promoted the cultural integrity of Indigenous peoples – is unsubstantiated. Las Casas’s ultimate goal was to convert the Indians, and the respect for Indigenous cultures was simply a means to an end. With that said, las Casas at least tolerated cultural differences, even vulgar practices like human sacrifice. He believed that such practices reflected the “natural inclination” of humans “to worship God,” or at least their idea of God, “according to their capacities and in their own ways.”⁶⁴ “Not all sacrifice is against natural law,” he reasoned, and is therefore not a sufficient reason for conquest.⁶⁵

Such respect for cultural difference was limited, however. As noted, it was a means to an end, as he argued that the ultimate goal of Spanish colonization should be the religious conversion of the Indians. He was adamant that the Church had an obligation to preach the gospel to all peoples. Las Casas even sanctioned a certain degree of force and

⁶¹ Bartolomé de las Casas, *Obras escogidas*, Vol. 3, *Apologética historia*, ed. Juan Pérez de Tudela y Bueso (Madrid: Ediciones Atlas, 1957), 174-175. On las Casas’s anthropological universalism, see Mauricio Beuchot, *Los fundamentos de los derechos humanos en Bartolomé de Las Casas* (Barcelona: Anthropos, 1994), 32-36; and Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Grand Rapids, MI: William B. Eerdmans Publishing, 1997), 272-273.

⁶² Mary Ann Glendon, “The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea,” *Harvard Human Rights Journal* 16 (2003): 32-33; and Paolo G. Carozza, “From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights,” *Human Rights Quarterly* 25, no. 2 (2003): 292.

⁶³ Greg C. Marks, “Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas,” *Australian Yearbook of International Law* 13 (1990): 19, 31, and 33.

⁶⁴ Las Casas, *In Defense of the Indians*, 227.

⁶⁵ *Ibid.*, 186.

compulsion in this regard, although he was adamant that physical violence and warfare, along with massacres and pillaging, obstructed rather than encouraged the spread of the gospel.⁶⁶ What was more effective, he reasoned, was “not external but persuasive violence.”⁶⁷ As he explained, “the compulsion signified here ... is accomplished through the urgings of reason and human persuasion or through the spiritual and interior persuasion attained by the ministry of angels.”⁶⁸ This sanctioning of “persuasive violence” and “compulsion” indicated that there were absolute limits to las Casas’s respect for cultural difference, and that his faith in the equality of humanity was nevertheless premised upon the belief in Christian supremacy.

In the end, las Casas’s defense of Indian rights was built upon the assumption that Indigenous peoples either faced forced assimilation or physical extermination. As he implored the *junta* at the Valladolid debate:

If you seek Indians so that gently, mildly, quietly, humanely, and in a Christian manner you may instruct them in the word of God and by your labour bring them to Christ’s flock, imprinting the gentle Christ on their minds, you perform the work of an apostle and will receive an imperishable crown of glory from our sacrificed lamb. But if it be in order that by sword, fire, massacre, trickery, violence, tyranny, cruelty, and an inhumanity that is worse than barbaric you may destroy and plunder utterly harmless peoples who are ready to renounce evil and receive the word of God, you are children of the devil and the most horrible plunderers of all.⁶⁹

As one scholar has argued recently, rather controversially, las Casas thus represented “another face of empire.”⁷⁰ Even if his defense of Indian rights was an

⁶⁶ Ibid, 68-69. This argument is also made in Francisco de Vitoria, “On the American Indians (*De Indis*),” in *Vitoria: Political Writings*, eds. Anthony Pagden and Jeremy Lawrance (New York: Cambridge University Press, 1991 [originally 1539]), 286.

⁶⁷ Las Casas, *In Defense of the Indians*, 271.

⁶⁸ Ibid, 303.

⁶⁹ Ibid, 40.

⁷⁰ Daniel Castro, *Another Face of Empire: Bartolomé de Las Casas, Indigenous Rights, and Ecclesiastical Imperialism* (Durham: Duke University Press, 2007).

important milestone in the general history of Indigenous rights discourse, and even if it was relatively progressive when measured against the predominant standards and assumptions of his time, it was nevertheless imbued with a deeply paternalistic ethic. As we will see, this ostensibly benevolent but nevertheless condescending sentiment towards Indigenous peoples was later reproduced with the 20th century development of *indigenismo* discourse. Moreover, to pick up on a theme highlighted in Chapter One, las Casas' appeal articulated the normalcy of assimilation, as it was simply assumed that Indigenous cultures were inferior and that their betterment depended upon cultural change. Finally, the las Casas example suggests that while advances in international law and global ethics may be progressive, they tend to be progressive only on their own terms. In other words, this episode points to the danger that Indigenous rights discourse can end up reproducing Eurocentric biases and assumptions.

Latin American Independence and Settler Colonialism

Yet even the pretense of protectionism towards Indigenous peoples that was best represented by las Casas at the Valladolid debate was largely dispelled in “postcolonial” Latin America. As noted above in a footnote, the term “postcolonial” is inserted into inverted commas in order to emphasize that much of Latin America continues to exist in the “settler colonial present,” well after the Spanish empire was dismantled.⁷¹ This is perhaps a controversial claim. “Considered a key distinction of Anglophone imperial projects,” as one anthropologist has recently indicated, “it is rare to find settler colonialism applied to Latin America.”⁷² Yet historian Richard Gott has argued that

⁷¹ Veracini, *The Settler Colonial Present*, 54-56.

⁷² M. Bianet Castellanos, “Settler Colonialism in Latin America,” *American Quarterly* 69, no. 4 (2017): 777.

“Latin America’s nineteenth century history of Europeanization, immigration and extermination suggests that the continent should fit neatly into the category of ‘settler colonialism,’ a notion usually employed to describe the white settler colonies of European empires other than those of Spain and Portugal.”⁷³

The settler colonial turning point in Latin America came in the early 19th century as a result of the Spanish American revolutions post-1810, thereby ushering in important political, ideological, and demographic changes. Demographically, many of the new countries in South America especially saw a concerted effort to “whiten” the population by encouraging European immigration, although such projects took decades to really get going. As early as the 1820s, both Argentina and Chile made efforts to attract more and more Europeans, but it was not until the end of the 19th century until they began arriving in massive numbers. By then, these new countries had already launched several successive military campaigns against the Indigenous populations in their respective hinterlands.⁷⁴ Even in Central American countries, such as Mexico, where the Indigenous population was much larger, such an underlying eliminatory logic was not entirely absent, for even the racial ideology of *mestizaje* (which roughly translates as “mixing” or “miscegenation”) was fostered as a “myth of national integration” that “erased indigeneity by absorbing it into the body politic.”⁷⁵

⁷³ Richard Gott, “Latin America as a White Settler Society,” *Bulletin of Latin American Research* 26, no. 2 (2007): 269.

⁷⁴ Patricia Richards, “The Politics of Gender, Human Rights, and Being Indigenous in Chile,” *Gender and Society* 19, no. 2 (2005): 206-207; Héctor Hugo Trinchero, “The Genocide of Indigenous Peoples in the Formation of the Argentine Nation-State,” *Journal of Genocide Research* 8, no. 2 (2006): 121-135; and Ricardo D. Salvatore, “The Unsettling Location of a Settler Nation: Argentina, from Settler Economy to Failed Developing Nation,” *South Atlantic Quarterly* 107, no. 4 (2008): 776-777.

⁷⁵ Shannon Speed, “Structures of Settler Capitalism in Abya Yala,” *American Quarterly* 69, no. 4 (2017): 787; and Castellanos, “Settler Colonialism in Latin America,” 778.

These new ideas about race reflected changes in post-independence political culture, as Latin American elites looked to the United States and Western Europe for models of national development. Following the tenets of republicanism and liberalism, there was a strong rejection of the Spanish colonial legal system that had afforded differential legal rights based on group status and instead foster a citizenry based on equality before the law.⁷⁶ This affected Indigenous peoples especially, as “there were widespread moves to disestablish indigenous communities and undermine the existence of a separate category of people who had a legal position distinct from that of simple citizen.”⁷⁷ State-building in Latin America tended to be centralized, as political power was concentrated in capital cities, away from rural and impoverished areas. As such, Indigenous peoples were no longer seen as “Indians” and were instead recast as *campesinos*, or rural farmers.⁷⁸ Even creole elites (referring to persons born in the Americas but of European, usually Spanish, ancestry) who were concerned with the exploitation of Indians pursued ameliorative policies that had unintended negative consequences. Simón Bolívar, for example, sought to expand opportunities for private property as a means of promoting individual equality.⁷⁹ Yet the liberal assault on collective property rights left many Indigenous peoples vulnerable to powerful landowners and stuck in a state of semi-permanent debt peonage. Indigenous peoples thus became the most isolated, marginalized, and impoverished segments of Latin American

⁷⁶ Angel R. Oquendo, “Indigenous Self-Determination in Latin America,” *Florida Journal of International Law* 17, no. 3 (2005): 625.

⁷⁷ Peter Wade, *Race and Ethnicity in Latin America* (Second ed.) (New York: Pluto, 2010 [1997]), 30.

⁷⁸ Shannon Speed, *Rights in Rebellion: Indigenous Struggle and Human Rights in Chiapas* (Stanford: Stanford University Press, 2008), 114.

⁷⁹ Guillermo de la Peña, “Social and Cultural Policies toward Indigenous Peoples: Perspectives from Latin America,” *Annual Review of Anthropology* 34 (2005): 79.

societies. This social and economic inequality defined what would eventually become known as the so-called “Indian problem.”

Yet settler colonialism in 19th century took on a subtly different form in Latin America than it did in the English-speaking world. Whereas in countries like the Canada, Australia, and the United States there were pushes to eliminate all things Indigenous, in Latin America the eliminationist drive was accompanied by a co-optation of Indigenous histories. As Latin American countries achieved independence from Spain in the early 19th century, creole elites sought to appropriate the iconography of Indigenous peoples in order to construct new nations that were distinct from Spain. For example, such imagery was prominently featured in a 19th century movement in the visual and literary arts known as *costumbrismo*, which depicted the local everyday life across the transatlantic Hispanic world, although Indigenous customs were captured only incidentally and without much too understanding of or respect for actual Indigenous peoples.⁸⁰ Moreover, such superficial representations definitively located Indigenous peoples in the past tense, as if they were bygone relics of a long-lost prehistorical era. These were the ideological seeds of *indigenismo*, as it would develop in the early 20th century.

The Internationalization of Indigenismo

As introduced above, the term *indigenismo* refers to a very diverse and multifaceted intellectual current in the Americas that started as early as the 1920s, crystallized by the 1940s, and was ultimately replaced as part of the transformations of

⁸⁰ Beatriz Stephan, “Narratives of Legitimation: The Invention of History-Monument and the Nation-State,” in *Literary Cultures of Latin America: A Comparative History*, Vol. 3, *Subject to History*, ed. Mario J. Valdés and Djelal Kadir (Oxford: Oxford University Press, 2004), 67; and Rebecca A. Earle, *The Return of the Native: Indians and Myth-Making in Spanish America, 1810-1930* (Durham: Duke University Press, 2007).

the 1970s. Semantically, *indigenismo* and its root word *indígena* was a peculiar innovation in the 20th century. In colonial era of Latin American history, the preferred terminology in the Spanish- and Portuguese-speaking world was *indio*, the English cognate of which is of course “Indian.” Yet by the early 20th century, this latter term assumed a pejorative connotation, given its legacy as a result of the Spanish conquests of the Americas.⁸¹ On the surface, at least, *indigenismo* was cast as a conceptual alternative that was openly concerned about the status of Indigenous peoples in Latin American societies. As we will see, however, *indigenismo* was a double-edge sword. On the one hand, it openly sympathized with the plight of Indigenous peoples and at least superficially respected some aspects of their material cultures. On the other hand, it also stereotyped Indigenous peoples as relics of the past and substantively pushed for the integration of these populations into dominant national units.

Indigenismo only fully emerged by in the wake of the Mexican Revolution (1910-1920). Along with Peru, and to a slightly lesser extent with Bolivia and Brazil, Mexico was a hotbed of *indigenismo* during this time, largely because it was implemented into policies by the newly installed National Revolutionary Party (*Partido Revolucionario Institucional*). This political party featured *indigenismo* not just as in its project for national integration and socioeconomic modernization, but for social justice as well. Indeed, much like the creole elites of the 19th century, post-revolutionary *Indigenistas* (referring to advocates of *indigenismo*, nearly all of whom were non-Indigenous) tended to superficially romanticize Indigenous customs as pre-Columbian sources for the construction of nationalistic myths. For example, there was a wave post-revolutionary

⁸¹ Estelle Tarica, “Indigenismo,” in *Oxford Research Encyclopedia of Latin American History* (2016); DOI: 10.1093/acrefore/9780199366439.013.68.

Mexican muralism, as exemplified by Diego Rivera's famous frescos in Mexico City.⁸² Unlike the 19th century *costumbrismo* movement, however, "the idealized Indian who emerged from this perspective was not simply a cultural icon, but at times became the very model of egalitarian politics, social conscience, and virtue that *Indigenistas* (and revolutionaries in general) sought to use to construct a modern, revolutionary order."⁸³

In addition to artists like Rivera, Mexican anthropologists were also prominent *Indigenistas*. Most prominent was Manuel Gamio (1883-1960), who "has rightly been called the father of Mexican anthropology."⁸⁴ As a graduate student of Franz Boas at Columbia University, Gamio rejected the tenets of scientific racism.⁸⁵ "The Indian has the same aptitude for progress as the white," he said; "he is neither inferior nor superior."⁸⁶ His valorization of indigeneity was progressive for his time, declaring that "the Indian possesses his own civilization."⁸⁷ As with the *indigenismo* movement as a whole, he registered a striking ambivalence regarding Indigenous peoples. On the one hand, *indigenistas* celebrated the "positive" features of Indigenous culture, especially in terms of handcraft goods and other forms of art that could be culturally appropriated into the dominant national identity. On the other hand, in order to integrate Indigenous populations into the modern nation-state, certain "negative" cultural traits were identified

⁸² Rick A. López, *Crafting Mexico: Intellectuals, Artisans, and the State after the Revolution* (Durham: Duke University Press, 2010), 32.

⁸³ Alexander S. Dawson, "From Models for the Nation to Model Citizens: Indigenismo and the 'Revindication' of the Mexican Indian, 1920-40," *Journal of Latin American Studies* 30, no. 2 (1998): 283-284.

⁸⁴ Miguel León-Portilla, "Manuel Gamio, 1883-1960," *American Anthropologist* 64, no. 2 (1962): 356.

⁸⁵ Martin S. Stabb, "Indigenism and Racism in Mexican Thought: 1857-1911," *Journal of Inter-American Studies* 1, no. 4 (1959): 422.

⁸⁶ Manuel Gamio, *Forjando Patria: Pro-Nacionalismo (Forging a Nation)* (trans. Fernando Armstrong-Fumero) (Boulder: University Press of Colorado, 2010 [1916]), 39.

⁸⁷ *Ibid.*, 98.

as potential impediments to modernization. Although *indigenistas* like Gamio saw

Indigenous cultures as, in his words,

curious, attractive and original ... it would be preferable for [this] population to be incorporated into contemporary civilization of advanced, modern ideas, which, if stripped of fantasy and traditional clothing, would contribute in a positive manner to the conquest of the material and intellectual well-being to which all humanity ceaselessly aspires.⁸⁸

Gamio and other *indigenistas* would later be criticized for having an assimilationist point of view. Indeed, considering his background as a post-revolutionary intellectual, Gamio wanted to turn Indigenous populations into Mexicans. According to his vision of nation-building, “the last vestiges of separatist tendencies and their fantastic ideas of local sovereignty will be extinguished.”⁸⁹

Nevertheless, Gamio argued that the ancestral past of indigeneity was the bedrock of the modern Mexican nation. In 1916, he published what was essentially a manifesto for a national anthropology of Mexico. The title of his book, *Forjando Patria*, has been translated into “Forging a Nation,” although the term *patria* is more sentimental than “nation,” perhaps closer in connotation to “homeland” or “fatherland.” In any case, he metaphorically depicted the project of Mexican nation-building like the sculpting of a statue, in which case the legacy of Indigenous peoples is like an “ancient pedestal on which the *Patria* rests.”⁹⁰ For however progressive his valorization of indigeneity may have been, it was nevertheless firmly fixated upon the leftover remnants of a once glorious history.

⁸⁸ Quoted in David A. Brading, “Manuel Gamio and Official Indigenismo in Mexico,” *Bulletin of Latin American Research* 7, no. 1 (1988): 84.

⁸⁹ Manuel Gamio, “Some Considerations of Indianist Policy,” in *The Science of Man in the World Crisis*, ed. Ralph Linton (New York: Columbia University Press, 1945), p. 410.

⁹⁰ *Ibid*, 26.

Mexico ... boasts a grand past that is attractive ... to whoever loves the environment of mysterious beauty in which the memory of bygone deeds still flourishes. The indigenous tradition, pragmatic, vigorous, and picturesque, allows us to see how the life of the Mexicans was before the Conquest. Their arts seem original and very novel to our aesthetic sensibilities. ... These memories revive the defeated race before our eyes.⁹¹

In order to cultivate such aesthetic sensibilities and to “fortify the feeling of nationalism,” he promoted a distinctly Mexican practice of archaeology, as well as the construction of museums and other forms of public history.⁹²

Gamio was a consummate public intellectual. In fact, before coming together as a book, much of the essays in *Forjando Patria* had been previously published in Mexico City newspapers, thereby disseminating this new intellectual movement to the broader public.⁹³ Moreover, he was committed to applying his expert knowledge in order to institutionalize *indigenismo* as a domestic policy program. Under the politically favorable climate of President Lázaro Cárdenas (from 1934 to 1940), Gamio was able to turn these ideas into reality as part of a newly created government agency known as the *Departamento de Asuntos Indígenas* (“Department of Indigenous Affairs”). In 1948, this department was turned into the *Instituto Nacional Indigenista* (“National Indigenist Institute”). This led to the formation of other state-sponsored *indigenista* agencies and departments in Latin America. In this institutional context, Gamio led an entire generation of applied anthropologists in Latin America who sought to use ethnographic knowledge and methodologies in order to solve the practical problems involved with modernization.

⁹¹ Ibid, 75.

⁹² Ibid, 34.

⁹³ Fernando Armstrong-Fumero, “Translator’s Introduction: Manuel Gamio and *Forjando Patria*: Anthropology in Times of Revolution,” in Gamio, *Forjando Patria*, 5.

Concurrent with these institutional developments at the domestic level of politics were important discussions in the hemispheric context of the Americas. In 1933 the Seventh International Conference of American States met in Montevideo, Uruguay. This was where the 1933 Montevideo Convention on the Rights and Duties of States was adopted. As highlighted in Chapter One, this was the monumental international legal instrument that set forth the formal definition of statehood. Yet this conference also became a platform for the internationalization of *indigenismo*. The official records included a proposal from the Mexican delegation for an inter-American conference or congress of *Indigenistas*:

As a proof the interest displayed by all the American Governments in favor of the Indians who constitute a large percentage of the reserve and population of the continent, an American Indian Conference might be held which would be attended by individuals of indigenous races capable of facing the study of the topics of the agenda of the Congress, or, in any case, by those identified with Indian problems.⁹⁴

This proposed conference was formalized in 1938 during the Eight International Conference of American States in Lima, Peru. However, it should be noted that there were no “individuals of indigenous races,” neither at this conference nor any other. Indeed, a marked feature of the *indigenismo* movement was that it was almost entirely populated by non-Indigenous individuals. Nevertheless, the 1938 conference in Lima was a significant step forward in the internationalization of the movement. In particular, the conference resolved to establish an international research center “for the study,

⁹⁴ Mr. Vasquez (Mexico), in *Seventh International Conference of American States, Montevideo, 1933: Plenary Sessions, Minutes and Antecedents* (S.I.: s.n., 1933), p. 231.

compilation, and exchange of data and information on the status of the indigenous populations and on the process of their integration into national life.”⁹⁵

Such an international research center would take some time to develop. After some delay, the First Inter-American Indigenist Congress was held in 1940 Pátzcuaro, Mexico. This was a major milestone for the *indigenismo* movement, as it fostered greater regional coordination regarding the so-called “Indian problem.” In fact, along with the Mexican hosts, the United States played a leading role in the conference, as its delegation included Commissioner for the Bureau of Indian Affairs under the Roosevelt administration, John Collier, who was famous for implementing the “Indian New Deal.”⁹⁶ In retrospect, the role of the United States in the *indigenismo* movement turned out to be only fleeting, but at the time it looked as if this movement had achieved a considerable level of international consensus. Indeed, such a consensus was formalized by treaty, known as the Pátzcuaro Final Act. According to this agreement, the contracting governments promised “to elucidate the problems affecting Indian groups within their respective jurisdictions, and to cooperate with one another, on a basis of mutual respect for the inherent rights of each to exercise absolute liberty in solving the ‘Indian Problem’ in America.”⁹⁷ The Pátzcuaro Final Act also established the *Instituto Indigenista Interamericano* (“Inter-American Indigenous Institute,” or III) as a clearinghouse for scientific investigations and administrative policies. Fittingly, the first president of the III was none other than Manuel Gamio.

⁹⁵ Robert C. Jones, “The New World Looks at its Indians,” *Bulletin of the Pan American Union* 82 (1948): 314.

⁹⁶ Laura Giraudo, “Neither ‘Scientific’ nor ‘Colonialist’: The Ambiguous Course of Inter-American *Indigenismo* in the 1940s,” *Latin American Perspectives* 186, no. 5 (2012): 15.

⁹⁷ “Convention Providing for Creation of the Inter-American Indian Institute,” in *Treaties and Other International Agreements of the United States of America 1776-1949*, Vol. 3, ed. Charles I. Bevans (Washington, DC: US Government Printing Office, 1968), 661.

Thus far, these developments in the internationalization of the *indigenismo* movement had occurred beyond the purview of the ILO. Yet by this time, the ILO happened to be developing a distinct regional approach to labor policy in the Americas, and it was in this context where the ILO was exposed to *indigenismo*.⁹⁸ This played out over a series of important ILO regional forums, beginning with the Santiago Conference (1936) and the Havana Conference (1939). The so-called “Indian problem” was hardly the primary focus of these proceedings, but its inclusion at all indicated that the issue was on the radar of the ILO. Indeed, as a result of the Santiago Conference, the ILO instructed its secretariat body to “undertake a special study of this problem and to consider the possibilities of international action leading to practical results.”⁹⁹ Renewed calls for such a study were repeated at the two subsequent ILO regional forums, specifically the Mexico City Conference (1946) and the Montevideo Conference (1949). In proposing a committee of experts to prepare such a study, these ILO forums registered a common understanding of the “Indian problem” as “essentially social and economic in character.”¹⁰⁰

The ILO co-optation of *indigenismo* received renewed emphasis when the ILO was reconstituted in the 1944 Declaration of Philadelphia, which “reiterated the ILO’s traditional objectives and struck out in two new directions – the primacy of human rights in the context of social policy and the need for international economic planning.”¹⁰¹ Soon

⁹⁸ Jef Rens, “Latin America and the International Labour Organisation: Forty Years of Collaboration, 1919-1959,” *International Labour Review* 80, no. 1 (1959): 5.

⁹⁹ International Labour Office, *Report on the Action Taken to Give Effect to the Resolutions Adopted by the Santiago Conference: Second Item on the Agenda* (Geneva: International Labour Organization, 1939), 159.

¹⁰⁰ “The Fourth Conference of American States Members of the International Labour Organisation,” *International Labour Review* 60, no. 3 (1949): 334.

¹⁰¹ Norman F. Dufty, “Organizational Growth and Goal Structure: The Case of the ILO,” *International Organization* 26, no. 3 (1972): 481-482.

thereafter, the ILO was folded into the United Nations organization as a specialized agency.¹⁰² Under this new institutional banner, the ILO began putting *indigenismo* into action. Beginning in 1952, international experts from the ILO and other UN agencies launched a series of joint field missions known as the Andean Indian Program. Aiming to provide technical assistance to the Indigenous populations of the Andean Plateau in west-central South America, these international experts worked in close cooperation with the governments of Bolivia, Ecuador, and Peru. Against the backdrop of the concurrent international development regime of the time, the Andean Indian Program was part of the ILO's broader efforts at the time to promote domestic state policies "to integrate the indigenous populations into national economic and social life."¹⁰³ This fundamental emphasis on the integration of "indigenous populations was essentially seen as "social engineering," according to the Program's lead expert, Ernest Beaglehole.¹⁰⁴ As a prominent ethnologist from New Zealand, he expected integration be "organic and comprehensive; in other words, the experts should be organized into teams to tackle all the problems arising out of the living and working conditions of these aboriginal peoples."¹⁰⁵

Over the span of 400 years, there had been a discursive strand in Latin America regarding the plight of Indigenous peoples. From Bartolomé de las Casas to Simón Bolívar, and from Manuel Gamio to Ernest Beaglehole, there were many Latin Americanists who were concerned that the pressures of conquest, settler colonialism, and

¹⁰² John H. E. Fried, "Relations between the United Nations and the International Labor Organization," *American Political Science Review* 41, no. 5 (1947): 963-977.

¹⁰³ Ernest Beaglehole, "A Technical Assistance Mission in the Andes," *International Labour Review* 67, no.6 (1953): 127.

¹⁰⁴ *Ibid*, 534.

¹⁰⁵ Jeff Rens, "The Andean Program," *International Labour Review* 84, no. 6 (1961): 429.

modernity were so destructive that intervention of some sort was necessary in order to save these peoples. This discursive strand was defined by a sense of protectionism on behalf of noble-minded and humanitarian-natured non-Indigenous men. Indeed, these men all shared a paternalistic ethos, and whatever dignity they may have recognized in Indigenous peoples, they all shared the assumption that Indigenous peoples needed to be saved. That meant some form of assimilation. As we will see later, this ethos infused the 1957 Indigenous and Tribal Peoples Convention.

Constructing the “Indian Problem”

The “Indian problem” became an increasingly prominent issue over the course of the 1940s into the 1950s, expanding out from the inter-American system and into the realm of global governance at large. Until that point, important international agreements, like the 1940 Pátzcuaro Final Act, were made under the general purview of the Pan-American Union, which was an international organization founded in 1890 and which was ultimately folded into the Organization of American States in 1948. Yet during this transformative post-World War II era in world politics, there was an important scale shift. In fact, before the issue was taken up by the ILO, there was even a fleeting interest in the Indigenous populations of the Americas from the UN. In May 1949, the UN General Assembly adopted a Bolivian resolution that called for a “study of the social problems of the aboriginal populations and other under-developed social groups of the American continent.”¹⁰⁶ Despite some initial follow up, this resolution was a dead end, and the issue of Indigenous peoples at the UN went dormant for decades. Nevertheless, these aborted

¹⁰⁶ United Nations General Assembly resolution 275(III), “Study of the Social Problems of the Aboriginal Populations and Other Under-developed Social Groups of the American Continent,” (11 May 1949).

steps at the UN demonstrate that the so-called “Indian problem” was becoming an international concern.

We will soon return to the narrative of the ILO regime and the 1957 Indigenous and Tribal Populations Convention (No. 107), but we must first continue mapping out the underlying subtext by identifying the broader background conditions of possibility behind this international legal instrument. How was the so-called “Indian problem” understood as a “problem,” and what factors were involved with making it an international issue? In the first place, as suggested earlier, this reflected deep-seated social scientific ideas inherited from the Victorian era, such as anthropological stage theory and social Darwinism. More immediately, the internationalization of the “Indian problem” was a product of modernization theory and developmentalism in the mid-20th century. Finally, the issue also implicated post-War War II debates over the extent of decolonization. In particular, the 1957 Convention (No. 107) was at least partly conceived in response to the Belgian thesis that contested the UN’s narrow rule of decolonization known as the “salt water doctrine.” Let us deal with these factors in turn.

Anthropological Stage Theory and Social Darwinism

As noted above, in the context of the League of Nations’ Mandate System, deep-seated social scientific ideas from the Victorian era were important sources of subtext in the discursive formation beneath the 1957 Indigenous and Tribal Populations Convention (No. 107). Especially important in this regard was anthropology, the modern disciplinary origins of which were rooted in the colonial foundations of the modern world system. That is to say, the structure of anthropological knowledge in the mid-20th century reflected the larger structures of the global political economy. Following Immanuel

Wallerstein, the modern world system dates to the 16th century, when important developments leading to the emergence of capitalism, such as the imperative for the perpetual accumulation of capital and important breakthroughs in transportation technologies, created the conditions for the integration of a single global production system. Insofar as the dominant interests from the “core” of the system were concerned with incorporating outsiders from the non-European “periphery,” there was an apparent economic incentive for understanding the cultural diversity of “others.” Anthropology eventually filled this role as part of the broader knowledge structure of Eurocentrism, or the entire set of “beliefs that postulate past or present superiority of Europeans over non-Europeans.”¹⁰⁷

The Eurocentric structures of knowledge that underpinned the expansion of the modern world system were born out the particular historical circumstances of modernity. Modernity refers to a set of interrelated historical processes dating back to the 16th century as well, including the rise of the nation-state, the increased importance of the capitalist mode of production, and the replacement of “traditional” values and beliefs with “modern” dispositions, especially considering the rapid expansion of a materialist worldview and cultural habits. As we will see, the traditional-modern binary was absolutely crucial to the ILO construction of the “Indigenous” concept. Moreover, the ILO regime also reflected the inbuilt “teleological myth” of modernity, in which “the human condition was portrayed as involving the inexorable march of progress from a

¹⁰⁷ J.M. Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993), 8. On anthropology and the modern world system, see Immanuel Wallerstein, *World Systems Analysis: An Introduction* (Durham: Duke University Press, 2004), 7; and John H. Bodley, *Cultural Anthropology: Tribes, States, and the Global System* (Fifth ed.) (New York: Rowman and Littlefield, 2011), 348.

state of savagery to one of civilization.” According to this mythology, “reason and science provided the means to facilitate this march through social engineering; human societies, like nature, could be mastered, reconstructed, and improved.”¹⁰⁸ These broader background conditions provide crucial subtext for the 1957 Indigenous and Tribal Populations Convention (No. 107).

As we unpack these background conditions a bit further, other underlying discursive strands emerge as well. We have already noted repeatedly that when the keyword “indigenous” was into the Anglophonic lexicon of global governance, it carried a connotation reflective of the social evolutionary paradigm inherited from the 19th century. This paradigm was exemplified by Lewis Henry Morgan, an influential 19th century American ethnologist who in his classic study, *Ancient Society* (1877), argued that human society evolves through a series of hierarchical stages or levels. “Savagery” was said to be the lowest level of human existence, supposedly based on nothing more than simple hunting and gathering. The next stage was “barbarism,” marked by the initial domestication of plants and animals. Finally, “civilization” was assumed to be the pinnacle of human existence that is marked by material abundance and the organization of civil society. According to this theory, all human societies pass through this unilinear sequence, and progress is inevitable.¹⁰⁹ Although the classification system of “savage-barbarian-civilization” was not literally reproduced by the ILO, the 1957 Indigenous and

¹⁰⁸ Alexander Laban Hinton, “The Dark Side of Modernity: Toward an Anthropology of Genocide,” in *Annihilating Difference: The Anthropology of Genocide* (Berkeley: University of California Press, 2002), 8.

¹⁰⁹ Henry Lewis Morgan, *Ancient Society; or, Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization* (New York: Henry Holt, 1877); and Alan Barnard, *History and Theory in Anthropology* (New York: Cambridge University Press, 2004), 30-31.

Tribal Populations Convention (No. 107) nevertheless followed this basic hierarchical and teleological structure, as well as the assumption of inevitability.

Likewise, social Darwinism is not explicitly evident in the 1957 Convention (No. 107), but it too was an important part of its underlying subtext. Although it was neither exclusive nor even primarily an anthropological theory, per se, social Darwinism was another product of the Victorian-era social sciences. Based on the Charles Darwin's Malthusian notion of the "struggle for existence," the idea of social Darwinism posited "that human beings have a natural tendency to compete and that the strong will overcome the weak."¹¹⁰ As a version of the social evolutionary paradigm, social Darwinism similarly assumed that progress is defined by the movement from less to more complex social types, although social Darwinism went even further in normalizing this idea of evolution as a law of nature. In particular, it extended the logic of Thomas Malthus regarding population growth and limited resources, arguing that these biological constraints generate an existential competition between populations. This was the idea in mind when sociologist Herbert Spencer coined the iconic phrase, "survival of the fittest."¹¹¹

Social Darwinism fit into the Eurocentric trope of extinction that naturalized the colonial destruction of so-called "primitive" peoples.¹¹² Extinction discourse is yet another discursive strand underpinning the early ILO process concerning Indigenous peoples, one that was also explicitly vocalized by anthropologists. For example,

¹¹⁰ Greagory Claeys, "The 'Survival of the Fittest' and the Origins of Social Darwinism," *Journal of the History of Ideas* 61, no. 2 (2000): p. 223.

¹¹¹ Barnard, *History and Theory in Anthropology*, 62.

¹¹² Bodley, *Cultural Anthropology*, 161; and Patrick Brantlinger, *Dark Vanishings: Discourse on the Extinction of Primitive Races, 1800-1930* (Ithaca: Cornell University Press, 2003), 177-178.

Bronislaw Malinowski, the Polish-born British anthropologist who influenced Lemkin's thoughts on culture, pleaded in the early 1920s that time was running out for ethnographers in the face of the rapid disappearance of so-called "primitive" peoples.¹¹³ Barring this highly ethnocentric and racist descriptor, the basic trend of extinction has some basis to it. According to anthropologist John Bodley, "perhaps 50 million tribal peoples died as industrial states expanded between 1800 and 1950."¹¹⁴ Beyond this staggering figure of individuals are the thousands of distinct cultures that were also lost. All this to say that the problem of extinction was not at all made up or unreal, but it was part of the colonial imaginary inherited from the Victorian era.

For one thing, in light of the social evolutionary paradigm, extinction discourse in this historical era was assumed to be inevitable. In this sense, the trope of extinction was closely related to social Darwinism. But reminiscent of las Casas, the extinction discourse also evoked a "savior" complex that legitimized an interventionist philosophy.¹¹⁵ Within the metropolitan core, there was an ostensibly benevolent and humanitarian concern with the "doomed races" at the periphery of the modern world system. This, in turn, generated an ethical imperative to do something, lest these supposedly wretched souls be lost to the seemingly inexorable tide of progress. An early example of this comes from Herman Merivale, a British scholar of political economy and colonial administrator from the mid-19th century who became a proponent of "amalgamation," by which he meant "the union of natives with settlers in the same community, as master and servant, as fellow-laborers,

¹¹³ Bronislaw Malinowski, *Argonauts of the Western Pacific* (New York: E.P. Dutton, 1922), 518.

¹¹⁴ John H. Bodley, *Tribal Peoples and Development: A Global Overview* (Mountain View, CA: Mayfield, 1988), 61-62.

¹¹⁵ Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," *Harvard International Law Journal* 42, no. 1 (2001): 229 and 235.

as fellow-citizens, and, if possible, as connected by intermarriage.”¹¹⁶ Thus, in order to ensure their survival against the onslaughts of modernity, Indigenous peoples needed to be brought into a state of tutelage.

By the mid-20th century, yet another discursive strand appeared in the form of social engineering, or the use of the centralized planning apparatus of the state to administer social change. Recall our earlier quote by James Scott in the Introduction, in the context of discussing the organizational theory of co-optation as part of the institutional history of the TVA. At the center of social engineering schemes, he said, “was a supreme self-confidence about continued linear progress, the development of scientific and technical knowledge, the expansion of production, the rational design of social order, the growing satisfaction of human needs, and, not least, an increasing control over nature (including human nature) commensurate with scientific understanding of natural laws.”¹¹⁷ As seen momentarily, the social engineering ethos informed many of the development schemes that the ILO had in mind while promoting its nascent regime concerning Indigenous peoples. Yet as far as our concern here, social engineering was a key part of the ideological rubric behind the endeavor to practically “solve” the so-called “Indian problem.”¹¹⁸

¹¹⁶ Herman Merivale, “Policy of Colonial Governments towards Native Tribes, as Regards their Protection and their Civilization,” in Bodley, *Tribal Peoples and Development*, 103.

¹¹⁷ James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), 89-90.

¹¹⁸ Andrew Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States* (Lincoln: University of Nebraska Press, 2015), 56-57; and Jeremy Patzer, “Residential School Harm and Colonial Dispossession: What’s the Connection?” in *Colonial Genocide in Indigenous North America*, eds. Andrew Woolford, Jeff Benvenuto, and Alexander Laban Hinton (Durham: Duke University Press, 2014), 172-175.

Modernization Theory and Developmentalism

As we move closer to the surface-level final text of the 1957 Indigenous and Tribal Populations Convention (No. 107), we see more explicit justificatory ideals in terms of modernization theory and developmentalism. This refers to a set of overlapping discourses that cohered in the historical context of the early Cold War, as the United States and Soviet Union competed over economic resources and political allegiances in the recently decolonized parts of the world by appealing to their respective programs for social and economic growth. In this context, modernization theory and developmentalism reflected the strategic geopolitical concerns of the two superpowers. With that said, modernization theory was constructed atop a deep-seated commitment to the changes wrought by modernity. In order to effect such changes, developmentalism became a high-profile issue on the agenda of global governance in the post-World War II period. As we will see, the so-called “Indian problem” registered in relation to these overlapping discursive frameworks.

To begin with, what is modernization theory and where did it come from? “Historically, modernization is the process of change towards those types of social, economic, and political systems that have developed in Western Europe and North America from the seventeenth century to the nineteenth and have then spread to other European countries and in the nineteenth and twentieth centuries to the South American, Asian, and African continents.”¹¹⁹ Even though modernization theory, per se, did not develop until the mid-20th century, it was born out of the European experience during the Industrial Revolution. “At its core modernization theory suggests that advanced industrial

¹¹⁹ S.N. Eisenstadt, *Modernization: Protest and Change* (Englewood Cliffs, NJ: Prentice-Hall, 1966), 1.

technology produces not only economic growth in developing societies but also other structural and cultural changes.”¹²⁰ Among other things, this entailed higher levels of urbanization, secularization, and the strengthening of democratic institutions.

Conversely, the modernization process also involved the weakening of traditional loyalties based on kinship ties and other ascribed identities. As such, modernization theory involved a one-way process of transitioning from traditionalism to modernity. Traditional societies were assumed to be characterized by long-standing and unquestioned customs and folkways, or what the French anthropologist Claude Lévi-Strauss called “cold” societies. In contrast, modern societies were “hot” societies, where change and progress were relentlessly pursued. The traditional-modern binary was born out of the late 19th century discourses of social evolutionary stage theory and the “civilizing mission,” as this mid-20th century iteration carried the same “messianic feeling” and “quasi-religious fervor expressed in the notion of salvation” as before.¹²¹

The doctrine of developmentalism reflected the same social evolutionary and ethnocentric teleology, as the traditional-modern binary was paralleled by the fundamental opposition between development-underdevelopment. Such linearity is evident in American economist W.W. Rostow’s stages of economic growth, which was a popular model of developmentalism during the 1960s. The model begins with premodern societies that are presumably unable to modernize due to the persistence of traditional identities and interests. These primordial attachments were said to obstruct development and leave society in a state of backwardness and underdevelopment. As such, the

¹²⁰ J. Michael Armer and John Katsikkis, “Modernization Theory,” in *Encyclopedia of Sociology*, Vol. 3, eds. Edgar F. Borgatta and Rhonda J.V. Montgomery (New York: Macmillan, 2000), 1884.

¹²¹ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 1995), 25.

necessary preconditions for development were established through cultural change. In particular, changes in individual values and attitudes lead to economic growth and technological innovation. The maturation of society was thus supposed to strive towards the achievement of a high living standard characterized by mass production and consumerism.¹²²

In light of the social engineering ethic described above, developmentalism thus required a total restructuring of underdeveloped societies. It was accepted that the destruction of traditions was a necessary cost involved with developmentalism. This sort of attitude was evident in a 1951 report by a group of experts commissioned by the UN Secretary-General. In discussing the preconditions for economic development, the report stated that

There is a sense in which rapid economic progress is impossible without painful adjustments. Ancient philosophies have to be scrapped; old social institutions have to disintegrate; bonds of caste, creed and race have to burst; and large numbers of persons who cannot keep up with progress have to have their expectations of a comfortable life frustrated. Very few communities are willing to pay the full price of economic progress.¹²³

Such a rationale was very much at the center of the “Indian problem,” insofar as the “problem” was assumed to be that the traditional cultures of Indigenous peoples impeded economic growth. Hence, the apparent “solution” was to erase the seemingly archaic values and beliefs through assimilation and integration. According to this logic, the

¹²² W.W. Rostow, *The Stages of Growth: A Non-Communist Manifesto* (New York: Cambridge University Press, 1970).

¹²³ United Nations Department of Social and Economic Affairs, *Measures for the Economic Development of Underdeveloped Countries* (New York: United Nations, 1951), para. 36. Quoted in Escobar, *Encountering Development*, 4.

“painful adjustments” wrought by cultural erasure were required in order “to pay the full price” for admission into modern society.¹²⁴

The social and cultural prerequisites for development were also emphasized by sociologist Talcott Parsons, whose theory of structural-functionalism also happened to highlight the keyword “integration.” Generally speaking, the key premise of the structural-functionalist theory is that societies have requisite needs for survival, and that these needs are met through specialized and differentiated social structures and functions that work together as part of more or less complex systems. As such, the theory posits that the various “parts” of a society contribute to the order and stability of the society as an integrated whole. According to Parsons, the socialization of individuals within a common cultural framework provided a certain measure of social order that is necessary for economic development. Integration was thus a functional imperative for the survival of social systems. Conversely, the lack of integration led to social breakdown and disorder.¹²⁵ As such, in order to deliver the promises of developmentalism and modernization theory, nation-states felt compelled to integrate their populations into an organic whole. As we will see, this emphasis on “integration” dovetailed with popular *Indigenismo* discourses.

Decolonization and the Salt Water Doctrine

This emphasis on “integration” also dovetailed with contemporaneous discourses related to decolonization and the formation of new nation states. The justificatory basis for the ultimate demise of European overseas empires can be found in the 1945 UN Charter, although the actual text therein was unclear and open to debate. Chapter XI of

¹²⁴ Ibid.

¹²⁵ Talcott Parsons, *The Social System* (New York: Routledge, 1951).

the Charter, which consists of Articles 73 and 74, embodied many of the same ideas as Article 22 of the Covenant of the League of Nations. Article 73 thus read:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a *sacred trust* the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.¹²⁶

Indeed, this notion of a “sacred trust” repeats verbatim the language used over a quarter-century earlier in the Covenant. However, unlike the Mandate System, Chapter XI of the Charter was not limited to the territorial possessions of the defeated powers. Moreover, this provision reflected the growing belief that the ultimate outcome of this “sacred trust” should be the political independence of so-called “non-self-governing territories.” Indeed, by 1952, the UN General Assembly resolved that the goal of this “sacred trust” should be the realization of the right of self-determination.¹²⁷

By the early 1960s this had led to an influx of new member states in the UN, mostly from Africa and Asia, where territorial boundaries were generally preserved from the previous colonial era. This reflected the legal principle of *uti possidetis juris*, which in contemporary international law means that “the right to self-determination must not involve changes to existing frontiers at the time of independence.”¹²⁸ In effect, this meant that many of these new states were multiethnic, thereby belying the neat sociocultural homogeneity that was expected to be a standard characteristic of modern nation-states.

¹²⁶ 1945 Charter of the United Nations Art. 73.

¹²⁷ United Nations General Assembly resolution 637(VII), “The Right of Peoples and Nations to Self-Determination” (16 December 1952).

¹²⁸ Malcolm N. Shaw, “Peoples, Territorialism and Boundaries,” *European Journal of International Law* 3 (1997): 482.

Moreover, the populations in many of these states were said to be defined by traditional beliefs and primordial attachments.¹²⁹ Insofar as these were seen as obstacles to the consolidation of unified national identities, these new states embarked upon what anthropologist Clifford Geertz called “the integrative revolution.”¹³⁰

In tandem with the creation of newly independent states in the so-called “Third World,” however, was a limitation in the scope of decolonization. After all, the UN Charter never defined “non-self-governing territories.” In practice, the meaning of this terminology was limited to the territories of overseas European empires. As an important UN General Assembly resolution from 1960 put it, “non-self-governing territories” was defined as “a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”¹³¹ As noted in the Introduction, this is what came to be known as the “salt water doctrine,” otherwise known as the insofar as the “blue water thesis,” scope of decolonization was limited to overseas territorial possessions. In effect, this precluded the enclaves of Indigenous peoples within the territorial domains of independent states.

The strongest proponents of the salt water doctrine came from the “postcolonial” countries, both young and old. Some of the newest “postcolonial” countries, such as those from Africa and Asia, did not wish to see the principle of self-determination applied so

¹²⁹ Edward Shils, “Political Developments in the New States,” *Comparative Studies in Society and History* 2, no. 3 (1960): 282-283.

¹³⁰ Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973), 277. The essay was originally published in 1963 as “The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States.” Cf. Allan Hoben and Robert Hefner, “The Integrative Revolution Revisited,” *World Development* 19, no. 1 (1991): 17-30.

¹³¹ United Nations General Assembly resolution 1541(XV), “Principles which should Guide Members in Determining whether or not an Obligation exists to Transmit the Information called for Under Article 71e of the Charter,” (15 December 1960).

broadly that it would threaten state secession.¹³² Many Latin American states agreed, adding that the situation of Indigenous peoples could be best improved through integration, not self-determination. For example, consider this argument from the Peruvian delegate in a 1954 debate in the Fourth Committee (Decolonization) of the UN General Assembly:

As far as Peru was concerned, the indigenous peoples enjoyed the right to elect their own representatives and their property rights were guaranteed by the Constitution. They were in an entirely different situation from inhabitants of a territory administered by a distant country in the government of which they had no part. The Peruvian Indians had a voice in the legislation of the country and any position, no matter how high, was open to them. Their poverty was not due to the fact that they were indigenous peoples but to the fact that they lived in a world where certain countries could fix prices to suit themselves; the problem was an economic rather than a colonial one. The Peruvian Government had done its utmost to advance the cause of the indigenous peoples.¹³³

Like the African-Asian bloc, the American countries (including the United States and Canada) were entirely resistant to the possibility of any international oversight over their own internal affairs.¹³⁴

In opposition to the salt water doctrine was the so-called “Belgian thesis,” which essentially argued that the dominant interpretation of “non-self-governing territories” based on geographical separation was too narrow. Instead, the “Belgian thesis” maintained that “all indigenous populations insufficiently developed to be able to govern themselves must benefit from the same guarantee.”¹³⁵ Stated differently, this argument

¹³² Yassin El-Ayouty, *The United Nations and Decolonization: The Role of Afro-Asia* (The Hague: Martinus Nijhoff, 1971), 53.

¹³³ Mr. Calle y Calle (Peru), in “United Nations General Assembly, Ninth Session: Official Records,” UN Doc. A/C.4/SR.420 (3 November 1954), para. 40.

¹³⁴ Audrey Jane Roy, *Sovereignty and Decolonization: Realizing Indigenous Self-Determination at the United Nations and in Canada* (MA Thesis: University of Victoria, 2001).

¹³⁵ F. van Langenhove, “Right of Peoples to Self-Determination,” in *The Sacred Mission of Civilization: To Which Peoples Should the Benefits be Extended? The Belgian Thesis* (New York: Belgian Government Information Center, 1953), 31.

would have “extended the concept of ‘non-self-governing territories’ to include disenfranchised indigenous populations living within the borders of independent states, especially if the race, language, and culture of these peoples differed from those of the dominant population.”¹³⁶ If taken to its logical extreme, the “Belgian thesis” could have opened up the right to self-determination to Indigenous peoples within independent states. Yet such an interpretation was by no means the intention of this argument. Far from it, in fact, as we now know that the “Belgian thesis” was “a cunning scheme” that intended to refute the very principle of decolonization by co-opting this very discourse. As Samuel De Jaegere argues, it was a tactic used to deflect international criticism against Belgian imperialism in the Congo.¹³⁷ In any case, the “Belgian thesis” failed to overcome the dominant salt water doctrine.

The debate over the scope of decolonization played out in the ILO regime. This is perhaps no surprise, as the main proponent of the thesis, Fernand van Langenhove, was a Belgian permanent ambassador in Geneva who happened to regularly participate in the International Labour Conference at the time. In fact, after failing at the UN, Langenhove pushed the “Belgian thesis” at the ILO. Yet by the time that the standards of the 1957 Indigenous and Tribal Populations Convention (No. 107) were being drafted, the international consensus had already formed around the salt water doctrine. In this context, the objective of “integration,” which was the cornerstone of the 1957 Convention, emerged as an alternative to self-determination, one which would not threaten the territorial integrity of independent states. Rodríguez-Piñero thus argues that “the notion

¹³⁶ Micha Pommerance, *Self-Determination in Law and Practice* (Boston: Martinus Nijhoff, 1982), 72, fn. 82; quoted in Roy, *Sovereignty and Decolonization*, 14.

¹³⁷ Samuel De Jaegere, “The ‘Belgian Thesis’ Revisited: United Nations Member States’ Obligation to Develop Autonomy for Indigenous Peoples,” *Finnish Yearbook of International Law* 14 (2003): 172.

of integration in Convention No. 107 contributed to sanction the breach between the international legal regime applying to peoples in conditions of classic colonialism and that applying to indigenous groups living within independent states, as promoted by the salt water doctrine.¹³⁸ Indeed, this particular instrument, he adds, “might be seen as the result of, and a factor in, the consolidation of this doctrine, giving a definitive shape to the modern law of decolonization.”¹³⁹

In sum, we have seen multiple layers of subtext beneath the 1957 Indigenous and Tribal Populations Convention (No. 107). Firstly, Victorian-era prejudices about “savagery” and “civilization” were carried over from the late 19th into the mid-20th century. As we will see more fully in a moment, such anthropological notions related to stage theory influenced the definition of “indigenous” in the ILO standard-setting practice. Secondly, the doctrine of developmentalism and stage theory also informed the underlying assumptions in the ILO about the desirability of cultural change in order to integrate Indigenous peoples into dominant national units. Finally, the narrow application of the decolonization regime around the salt water doctrine was yet another important factor in the articulation of the ILO regime.

The Making of the 1957 Convention (No. 107)

By the mid-1950s, the enabling circumstances had aligned for the production of the 1957 Indigenous and Tribal Populations Convention (No. 107). The nascent ILO regime had taken on an ostensibly humanitarian objective in “solving” the so-called “Indian problem,” which had been registered by the global development agenda as a problem of poverty. In other words, this was a technical problem that could be solved

¹³⁸ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 142.

¹³⁹ *Ibid*, 143.

through the social engineering. By setting forth a new body of international standards, the ILO sought to provide a practical approach to the “Indian problem.” The forthcoming analysis thus begins with the standard-setting process at the ILO. Then we turn to how the ILO regime defined “indigenous” through the prejudicial lenses described in the previous section, namely, through anthropological stage theory and modernization theory. Finally, we further unpack the meaning of “integration” as the cornerstone of the 1957 Convention (No. 107) that reflected the normalcy of assimilation in the mid-20th century.

The ILO’s Standard-Setting Process

As analyzed above, the early ILO standards on “native workers” eventually intersected with the internationalization of *indigenismo* after the 1940s, thereby setting in motion the decision-making process that culminated in the eventual adoption of the 1957 Indigenous and Tribal Populations Convention (No. 107). This process is only understandable in light of the ILO’s standard procedure for *legalization*, referring “to the way in which moral claims become positivized in law, be it that of the nation-state or an international body.”¹⁴⁰ As an international organization, we cannot underestimate the especially prominent role of the ILO in the field of international labor law. Over the course of its institutional life, the ILO has produced nearly 200 legally binding conventions or protocols (so-called “hard law”), and just as many non-binding recommendations (so-called “soft law”).¹⁴¹ Only in retrospect did the 1957 ILO Convention No. 107 marked a crucial milestone in international law. At the time,

¹⁴⁰ Richard Ashby Wilson, “Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law,” in *The Practice of Human Rights: Tracking Law Between the Global and the Local*, eds. Mark Goodale and Sally Engle Merry (New York: Cambridge University Press, 2007), 351.

¹⁴¹ The differences between these two types of instrumentalities, i.e. conventions as “hard law” and recommendations as “soft law,” are based on varying degrees of obligation, precision, and delegation. See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, “The Concept of Legalization,” *International Organization* 54, no. 3 (2000): 401.

however, this instrument was conceived and adopted without much fanfare. For the ILO, it was simply business as usual.

The ILO's authority to produce international law in the form of "recommendations" and "conventions" is written into its constitution."¹⁴² This law-like authority is invested in the International Labour Conference (hereafter, referred to simply as the Conference), which is the principle policy-making body of the ILO. As a forum for the ILO's unique tripartite constituencies, including government delegations, as well as their partners from employers' and workers' associations, the Conference has the final say in adopting international legal standards. In support are the two other bodies of the ILO's organizational structure. The Governing Body sets the agenda and runs the day-to-day operations of the ILO, and the International Labour Office (i.e., the Office) functions as a secretariat, providing key sources of research and documentation for ILO proceedings.¹⁴³

As far as the step-by-step drafting process behind the 1957 Convention is concerned, the point of origin can be traced back to 1954. In preparing the agenda for the 39th session of the Conference, the Governing Body included consideration of "a comprehensive *recommendation* formulating general standards of social policy with respect to aboriginal populations in independent countries."¹⁴⁴ The emphasis here on the keyword "recommendation" is notable, given the fact that the process ended up in the form of a convention instead. Yet at this earlier stage, it was still undecided as to what

¹⁴² 1919 ILO Constitution, Art. 19(1).

¹⁴³ International Labour Office, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No.169): A Manual* (Geneva, International Labour Office, 2003), 2.

¹⁴⁴ "Date, Place and Agenda of the 39th Session of the International Labour Conference," quoted in Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 119. Emphasis added.

form the instrument should take. A recommendation could provide general standards of social policy, especially in the realm of technical assistance and developmental aid, which is what the ILO was suited for anyways. A convention, however, would impose greater obligations on behalf of states to adopt international standards. A compromise position was eventually reached in 40th session of the Conference in 1956, when it was decided to adopt two instruments: the 1957 ILO Convention No. 107, and its accompanying Recommendation (No. 104).

Indigenous peoples themselves were conspicuously absent during these proceedings. As we will see again in Chapter Three, the accessibility of Indigenous peoples is limited by the ILO's tripartite constituency of governments, employers, and workers. During the ILO's revision process in the 1980s, Indigenous organizations were present only in the margins, as they were still denied direct access to the official decision-making process that eventually culminated in what became the 1989 Indigenous and Tribal Peoples Convention (No. 169). Nevertheless, as far as preparation for the 1957 Convention (No. 107) is concerned, there were no Indigenous organizations or representatives at all. In this original setting, therefore, the legalization process was inherently skewed towards the dominant interests of states. This is not surprising, given the ILO's standard-setting procedure. Although the Conference had the final say in adopting these new standards, its work was crucially assisted by the Office, the latter of which was first responsible for issuing a questionnaire to member states. In turn, these responses became the basis for the production of a working list of standards, which was then returned to the Conference as a basis for final deliberations.¹⁴⁵ As a result,

¹⁴⁵ International Labour Conference, *Report VI(1): Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (Geneva: International Labour Office, 1956);

government delegations tended to monopolize the discussion during the 39th and 40th sessions of the Conference (1954-1957).¹⁴⁶

Examining the preparatory works from this period reveals an enduring feature of this dissertation's general history. Much like the debates over cultural genocide in the drafting of the 1948 Genocide Convention, the ILO debate a decade later involved a small bloc of opposition from the governments of Canada, Australia, New Zealand, and the United States (as well as the United Kingdom and South Africa). Along with the employers' organizations from the United States and Latin America, this bloc was generally disinclined towards any strong commitments in a field that they considered to be under the realm of domestic affairs. For example, "the Canadian and United States Government members noted that most of the principles embodied in the proposed [standards] were already applied in regard to the indigenous populations of their own countries."¹⁴⁷ They assumed that the adoption of international standards would be a step backwards, as far as their own domestic priorities were concerned. The Canadian representative added that "countries ratifying the proposed Convention would have to relinquish their national jurisdiction in a wide field; the world of today is not ready for such a step."¹⁴⁸ As we will see in Chapter Four, which traces the drafting of the 2007 Declaration, this claim of "over-compliance" has been a common theme of state resistance towards Indigenous rights.¹⁴⁹

and idem, *Report VI(2): Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (Geneva: International Labour Office, 1957).

¹⁴⁶ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 123 and 125.

¹⁴⁷ International Labour Conference, Report VI(1), 9.

¹⁴⁸ Idem, VI(2), 6.

¹⁴⁹ Sheryl R. Lightfoot, "Indigenous Rights in International Politics: The Case of 'Overcompliant' Liberal States," *Alternatives: Global, Local, Political* 33, no. 1 (2008): 83-104.

In the end, however, there were enough members in the Conference who were indeed ready to adopt a more obligatory set of international standards. This majority was led by mostly Latin American national delegations that were already generally committed to the *Indigenismo* movement. There was also support from the Soviet bloc, which argued for more comprehensive measures in terms of greater autonomy and stronger land rights for Indigenous peoples.¹⁵⁰ Finally, Belgium was another significant proponent of the instrument, for even though the 1957 Indigenous and Tribal Populations Convention (No. 107) ended up sanctioning the salt water doctrine, its emphasis on the “protection” and “integration” of Indigenous peoples nevertheless aligned with the underlying prejudices of the “Belgian thesis.”

Despite these ideological blocs, there was nevertheless a general normative consensus regarding the presumed need for Indigenous peoples to be integrated into the dominant units of nation-states. Following the insights of *Indigenismo*, the members of the 39th and 40th sessions of the Conference generally agreed on the basic diagnosis of the so-called “Indian problem” in terms of underdevelopment. For example, the following statement from the Ukrainian government was likely to have been widely shared at the time: “that the tribal structure was anachronistic and inconsistent with the development of indigenous populations.”¹⁵¹ Even at a time when the Cold War rivalry was peaking, the issue of the worldwide “Indian problem” was more or less “depoliticized” in the context of the ILO. As suggested by Rodríguez-Piñero, “the discussion of the issue within the framework of the ‘indigenous problem’ discourse had the effect of depoliticizing the

¹⁵⁰ International Labour Conference, *Report VI(1)*, 11. See Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 133-139.

¹⁵¹ International Labour Conference, *Report VI(1)*, 14.

standards, relegating them to the allegedly neutral, technical realms of development policy and anthropology.”¹⁵²

Defining “Indigenous Populations” and the Goal of Integrationism

Over the course of the 1950s, the internationalized “Indian problem” of the Americas assumed a more globalized frame in the conceptually reimagined form of the “indigenous problem.” This was especially true of so-called “tribal and semi-tribal populations” in the “Third World,” as many newly independent states in Asia and Africa began their own projects of nation-building in the midst of those we would identify today as Indigenous peoples. Thus, when the First Session of the ILO Committee of Experts on Indigenous Labor met in 1951 La Paz, Bolivia, its framework was not geographically restricted to the Americas.¹⁵³ Rather, it reframed this as a worldwide problem, pertaining to independent countries in general, especially those “where two or more different peoples lived side by side as the result of conquest or colonization.”¹⁵⁴ In fact, the Committee of Experts on Indigenous Labour included members not just from more traditional *indigenista* countries like Mexico and Peru, but also from relative newcomers to the field, such as India and the Philippines.

The global scope of the “Indigenous problem” is further evident in a seminal 1953 publication from the ILO, *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries*. This report was a comprehensive snapshot of Indigenous populations around the world.¹⁵⁵ It covered the usual suspects in

¹⁵² Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 129.

¹⁵³ Anonymous, “First Session of ILO Committee of Experts on Indigenous Labour,” *International Labour Review* 64, no. 1 (1951): 81.

¹⁵⁴ International Labour Conference, Report VI(1), 8. See also anonymous, “Second Session of ILO Committee of Experts on Indigenous Labour,” *International Labour Review* 70, no. 5 (1954): 418.

¹⁵⁵ International Labour Office, *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries* (Geneva: International Labour Organization, 1953), 5-16.

Latin America, North America, and Oceania. More seminally, the report also covered Asia, and although the Middle East and Africa were not included, future revisions to the report (which never materialized) were expected to broaden its global scope even further. Unlike the earlier ILO regime on “native workers,” which was limited to overseas colonial dependencies, the new focus was on Indigenous peoples in independent countries. This marked an important conceptual innovation that reappropriated the term from its origins in colonial discourse and prepared it for its contemporary usage.¹⁵⁶

As such, the so-called “indigenous problem” was framed in the 1953 ILO report as an issue of global concern. Wherever Indigenous peoples existed, no matter what country or continent, the “problem” was the same: “economic and social inferiority.” Regarding the conditions of this inferiority, the 1953 ILO report made a distinction “between ‘internal’ factors, arising within the community or tribe, and factors ‘external’ to it.” Internal factors included “the unilingual condition of the Indian, his mythical beliefs and practices regarding natural phenomena, nomadism (in some regions), etc.” In other words, true to the tradition-modernity binary at the heart of modernization theory, the assumption here was that the continuity of Indigenous cultures represented an impediment to integration. Meanwhile, the inferiority of Indigenous peoples was also due to “external factors,” such as “geographical remoteness, the persistence of certain semi-feudal practices in land tenure and, in many cases, social discrimination based on the assumption that aborigines are biologically incapable of attaining the degree of evolution necessary for integration into the national economic and labor system.”¹⁵⁷ Much like the

¹⁵⁶ This is a central thesis in Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 6, 13, 39-40, 50-52, 146-150, 334, and 338-341.

¹⁵⁷ International Labour Office, *Indigenous Peoples*, 27.

famous *Indigenista* leader Manuel Gamio argued that the problem was not racial in nature but social and economic, the ILO study rejected the notion that Indigenous peoples were somehow biologically inferior. In that sense, the ILO discourse was somewhat progressive, at least when measured against the endurance of anti-Indigenous racism worldwide.

Nevertheless, the ILO discourse was prejudicial against Indigenous cultures, insofar as the latter were understood to be intrinsically inferior. This is evident in the 1953 ILO report, which did not offer a formal definition of “indigenous,” per se, but did attempt the following definition, which deserves to be quoted at length:

Indigenous persons are descendants of the aboriginal population living in a given country at the time of settlement or conquest (or of successive waves of conquest) by some of the ancestors of the non-indigenous groups in whose hands political and economic power at present lies. In general these descendants tend to live more in conformity with the social, economic and cultural institutions which existed before colonization or conquest (combined in some countries with a semi-feudal system of land tenure) than with the culture of the nation to which they belong; they do not fully share in national economic and culture owing to barriers of language, customs, creed, prejudice, and often to an out-of-date and unjust system of worker-employer relationships and other social and political factors. When their full participation in national life is not hindered by one of the obstacles mentioned above, it is restricted by historical influences producing in them an attitude of overriding loyalty to their position as members of a given tribe in the case of marginal indigenous persons or groups, the problem arises from the fact that they are not accepted into, or cannot or will not participate in, the organized life of either the nation or the indigenous society.¹⁵⁸

When compared to previous understandings of the keyword “indigenous” from the 1930s and earlier, when it was measured on the scale of “civilized” versus “primitive,” this new description maintained the same logical structure of anthropological stage theory, although the binary was recoded as “integrated” versus “non-integrated.”¹⁵⁹ The idea of

¹⁵⁸ Ibid, 25-26

¹⁵⁹ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 156.

being “indigenous” was still understood by virtue of its opposite; that is to say, being “indigenous” was neither “civilized” nor “integrated.”

This logic is evident in Article 1 of the 1957 Indigenous and Tribal Peoples Convention (No. 107), which tacitly defined “indigenous” as a hindrance or obstruction to progressive sociocultural change and integration. The final text of Article 1 breaks down the unitary category of “indigenous” into “tribal” and “semi-tribal” populations. Persons were said to be “indigenous” on account of their identification with traditional customs and institutions rather than with “the nation to which they belong.”¹⁶⁰ The definitional framework then qualified certain “Indigenous populations” as either “tribal” or “semi-tribal.” The latter designation “includes groups and persons who, although they are in the process of losing their tribal characteristics, are *not yet* integrated into the national community.”¹⁶¹ “Not yet” is a very important phrase here, as it is based on the expectation that “integration” is either inevitably bound to happen, or at least the desired endpoint in an otherwise normal process of sociocultural change. The “semi-tribal” category was simply an evolutionary waypoint towards the ultimate destination of complete and total integration, at which point the “indigenous” identity would become obsolete. Indeed, it is fair to critique the 1957 Convention (No. 107) as an embodiment of the “logic of elimination,” as the underlying desire was to “solve” the “indigenous problem.”¹⁶²

¹⁶⁰ 1957 Indigenous and Tribal Populations Convention, Art. 1(1)(a).

¹⁶¹ Ibid, Art. 1(2).

¹⁶² Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

There was an inherent conceptual dependency between “indigenous” and “integration.”¹⁶³ “Integration” was never defined in the 1957 Convention, as its meaning was widely taken for granted at the time. Semantically, to “integrate” is to incorporate various parts into a single whole. In political terms, it was understood to mean the forging of a sovereign unity out of the plurality of different segments of society, as we saw above with the so-called “integrative revolution” in “postcolonial” Asia and Africa.¹⁶⁴ In social scientific discourse of the mid-20th century, this idea was prevalent as part of the structuralist-functionalist paradigm in anthropology and sociology, which sought to identify how certain parts of a social system function as a whole in providing order and stability within the society. As we saw in Chapter One, when noting how Lemkin’s idea of cultural genocide was indebted to functionalist anthropology, this approach assumed an organic metaphor, as if societies were like living organisms, and the parts that integrate whole societies were like cells and organs. From this perspective, anything that does not contribute to an overall equilibrium is considered dysfunctional. Hence, the “indigenous problem” was to be solved by overcoming such impediments to change.

The role of applied anthropology was crucial for understanding this linkage between “indigenous” and “integration,” as cultural factors were taken into account when designing policies for social and economic change. This was most evident in the work of Ernset Beaglehole, the prominent New Zealand ethnologist noted earlier as the leader of the ILO’s Andean Indian Program. As a member as well of the aforementioned ILO Committee of Experts on Indigenous Labor, he was a prominent expert in the field. He believed that the anthropologist shared the same goal as the economist. “Cultural

¹⁶³ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 165.

¹⁶⁴ Geertz, *The Interpretation of Cultures*, 277.

integration without economic integration can never be successful,” he explained.

“Conversely, economic integration may fail because of the blockages and resistances human beings place in the way of an economic integration that may do violence to their cherished values.”¹⁶⁵ The practical effect of applied anthropologists was to “scientifically” identify these cultural barriers in order to avoid any resistance to change.

Yet this challenge involved a bit of nuance, for to *induce* change denotes leading by persuasion. Applied anthropologists like Beaglehole thus adamantly rejected any form of forced assimilation. This was not because they respected the inherent value of Indigenous cultures. Far from it. Rather, the use of compulsory power to effect change could become counterproductive. As Beaglehole explained, “changes in culture can best proceed through the consent and participation of those whose life one wishes to alter. Change can be brought about by force, but such change produces resistances and blockages which often nullify the result that one seeks to achieve.”¹⁶⁶ This was codified in Article 2(4) of the 1957 Convention, which stated that “recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.”¹⁶⁷ Even in cases of morally repugnant “tribal customs,” such as “head-hunting, infanticide, the law of retaliation,” and so on, the “forcible suppression of [such] practices considered objectively as irrational or harmful can have unfortunate results; the best policy,” according to the preparatory works of the 39th session of the Conference, “would appear to consist in encouraging the development of alternative

¹⁶⁵ Ernest Beaglehole, “Cultural Factors in Economic and Social Change,” *International Labour Review* 69, no. 5 (1954): 417.

¹⁶⁶ *Ibid.*, 417-418.

¹⁶⁷ 1957 Indigenous and Tribal Populations Convention, Art. 2(4).

institutions or activities which can be presented as symbolic substitutes for the practices which it is intended to abolish.”¹⁶⁸

In the process of inducing such changes, Beaglehole and his colleagues appreciated the importance of co-opting Indigenous leaders and traditional practices. “In order to get things done,” Beaglehole explained, the first step of the applied anthropologist “is to identify the chief, support his prestige and power and then expect that the chief will be able to take responsibility for law, order, organization and the promotion of desired changes.”¹⁶⁹ The cooperation of tribal leaders was seen as “a decisive factor in the introduction of new forms of life and work into indigenous communities that are already in a process of integration.”¹⁷⁰ This advice was based on the practical knowledge that induced cultural changes could not sell themselves, and that they instead needed to fit into pre-existing social and cultural frameworks in order to be effectively internalized by the targeted populations. Accordingly, Indigenous cultures were not unilaterally slated for total elimination. Rather, through the “scientific” studies of applied anthropologists, certain aspects of Indigenous cultures could be used (or co-opted) as platforms for change. Thus, Beaglehole argued that the role of the expert should be to “graft” European techniques on to Indigenous practices and beliefs.¹⁷¹

With that said, Indigenous customs could only be tolerated as temporary measures on the pathway to integration. For example, the customary laws of a group could be afforded a certain degree of respect as long as an “indigenous population” remained more

¹⁶⁸ International Labour Conference, *Report VIII(1): Living and Working Conditions of Indigenous Populations in Independent Countries*: (Geneva: International Labour Office, 1955), 105.

¹⁶⁹ Beaglehole, “Cultural Factors in Economic and Social Change,” 427.

¹⁷⁰ International Labour Conference, *Report VIII(1)*, 168.

¹⁷¹ Beaglehole, “Cultural Factors in Economic and Social Change,” 419 and 431.

or less isolated beyond the nation-state. Such forms of “tribal justice” could be respected and maintained, at least at first, as part of the co-optive scheme described above. In other words, Indigenous cultures could be protected only as a means to an end. As stated in the 1957 Declaration, these “special measures” were not supposed to create or prolong “a state of segregation.”¹⁷² Rather, such tolerance could only be extended as part of the larger strategy to enable “the said population to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to other elements of the population.”¹⁷³ As the integrative process unfolded, it was expected that such special considerations would be removed.¹⁷⁴ In the end, the goal of equality would ultimately result in the erasure of ethnic distinctions and cultural differences within the dominant national units comprising the international system of sovereign states.

Settler Colonial Globalism

In conclusion, the 1957 Indigenous and Tribal Populations Convention (No. 107) never achieved anything close to universal acceptance in international law, having only been ratified by 29 countries up to 1989, when it was closed for any further ratification. Unsurprisingly, given the role of the *indigenismo* movement, the majority of these countries came from Latin America.¹⁷⁵ There were also a smattering of states from the Middle East and North Africa, Asia, as well as sub-Saharan Africa.¹⁷⁶ Finally, two European colonial powers – Belgium and Portugal, both of which sought to maintain

¹⁷² 1957 Indigenous and Tribal Populations Convention, Art. 3(2)

¹⁷³ Ibid, Art. 1(2)(a)

¹⁷⁴ International Labour Conference, *Report VIII(1)*, 106.

¹⁷⁵ These included Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Mexico, Panama, Paraguay, Peru, and El Salvador. Although not part of Latin America, Haiti also ratified the convention.

¹⁷⁶ These included Angola, Bangladesh, China, Egypt, Ghana, Guinea Bissau, India, Iraq, Malawi, Pakistan, Syrian Arab republic, Tunisia, and the United Arab Republic.

their overseas imperial possessions in Africa – also ratified the instrument. Notably absent from this list were any of the English-speaking settler colonial countries of the world, including Canada, Australia, New Zealand, and the United States, as well as the USSR and the Scandinavian countries, all of which happened to have sizable Indigenous populations as well. Many of the ratifying states even claimed to have no Indigenous or “tribal” populations within their borders, and that they supported the convention on purely symbolic grounds.¹⁷⁷ It should be noted that two original parties eventually denounced the instrument.¹⁷⁸ All in all, the 1957 Convention (No. 107) was mostly ineffective as an instrument of international law.

With that said, the 1957 Indigenous and Tribal Populations Convention (No. 107) reflected many of the defining features of the mid-20th century status quo. For one thing, we have already seen that it consolidated the narrow scope of decolonization, otherwise known as the salt water doctrine. This effectively meant that Indigenous peoples within independent states would be denied the right to self-determination and instead limited to integration into the dominant national units of sovereign states. Conversely, this consolidation of the rules of decolonization also meant that the territorial integrity of settler colonial states would be preserved. Stated differently, the 1957 Convention (No. 107) was yet another product of *settler colonial globalism*. I have used this phrase to argue that the UN-based rules of rules of sovereignty and self-determination emerged from settler colonial countries, anxious as they were to consolidate their hold over dispossessed Indigenous territories. To the extent that the 1957 Convention (No. 107)

¹⁷⁷ This included Angola, Belgium, Cuba, Egypt, Ghana, Guinea-Bissau, Haiti, Malawi, Portugal, Syria, and Tunisia.

¹⁷⁸ This included China and the United Arab Republic.

justified the “salt-water thesis” of decolonization, it helped to crystalize the settler colonial construction of sovereignty into the dominant structure of global governance.

Moreover, the 1957 Indigenous and Tribal Populations Convention (No. 107) also embodied the *normalcy of assimilation*, or a widespread assumption regarding the normative goodness of assimilative practices as a natural function of modernity and nation-state building. We saw this concept at work in Chapter One, where we argued that the omission of cultural genocide from the 1948 Genocide Convention served to legitimize the assimilation of Indigenous peoples and their integration into the dominant nation-state units that comprise the international system. It may be recalled from the previous chapter that one delegate spoke of “the natural evolution of humanity, or the inevitable absorption of certain minority groups into the national whole.”¹⁷⁹ This type of social evolutionist discourse was further evident in the preparation of the 1957 Convention (No. 107), perhaps even more so. After all, the fundamental purpose of this latter instrument was to induce cultural changes as a means of “solving” the so-called “indigenous problem.”

This chapter problematizes the history of Indigenous rights discourse, insofar as the origins of “indigenous populations” as an issue in global governance was rooted in the ILO’s colonial policy that sought to discipline and coordinate the use of “native laborers.” This genealogical strand in the deep history of Indigenous rights discourse raises complex and disconcerting implications. Most significantly, this early historical period serves as a crucial reminder that the signified concept of “Indigenous” is structurally dependent on colonialism as a signifier. Indeed, this keyword comes with

¹⁷⁹ Mr. Rudzinski (Poland), in “Ad Hoc Committee on Genocide, Summary record of the Fourteenth Meeting,” UN Doc. E/AC.25/SR.14 (27 April 1948).

some ideological baggage, as its original usage in the ILO regime was accompanied by other important ideas in the repertoire of colonial discourse, such as the “civilizing mission.” These colonial origins in turn highlight the inherent ambivalence of contemporary Indigenous rights discourse as either a tool of liberation or domination, as outlined in the Introduction.

In this critical analysis, the 1957 Indigenous and Tribal Populations Convention (No. 107) was very much an instrument of social control rather than a means of emancipation. From its beginning, the ILO regime was intended to regulate what was assumed to be “naturally” unequal relations between “modern” nation-states and “primitive” Indigenous peoples. Indeed, although this particular instrument fits into the general history of Indigenous rights discourse, ILO Convention No. 107 speaks primarily in terms of the obligations, duties, and responsibilities of states, not in terms of the “rights of Indigenous peoples,” as put forth by the 2007 Declaration, for example.

With that said, the ILO regime also had unintended consequences. Now that the keyword “indigenous” had been introduced to the lexicon of global governance, it became a target of co-optation. As we will see next in Chapter Three, by the 1970s, Indigenous peoples themselves were ready to reappropriated this terminology in order to organize a global movement for normative and institutional change. The 1957 Indigenous and Tribal Populations Convention (No. 107) was thus about to become outdated.

CHAPTER THREE
Facing Settler Colonialism (1970s-1980s):
The 1989 Indigenous and Tribal Peoples Convention (No. 169)

Historical Spotlight: Geneva, June 27, 1989

Final revisions to the 1989 Indigenous and Tribal Peoples Convention (No. 169) were made during the 76th session of the International Labor Conference. As the standard-setting body of the International Labour Organization (ILO), the annual meeting of the Conference was held, as always, at ILO headquarters in Geneva. At the top of that year's agenda was a "partial revision" of the 1957 Indigenous and Tribal Populations Convention (No. 107). Following the Conference's standardized procedures, the necessary preparatory work was delegated to an ad hoc committee reflective of the tripartite membership structure of the ILO. This included representatives from governments, employers' organizations, and workers' organizations, and apart from the few Indigenous individuals who were part of one of those three official categories, Indigenous peoples as such were not included. The rigorous participation rules of the ILO regime had put the entire revision process in a bind. As noted in the official records by Hans Jakob Helms, a Danish government adviser from Greenland who reported on behalf of the Conference's final drafting committee, the ILO revision process "had to find a balance between language which would, on the one hand, have expressed the aspirations of the indigenous and tribal peoples themselves ... and, on the other, the need to have a *realistic* text that could be ratified and provide a basis for national and international action."¹

¹ Quoting Mr. Helms (Government adviser, Denmark, and rapporteur of the Committee on Convention No. 107) in International Labour Conference, *Seventy-Sixth Session, Geneva 1989: Record of Proceedings* (Geneva: International Labour Office, 1990), 31/1.

This apparent conundrum follows a recurring theme in this dissertation. Once again, we see a familiar rhetorical pattern, as with the saying “on the one hand, on the other hand,” a linguistic construction that operates as a duality whereby two opposite ways of thinking about a situation are compared. Recall how this construction was used in Introduction to frame the dilemma of normative change and continuity. In particular, we used it to situate James Anaya on one side of the Indigenous rights literature and Sharon Venne on the other, with intellectual career of Jeff Corntassel spanning the divide. With this frame in mind, we can read the piece of evidence presented above as naively reflecting the entire interpretative spectrum between Anaya and Venne. The first part of this statement from the rapporteur of the Committee on Convention No. 107 (specifically the part about “aspirations”) echoes the hopeful optimism symbolized by Anaya, whereas the second part of the quote (i.e. “the need to have a realistic text”) lends weight to Venne’s critical suspicion.

On the one hand, this 1989 statement from the ILO does indeed represent progressive change. Even if Indigenous peoples as such were locked outside the final negotiating room, the fact of the matter is that the ILO revision process would not have happened in the first place without the presence of a transnational advocacy network dedicated to Indigenous rights. What Anaya said in the Introduction is entirely correct, insofar as post-1970s Indigenous rights activism provided the source for an important global “shift in attitudes” since the 1957 Convention was adopted.² This factor was widely noted throughout the ILO revision process. As stated at the 1986 Meeting of Experts on the Revision of Convention No. 107, for example, the feeling at the time was

² James Anaya, “Remarks by James Anaya,” *Proceedings of the Annual Meeting (American Society of International Law)* 106 (2012): 528.

“unanimous in concluding that the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world.”³

This is further evidence that a momentous change or transformation of international norms occurred by this time, as the once dominant set of assumptions regarding the normalcy of assimilation were being replaced by a new framework of global ethics related to multiculturalism and the value of cultural diversity.

On the other hand, the piece of evidence from above also claimed “the need to have a *realistic* text.”⁴ Here we see the critically suspicious side of this ambivalent moral equation, as represented by the intellectual profile of Venne rather than Anaya. Within this statement is a crucial political concession. Frankly, in order for the 1989 Indigenous and Tribal Peoples Convention (No. 169) to have succeeded, it had to fit into the dominant and power-laden constraints of “reality.” Again, the ironic use of inverted commas here is used as a reminder that we need to continuously tease out and uncover the hidden historical-intellectual processes in which “reality” is socially constructed. Moreover, the emphasis on this particular keyword also alludes to the classical realism, the “founding father” of IR theory from the mid-20th century that explains how the rules of the world were locked into place. Insofar as the basic rules of sovereignty are used to enforce the subordination of Indigenous peoples under the domains of settler states, “the need to have a *realistic* text” in this case meant that settler colonial anxieties had to be assuaged in order for the legalization process to succeed.⁵

³ “Appendix I: Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107),” in International Labour Office, *Partial Revision of the Indigenous and Tribal Peoples Convention, 1957 (No. 107): Report VI(1)* (Geneva: International Labour Office, 1988), 107.

⁴ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 25/1.

⁵ *Ibid*, 31/1.

Once again, we face the recurring dilemma of normative change and continuity, as well as the Janus-faced paradox of human rights. The post-1970s expansion of rights discourse provided Indigenous peoples with the opportunity to carve out some relative gains in terms of international human rights law. But we have already seen that the apparent success of this legalization process was premised upon the need to obtain a certain degree of consensus from settler colonial countries. A key argument in what follows is that the 1989 Indigenous and Tribal Peoples Convention (No. 169) only went so far in advancing the rights of Indigenous peoples, whose fundamental freedoms still remained subordinate to the structural imperatives of a state-centric global system that has been shaped in the image of “settler sovereignty.”⁶ Our goal is to chart these competing currents between normative change and continuity.

By putting the ILO revision process into historical context, Chapter Three will also introduce an important generational shift in our historical genealogy connecting the old idea of cultural genocide to the new idea of cultural integrity. Specifically, our focus here is on a series of important historical developments spanning from the late 1960s through to the late 1980s. These broader background factors include the decline of *Indigenismo*, the rise of anthropological activism, the recuperation of the *ethnocide* concept, and new ideas at the UN about the nature of developmentalism. During this time period, we will also see positive institutional moves in global governance after a number of important expert reports were commissioned by the UN rights regime. While all of this was occurring, Indigenous peoples organized a transnational advocacy network that actively pursued the art of declarations as a practice of making international law. All of

⁶ Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, MA: Harvard University Press, 2010), 16, 157, and 187.

these background factors are necessary in order to set up our eventual focus on the ILO revision process in the late 1980s, followed by a close textual analysis of the 1989 Indigenous and Tribal Peoples Convention (No. 169). Finally we will raise important questions about the concurrence between Indigenous rights discourse and neoliberalism. But first we must situate the following historical analysis within the overall structure of this dissertation.

Structural Power and the Critical Theory of Co-optation

As we continue to develop our four-part theoretical framework of power and co-optation, we now turn to the third spot of this dissertation's analytical structure. Recall from the Introduction how this structure consists of overlapping conceptual schemes. Using Barnett and Duvall's typology of power, we have already covered the concepts of compulsory power and institutional power in Chapters One and Two, respectively. Accordingly, here in Chapter Three we focus on *structural power* (whereas ahead in Chapter Four we conclude with productive power). In addition to this multifaceted conceptual framework of power, we have also been fashioning a four-part theoretical framework of co-optation. Again, the organizational theory of co-optation was highlighted in Chapter One, whereas the liberal theory was at stake in Chapter Two. Before we present our preferred explanation in Chapter Four (i.e. the dynamic theory), we must first develop a *critical theory of co-optation*.

In order to elaborate this conceptual and theoretical vocabulary, we first have to put Chapter Three into historical context. The roughly concurrent chronologies in Chapters One and Two both covered the early- to the mid-20th century, apart from a few deviations towards the 16th and 19th centuries. As we have seen, the 1948 Genocide

Convention and the 1957 Indigenous and Tribal Populations Convention (No. 107) shared similar assumptions, biases, and presuppositions that were reflective of the status quo at the time, especially in terms of *settler colonial globalism* and the *normalcy of assimilation*. However, here in Chapter Three we reach a crucial turning point, as dominant ways of thinking about the world were upended during a period identified as the post-1970s turning point. As noted in the Introduction with reference to Samuel Moyn and Jan Eckel, there is a growing body of scholarship that focuses on the “long” decade of the 1970s as a crucial turning point in the history of human rights.⁷ Although the nostalgia of the “Sixties” are typically associated with the counterculture and revolution, the radical shift in the global political climate took place in the decade following the symbolic year of 1968. Moreover, many of the transformations underway during this era stretched into the 1980s, when the global political economy was reordered according to the doctrine of neoliberalism.

In order to emphasize the significance of this loosely defined and open-ended period, as well as to consider the background factors that made possible the “breakthrough” in human rights during the 1970s, consider the relevance of two broader intellectual developments from this historical context. In the first place, the “long” 1970s was marked by the emergence of neoliberalism. As a common set of ideological and political principles that first gained hold in the English-speaking world by the end of the 1970s, neoliberalism “succeeded in the early 1980s in setting the world’s economic and

⁷ Samuel Moyn, “The Return of the Prodigal: The 1970s as a Turning Point in Human Rights History,” in *The Breakthrough: Human Rights in the 1970s*, eds. Jan Eckel and Samuel Moyn (Philadelphia: University of Pennsylvania Press, 2014), 3-4.

political agenda for the next quarter century.”⁸ Going back to the discursive map of IR theory imaged by Agathangelou and Ling in the Introduction, neoliberalism can be seen as the “good daughter” in the “house of IR,” insofar as it represented a new generational offspring from the standard bearers of the status quo: “*pater* realism” and “*mater* liberalism.”⁹ Yet on the flip-side of neoliberalism as the “good daughter,” we can also see late 20th century developments in post-Marxism as like the “rebel sons” in the intellectual order of IR theory. The expansion of post-Marxist thought was infused with a sentiment of resistance, one that deeply questioned the taken-for-granted nature of status quo arrangements. We will come back to post-Marxist theory, when we draw from Gramsci’s notion of “cultural hegemony” to help articulate the critical theory of co-optation.

In any case, as we turn to the 1989 Indigenous and Tribal Peoples Convention (No. 169) as an outcome of post-1970s turning point, we can see the opposing viewpoints of neoliberalism and neo-Marxism as a reflection of our recurring dilemma between normative change and continuity. This dilemma reflects a powerful tension between the institutional inertia of the dominant global order on the one hand, and a deep critique of the status quo on the other. At a very general level of analysis, this tension affected the ILO revision process, insofar as it was enmeshed within these divergent trends. As noted at the outset of this chapter, the revision process importantly acknowledged the aspirations of Indigenous peoples. At the same time, however, the ILO also faced “the need to have a *realistic* text.”¹⁰ Later in the chapter, when we cover the “peoples-

⁸ Manfred B. Steger and Ravi K. Roy, *Neoliberalism: A Very Short Introduction* (New York: Oxford University Press, 2010), 10.

⁹ Anna M. Agathangelou and L.H.M. Ling, “The House of IR: From Family Power Politics to the *Poiesies* of Worldism,” *International Studies Review* 6 (2004): 21-49.

¹⁰ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 31/1.

population” debate, we will see just how anxious settler states were during this process in protecting their right to political unity and territorial integrity. As the ILO revision process was forced to follow the dominant rules of sovereignty, the basic constraints of Indigenous peoples under the domestic confines of settler states was once again normalized. Thus, the argument here is that for all of the apparent gains made by the 1989 Convention (No. 169), especially in terms of disavowing the idea of integrationism, this important revision in international law actually re-inscribed and legitimized the basic structure of settler-Indigenous relations worldwide.

We will return to this paradoxical outcome of rights discourse later, but first the concept of *structural power* will help us dig up and excavate these hidden power effects. The distinctiveness of this concept can be seen through its respective similarities with and differences from the previous concepts of compulsory and institutional power. For instance, the concepts of compulsory power (from Chapter One) and structural power (here in Chapter Three) both share an analytical concern with the direct and immediate effects of power in shaping the circumstances and limiting the actions of others. But whereas the compulsory power generally works operates through the direct interaction of “pre-constituted social actors,” structural power instead “consists of social relations of constitution.”¹¹ In other words, whereas the pre-existence of actors is taken for granted in the former concept, the latter shows that actors are in fact constituted through relations of power. In the vein of Hegel’s classic slave-master dialectic, or Marx’s capital-labor binary, we can explain the co-constituted feature of structural power as such: what we might call “structural position A” (e.g. settler states) can only be said to exist “by virtue

¹¹ Michael Barnett and Raymond Duvall, “Power in Global Governance,” in *Power in Global Governance*, eds. Michael Barnett and Raymond Duvall (New York: Cambridge University Press, 2005), 9.

of its relationship to structural position B” (e.g. Indigenous peoples).¹² Accordingly, we can use the concept of structural power to explain how the capacities of Indigenous peoples are conditioned by their position within the social structures of settler states.

The concept of structural power aligns with the third position in our parallel four-part theoretical framework of co-optation. In particular, here we are concerned with *the critical theory of co-optation*. As noted earlier, this theory is *critical* in the general sense that it openly questions the status quo in order to ultimately “liberate human beings from the circumstances that enslave them.”¹³ Although this theory is not necessarily defined by the post-Marxist tradition highlighted above, we can use that tradition to help make sense of this version of co-optation. Especially pertinent is one particular sub-branch in this part of the “family tree” of IR theory referred to as neo-Gramscianism, named after the early 20th century Italian Marxist theorist and politician Antonio Gramsci. According to this perspective, which is associated with the Gramsci’s notion of “cultural hegemony,”

the structure of global capitalism substantially determines the capacities and resources of actors. It also shapes their ideology, that is, the interpretive system through which they understand their interests and desires. This ideology is hegemonic in that it serves the objective interests of the capitalists and their fellow travelers at the direct expense of the objective (but not, then, recognized) interests of the world’s producing classes, thereby disposing action toward the reproduction, rather than the substantial transformation, of the structure and its relations of domination.¹⁴

This perspective usefully brings to the surface the role of global capitalism as an integral part of the status quo in the global system, an aspect that will be stressed by the end of Chapter Three, when we discuss neoliberalism and the Janus-faced paradox of human

¹² Ibid, 18.

¹³ Max Horkheimer, *Critical Theory* (New York: Seabury Press, 1982), 244.

¹⁴ Michael Barnett and Raymond Duvall, “Power in Global Governance,” 18.

rights. Moreover, neo-Gramscianism provides insight into the complex dynamics of power and resistance. With the idea of cultural hegemony in mind, we can begin to imagine of the critical theory of co-optation as a mechanism designed by those who dominate in order to elicit the consent of those who are dominated.¹⁵

Emblematic of the critical theory of co-optation is the most recent work of Jeff Corntassel. Recall from the Introduction, where we used the intellectual profiles of James Anaya and Sharon Venne to represent the divergent trends of Indigenous rights discourse. In this context, Corntassel's intellectual career to spanned the divide between hopeful optimism on the one hand, and critical circumspection on the other. Accordingly, in the mid-1990s, Corntassel argued in the spirit of hopeful optimism that Indigenous rights discourse should disavow the relatively harder or stronger political demands for sovereignty and instead embrace the softer or easier discourse on culture and human rights.¹⁶ By 2007, however, Corntassel's perspective had shifted from Anaya's side of the interpretive spectrum towards Venne's end, where the concern became how the legalization of Indigenous rights has effectively reproduced forms of colonial power.¹⁷ It is in this later context that Corntassel put forth what we are calling a *critical theory of co-optation*.

Together with Taiaiake Alfred, Corntassel's notion of co-optation is essentially something bad that should be avoided by Indigenous political actors.¹⁸ In this sense, co-

¹⁵ T.J. Jackson Lears, "The Concept of Cultural Hegemony: Problems and Possibilities," *American Historical Review* 90, no. 3 (1985): 569.

¹⁶ Jeff J. Corntassel and Thomas Hopkins Primeau, "Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination'," *Human Rights Quarterly* 17, no. 2 (1995): 343-365.

¹⁷ Jeff Corntassel, "Towards a New Partnership? Indigenous Political Mobilization and Co-Optation during the First UN Indigenous Decade (1995-2004)," *Human Rights Quarterly* 29, no. 1 (2007): 137-166.

¹⁸ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Second ed.) (New York: Oxford University Press, 2009 [1999]), 97; and Taiaiake Alfred and Jeff Corntassel, "A Decade of Rhetoric

optation is a form of political manipulation where the most threatening elements of resistance are deradicalized and neutralized. According to this argument, the end result of co-optation is when the original goals and aspirations of a movement are subsumed within the dominant constraints of prevailing forces. The international legalization process for Indigenous peoples has been based on nothing more than the “illusion of inclusion ... Consequently, a system that once denied an Indigenous rights agenda now embraces it and channels the energies of transnational Indigenous networks into the institutional fiefdoms of member countries.”¹⁹ To be clear, Corntassel was referring to his experiences at the UN during the 1990s, the historical context of which is covered in Chapter Four. However, the “illusions of inclusion” were perhaps even more pronounced here in Chapter Three with regards to the 1989 Indigenous and Tribal Peoples Convention (No. 169). As noted above, Indigenous peoples, as such, were figuratively locked outside the negotiating room. Indeed, by the end of this chapter, I argue that the institutional constraints of the ILO system effectively violated its own commitment to ensuring the participation of Indigenous peoples in the legalization process.

With this argument in sight, we cannot fault the critical perspective exemplified by Venne, Corntassel, and others for being overly suspicious and wary of any promises. Unfortunately, from a sober reading of this history, it is fair to conclude that “Indigenous rights mobilization has had as little transformative impact on the underlying political-economic conditions that perpetuate vulnerability as development projects.”²⁰ Not only

for Indigenous Peoples,” *Indian Country Today* (11 May 2004), available at http://www.corntassel.net/print_rhetoric.htm.

¹⁹ Corntassel, “Towards a New Partnership?” 161.

²⁰ Mark Goodale, “Dark Matter: Toward a Political Economy of Indigenous Rights and Aspirational Politics,” *Critique of Anthropology* 36, no. 4 (2016): 442.

has the possibility of real transformation been denied (as with the conceptual narrowing of decolonization according to the “salt-water” thesis), but there is even the possibility of moving backwards. After all, practically speaking, the 1989 Convention (No. 169) has fewer ratifications than the 1957 Convention (No. 107). Only 22 countries are parties 1989 Convention (No. 169), and 15 of them come from a single region (Latin America). In contrast, the 1957 Convention (No. 107) had achieved 27 ratifications at its height, and even today it remains in force for 18 countries.

Far from achieving an emancipation from the ongoing structures of settler colonialism, it seems as if the legalization of Indigenous rights discourse is perpetuating and reproducing these very structures. In order to flesh out this sense of going backwards, consider the concept of “backsliding.” This term is used in the literature on European Union (EU) integration, or the process by which new post-Communist (EU) states from Eastern Europe are expected to adopt EU human rights standards.²¹ The concept has recently been extended to cover Western liberal democracies as well. For example, one recent critical analysis argues that the international legalization of minimum human rights standards may “also exert a downward pull on high-performing states.”²² That is to say, the ratification of international standards by strong democratic countries can result in lowering actual outcomes. The rationale for state compliance with international law thus includes the counterintuitive possibility that an official decision in favor of nothing more than a minimum set of standards can “provide a political cover for those opposed to a

²¹ Philip Levitz and Grigore Pop-Eleches, “Why No Backsliding? The European Union’s Impact on Democracy and Governance Before and After Accession,” *Comparative Political Studies* 43, no. 3 (2010): 457-485.

²² Andrew T. Guzman and Katerina Linos, “Human Rights Backsliding,” *California Law Review* 102 (2014): 603.

particular expansion of rights.”²³ This point will become increasingly salient as we trace the ILO revision process by the end of this Chapter.

Before we outline the set of post-1970s historical background factors that made the ILO revision possible in the first place, one final point must be made looking ahead to Chapter Four and the Conclusion. Although we still await my preferred explanation of the dynamic theory of co-optation, I also mentioned that this depends upon a critical theory of co-optation. In other words, I am following the argument made by Cornassel, but just tweaking it with a more nuanced and dynamic concept of co-optation that opens up a broader range of possibilities. While my argument is critical, following in the spirit of Venne, my approach nevertheless remains couched in a hopeful and optimistic belief, with a nod to Anaya. Again, the purpose of crafting a dynamic theory of co-optation is to account for both sides of this dilemma of Indigenous rights discourse.

The Post-1970s Turning Point

In light of Anaya’s emphasis on a post-1970s “shift in attitude” towards Indigenous peoples worldwide, our immediate task is to explain the conditions which made this global shift possible. If we temporarily bracket the question about underlying structural continuities in terms of the post-1970s global political economy, it is nevertheless important to stress how much change there was during this time. The post-1970s turning point was a crucial rupture or discontinuity with the totalizing structure of “reality” inherited from the past. For the first time in this dissertation’s intellectual history, Indigenous peoples became the main actors, finally speaking for themselves rather than being entirely left out of international discussions due to the misguided

²³ Ibid, p. 638.

paternalism of states and other vested interests that make up the dominant powers of the world. During this period, there was a resurgence of political Indigenous organizing across the global-local divide.²⁴ The purpose of this section is to outline the background conditions of possibility behind this intellectual-historical turning point.

Very briefly, before we begin outlining these background conditions, a methodological point is in order. As we refer to this period as a “turning point,” we should be careful not to take this too literally. There was no singular moment of transformation when the old normalcy of assimilation suddenly disappeared and was instantly replaced by the new norm of cultural integrity. Much like the traditional historiography of human rights, with its longstanding search for historical origins, some of the current literature on Indigenous rights identifies one moment in particular, such as the International Non-Government Organizations Conference on Discrimination against Indigenous Peoples of the Americas (hereafter, the 1977 NGO Conference).²⁵ Recall, we highlighted this event at the very outset of the Introduction as an important “discursive event,” insofar as the term *cultural integrity* first emerges as part of an early draft declaration. We will return to this historical episode later on in the chapter. Yet our genealogical approach explicitly avoids the search for origins, as the dynamic change

²⁴ Joane Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (New York: Oxford University Press, 1996); Taiaiake Alfred, *Wasáse: Indigenous Pathways of Freedom and Action* (Peterborough, ON: Broadview, 2005), 19-38; Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary Colonialism,” *Government and Opposition* 40, no. 4 (2005): 597-614; Jeff Corntassel, “Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination,” *Decolonization: Indigeneity, Education & Society* 1, no. 1 (2012): 86-101.

²⁵ Ingrid Washinawatok, “International Emergence: Twenty-One Years at the United Nations,” *New York City Law Review* 3 (1998): pp. 41-42; Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Burlington, VT: Ashgate, 2011), 66; and Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (New York: Routledge, 2016), 38.

from the abandoned concept of cultural genocide to the new norm of cultural integrity was not a wholesale switch that happened all of the sudden.

Rather, our genealogical approach is suited for outlining the broader conditions of possibility for this apparent global shift in attitudes occurred after the 1970s. There were a number of different overlapping and more general background factors during this “long” decade which were necessary for the production of Indigenous rights discourse during this time. For one thing, there was a moral “breakthrough” in human rights as a prominent factor in world politics. At the same time, crucial changes were occurring in the discipline of anthropology, where changing attitudes about culture and Indigenous peoples opened up an important strand of transnational activism. In Latin America especially, there was also a growing critique of the *Indigenismo* discourse inherited from the mid-20th century. It was within this milieu that the lost neologism of “ethnocide” was found again and retooled, particularly by a small number of radical French anthropologists. Let us deal with each of these converging developments in turn.

The Human Rights “Breakthrough”

Over the past decade, a growing body of scholarship has identified the “long” decade of the 1970s as the crucial period in which there was a “breakthrough” in human rights across the global-local divide of world politics.²⁶ As discussed in the Introduction, this literature is best represented by the revisionist historiography of Samuel Moyn and Jan Eckel. They challenge more traditional narratives of human rights history that tend to be overly teleological, as if either the ancient roots of natural law or the liberal foundations of modern citizenship inevitably led to the discovery of universal human

²⁶ Moyn, “The Return of the Prodigal,” 3; and idem, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010), 222.

rights.²⁷ These more orthodox accounts, which are typically associated with the political philosophy of liberalism, often depict a triumphant and progressive story about the advancement of morality and global ethics. If were to follow the traditional plotline, we could meet back up with the spirit of hope and optimism represented by Anaya in order to show how the legalization of Indigenous rights in recent decades was made possible by the liberal expansion of human rights discourse in general.²⁸

The genealogical approach usefully problematizes these taken-for-granted stories about the supposed “origins” of human rights. We should avoid the liberal teleology associated with these traditional accounts of human rights evolution, and instead look for the underlying discontinuities, breaks, or ruptures in the deep-seated myths about the nature of “reality.” At least, that is how genealogy is supposed to work in theory, given its emphasis on critiquing the essentialist notion of historical origins. As practiced by Moyn and Eckel, however, the revisionist argument about the post-1970s turning point might fall prey to their own genealogical critique. By simply shifting the timeline of human rights history from the mid-20th century to the 1970s, does this argument simply move the point of origin to another historical era? Moreover, what does this revisionist historiography mean by “human rights,” per se? Indeed, there are hints of essentialism even within Moyn’s argument, which posits the meaning of human rights in a very narrow and minimalist sense: “Within one decade, human rights would begin to be invoked across the developed world and by many more ordinary people than ever before.

²⁷ Targets include Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2011); and Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004). For an early critique of this traditional approach, see Kenneth Cmiel, “The Recent History of Human Rights,” *American Historical Review* 109, no. 1 (2004): 117-135.

²⁸ S. James Anaya, “International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State,” *Arizona Journal of International and Comparative Law* 21, no. 1 (2004): 13-61.

Instead of implying colonial liberation and the creation of emancipated nations, *human rights most often now meant individual protection against the state.*"²⁹

We will come back to this emphasized portion of Moyn's quote momentarily, so that we may tease out an important distinction between human rights and Indigenous rights. Although the emergence of contemporary Indigenous rights discourse may have depended on the discursive space opened up by the human rights discourse analyzed by Moyn, they are not the same thing, as elaborated below. However, their coincidence is telling. Moyn and Eckel's revisionist historiography places special emphasis on the year of 1977. This was when Jimmy Carter was inaugurated as President of the United States; he made human rights an integral part of American foreign policy. This was also the same year when Amnesty International won the Nobel Peace Prize. Indeed, it is as if the idea of human rights suddenly achieved an extraordinary degree of precedence. It is therefore no surprise that the aforementioned 1977 NGO Conference, which is often marked as the inauguration of contemporary Indigenous rights discourse, happened the very same year.

It is thus possible to see the rise and consolidation of a transnational advocacy network around the issue of Indigenous rights as a distinct offshoot of this 1970s "breakthrough" in human rights. Arguably, the sudden rise of human rights discourse effectively opened up a political opportunity structure for Indigenous rights discourse. The latter fits into the "polycentric and fitful process" described by Eckel, who also points out that the "breakthrough" period is not really a unified period, per se, but rather a

²⁹ Moyn, *The Last Utopia*, 4. Cf. Christopher McCrudden, "Human Rights Histories," *Oxford Journal of Legal Studies* 35, no. 1 (2015): 187-188.

convergence of multiple chronologies.³⁰ There were a number of simultaneous movements going on around the world, including the dissidence movement in Communist Europe, opposition to military dictatorships in Latin America, and in our case the emergence of Indigenous global politics. All of these cases drew upon roughly similar conditions of possibility.

There were a number of historical contingencies involved with the post-1970s “breakthrough.” Eckel provides an explanatory framework that distinguishes a series of extraneous causes and contexts alongside the intrinsic appeal of human rights discourse. Extraneous in this sense refers to more general or external background conditions. One important extraneous factor included the easing of Cold War tensions during the period of *détente*, which opened space for a narrow human rights perspective to emerge as an alternative to the dominant logic of *realpolitik*. Part of the intrinsic appeal of human rights (narrowly conceived in terms of individual protection against the state) was that it is “nonpolitical or above politics” and ostensibly driven by “purely” humanitarian motives.³¹ Because of its fundamental rejection of power politics, per se, the normative appeal of human rights rushed in to fill the ideological vacuum left open by *détente*. “In this atmosphere,” explains Moyn, “an internationalism revolving around individual rights surged, and it did so because it was defined as a pure alternative in an age of ideological betrayal and political collapse.”³²

Another external factor, although more controversial, was the demise of European overseas empires and the wrapping up of the UN’s official decolonization process. For

³⁰ Jan Eckel, “The Rebirth of Politics from the Spirit of Morality: Explaining the Human Rights Revolution of the 1970s,” in *The Breakthrough*, 241.

³¹ Ibid, 258.

³² Moyn, *The Last Utopia*, 8.

one thing, Moyn contends that “human rights experienced their triumph as a widespread moral vernacular after decolonization not during it ... because ... the loss of empire allowed for the reclamation of liberalism, including rights talk, shorn of its depressing earlier engagements with oppression and violence abroad.”³³ Indeed, it is true that rights discourse was often (and sometimes still is) used to justify (settler) colonial interventions, considering the so-called “savior complex” as a motivating force to protect innocent “victims” from barbarous “savages.”³⁴ Thus, the demise of European overseas empires enabled politicians and activists to rehabilitate morality as a political resource.³⁵ Besides, Moyn argues that anti-colonialism of the mid-20th century was not about the supranational protection of individuals from the state, but rather about collective liberation and the struggle for sovereign independence.³⁶ Eckel adds that “human rights claims did not constitute a prominent strategy in the anticolonial struggle, and those activists making use of them engaged in a distinct appropriation of the idea for highly politicized ends.”³⁷

Moyn and Eckel’s distinction between human rights and anti-colonialism leads us back to the claim that, despite their familial resemblances, human rights (strictly conceived) and Indigenous rights were originally very different. Already in Chapter Two, we demonstrated that as the so-called “Third World” was brought into the international system by the 1960s, the rules of sovereignty were re-inscribed in order in order to tightly

³³ Ibid, 117.

³⁴ Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal* 42, no. 1 (2001): 201-245; and Shannon Speed and Jane F. Collier, “Limiting Indigenous Autonomy in Chiapas, Mexico: The State Government’s Use of Human Rights,” *Human Rights Quarterly* 22, no. 4 (2000): 877-905.

³⁵ Eckel, “The Rebirth of Politics from the Spirit of Morality,” 256.

³⁶ Moyn, *The Last Utopia*, 84-85.

³⁷ Jan Eckel, “Human Rights and Decolonization: New Perspectives and Open Questions,” *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1, no. 1 (2010): 129.

regulate self-determination claims, thereby assuaging state anxieties regarding the specter of secession. As a result, human rights advocates at the time had a strategic rationale for decoupling human rights (strictly conceived) from self-determination. By “strictly conceived,” we point to the minimalist conception of human rights used by Moyn, in terms of “individual protection against the state.”³⁸ As we will see in greater detail below, when we look at the developments that grew out of the 1977 NGO Conference, Indigenous rights discourse was about much more than protecting the civil and political rights of individuals against the state. Rather, it was an explicitly political agenda that called for decolonization in its most radical form, including the possibility of state secession.

This divergence posed a strategic dilemma for Indigenous rights advocates. We already noted above that part of the intrinsic appeal of human rights discourse was its ostensibly “anti-political” stance. Yet the notion that human rights (strictly conceived) is or should be beyond politics also disarms such discourse of its revolutionary potential. This is the argument behind the so-called “displacement thesis” that was highlighted in the Introduction, as exemplified by Wendy Brown: “Human rights activism is a moral political project and if it displaces, competes with, refuses, or rejects other political projects, including those also aimed at producing justice, then it is not merely a tactic but a particular form of political power carrying a particular image of justice.”³⁹ As we will argue more thoroughly in Chapter Four, channeling of Indigenous rights discourse into the field of cultural human rights rather than decolonization discourse has likewise

³⁸ Moyn, *The Last Utopia*, 4.

³⁹ Wendy Brown, “‘The Most We Can Hope For...’: Human Rights and the Politics of Fatalism,” *South Atlantic Quarterly* 103, nos. 2/3 (2004): 453.

diverted and displaced more radical pressures for structural transformation.⁴⁰ Once again, this reflects the paradox of human rights as an instrument of liberation as well as regulation.

Apart from this crucial divergence, we still cannot overlook the important convergence either between the human rights “breakthrough” and the emergence of contemporary Indigenous rights discourse. This was evident in the utilization of innovations in communications technology that revolutionized mass media after the 1970s. Advocates used the technologies to transmit highly curated images of human rights violations from around the world in order to provoke indignation and raise public awareness at home. For example, consider a 1969 article in the most widely-read national newspaper in Britain, *The Sunday Times*, which was authored by acclaimed travel writer Norman Lewis. Its bold headline – “GENOCIDE” – was accompanied by a large-scale color photograph of four Indigenous children in the Brazilian Amazon. Naked, innocent, and alone, the children stand in this image stood against an invisible threat of extermination that figuratively loomed just beyond the frame. The article’s subtitle – “From Fire and Sword to Arsenic and Bullets, Civilization Has Sent Six Million Indians to Extinction” – set up a gory retelling of Brazilian-Indigenous relations, whereby the image of the Indigenous children represented Indigenous peoples as a whole.⁴¹ Typecast as poor, defenseless, and wretched souls, the imagery of Indigenous peoples as victims of genocide may have exposed their plight to the world, but the sensationalization of their

⁴⁰ Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, 2010), 6-7.

⁴¹ Norman Lewis, “Genocide – From Fire and Sword to Arsenic and Bullets, Civilization Has Sent Six Million Indians to Extinction,” *Sunday Times* (London) (February 23, 1969). See also Shelton H. Davis, *Victims of the Miracle: Development and the Indians of Brazil* (New York: Cambridge University Press, 1977), 11-12 and 79-80.

victimhood left them as “speechless emissaries” devoid of agency.⁴² Nevertheless, such changes in communication technologies and the consumption of mass media provided important background conditions for the rising profile of Indigenous peoples in global discourse.

The budding Indigenous rights movement also benefitted from adopting popular strategies and tactics of mass mobilization at the time. Unlike traditional movements concerning the political and economic issues of class and nation, the countercultural turn of the late 1960s opened up a wave of “new social movements” based on social and cultural issues such as environmental protection, gender equality, and ethnic identities.⁴³ There was a decisive turn to the grassroots in this context, and human rights organizations such as Amnesty International (founded in 1961) were able to capitalize on new campaigning techniques. Other NGOs followed suit in the burgeoning field of Indigenous rights, including the International Work Group on Indigenous Affairs (founded in 1968), Survival International (1969), and Cultural Survival (1972).⁴⁴ This shift in grassroots organizing was yet another important background factor in the broader political opportunity structure identified as the post-1970s transformations.

⁴² Cf. Kevin Rozario, “‘Delicious Horrors’: Mass Culture, the Red Cross, and the Appeal of Modern Humanitarianism,” *American Quarterly* 55, no. 3 (2003): 417-455; and Liisa H Malkki, “Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization,” *Cultural Anthropology* 11, no. 3 (1996): 377-404.

⁴³ Donatella Della Porta and Mario Diani, *Social Movements: An Introduction* (Second ed.) (Malden, MA: Blackwell, 2011 [2008]), 8.

⁴⁴ Jens Dahl, *IWGIA: A History* (Copenhagen: International Work Group for Indigenous Affairs, 2009), 26; Louise Lamphere, “David Maybury-Lewis and Cultural Survival: Providing a Model for Public Anthropology, Advocacy, and Collaboration,” *Anthropological Quarterly* 82, no. 4 (2009): 1049-1054; and Jochen Kemner, “Fourth World Activism in the First World: The Rise and Consolidation of European Solidarity with Indigenous Peoples,” *Journal of Modern European History* 12, no. 2 (2014): 262-279.

Anthropological Activism and the Decline of Indigenismo

Another important background context in 1970s transitional period was writings on Indigenous issues from Latin America.⁴⁵ The ideology of *indigenismo*, which had dominated Indigenous affairs in Latin America since the early 20th century, and which had been so influenced by Spanish-speaking anthropologists, came under attack. This was the result of important changes in the discipline of anthropology, which was said to be “in a state of crisis” at this time.⁴⁶ Especially amongst a younger generation of students and scholars, there was growing disillusionment with the discipline’s failure to come to terms with the political implications of its work. In the spirit of the late 1960s counterculture, new scholars, such as the German-born Mexican scholar, Rodolfo Stavenhagen (who eventually became a United Nations special rapporteur on Indigenous rights) began reckoning with the close historical links between applied anthropology and “the management of empire.”⁴⁷ The intellectual history of the discipline was rewritten to emphasize its complicity with colonialism, as ethnographic knowledge had long been used to legitimate the expansion and exercise of Eurocentric power.⁴⁸ From this critical position, once dominant assumptions about socioeconomic “backwardness” and cultural change were being challenged.⁴⁹

The transformation of anthropology was especially evident in Mexico, which had once been the epicenter of the *indigenismo* movement. As it was elsewhere around the world, 1968 was a tumultuous year in Mexico City, with widespread student

⁴⁵ Chris Tennant, “Indigenous Peoples, International Institutions, and the International Legal Literature from 1495-1993,” *Human Rights Quarterly* 16 (1994): 13.

⁴⁶ Diane Lewis, “Anthropology and Colonialism,” *Current Anthropology* 14, no. 5 (1973): 581.

⁴⁷ Rodolfo Stavenhagen, “Decolonizing Applied Social Sciences,” *Human Organization* 30, no. 4 (1971): 334.

⁴⁸ Talal Asad, ed., *Anthropology and the Colonial Encounter* (Atlantic Highlands, NJ: Humanities, 1973).

⁴⁹ Kathleen Gough, “New Proposals for Anthropologists,” *Current Anthropology* 9, no. 5 (1968): 406.

demonstrations and political unrest. Young Mexican anthropologists took out their ire in a polemical 1970 treatise entitled *De eso que llaman antropología Mexicana*, roughly translated as “On So-Called Mexican Anthropology.”⁵⁰ They denounced the Instituto Nacional Indigenista (INI) for being complicit with the authoritarian regime and for perpetuating “internal colonialism.”⁵¹ Rather than assisting government policies in the diminishment of Indigenous identities, they argued, anthropologists should become more independent from the state and instead work with Indigenous peoples themselves. Indigenous autonomy, self-determination, and cultural pluralism should be the most important goals of anthropology, rather than national integration and development.⁵² Ironically, some of these young Mexican anthropologists were eventually hired by the INI, the very same institution that they had so severely critiqued. As a result, this turn ushered in a new era of Indian policy in Mexico referred to as “participatory indigenismo.”⁵³

One of the young, critical anthropologists leading this political turn in the discipline was Guillermo Bonfil Batalla. He argued that the integrationist paradigm essentially amounted to a program of what he called “de-Indianization,” which he critiqued as working towards the eventual disappearance of Indigenous cultures. He saw right through the ostensibly benevolent pretenses of this older model of *indigenismo*,

⁵⁰ Arturo Warman, Margarita Nolasco, Guillermo Bonfil, Mercedes Olivera, and Enrique Valencia, *De eso que llaman antropología Mexicana* (Mexico City: Editorial Nuestro Tiempo, 1970). See also Guillermo de la Peña, “Social and Cultural Policies toward Indigenous Peoples: Perspectives from Latin America,” *Annual Review of Anthropology* 34 (2005): 731.

⁵¹ See also Pablo Gonzalez Casanova, “Internal Colonialism and National Development,” *Studies in Comparative International Development* 1, no. 4 (1965): 27-37.

⁵² See also Rodolfo Stavenhagen, “Classes, Colonialism, and Acculturation: Essay on a System of Inter-Ethnic Relations in Mesoamerica,” *Studies in Comparative International Development* 1, no. 6 (1965): 53-77.

⁵³ María L. O. Muñoz, *Stand Up and Fight: Participatory Indigenismo, Populism, and Mobilization in Mexico, 1970-1984* (Albuquerque: University of New Mexico Press, 2016).

which was really a paternalistic and discriminatory system of cultural control. “The rights of equality were recognized, but not the right to be different.”⁵⁴ This idea, that Indigenous peoples had the inherent right to be different, was revolutionary and foreshadowed an important theme that would eventually come through with the adoption of the 2007 Declaration. Unlike the prior model of integration, this new vision embraced cultural pluralism and diversity. Moreover, to the extent that “de-Indianization” involved forms of forced assimilation and the destruction of Indigenous cultures, Bonfil Batalla offered an early version of what would become known as the cultural integrity norm. He was also especially critical of the tendency of non-Indigenous peoples to parse out the so-called “good” or “bad” aspects of Indigenous cultures, without any say of Indigenous peoples themselves. “In summary, the attempt was to annul what was left of the decision-making capacity of Indian peoples after the constant attacks of colonial domination.”⁵⁵

In 1975 Bonfil Batalla helped organize Mexico’s first National Congress of Indian Peoples, which was attended by over 2,500 Indigenous delegates from all over the country. Unlike prior initiatives under *indigenismo*, this even provided the opportunity for Indigenous peoples to take the lead in shaping their own programs and initiatives. The topics covered at the Congress included many of the issues at stake in the 1957 Indigenous and Tribal Populations Convention (No. 107), such as land rights and economic development. However, the Congress departed from this older approach by introducing new issues, such as the preservation of languages, bilingual and bicultural education, the status of Indigenous women, and the expansion of youth organizations.⁵⁶

⁵⁴ Guillermo Bonfil Batalla, *México Profundo: Reclaiming a Civilization* (trans. Philip A. Dennis) (Austin: University of Texas Press, 1996), 115.

⁵⁵ *Ibid.*, 119.

⁵⁶ Muñoz, *Stand Up and Fight*, 139.

More dramatically, the outcome document produced by the Congress demanded “respect for the self-determination of Indigenous peoples,” although this declaration was careful to disavow any forms of separatism and the threat of state secession.⁵⁷

By that point, the language of self-determination was vocalized by a transnational network of Latin American anthropologists. In 1971, the World Council of Churches convened nearly a dozen prominent Latin American anthropologists for the Conference of Barbados. They produced an outcome document that explicitly called for the “liberation of the Indians” and a “radical break with the existing social situation.” In effect, this meant “the termination of colonial relationships” and “the creation of a truly multi-ethnic state in which each ethnic group possesses the right to self-determination and the free selection of available social and cultural alternatives.”⁵⁸ This reference to self-determination was limited to an internal sense of the term. Unlike the Indigenous activists from North America who would convene at the 1977 NGO Conference in Geneva and call for self-determination in the external sense, meaning full decolonization and the right to statehood, the 1971 Conference of Barbados focused more on cultural autonomy.⁵⁹

The call for Indigenous self-determination by the 1971 Conference of Barbados was linked to charges against Latin American states for the more or less intentional destruction of Indigenous groups. For example, the outcome document said that such

⁵⁷ Ibid, 140.

⁵⁸ Miguel Alberto Bartolome, Guillermo Bonfil Batalla, Victor Daniel Bonilla, Gonzalo Castillo Cardenas, Miguel Chase Sardi, Georg Grünberg, Nelly Arvelo de Jiminez, Esteban Emilio Mosonyi, Darcy Ribeiro, Scott S. Robinson, and Stefano Varese, *Declaration of Barbados* (Copenhagen: International Work Group for Indigenous Affairs Document No. 1, 1971), 3. See also Charles R. Hale, “Activist Research v. Cultural Critique: Indigenous Land Rights and the Contradictions of Politically Engaged Anthropology,” *Cultural Anthropology* 21, no. 1 (2006): 99-100.

⁵⁹ Engle, *The Elusive Promise of Indigenous Development*, 56-57.

states were guilty of committing “genocide and ethnocide.”⁶⁰ Left unstated was the conceptual distinction between the two. As we will see in the following sub-section, the term “ethnocide” was then in the process of being recuperated as a rhetorical instrument to critique the assimilatory pressures faced by Indigenous peoples in Latin America. Christian missionaries were especially singled out in this regard: “The missionary presence has always implied the imposition of criteria and patterns of thought and behavior alien to the colonized Indian societies. A religious pretext has too often justified the economic and human exploitation of the aboriginal population.”⁶¹ The document concluded by stating that “anthropologists must denounce systematically by any and all means cases of genocide and those practices conducive to ethnocide.”⁶²

Anthropologists from Latin America were not alone in this disciplinary call to arms, as American and European anthropologists were also shifting towards more critical positions favoring the rights of Indigenous peoples. Emblematic of this transformation was the early career of John Bodley, who conducted fieldwork with the Asháninka people in the Peruvian Amazon during the mid- to late-1960s. After finishing his doctoral dissertation, he published an advocacy report that cast doubt on traditional anthropological assumptions.⁶³ He dismissed the view “that the extinction of tribal life is natural, inevitable, and beneficial,” a myth that he said was a tragic “self-fulfilling prophecy.”⁶⁴ “These views must be reassessed,” he argued, “now that it is becoming apparent that the benefits of economic development and advanced technology may not be

⁶⁰ Bartolome, et al., *Declaration of Barbados*, 4.

⁶¹ Ibid, 5.

⁶² Ibid, 6.

⁶³ John Bodley, *Campa Socio-Economic Adaptation* (PhD Dissertation: University of Oregon, 1970); and idem, *Tribal Survival in the Amazon: The Campa Case* (Copenhagen: International Work Group for Indigenous Affairs Document No. 5, 1972).

⁶⁴ Ibid, 12 and 13.

worth their price of worldwide environmental degradation which may ultimately threaten the existence of all human life.”⁶⁵ He recommended that the Peruvian government take steps to insure the Asháninka people’s “right to continued cultural independence.”⁶⁶ This argument was expanded in Bodley’s first book, *Victims of Progress* (1975), which provided a global survey of the destructive effects of modern technology and development on Indigenous peoples.

Bodley’s early advocacy work was supported by a growing transatlantic network of non-Indigenous anthropologists from the Global North who were similarly concerned with the survival of Indigenous peoples. We have already introduced the IWGIA as one of the first non-governmental organizations concerned with Indigenous rights. It was established as a result of a roundtable on “The Politics of Indigenous Affairs: Ethnocide and Genocide” at the 38th International Congress of Americanists, which took place in 1968 Stuttgart, Germany.⁶⁷ The roundtable was comprised of anthropologists returning from fieldwork in Latin America, where they documented major human rights violations against Indigenous peoples, particularly in Brazil, Columbia, Paraguay, Peru, and Venezuela.⁶⁸ Their primary focus was documenting genocidal atrocities and patterns of forced integration through the publication of research documents, as well as campaigning governments and international organizations to promote Indigenous rights. Instead of maintaining the traditional posture of neutrality and disinterested scholarship, the IWGIA thus positioned itself as a scholarly organization committed to activism.⁶⁹

⁶⁵ Ibid, 12.

⁶⁶ Ibid, 13.

⁶⁷ Anonymous, “Calendar of Meetings,” *Latin American Research Review* 3, no. 4 (1968): 97-98.

⁶⁸ Dahl, *IWGIA*, 10.

⁶⁹ Andrew Gray, “On Anthropological Advocacy,” *Current Anthropology* 31, no. 4 (1990): 387.

One of the earliest and most notable, if controversial, IWGIA campaign was on behalf of the Aché people, who are a Guaraní-speaking Indigenous group located in eastern Paraguay. In 1973, the IWGIA published a report entitled *The Aché Indians: Genocide in Paraguay*, authored by a young West German ethnologist, Mark Münzel, who had conducted fieldwork in the region in the late 1960s.⁷⁰ The report outlined a history of violence against the Aché since the early 20th century, when an historical pattern of “manhunts” began in order to provide forced laborers for the construction of roads and other infrastructure projects in the development of the Paraguayan state. By the 1950s, settlers organized paramilitary units that committed massacres and other atrocities against the Aché. One prominent settler named Manuel de Jesús Pereira was a functionary of the Native Affairs Department of the Ministry of Defense who turned his countryside farm into a “reservation” where slavery, sexual violence, and murder was rife.

The report also included dramatic first-hand observations from Münzel. For example, the author claimed that, “on 30 November 1971, I myself heard Pereira (whom I had seen some hours before completely drunk) boast that he had shot down a man: ‘I am a great killer!’ I then saw the victim, still alive but crippled for the rest of his life.”⁷¹ Elsewhere Münzel describes how torturous methods were used to destroy “the identity and even the self-respect of the Achés as human beings. ... Pereira told us that it was necessary in order to ‘civilize’ the Aché, to break the power of their chiefs, who were always the most rebellious among them.”⁷² Given the author’s rhetorical appeal to ethos

⁷⁰ Mark Münzel, *The Aché Indians: Genocide in Paraguay* (Copenhagen: International Work Group for Indigenous Affairs Document No. 11, 1973).

⁷¹ Ibid, 21.

⁷² Ibid, 31.

and pathos, the report makes for a dramatic and sensational read, as Pereira is depicted as a perfect villain. With a prosecutorial tone, Münzel even charged the Paraguayan government with committing genocide. The latter term is used only sparingly in the report and without any definition, as if Münzel believed the applicability of this keyword was self-evident, given not only the threat of physical annihilation but also the destruction of Aché identity.⁷³

Although Münzel's IWGIA report was full of detailed information, its rhetorical thrust contained an element of sensationalization. After all, it was after all designed to garner international attention. In fact, the story was picked up by American media outlets, including a January 1974 issue of the *New York Times* that quoted not only Münzel but also the highly respected Paraguayan anthropologist, Miguel Chase-Sardi, who said thatm “taking into account our obligation to respect all cultures, anything short of preserving the Aché's traditional way of life would amount to cultural genocide.”⁷⁴ Interestingly, Chase-Sardi used this alternative terminology instead of *genocide*, per se, thereby potentially sidestepping the definitional pitfalls associated with this broader semantic field. Nevertheless, as a result of this intervention, Chase-Sardi was soon arrested, tortured, and eventually deported. It should be noted that Paraguay was ruled at the time by a right-wing military dictatorship under the presidency of Alfredo Stroessner, a long-standing US ally in the Cold War, and as with other right-wing dictatorships in Latin

⁷³ Ibid, 32. In a much later publication, Münzel cited the 1948 Convention. See idem, “Prólogo: 35 Años Después,” in *Los Aché del Paraguay: Discusión de un Genocidio*, eds. Alejandro Parellada and María de Lourdes Beldi de Alcántara (Copenhagen: International Work Group on Indigenous Affairs, 2008), 14-15.

⁷⁴ Jonathan Kandell, “Slavery Just One Threat Facing Paraguay Tribe,” *New York Times* (21 January 1974), 1 and 8.

America, this regime employed the “National Security Doctrine” to justify the militaristic suppression of domestic opponents smeared as “communists.”⁷⁵

By the mid-1970s, such efforts turned the Aché case into an international *cause célèbre*. The Norwegian, Swedish, and Danish governments spoke out against the Aché at the UN.⁷⁶ In March 1974, Richard Arens, an American professor of international law at Temple University, acting as a representative of the International League for the Rights of Man, formally addressed the Secretary General of the UN regarding the situation in Paraguay. Soon after, a representative from the Anti-Slavery Society of Great Britain addressed the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Finally, that same year US Senator James Abourezk formally denounced the genocide of the Aché, thereby instigating a diplomatic scandal that led to the US ambassador to Paraguay being recalled.⁷⁷ In light of this international controversy, the Stroessner regime issued a formal response in the Asunción daily newspaper, *La Tribuna*, where the Paraguayan Minister of Defense asserted that, “in our country there exists no genocide in *the full sense of the word*.”⁷⁸ At a separate press conference, the same government official reasoned that there was no official policy for group destruction, and that without any such intent there could be no genocide, *per se*.⁷⁹

⁷⁵ See generally Daniel Feierstein, “National Security Doctrine in Latin America: The Genocide Question,” in *The Oxford Handbook of Genocide Studies*, eds. Donald Bloxham and A. Dirk Moses (New York: Oxford University Press, 2010), 489-508; and Marcia Esparza, Henry R. Huttenbach, and Daniel Feierstein, eds., *State Violence and Genocide in Latin America: The Cold War Years* (New York: Routledge, 2010).

⁷⁶ Münzel, *The Aché Indians*, 24; René D. Harder Horst, *The Stroessner Regime and Indigenous Resistance in Paraguay* (Gainesville: University Press of Florida, 2007), 86; and Dahl, *IWGIA*, 28.

⁷⁷ For a review of developments during this time, see Richard Arens, “Introduction,” in *Genocide in Paraguay*, ed. Richard Arens (Philadelphia: Temple University Press, 1976), 3-18.

⁷⁸ Münzel, *The Aché*, 25, emphasis added.

⁷⁹ *Ibid.* See also Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven: Yale University Press, 1982), 34; and idem, *The Prevention of Genocide* (New Haven: Yale University Press, 1985), 12.

Such public condemnations clearly struck a nerve, leading to NGO in-fighting between Indigenous rights organizations, particularly between the IWGIA and Cultural Survival. Cultural Survival was founded in 1972 by the Harvard anthropologist, David Maybury-Lewis, an expert on the kinship systems of lowland South American peoples who was committed to balancing between scholarship and activism. In 1978, the US Agency for International Development office in the American embassy in Asunción commissioned Maybury-Lewis to prepare a report on the situation of the Aché. Along with MIT anthropologist James Howe, Maybury-Lewis made two trips to Paraguay in late 1978 and early 1979. Their subsequent report was confidential at first and was only publically released after being obtained through a Freedom of Information Act, at which point it was published by Cultural Survival.⁸⁰ Compared to the IWGIA report, Maybury-Lewis and Howe were much softer on the Stroessner regime, concluding that there was no state policy of extermination, and that the government could only be faulted for sins of omission rather than commission. Moreover, they criticized the allegations made by Münzel in particular, whose rhetoric was suggested as being unbalanced and inflammatory.⁸¹ Their position was largely informed by a Peace Corps volunteer with the Aché at the time, Kim Hill, who went on to co-author a monumental ethnography on these people which also reasoned that genocide had not occurred. Evoking the “uniqueness” argument from Holocaust and genocide studies, Hill’s 1996 monograph concluded that there is no “moral justification for equating the Aché history to that of the

⁸⁰ David Maybury-Lewis and James Howe, *The Indian Peoples of Paraguay: Their Plight and Their Prospects* (Cambridge: Cultural Survival Special Report no. 2, 1980).

⁸¹ Ibid, 35-41. See also Richard Reed and John Renshaw, “The Aché and Guaraní: Thirty Years after Maybury-Lewis and Howe’s Report on Genocide in Paraguay,” *Tipiti: Journal of the Society for the Anthropology of Lowland South America* 10, no. 1 (2012): 1-18.

Jews during the Second World War. Such loose analogies simply dilute the significance and horror of actual genocide when it is observed.”⁸²

The other prominent non-indigenous NGO in the field, Survival International, entered the debate in 1992 when it released a press release critical of Cultural Survival on a number of grounds, one of which concerned Maybury-Lewis and Howe’s report. This public debate proved to be embarrassing for all parties. For example, *The Nation* reported on Survival International’s press release and framed it as a petty “vendetta” or a “turf war” between rival NGOs.⁸³ In a subsequent exchange of letters in that same magazine, Stephen Corry, the director of Survival International, responded that the Maybury-Lewis and Howe report amounted to “a whitewash of a genocidal government.”⁸⁴ This line of criticism was later elaborated in a Survival International newsletter, which argued that Cultural Survival was essentially maintaining the official line of a US government that was concerned with protecting a Cold War ally.⁸⁵ Most recently, in the summer of 2014, soon after an Aché organization initiated a lawsuit in an Argentine federal court, the two organizations went at it again.⁸⁶ Unfortunately, this debate between NGOs shows no signs of resolution, an impasse perhaps due to the contested nature of genocide as a critical keyword.

⁸² Kim Hill and A. Magdalena Hurtado, *Aché Life History: The Ecology and Demography of a Foraging People* (New York: Aldine de Gruyter, 1996), 169.

⁸³ Alexander Cockburn, “Beat the Devil,” *The Nation* 255, no. 9 (September 1992): 314-315 and 329.

⁸⁴ Stephen Corry, “Exchange,” *The Nation* 255, no. 18 (30 November 1992): 650.

⁸⁵ John Renshaw, “The Denial of Genocide” (London: Survival International, 1993).

⁸⁶ Survival International, “South American Tribe Sues over Historic Genocide” (1 July 2014), available at <http://www.survivalinternational.org/news/10264>; and Suzanne Benally, “Cultural Survival Supports the Aché in Their Struggle for Justice, Rights, and Self-determination,” *Cultural Survival* (7 July 2014), available at <http://www.culturalsurvival.org/news/cultural-survival-supports-ache-their-struggle-justice-rights-and-self-determination>.

Recuperating the Ethnocide Concept

Yet by the 1970s, the semantic field around the keyword “genocide” began to shift. In the English-speaking world at least, a nascent body of scholarship on genocide began forming under the shadow of the Holocaust, just as the public memory of the Holocaust gained increasingly more and more normative force. This led to a disciplinary orientation towards an extremely restrictive conception, even narrower than the already enclosed definition provided by the 1948 Convention. With the Holocaust as a prototype, genocide was reconceived as nothing more than mass murder.⁸⁷ In other words, the conceptual boundary between physical and cultural destruction became even starker, as was the ontological assumption that genocide strictly concerned the biophysical existence of a people, rather than the social construction of a *genos*. As a result, this disciplinary orientation left behind an even wider chasm from Lemkin’s original conception that included the category of cultural genocide.

This semantic gap began to be filled by a couple of radical French anthropologists – Robert Jaulin (1928-1996) and Pierre Clastres (1934-1977) – who recuperated the lost idea of “ethnocide.” Recall from Chapter One that, in an oft-overlooked footnote from *Axis Rule in Occupied Europe*, Lemkin originally considered “ethnocide” as a conceptual alternative to “genocide,” insofar as the root word *ethnos* could have been used instead of the *genos*.⁸⁸ Of course, he abandoned this semantic alternative. Moreover, we have already seen how Lemkin’s originally broad conceptualization was whittled down in the

⁸⁷ David Moshman, “Conceptual Constraints on Thinking about Genocide,” *Journal of Genocide Research* 3, no. 3 (2001): 432-436; and Alexander Laban Hinton, “Critical Genocide Studies,” *Genocide Studies and Prevention* 7, no. 1 (2012): 7.

⁸⁸ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, Division of International Law, 1944), 79, fn. 1.

drafting of the 1948 Genocide Convention, leaving the category of “cultural genocide” outside the corpus of international criminal law. Faced with this conceptual narrowing of “genocide,” the concept of “ethnocide” was recovered by the 1970s as a terminological alternative to cover something analogous to the lost category of “cultural genocide,” or the non-murderous acts involved with the social destruction of groups.⁸⁹

With that said, the recuperated concept of “ethnocide” was not specifically equivalent to the lost concept of “cultural genocide.” Recall once again that Lemkin (as well as the Secretariat draft, which was the first draft of the 1948 Convention) understood the category of cultural genocide as a type of genocidal action. It was not a *sui generis* variant of the master concept, however. Quite simply, cultural genocide *was* genocide, per se, just as physical genocide and biological genocide were distinct parts of an otherwise generic conception. Yet this new idea of “ethnocide” was re-coined as a conceptual alternative, based on essential difference from “genocide,” strictly speaking. As we will see, both Jaulin (who used the term first) and Clastres (who used it in turn) followed the dominant assumption that genocide was nothing more than mass murder. Accordingly, they proposed “ethnocide” to be an entirely distinct concept. In other words, both maintained that this type of group destruction was conceptually distinguishable from intentional physical annihilation, and in this vein, they tacitly maintained the conventional rendering of genocide as categorically distinct from ethnocide. Nevertheless, their usage of ethnocide was revolutionary, insofar as it implied a moral equivalence to genocide, per se.

⁸⁹ Bartolomé Clavero, *Genocide or Ethnocide, 1933-2007: How to Make, Unmake, and Remake Law with Words* (Milan: Giuffrè Editore, 2008), 100.

Before we unpack this new conceptualization, let us provide some background on Jaulin and Clastres. They were both products of the Laboratory of Social Anthropology, founded in 1960 by the famous French anthropologist, Claude Lévi-Strauss, to support ethnographic fieldwork in South America.⁹⁰ Lévi-Strauss was a proponent of structuralism, an intellectual paradigm introduced in Chapter Two. His work posited a universal and innate biochemistry of the mind and underlying patterns of human thought that ostensibly provide the elementary structures of social norms and institutions.⁹¹ Yet in the aftermath of the May 1968 revolutionary fervor, the structuralist paradigm suffered a wave of intense critique, along with other “great ideologies,” such as Communism, Catholicism, and the post-World War II form of French nationalism known as Gaullism. This climate produced a radicalization effect for young scholars, both politically and theoretically.⁹²

It was in this context that the keyword “ethnocide” was re-coined by the French ethnologist, Robert Jaulin, in order to describe what he considered to be the predatory impulse of Western civilization in consuming and destroying the world’s cultural diversity. Jaulin came up with this idea while conducting field work with the Barí people on the Colombian borderland region with Venezuela. Although the Barí first made contact with Europeans in the late 18th century, they managed to hold on to much of their land and culture until the turn of the 20th century, when oil was discovered on their

⁹⁰ Barbara Glowczewski, “Guattari and Anthropology: Existential Territories among Indigenous Australians,” in *The Guattari Effect*, eds. Eric Alliez and Andrew Goffey (New York: Continuum, 2011), 101.

⁹¹ Alan Barnard, *History and Theory in Anthropology* (New York: Cambridge University Press, 2004), 125-135.

⁹² Pierre-Philippe Rey, “Anthropology and Commitment: From Politics to Practice,” *European Journal of Development Research* 3, no. 2 (1991): 44-58; and Jacob Joseph Collins, *The Anthropological Turn in French Thought: The 1970s to the Present* (PhD Dissertation: University of California Los Angeles, 2013).

territory, unleashing a torrent of social and cultural changes, as well as mass death from measles.⁹³ Following the structured pattern of settler colonialism, the Bari people were absorbed into the postcolonial formation of modern states in the region. The combination of Christian missionaries, foreign oil companies, and the Venezuelan and Colombian militaries were multiple vectors leading to the extermination of Barí culture, the complete and utter destruction of their way of life. Jaulin called this “ethnocide.”

Unfortunately, hardly any of Jaulin’s writings have been translated into English, but even in its original language the text is said to be ambiguous, cryptic, and obscure.⁹⁴ Although based on ethnographic field work, his argument was less concerned with depicting the “Other” than with critically self-reflecting on the treachery of Western “civilization.” The title of his book, *La paix blanche: introduction à l’ethnocide* (1970), or “the white peace,”⁹⁵ was ironic, the meaning of which might be in reference to the absorption of the Bari people into the normative “whiteness” that defined the incipient settler formations of many postcolonial nation-states in Latin America. As with the process of bleaching, the settler colonial absorption of Indigenous peoples aims to blot out or suppress differences in order to achieve an imagined degree of homogeneity within the sovereign boundaries of independent states. An inherent outcome of this ongoing global process has been the precipitous decline in the sum totality of culture in the world today. This erasure of cultural diversity is the essence of Jaulin’s idea of “ethnocide.”

Ethnocide is driven by a deep antipathy towards Indigenous cultures; it is based on the fundamental negation of the “Other,” as well as an extreme sense of ethnocentrism

⁹³ Roberto Lizarralde and Stephen Beckerman, “Historia contemporánea de los Barí,” *Anthropologica* 58 (1982) 3-52.

⁹⁴ Julian Pitt-Rivers and Robert Jaulin, “Ethnology and History,” *RAIN* 3 (1974): 1-3.

⁹⁵ Robert Jaulin, *La Paix blanche: Introduction à l’ethnocide* (Paris: Éditions du Seuil, 1970).

and superiority. As noted, *La paix blanche* was about the inherent tendency of European civilization to bleach out other cultural worlds, to consume and disintegrate the traditional roots of Indigenous peoples. This inherent tendency is not necessarily rooted in aggression or intense hatred of the Indigenous “Other,” as much as it is based on its essential negation. Beginning with the early modern period of world history, he describes a process in which the identities of non-European cultures have been swallowed up by the West. He describes “this civilization of ours” as a destructive “movement of emptying, or Decivilization.”⁹⁶

A sort of discomfort accompanies today the current proposition according to which there is a progressive civilization on the one hand, savageries on the other hand. Things are reversed: one asks: *‘Did not Civilization consist of those multiple and distinct civilizations, and was not their procedure of death our own common and unitary Decivilization?’*⁹⁷

“Civilization” is thus critically inverted in this formulation. No longer taken for granted as a source of normative goodness, “civilization” begins to look like a disease spreading death and destruction, or the immersion of bleach atop a once colorfully diverse membrane. He argues that Western “civilization” has an inherent tendency to consume and dispose of other cultural worlds. “We” have done this to affirm ourselves through the negation of the “Other.” Indeed, Jaulin suggests that the West has been unified through ethnocide. Despite all of the wars fought between Western powers, including most recently World Wars I and II, these were nothing more than the squabbles between siblings. Together, all of the West has shared into a “joint campaign ... aimed at the destruction of multiple human civilizations.”⁹⁸ The extermination of the Bari culture

⁹⁶ Pitt-Rivers and Jaulin, “Ethnology and History,” 2

⁹⁷ Ibid.

⁹⁸ Ibid, 3.

is thus a symptom of a much deeper disease, and it's one that is at the heart of ourselves.

"We are reminded of our savagery and of the need to abandon ourselves," he concluded.⁹⁹ Indeed, although Jaulin (like Clastres, who followed his formulation) pushed back against structuralism, he offered his own grand, essentialized argument about the inherently destructive nature of Eurocentrism and colonialism.

Jaulin's construal of "ethnocide" was soon followed by Pierre Clastres, who did his fieldwork amongst the aforementioned Aché people in Paraguay beginning in early 1960s. Like Jaulin, he too made a grand, essentialized argument about the destructive pathologies of Western "civilization." Indeed, this deep suspicion of "civilization" was a common theme amongst critical anthropologists at the time. For example, we noted this theme above in reference to the American anthropologist John Bodley, whose book, *Victims of Progress*, captures this fundamental rejection of the tenets of modernization theory. Clastres thus wrote about "primitive societies" as a "mirror ... of our own civilization."¹⁰⁰ As summarized by one of his editors, "anthropology can make the image of the 'others' function in such a way that it reveals something about 'us,' certain aspects of our own humanity that we are not able to recognize as our own."¹⁰¹

In a way that was reminiscent of Jean-Jacques Rousseau's notion of the "noble savage," Clastres' ethnographic work was a form of anarcho-primitivism. He believed that stateless societies such as the Aché stood outside the Hegelian dialectic at the heart of Marxism's core theory of historical materialism, "hoping to find an extra-European

⁹⁹ Ibid.

¹⁰⁰ Pierre Clastres, *Archaeology of Violence* (Trans. By Jeanine Herman) (Los Angeles: Semiotext[e], 2010), 86.

¹⁰¹ Eduardo Viveiros de Castro, "Introduction," in Clastres, *Archaeology of Violence*, 25.

point of view on European society.”¹⁰² His signature work, *Society against the State* (1974), reflected on the distribution of non-coercive power and authority in chieftainships. According to him, Indigenous chieftains had no inherent rights to govern. Rather, as servants of society, their only sources of power were drawn from their oratorical skills of persuasion, their generosity in the transfer of goods, and the bonds of kinship.¹⁰³ The thrust of his critique was against the ethnocentric value judgment of Western scholars and administrators against Indigenous societies as being somehow inferior, archaic, or lacking. Instead, he spoke in glowing and heavily idealized terms: “Given their political organization, most Indian societies are distinguished by their sense of democracy and taste for equality.”¹⁰⁴

To be sure, Clastres’ writings were prone to hyperbole. For one thing, his romantic idealization of Indigenous peoples has been open to critique. As one interlocutor posited, “Clastres’ rendition of the Guayaki [another term for the Aché] as morally superior, ‘living fossils, throwbacks to a distant period, displays what [Clifford] Geertz (1998) aptly notes is a ‘Rousseauian primitivism’ – the nostalgic perception that the free and unfettered ‘noble savages’ are radically unlike us moderns.”¹⁰⁵ Similarly, Clastres’ critique of the West was prone to overstatement: “Don’t be fooled by appearances,” he said in an interview. “The machine of the state, in all Western societies, is becoming more and more statist ... The statist machine is heading towards a kind of

¹⁰² Samuel Moyn, “Of Savagery and Civil Society: Pierre Clastres and the Transformation of French Political Thought,” *Modern Intellectual History* 1, no. 1 (2004): 58.

¹⁰³ Pierre Clastres, *Society against the State: Essays in Political Anthropology*, trans. Robert Hurley (New York: Zone Books, 1987 [1974]), 207.

¹⁰⁴ *Ibid.*, 28.

¹⁰⁵ Bartholomew Dean, “Critical Re-Vision: Clastres’ Chronicle and the Optic of Primitivism,” *Anthropology Today* 15, no. 2 (1999): 10; quoting Clifford Geertz, “Deep Hanging Out,” *New York Review of Books* 45, no. 16 (1988): 69-73.

fascism.”¹⁰⁶ Finally, Clastres often slipped into the trope of extinction, saying that Indigenous peoples had suddenly “vanished” and gone “extinct,” thereby undercutting the possibility of Indigenous survival.¹⁰⁷ In a manner reminiscent of Malinowski, he claimed that “soon, there will be no more Indians.”¹⁰⁸

With that said, we have already noted that the Aché during the 1960s were faced with an extermination campaign by the Paraguayan government and settlers. It was in this context that Clastres turned to Jaulin’s concept of “ethnocide.”¹⁰⁹ In his review of the concept, Clastres began by noting (incorrectly, as it happens) that “a few years ago, the term ethnocide did not exist,” and that it only recently emerged because “we felt it inadequate or inappropriate to use the much more widely used ‘genocide’ to satisfy ... a certain need for terminological precision.”¹¹⁰ Unfortunately, this presumed need for “terminological precision” was steeped in an ignorance of the conceptual origins of genocide, as Clastres never once mentioned Lemkin and instead uncritically followed the Holocaust-centric conception that was then falling into place. “Created in 1946 at the Nuremberg trials,” he stated incorrectly, “the legal conception of genocide” was said to refer to “the systematic extermination of European Jews by German Nazis. The legal definition of the crime of genocide is rooted, thus, in racism.”¹¹¹ Herein lied the key difference:

If the term genocide refers to the idea of “race” and to the will to exterminate a racial minority, ethnocide signals not the physical destruction of men (in which case we remain within a genocidal situation), but the destruction of their culture.

¹⁰⁶ Quoted in Moyn, “Of Savagery and Civil Society,” 72.

¹⁰⁷ Clastres, *Society against the State*, 81; and idem, *Archaeology of Violence*, 154.

¹⁰⁸ Quoted in Moyn, “Of Savagery and Civil Society,” 73.

¹⁰⁹ Pierre Clastres, “On Ethnocide,” (trans. by Julian Pefanis and Bernadette Maher) *Art & Text* 28 (1988): 51-58. This essay was originally published in French in 1974. It was then republished once again in English in idem, *Archaeology of Violence*, 101-113.

¹¹⁰ Ibid, 101.

¹¹¹ Ibid, 101-102.

Ethnocide is then the systematic destruction of ways of living and thinking of people different from those who lead this venture of destruction. In sum, genocide assassinates people in their bodies, ethnocide kills them in their minds. In either case, it is still a question of death, but of a different death: physical and immediate elimination is not cultural oppression with deferred effects.¹¹²

As critiqued above, this conception of “ethnocide” as distinct from “genocide” is rooted in a misunderstanding of genocide’s original formulation. Indeed, Clastres went even further than the 1948 Convention in enclosing the meaning of genocide around the biophysical dimension of group destruction. Accordingly, this new conception of “ethnocide” is rooted in a very problematic distinction from the keyword of “genocide.”

Nevertheless, there is value in Clastres’ conceptual parsing, insofar as genocide and ethnocide involved different ideological motivations. Both entailed a disdain towards the difference of the “Other.” In other words, both genocide and ethnocide shared the same desired end, namely, the erasure of difference through the elimination of the “Other.” What distinguished them was the means. On the one hand, “the genocidal mind ... wants purely and simply to deny difference; the others are exterminated because they are absolutely bad.” On the other hand, ethnocide “admits a relativity of evil in difference: the others are bad, but they can be improved, by obliging them to transform themselves to the point of total identification, if possible, with the model proposed to or imposed on them.”¹¹³ Thus, whereas genocide was motivated by a pessimistic desire to annihilate difference, ethnocide was driven by an optimistic desire to consume or absorb difference. The latter was optimistic in the sense that “ethnocide is practiced for the good of the Savage. ... The spirituality of ethnocide,” he added, in what amounted to a serious

¹¹² Ibid, 103.

¹¹³ Ibid.

critique of the “civilizing mission,” “is the ethics of humanism.”¹¹⁴ Indeed, ethnocide was not seen as an act of destruction. On the contrary, it was posited by its perpetrators as a humanitarian act of uplifting.

Although not cited by Clastres, his point here about the difference between the exclusion and inclusion of difference was made earlier by his mentor, Lévi-Strauss. In the latter’s 1955 memoir, *Tristes Tropiques*, he distinguished between two types of ways that societies deal with strangers: anthropophagic versus anthropoemic.¹¹⁵ As summarized by Zygmunt Bauman, the anthropophagic approach involved “annihilating the strangers by devouring them and then metabolically transforming into a tissue indistinguishable from one’s own.”¹¹⁶ In this analogy, the anthropophagic approach was akin to ethnocide, insofar as it entailed the optimistic incorporation of difference. In contrast, genocide was akin to the anthropoemic approach. Again, as summarized by Bauman, this latter approach involved “vomiting the strangers, banishing them from the limits of the orderly world and barring them from all communication with those on the inside.”¹¹⁷

Yet this analogy was not entirely perfect. Lévi-Strauss equated the anthropophagic approach with so-called “primitive” societies that (supposedly) practiced cannibalism, whereas the anthropoemic approach was more “like our own.”¹¹⁸ Without denying the latter association, however, Clastres was adamant that the practice of ethnocide was an integral “characteristic of our own world.”¹¹⁹ Indeed, following his critique from *Society against the State*, he posited the state as inherently ethnocidal. As

¹¹⁴ Ibid, 104 and 105.

¹¹⁵ Claude Lévi-Strauss, *Tristes Tropiques* (trans. John Russell) (New York: Criterion, 1961 [1955]), 386.

¹¹⁶ Zygmunt Bauman, *Postmodernity and its Discontents* (New York: New York University Press, 1997), 18.

¹¹⁷ Ibid.

¹¹⁸ Lévi-Strauss, *Tristes Tropiques*, 386.

¹¹⁹ Clastres, *Archaeology of Violence*, 107.

he put it, the state is a “centripetal force” that tends to crush “opposite centrifugal forces.” In other words, the state works towards “the dissolution of the multiple into One.”¹²⁰ In order to illustrate this fundamental tendency, he cited the example of the modern French state. Prior to the modern era, there was a great diversity of provincial cultures, but as a result of the French Revolution, and even more so with the inauguration of the Third Republic, there was a process of national integration that involved “the suppression of differences.”¹²¹ He concluded:

This brief glance at our country's history suffices to show that ethnocide, as a more or less authoritarian suppression of sociocultural differences, is already inscribed in the nature and functioning of the state machine, which standardizes its rapport with individuals: to the State, all citizens are equal before the law. To affirm that ethnocide, starting with the French example, is part of the State's unifying essence, logically leads to the conclusion that all state formations are ethnocidal.¹²²

For all intents and purposes, therefore, Jaulin and Clastres introduced an entirely new concept of “ethnocide.” On the one hand, by ignoring Lemkin’s original work, they ended up reinforcing what was becoming a dominant assumption about “real” genocide involving physical annihilation, thereby naturalizing the categorical dismissal of “cultural genocide” from its definitional rubric. On the other hand, however, by refashioning the concept of “ethnocide,” they provided an alternative that was capable of filling the gap left behind by the omissions of the 1948 Convention.¹²³ Moreover, their work was reflective of the important transformations of the 1970s. For one thing, although neither Jaulin nor Clastres spoke of human rights, their activism and political commitments

¹²⁰ Ibid, 108.

¹²¹ Ibid, 109.

¹²² Ibid, 110.

¹²³ Ibid, 108.

demonstrated a shift away from disinterested scholarship. Likewise, their conception of “ethnocide” provided theoretical ammunition in the critique of *indigenismo*. As we will see in a subsequent section, this language was about to be used to deconstruct the modernist assumptions behind the old idea of “development.”

Transnational Advocacy Networks at the Art of Declarations in International Law

As we continue to outline the background conditions of possibility behind the intellectual-historical turning point of the 1970s, we finally arrive at the moment that Indigenous activists who were perhaps most responsible for realizing the global shift in attitudes towards Indigenous peoples. This “long” decade saw the formation of what IR theorist and Anishinaabe scholar Sheryl Lightfoot has called “global Indigenous politics,” which she describes as a unique and creative form of international diplomacy that reflects Indigenous values and challenges the state-centric assumptions at the core of the existing international order.¹²⁴ Our present objective is to outline the emergence of global Indigenous politics as a distinct type of “transnational advocacy network,” which refers to transnational communicative structures comprised of social movements, NGOs, civil society groups, and intellectuals, as well as elements from intergovernmental organizations and some state agencies.¹²⁵

We will outline the Indigenous activists and organizations at the core of this particular transnational advocacy network. First we begin with George Manuel (1921-1989), a member of the Shuswap Nation in British Columbia, Canada, and the founder of the World Council of Indigenous Peoples (WCIP), which was established in 1975. Next

¹²⁴ Lightfoot, *Global Indigenous Politics*, 72.

¹²⁵ Margaret E. Keck and Katheryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 9.

we turn to the 1974 formation of the International Indian Treaty Council (IITC), which grew out of the radical American Indian Movement. As we will see, there were tensions between the WCIP and the IITC over their respective strategies and tactics, especially as they related to the political aim of decolonization. In a nutshell, whereas the IITC adopted the absolutist goal of complete decolonization, as in state secession and independence, the WCIP adapted the language of decolonization in order to pursue self-determination without necessarily seceding from settler states. Finally, we conclude with the aforementioned 1977 NGO Conference, which combined absolutist demands for decolonization, while also calling for the expansion of human rights, including the right to cultural integrity.

One last word is necessary before we begin. A defining feature of global Indigenous politics has been the art or practice of preparing and publicizing law-like declarations. Generally speaking, declarations are formal, public statements that signify important normative transformations in attitudes and expectations.¹²⁶ In international law and global governance, declarations are instruments of “soft law,” insofar as they are not legally binding rules, but rather general statements of norms or principles.¹²⁷ They are often used not just to articulate *rights*, but *wrongs* as well. For example, one of the most famous historical examples of this narrative format, the “Declaration of Independence” (1776), was mostly a list of grievances. Indeed, the righting of wrongs is typically the purpose of declarations.¹²⁸ As we will see, in the context of post-1970s Indigenous rights

¹²⁶ Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton & Co., 2007), 113.

¹²⁷ A.E. Boyle, “Some Reflections on the Relationship of Treaties and Soft Law,” *International and Comparative Law Quarterly* 48 (1999): 901; and Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, “The Concept of Legalization,” *International Organization* 54, no. 3 (2000): 402.

¹²⁸ Gayatri Chakravorty Spivak, “Righting Wrongs,” *South Atlantic Quarterly* 103, nos. 2/3 (2004): 523-524.

discourse, the wrongs of genocide (as well as ethnocide) were frequently used in the production of this wave of declarations.

George Manuel's Idea of the Fourth World

The biography of George Manuel emerges from a historical context of Indigenous activism in the Canadian province of British Columbia during the early to mid-20th century. For example, in the very year he was born – 1921 – there was a large potlatch held in the province, despite the fact that such an activity was explicitly against the law. A potlatch is a ceremonial, gift-giving feast that is common amongst Indigenous peoples of the Pacific Northwest. The Canadian government had banned the potlatch since 1884 as part of its relentless pursuit of assimilation policies towards Indigenous peoples.¹²⁹ The 1921 potlatch was thus a major act of defiance, resulting in several dozen individuals getting arrested and sent to jail.

As Manuel matured, one of his most influential mentors was Andrew Paull (1892-1959), a Squamish leader, activist, and survivor of the Indian Residential School (IRS) system. The IRS system was a joint venture between the Canadian government and the Christian churches that began in the late 19th century, the objective of which was expressly captured by a Canadian government administrator in 1920 who said that “I want to get rid of the Indian problem. ... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question.”¹³⁰ Yet one of the unintended consequences of the IRS system was that

¹²⁹ Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: University of British Columbia Press, 1995), 78. More generally, see Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990).

¹³⁰ Quoted in E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), 50.

it fostered a pan-tribal identity amongst a new generation of Indigenous leaders.¹³¹ Thus, in 1916 Paull co-founded the Allied Tribes, which brought together leaders from over a dozen tribal groupings from all across British Columbia to act as a united front in pressing land claims.¹³² After World War II he founded the North American Indian Brotherhood, which intended to be a nationwide organization, and which at some point in the 1950s reportedly sent representatives to the UN, albeit to no avail.¹³³

Manuel was also a product of the IRS system, and in 1959 – the same year his mentor passed away – he became president of the North American Indian Brotherhood. Although this organization was short-lived and soon folded, in 1970 Manuel co-founded a new body called the National Indian Brotherhood. This was a representative national body of leaders from Indigenous bands officially recognized by the Canadian government. Indeed, the National Indian Brotherhood (which in 1978 would become the Assembly of First Nations, which continues to exist) was primarily funded by the Canadian government, a fact that would set it apart from the more radical IITC, as discussed below.¹³⁴ The National Indian Brotherhood was galvanized by a controversial 1969 white paper by the Canadian federal government that proposed the elimination of the “Indian” as a distinct legal category with special rights. It was critiqued as the culmination of the government’s century-long desire to fully assimilate Indigenous

¹³¹ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2000), 126; and idem, “The Indigenous Claim for Recognition in the International Public Sphere,” *Florida Journal of International Law* 17, no. 3 (2005): 589.

¹³² Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Toronto: University of British Columbia Press, 2005), 77.

¹³³ Douglas E. Sanders, *The Formation of the World Council of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, Document 29, 1977), 11; and Franke Wilmer, *The Indigenous Voice in World Politics* (Thousand Oaks, CA: SAGE, 1993), 137.

¹³⁴ Peter McFarlane, *Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement* (Toronto: Between the Lines, 1993).

peoples, thereby solving the “Indian question” once and for all.¹³⁵ In the midst of this backlash, Manuel and the National Indian Brotherhood were at the forefront of a new discourse of Indigenous rights.

In the early 1970s, Manuel travelled abroad and began fashioning a distinctly internationalist approach to Indigenous rights discourse. In 1971 he was part of a government-sponsored trip to New Zealand and Australia, where he noted striking commonalities: “Just as much as the Maoris and the Aborigines, the Indian people in Canada are dark people in a White Commonwealth.”¹³⁶ That following year, he attended the UN Conference on the Human Environment in Stockholm, Sweden. With the help of the IWGIA, he met members of a Sámi community, who are an Indigenous people from northern Sweden. As a result of this meeting, he announced his plan to organize a world conference for Indigenous peoples.¹³⁷ In between these trips, he also traveled to Dar es Salaam, Tanzania, as an official Canadian delegate in the tenth anniversary of Tanganyikan independence.¹³⁸ Manuel was especially impressed by the President of Tanzania, Julius Nyerere (1922-1999), who reportedly said to him that “when the Native peoples come into their own, that will be the Fourth World.”¹³⁹ Manuel appropriated this idea of the Fourth World to articulate his vision of the global community of Indigenous peoples. As elaborated by Anthony Hall:

¹³⁵ Harold Cardinal, *The Unjust Society* (Edmonton: M.G. Hurtig, 1969); and Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006), 12-37.

¹³⁶ Quoted in McFarlane, *Brotherhood to Nationhood*, 159.

¹³⁷ Sanders, *The Formation of the World Council of Indigenous Peoples*, 11.

¹³⁸ McFarlane, *Brotherhood to Nationhood*, 108-119. The east African state of Tanganyika gained its independence from the United Kingdom in 1961 and in 1964 changed its name to the Republic of Tanzania.

¹³⁹ George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills, Ont.: Collier-Macmillan, 1974), 236.

An essential theme running through the seminal conception of the Fourth World was a rejection of the models of social, technological, and economic development implicit in the idea of the Third World, where the imagery of underdevelopment is the underlying premise. ... Third World thinking left little room for recognition of the value, worth, and contemporary applicability of Indigenous knowledge and philosophy. Fourth World thinking is necessarily antagonistic to the bias of Third World thinking, a mode of conceptualization that promotes external models of change for most humanity to mimic and duplicate. Unlike Third World thinking, with its emphasis on imposing standardized, monocultural models of growth and development on different societies, Fourth World thinking emphasizes the freedom of diverse peoples to chart their own distinct courses of social, legal, economic, technological, and political change.¹⁴⁰

Once back in Canada, Manuel set to work on preparing a world conference. With the financial assistance of the World Council of Churches (which had organized the 1971 Conference of Barbados, discussed above), the National Indian Brotherhood sought to obtain NGO status at the UN, which was granted in 1974. A couple of preparatory meetings were held, first in 1974 Georgetown, Guyana, and the second in 1974 Copenhagen, Denmark. The conference was finally held in late October 1975 near Port Alberni, British Columbia, where it was hosted by the Tseshah First Nation. Ironically, the facilities that were used had originally been part of the IRS system.¹⁴¹ The conference was attended by 52 delegates from 19 countries, mostly from the Americas, Oceania, and Scandinavia, and they agreed to establish the World Council of Indigenous Peoples (WCIP). Over the course of several days, a series of workshops were organized dealing with representation at the UN, the charter of the WCIP, issues related social, economic, and political justice, the retention of cultural identity, and the protection of land and natural resources.¹⁴² On the final day of the conference, the conference adopted a

¹⁴⁰ Anthony J. Hall, *The American Empire and the Fourth World* (Ithaca: McGill-Queen's University Press, 2003), 240-241.

¹⁴¹ Sanders, *The Formation of the World Council of Indigenous Peoples*, 14.

¹⁴² *Ibid*, 16.

“Solemn Declaration” that began with the statement: “We the Indigenous Peoples of the world.”¹⁴³ The use here of the first-person, plural pronoun “we” marked the construction of a collective global identity.¹⁴⁴

A second meeting of the WCIP was held in September 1977 in Kiruna, Sweden. Some delegates condemned of the 1957 Indigenous and Tribal Populations Convention (No. 107), which they said “did not involve Indigenous peoples and in fact would continue oppression of Indigenous people wherever concerned.” They added that the WCIP should “be totally involved at all levels when international instruments are to be drafted.”¹⁴⁵ Additionally, the 1977 WCIP conference issued a “Declaration on Human Rights,” which began by stating that the “infamous conditions” resulting from the invasion of Europeans, including “direct and indirect violence, fraud and manipulation ... still prevail as of today.”¹⁴⁶ Without naming it as such, the Declaration was critiquing what we call the “settler colonial present.”¹⁴⁷ Additionally, the Declaration laid out a series of “irrevocable and inborn rights which are due to us in our capacity as Aborigines,” including the right to autonomy, the “right to maintain our culture, language and traditions in freedom,” and the “right to respect our Indigenous culture in all its modes of expression.”¹⁴⁸ As we will see, the enumeration of rights in the form of a declaration would be a common theme during this period.

¹⁴³ Ibid, 17.

¹⁴⁴ Chadwick Allen, *Blood Narrative: Indigenous Identity in American Indian and Maori Literary and Activist Texts* (Durham: Duke University Press, 2002), 211.

¹⁴⁵ Quoted in Jonathan Crossen, *Decolonization, Indigenous Internationalism, and the World Council of Indigenous Peoples* (PhD Dissertation: University of Waterloo, 2014), 170.

¹⁴⁶ World Council of Indigenous Peoples, Second General Assembly, “Declaration on Human Rights,” (Kiruna, Sweden, 24-27 September 1977), available at http://cwip.org/wp-content/uploads/documents/wcip_dec.txt.

¹⁴⁷ Lorenzo Veracini, *The Settler Colonial Present* (New York: Routledge, 2015).

¹⁴⁸ World Council of Indigenous Peoples, Second General Assembly, “Declaration on Human Rights.”

American Indian Movement and the Politics of Rejection

Amongst Indigenous rights advocates in the United States, there was a bifurcation between relatively more conciliatory and more radical approaches. On the conciliatory side, the counterpart to the National Indian Brotherhood from Canada was the National Congress of American Indians. Founded in 1944, and it was the first intertribal organization in the United States that was dedicated to policymaking on a national level. They vigorously opposed governmental policies that sought to terminate the federal recognition of tribal governments, as well as programs that sought to relocate Indigenous peoples from reservations to urban centers. Additionally, they helped tribes work through the Indian Claims Commission process, which arbitrated claims between Native American tribes and the federal government. Although assertive, the efforts of the National Congress of American Indians pursued change primarily through official legal channels.¹⁴⁹

Yet the 1960s saw a radical shift in Indigenous activism, especially amongst a younger generation of Native Americans. Inspired by the contemporaneous radicalism of African American activists and the model of the Black Power movement, young Indigenous activist began to foment the idea of Red Power.¹⁵⁰ Unlike the more conciliatory-minded National Congress of American Indians and the National Indian Brotherhood, both of which worked with and were at least partly funded by settler governments, the Red Power movement was steeped in what the Mohawk anthropologist Audra Simpson calls the “politics of refusal,” which she posits as an alternative to the

¹⁴⁹ Vine Deloria, Jr., “Activism, 1950-1980,” *Handbook of North American Indians*, Vol. 2, *Indians in Contemporary Society*, ed. William C. Sturtevant (Washington, DC: Smithsonian Institution, 2008), 38-44.

¹⁵⁰ Joane Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (New York: Oxford University Press, 1996); Alvin M. Josephy, Jr., Joane Nagel, and Troy R. Johnson, eds., *Red Power: The American Indians' Fight for Freedom* (Lincoln: University of Nebraska Press, 1999).

liberal practice of recognition. This alternative rejects the “gift” of individual equality afforded by citizenship status. Instead, it is about maintaining and securing Indigenous political space beyond the domination of settler states. Ultimately, it is based on a refusal to disappear despite the enduring “logic of elimination.”¹⁵¹

The most emblematic social movement organization of this radical shift was the American Indian Movement. Originally founded in 1968 in St. Paul-Minneapolis to counter police brutality, it soon became a continental wide movement. In 1972 the American Indian Movement organized a cross-country caravan known as the “Trail of Broken Treaties.” Starting on the West Coast and picking up Native Americans as it moved eastwards, the caravan reached its destination in Washington, D.C., in late October that year, just on the eve of the United States presidential election. Its goal was to deliver a Twenty-Point Position Paper to President Nixon, but after the latter refused to meet with the activists, they occupied the Department of Interior headquarters, which was where the Bureau of Indian Affairs was located. The standoff lasted over a week, during which time the activists were able to broadcast the Twenty Points. Most of the points concerned the restoration of treaty relations between the United States government and Native Americans. However, the eighteenth point concerned the “protection of Indian religious freedom and cultural integrity.”¹⁵²

Several months later, in early 1973, the American Indian Movement shifted its focus back west. Beginning in late February that year, some 200 Oglala Lakota and a

¹⁵¹ Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014), 22. Cf. Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

¹⁵² “The Twenty-Point Proposal of Native Americans on the Trail of Broken Treaties,” in *Red Power*, eds. Josephy, Jr., Nagel, and Johnson, 46. See also Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1985 [1974]), 43-62.

contingent of American Indian Movement activists occupied the town of Wounded Knee, South Dakota, on the Pine Ridge Indian Reservation. Wounded Knee was the site of an infamous 1890 massacre of about 300 Miniconjou and Hunkpapa Lakota by the United States 7th Cavalry Regiment, an incident made famous by the 1970 bestseller, *Bury My Heart at Wounded Knee*.¹⁵³ The symbolic politics involved with occupation of Wounded Knee became a mass-media spectacle on a global scale, thereby raising the profile of Indian treaty rights and sovereignty claims.¹⁵⁴ Quite dramatically, the occupiers declared Wounded Knee the capital of the sovereign state of the Oglala Sioux Nation.¹⁵⁵

Although the occupation of Wounded Knee lasted only 71 days, it galvanized the Red Power movement. In June 1974, more than 5,000 people representing 97 tribes in the United States and Canada convened at the Standing Rock Sioux Indian Reservation for a conference organized by the American Indian Movement.¹⁵⁶ It was here that the International Indian Treaty Council (IITC) was formally established by way of the “Declaration of Continuing Independence.” The Declaration articulated its grievances through the keyword “genocide” in order to press its demands for decolonization and sovereignty. Ultimately its goal was to obtain international recognition: “We recognize that there is only one color of Mankind in the world who are not represented in the United Nations; that is the indigenous Redman of the Western Hemisphere. We recognize this lack of representation in the United Nations comes from the genocidal policies of the

¹⁵³ Dee Brown, *Bury My Heart at Wounded Knee* (New York: Holt, Rinehart & Winston, 1970). See also Jeffrey Ostler, *The Lakotas and the Black Hills: The Struggle for Sacred Ground* (New York: Penguin, 2010), 123 and 171-172.

¹⁵⁴ B. D’Arcus, “Contested Boundaries: Native Sovereignty and State Power at Wounded Knee, 1973,” *Political Geography* 22, no 4 (2003): 417.

¹⁵⁵ Rachel A. Bonney, “The Role of AIM Leaders in Indian Nationalism,” *American Indian Quarterly* 3, no. 3 (1977): 216.

¹⁵⁶ Russell Means, *Where White Men Fear to Tread: The Autobiography of Russell Means* (New York: St. Martin’s Griffin, 1995), 324.

colonial power of the United States.”¹⁵⁷ Soon thereafter the IITC established an office in New York City proximal to the UN headquarters.¹⁵⁸

The internationalization of the American Indian Movement through the IITC was primarily organized by the Cherokee artist Jimmie Durham (born 1940). In 1968 he had relocated to Geneva, where his wife was employed by the World Council of Churches (which, as we have already seen, played an important role in the internationalization of Indigenous rights discourse). There he socialized with diplomats from around the world, including representatives of African liberation organizations. In this context, he began viewing Native American issues through the lens of decolonization.¹⁵⁹ As he put it, “the desire to negotiate within an international arena is a constant to us. We define it as just being part of the world community that we used to be part of.”¹⁶⁰ Yet in order to be taken seriously in the contemporary world of diplomats was a sense of etiquette. For example, he recalled that, during the 1973 standoff at Wounded Knee, an Oglala Lakota elder named Frank Fools Crow (1890-1989) led a small delegation to UN headquarters in New York City.¹⁶¹ Dressed in their traditional regalia, however, they were taken for just “another clown show ... They just arrived at the United Nations, they did not know what else to do. ... Then two years later,” Durham said, “we set up our office and I had the job of doing this a bit more methodically ... Since it did not work when we sent our chiefs,

¹⁵⁷ International Indian Treaty Council, “The Declaration of Continuing Independence, June 1974,” available at <http://www.iitc.org/about-iitc/the-declaration-of-continuing-independence-june-1974/>.

¹⁵⁸ Deloria, Jr., *Behind the Trail of Broken Treaties*, 267.

¹⁵⁹ Jonathan Crossen, “Another Wave of Anti-Colonialism: The Origins of Indigenous Internationalism,” *Canadian Journal of History* 52, no. 3 (2017): 548.

¹⁶⁰ Quoted in Nikos Papastergiadis and Laura Turney, *On Becoming Authentic: Interview with Jimmie Durham* (Cambridge: Prickly Pear Pamphlet No. 10, 1996), 13.

¹⁶¹ Robert Anderson, Joanna Brown, Jonny Lerner, and Barbara Lou Shafer, *Voices from Wounded Knee, 1973: In the Words of the Participants* (Roosevelt, NY: Akwesasne Notes, 1974), 64; and Robin Wagner-Pacifici, *Theorizing the Standoff: Contingency in Action* (New York: Cambridge University Press, 2000), 70.

let's send someone who maybe know how to do things the way they do and follow their tricks.”¹⁶² Sure enough, Durham was able to professionalize the Indigenous rights movement at the international level. Thus, in February 1977 the IITC became the first Indigenous organization to secure consultative status from the UN Economic and Social Council.

The 1977 NGO Conference

Jimmie Durham was able to use his local connections to secure a venue in Geneva for the all-important International NGO Conference on Discrimination against Indigenous Peoples of the Americas, or what we have been referring to as the 1977 NGO Conference. Recall from the Introduction that the 1977 NGO Conference was hosted under the auspices of the UN at the illustrious *Palais des Nations* in Geneva, the very same place where Chief Deskakeh delivered “The Red Man’s Appeal to Justice” to the League of Nations over a half-century earlier. And much like Chief Deskakeh became a *cause célèbre*, so too did the Indigenous diplomats at the 1977 NGO Conference become a local sensation. One of the leaders of the American Indian Movement, Clyde Bellecourt, said that “we’re not just going to wonder into that hall ... We’re going to march on that building, all as one, singing our sacred songs.”¹⁶³ According to Russell Means, another American Indian Movement leader who attended the conference, added that “Geneva has never seen anything like it. When we approached the Palace of Nations, every window was filled with people. ... The world press – except for Western

¹⁶² Quoted in Papastergiadis and Turney, *On Becoming Authentic*, 13.

¹⁶³ Quoted in Means, *Where White Men Fear to Tread*, 371.

Hemisphere media, which boycotted the entire event – had never seen anything like us Indians, and they played it up.”¹⁶⁴

Although the 1977 NGO Conference was ultimately a great success, its organization was not without controversy. According to Rozanne Dunbar-Ortiz, an activist-scholar and member of the American Indian Movement who attended the conference, “the IITC eschewed all government support and sought to affiliate with national liberation movements and the Non-Aligned Movement, which had the favor of the ‘Eastern’ bloc, that is, the Soviet Union and other socialist states.”¹⁶⁵ Russell Means adds that “the Soviets were especially sympathetic because they wanted anyone who dissented against the United States in their camp.”¹⁶⁶ After all, this was the year when Jimmy Carter was inaugurated as President of the United States, at which point human rights became a major foreign policy issue. It is likely that the Soviet Union saw Indigenous peoples’ issues as a way of fighting back, much as it had during the 1948 Convention.

This led to a significant dispute between the IITC and the WCIP, the latter of which was sidelined during the 1977 NGO Conference. Recall that the WCIP was financially supported by the Canadian government, and compared to the IITC, was relatively more conciliatory. This set up an intra-movement dispute between the two organizations. As recorded in *Akwesasne Notes*, a periodical founded by and for

¹⁶⁴ Ibid. See also Washinawatok, “International Emergence,” 41-42.

¹⁶⁵ Rob Albritton, “From Wounded Knee to the United Nations: Rob Albritton Interviews Roxanne Dunbar-Ortiz,” *Socialist Project: E-Bulletin* 1169 (2015), available at <https://socialistproject.ca/bullet/1169.php>.

¹⁶⁶ Means, *Where White Men Fear to Tread*, 365.

Indigenous peoples in 1968, and which was very much associated with the Red Power movement, had this to say:

Native forces that are loyal to Canada or the US were at work trying to disrupt the conference. The World Council of Indigenous Peoples' executive officers were among these. They seemed to continuously try to find ways to discredit the conference and its organizers. People who are viewed by the Canadian or US governments as native leaders found ways to discourage the organization of the conference.¹⁶⁷

Despite this infighting, the 1977 NGO Conference was well attended. More than 400 people attended the proceedings, including over 100 Indigenous representatives from some 60 different peoples all across the Western hemisphere, many of whom risked persecution at home. For example, delegates from the Mapuche Confederation attended in exile as a result of the 1973 military coup in Chile. Additionally, about 60 international non-governmental organizations participated, as well as representatives from the United Nations, the ILO, and UNESCO. There were also observers from at least 40 member states of the United Nations, including someone from the Palestinian Liberation Organization.¹⁶⁸

One of the most pressing issues brought up during the proceedings was genocide. For instance, during the opening plenary session, Russell Means asserted that “we are

¹⁶⁷ Anonymous, “How It Is With Us,” *Akwesasne Notes* 9, no. 5 (1977): 25. See also Roxanne Dunbar-Ortiz, “The First Ten Years, from Study to Working Group, 1972-1982,” in *Indigenous Peoples' Rights in International Law: Emergence and Application*, eds. Roxanne Dunbar-Ortiz, Dalee Sambo Dorrough, Gudmundur Alfredsson, Lee Swepston, and Petter Wille (Copenhagen: International Work Group on Indigenous Affairs, 2015), 44.

¹⁶⁸ International Indian Treaty Council, “International NGO Conference on Discrimination against Indigenous Population in the Americas, 20-23 September 1977,” *Treaty Council News* 1, no. 7 (1977): 1; and United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Problem of Discrimination Against Indigenous Populations: Chapter IV: Other International Action,” UN Doc. E/CN.4/Sub.2/476/Add.5 (17 June 1981), paras. 86-89.

approaching the international community ... to stop the genocide of a whole people.”¹⁶⁹

Jose Mendoza Acosta, representing the Indigenous peoples of Panama, likewise decried against “the genocide ... that is committed daily against our people.”¹⁷⁰ There was a sense of urgency in these statements, for as Marie Sanchez of the Northern Cheyenne nation put it, “we wish to continue to exist.”¹⁷¹ For some, this sense of urgency precluded legal niceties or semantics. For example, as Romesh Chandra, a non-Indigenous representative from the World Peace Council, admitted,

I’m not so versed in international law. But I know that when you seek to wipe out a whole people by any means, by murder, by massacre, by sterilization, by driving them out, in my limited dictionary, in the limited dictionary of ordinary people everywhere in the world there is no other word to describe it but genocide. It is genocide. Not under law perhaps somewhere ... but as we understand it.¹⁷²

There was also a strong refusal of the assimilationist state policies, especially those associated with the 1957 Indigenous and Tribal Populations Convention. Marie Sanchez said that “we would like to terminate the politics of paternalism, integration and discrimination.”¹⁷³ Other participants stressed the eliminatory intent behind such policies. Ed Bernstick of the Cree Nation thus charged the Canadian government with trying “to assimilate entire reserves. And have succeeded on some in destroying the language, education and livelihood of the people.”¹⁷⁴ Notably, use of the relatively new keyword “ethnocide” was sparse, although one attendee who used it with an explicit definition was Rene Fuerst, a non-Indigenous anthropologist based in Geneva. “As for the cultural

¹⁶⁹ International Indian Treaty Council, “International NGO Conference on Discrimination against Indigenous Population in the Americas,” 5.

¹⁷⁰ *Ibid.*, 6.

¹⁷¹ *Ibid.*, 12.

¹⁷² *Ibid.*, 31.

¹⁷³ Marie Sanchez, “For the Women,” *Akwesasne Notes* 9, no. 5 (1977): 15.

¹⁷⁴ International Indian Treaty Council, “International NGO Conference on Discrimination against Indigenous Population in the Americas,” 11.

destruction or the ethnocide of the native tribal population,” he noted, “it constitutes the method actually used to break them down without giving rise to judgment and reproach. This method is all the more used as no national or international law takes into account this practice.” Unlike states committing genocide, “governments practicing ethnocide neither have bad press nor do they come under the law. ... Ethnocide is thus nothing else than a legal means to destroy the Indians, a means which by its finality does not differ at all from genocide.” He even added, with a shot against the ILO (which happened to have a delegate in attendance) that “under the cover of a so-called peaceful and progressive integration into the national domination society, ethnocide is not only advocated by the responsible authorities, but even recommended by the Convention 107.”¹⁷⁵ In fact, the conference recommended the 1957 Indigenous and Tribal Populations Convention (No. 107) “be revised to remove the emphasis on integration.”¹⁷⁶

The 1977 NGO Conference was broken up into three commissions that dealt with the various dimensions of discrimination against Indigenous peoples: legal, economic, and social and cultural. It was in the latter commission – social and cultural – where discussion of genocide and ethnocide was continued. The commission was said to have received many testimonies “concerning the massive and systematic efforts ... to destroy the basis and existence of the indigenous cultures.”¹⁷⁷ Although the concept of settler colonialism was not used (in fact, the concept was still relatively obscure), the commission did argue that “the destruction of indigenous cultures in the Americas is

¹⁷⁵ Ibid, 7-8.

¹⁷⁶ Ibid, 22.

¹⁷⁷ Ibid, 16.

historically inseparable from ... the greed for land.”¹⁷⁸ The dispossession and desecration of land was linked to cultural destruction, as was “the dissolution of community and family bonds,” the latter of which were said to destroy “the cultural and social integrity” of Indigenous peoples.¹⁷⁹ In the social and cultural commission’s conclusion, it said that “ethnocide must be defined as both a cause and a part of genocide, in that the ulterior purpose is the disappearance of the indigenous community.”¹⁸⁰

These concerns were finally communicated through the outcome document of the 1977 NGO Conference, known as the “Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere.” The document is a curious rhetorical mixture of human rights and decolonization. On the one hand, the preamble of the declaration is framed in the language of human rights, which is perhaps unsurprising, given how suddenly prominent human rights had become in global affairs. With that said, the preamble also opened up towards the broader meaning of human rights, including the “fundamental right” to culture. Moreover, as noted at the very outset of the Introduction, the declaration was also innovative in calling for the right to “national and cultural integrity,” thereby introducing this language to the lexicon of human rights. This provision stated that

It shall be unlawful for any state to take or permit any action or course of conduct with respect to an indigenous nation or group which will directly or indirectly result in the destruction or disintegration of such indigenous nation or group or otherwise threaten the national or cultural integrity of such nation or group, including, but not limited to, the imposition and support of illegitimate

¹⁷⁸ Ibid, p. 17. See also Lorenzo Veracini, “‘Settler Colonialism’: Career of a Concept,” *Journal of Imperial and Commonwealth History* 41, no. 2 (2013): 313-333.

¹⁷⁹ International Indian Treaty Council, “International NGO Conference on Discrimination against Indigenous Population in the Americas,” 17.

¹⁸⁰ Ibid, 18.

governments and the introduction of non-indigenous religions to indigenous peoples by non-indigenous missionaries.¹⁸¹

On the other hand, the majority of the declaration is geared towards political demands for decolonization. Its enumeration of rights begins by calling for the recognition of indigenous nations as subjects of international law, even using the criteria for statehood that was established by the 1933 Montevideo Convention, as discussed in Chapter Two: “a. Having a permanent population; b. Having a defined territory; c. Having a government; d. Having the ability to enter into relations with other states.”¹⁸² The declaration was thus calling for nothing less than total and complete independence of Indigenous peoples. Indeed, although discussions about the urgent threats of genocide and ethnocide were important during the proceedings of the 1977 NGO Conference, and even if the introduction of “cultural integrity” was an important innovation in the declaration, the overarching goal of the intervention was about self-determination and land. In sum, human rights discourse was simply the means, whereas the end was all about decolonization.

As we will see in Chapter Four, this rhetorical strategy was short lived, insofar as it was unable to mesh with the imposed constraints of “reality” in the international system. The intra-movement dispute between the relatively more conciliatory WCIP and the more radical IITC demonstrated a strategic divergence between human rights and decolonization. These two Indigenous organizations shared the same goals. It was simply a matter of emphasis. Whereas the WCIP pursued the rights of peoples to self-determination within the confines of settler states as a means to gaining alternative rights,

¹⁸¹ Ibid, 26.

¹⁸² Ibid, 25.

the IITC aimed for self-determination in the complete and total sense of the concept, thereby entailing the possibility of state secession. Perhaps unsurprisingly, the rhetoric of the WCIP versus the IITC would be more amenable to the powerbrokers at the UN. Accordingly, while scholars who mark the 1977 NGO Conference as the “inauguration” or “birth” of Indigenous global politics are not incorrect, such praise risks overlooking this crucial divergence between the rhetoric of human rights and the rhetoric of decolonization.¹⁸³

In sum, these transnational activists energetically appropriated global human rights frameworks and translated them into particular situations. As intermediaries, they not only fostered the gradual emergence of a rights consciousness in their local communities, but also feed retranslated ideas and concerns back into global human rights frameworks.¹⁸⁴ This emergent form of Indigenous rights discourse was something of a bricolage, comprised of various discursive strands that happened to be available, including not just human rights rhetoric, but new ideas about developmentalism, decolonization, genocide, and identity politics.

Institutional Moves at the UN

The post-1970s development of a transnational advocacy network in the field of Indigenous rights discourse fed back into a series of important institutional moves at the UN during the same decade. Before turning to these developments, it is first necessary to provide some organizational context. After an abortive effort in the UNGA during the late 1940s to study the “problem” of Indigenous peoples in the Americas, this so-called

¹⁸³ Washinawatok, “International Emergence,” 41-42; Morgan, *Transforming Law and Institution*, 66; and Lightfoot, *Global Indigenous Politics*, 38.

¹⁸⁴ This follows the conceptual model set forth in Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), 134.

“problem” was eventually picked up again in the early 1970s by the UN Economic and Social Council (ECOSOC).¹⁸⁵ As one of the six primary organs of the UN, the ECOSOC was established by the UN Charter “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.”¹⁸⁶ Unlike other primary organs of the UN organization, such as the Security Council or the GA, the ECOSOC is relatively powerless, insofar as it cannot produce binding “hard” law. Indeed, as far as human rights are concerned, the GA is effectively the only legislative body with a capacity for lawmaking.¹⁸⁷ However, the ECOSOC functions at the earliest stages in the process of legalization, or the act of positivizing norms into law. In the organizational scheme of the UN, the ECOSOC can lay the normative groundwork for more positivist deliberations higher up the bureaucracy, especially in the GA. Accordingly, the ECOSOC serves as the central forum within the UN for policy debates and recommendations on normative issues related to economic development, social security, and human rights more generally.

Given the wide-ranging normative agenda of the UN, the ECOSOC is organized into a number of issue-specific commissions, programs, funds, and specialized agencies. One of the key commissions under our concern was the Commission on Human Rights (CHR). Established in 1946, it was responsible for producing a draft International Bill of Human Rights, the final product of which was the Universal Declaration of Human

¹⁸⁵ UN General Assembly resolution 275 (III), “Study of the Social Problems of the Aboriginal Populations and Other Under-Developed Social Groups of the American Continent” (11 May 1949); and UN Economic and Social Council resolution 1589 (L), “The Problem of Indigenous Populations” (21 May 1971).

¹⁸⁶ UN Charter, Art. 55.

¹⁸⁷ This legislative authority may only be quasi, at best, and it is not at all clear that this was the original intention of the UNGA. See Oscar Schachter, “United Nations Law,” *American Journal of International Law* 88 (1994): 1; and Philip Alston, “Conjuring Up New Human Rights: A Proposal for Quality Control,” *American Journal of International Law* 78 (1984): 607.

Rights that was ultimately proclaimed by the UNGA on December 10, 1948.¹⁸⁸ More specifically, the key subsidiary body that will be the focus both in this section and in Chapter Four was the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereafter referred to simply as the Sub-Commission).¹⁸⁹ Originally created in 1949, the Sub-Commission was a committee of independent experts elected by the CHR with the consent of member states. It guided and instructed the CHR on primarily on matters of discrimination, which generally received far more attention than the issue of minorities, the latter of which never gained much traction in the UN as a whole.¹⁹⁰ As we will see below, the 1971 session of the Sub-Commission made a couple of highly relevant decisions that are of monumental importance to our genealogy. In particular, they assigned two independent experts, or what the UN vernacular refers to as Special Rapporteurs, on the “Study of the Question of the Prevention and Punishment of the Crime of Genocide” and the “Study of the Problem of Discrimination against Indigenous Populations,” respectively.¹⁹¹

Additionally, we will also examine an important development concerning the concept of “ethnocide” with the 1981 Declaration of San José. This was the outcome of a series of meetings convened by the UN Educational, Scientific and Cultural Organization (UNESCO), the latter of which is a specialized agency that is coordinated by the

¹⁸⁸ Hersch Lauterpacht, “The Universal Declaration of Human Rights,” *British Year Book of International Law* 25 (1948): 357.

¹⁸⁹ Originally established in 1947 as a subsidiary body of the now defunct Commission on Human Rights, since 1999 this body has been renamed the UN Sub-Commission on the Promotion and Protection of Human Rights, which is now part of the Human Rights Council (which in turn replaced the former Commission on Human Rights).

¹⁹⁰ John P. Humphrey, “The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities,” *American Journal of International Law* 62, no. 4 (1968): 870-871.

¹⁹¹ Commission on Human Rights, “Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the Work of its Twenty-fourth Session,” UN Doc E/CN.4/Sub.2/323 (6 October 1971).

ECOSOC. As we will see, these meetings were held during the early 1980s concerning the relationship between “ethno-development” and “ethnocide.” We have already dealt with the latter concept in previous sections, so here we will see how the concept of “ethnocide” was introduced into the realm of global governance. However, the key addition here is with the former concept – “ethno-development.” In order to explain this neologism, we will discuss broader developments in the UN organization concerning new perspectives on developmentalism, particularly in regards to environmentalism and the idea of sustainable development.

Study of the Question of the Prevention and Punishment of the Crime of Genocide

The 1948 Convention was inept in the decades immediately following its adoption, despite the fact that the instrument called upon “the competent organs of the United Nations to take such action ... as they consider appropriate for the prevention and suppression of acts of genocide.”¹⁹² In the historical context of the Cold War, the UN could only watch “helplessly from the sidelines. The states were meticulous in their efforts to ensure that the United Nations was not allocated any powers that could have led to any appreciable infringement of their sovereignty.”¹⁹³ It was not until 1982 when the General Assembly addressed the issue of genocide, and the Security Council did not deal with it until 1992.¹⁹⁴ Prior to that, the only UN organ that was active in the field was the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

¹⁹² Article 8 of the 1948 Convention.

¹⁹³ Gerd Hankel, “The United Nations, the Cold War, and Its Legacy,” in *The Oxford Handbook of Genocide Studies*, eds. Donald Bloxham and A. Dirk Moses (New York: Oxford University Press, 2010), 579. See also Samuel Totten and Paul R. Bartrop, “The United Nations and Genocide: Prevention, Intervention, and Persecution,” *Human Rights Review* 5, no. 4 (2004): 9.

¹⁹⁴ William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Second ed.) (New York: Oxford University Press, 2009 [2000]), 540 and 546.

This dates back to 1967, when the Sub-Commission questioned whether the 1948 Convention was an adequate instrument and whether the definition needed expansion. Some members of the Sub-Commission “felt that the Convention had become obsolete because new practices associated with genocide ... had developed. ... One member drew the attention of the Sub-Commission to several small, scattered groups of people whose survival had been threatened, not by overt acts of war or physical destruction, but by environmental and other causes.”¹⁹⁵ Another member disagreed, arguing that “it would not be helpful to enlarge the concept of genocide.”¹⁹⁶ The Sub-Commission resolved to undertake a study of any additional measures to implement the 1948 Convention.¹⁹⁷ Two years later, the ECOSOC approved the resolution and authorized the designation of a Special Rapporteur to undertake such a study.¹⁹⁸

In 1971, the Sub-Commission appointed one of its members, Nicodème Ruhashyankiko of Rwanda, as Special Rapporteur.¹⁹⁹ By drawing from relevant scholarship, case law, official documentation, and government responses to request for information regarding the domestic implementation of the 1948 Convention, the report was intended to deal with the question of genocide on a global basis in order to not only “serve as a basis for the Sub-Commission’s recommendations but also with a view to

¹⁹⁵ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Report of the Twentieth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights,” UN Doc. E/CN.4/947 (4 December 1967), para. 165.

¹⁹⁶ *Ibid.*

¹⁹⁷ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 7(XX), “Genocide,” (3 October 1967).

¹⁹⁸ United Nations Economic and Social Council resolution 1420(XLVI), “Genocide,” (6 June 1969).

¹⁹⁹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 7(XXIV), “Genocide,” (18 August 1971).

educating the world public opinion.”²⁰⁰ In that sense, the final report, which was completed in 1978, was relatively progressive and in many respects cutting-edge.²⁰¹ For example, in considering the historical factors in which genocide emerged, the report stated that “genocide is also considered to occur as a consequence of colonialism,” citing Jean-Paul Sartre’s statement, “On Genocide.” This latter work, which was originally delivered in 1967 at the Second Session of the Bertrand Russell International War Crimes Tribunal on Vietnam, presaged the colonial genocide literature.²⁰² Additionally, Ruhashyankiko also broke new ground by inquiring into the relationship between genocide and apartheid in South Africa.²⁰³

The report also considered the possibility of either revising the 1948 Convention or adopting a new instrument altogether. The issue of cultural genocide was examined in this regard, particularly “whether all cultures deserved to be protected and deciding whether the assimilation resulting from civilizing action would also constitute genocide.”²⁰⁴ After recounting the debate over such a provision during the drafting of the 1948 Convention in some detail, Ruhashyankiko shared several governmental responses to his inquiries. Some governments were favorably disposed towards new international legal actions along such lines, including the Holy See, Ecuador, Israel, Oman, and

²⁰⁰ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Question of the Prevention and Punishment of the Crime of Genocide: Preliminary Report by Nicodème Ruhashyankiko, Special Rapporteur,” UN Doc. E/CN.4/Sub.2/L.565 (23 May 1972), para. 5.

²⁰¹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Question of the Prevention and Punishment of the Crime of Genocide: Study Prepared by Nicodème Ruhashyankiko, Special Rapporteur,” UN Doc. E/CN.4/Sub.2/416 (4 July 1978).

²⁰² Ibid, para. 8. Jean-Paul Sartre, “On Genocide,” in *Crimes of War*, eds. Richard A. Falk, Gabriel Kolko and Robert Jay Lifton (New York, Random House, 1971), 536.

²⁰³ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Question of the Prevention and Punishment of the Crime of Genocide,” paras. 377-418.

²⁰⁴ Ibid, para. 448.

Romania.²⁰⁵ Yet others felt that the concept was still “too vague to be accurately defined as criminal acts.”²⁰⁶ The report also cited Robert Jaulin’s notion of “ethnocide,” which was conceived as an alternative to genocide. Indeed, the recent publicity directed towards the brazen massacres of Indigenous peoples in Amazonia “has resulted in a revived campaign of ethnocidal assimilation as the only alternative to extermination.”²⁰⁷ Much like the 1977 NGO Conference said that “ethnocide is thus nothing else than a legal means to destroy the Indians,” the Ruhashyankiko report frankly admitted that government could turn to the relatively less egregious methods of ethnocide as a way of avoiding the stigma of genocide.”²⁰⁸

Ultimately, the Special Rapporteur reported that he was “unable to draw a definite conclusion as to whether the acts regarded as cultural genocide or ‘ethnocide’ are constituent elements of the crime of genocide,” nor was he willing to say “whether it is possible to conclude an additional convention covering cultural genocide or to include it in a revised convention on genocide.”²⁰⁹ With that said, if we look at the number of paragraphs that included governmental responses in favor of including cultural genocide or ethnocide versus those that were not, it was clear that the weight of his analysis was tilted towards the negative. Moreover, the only secondary literature he included here was all similarly disinclined. However deplorable cultural genocide or ethnocide may have been considered, there was still an assumption of an “essential difference” between

²⁰⁵ Ibid, paras. 450-451.

²⁰⁶ Ibid, para. 452.

²⁰⁷ Ibid, para. 460. The report cites Robert Jaulin, ed., *L’ethnocide à travers les Amériques, Textes et documents* (Paris: Librairie Arthème Fayard, 1972).

²⁰⁸ International Indian Treaty Council, “International NGO Conference on Discrimination against Indigenous Population in the Americas,” 7.

²⁰⁹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Question of the Prevention and Punishment of the Crime of Genocide,” para. 461.

physical and cultural forms of group destruction.²¹⁰ In conclusion, he said that “it would be a mistake to interpret the 1948 Convention in broader terms than those envisaged by the signatories, and that it would be better to adhere to the spirit and letter of the Convention and to prepare new instruments as appropriate.”²¹¹

Given how sensitive and easily politicized the topic of genocide can be, the Ruhashyankiko report became embroiled in controversy as soon as it was published. Much of this was due to the Special Rapporteur’s “unpardonable” decision to remove a reference to the Armenian genocide.²¹² To a far less extent, there was even criticism that the report “ignored the genocide of the Palestinian people.”²¹³ The Pakistani delegate to the Sub-Commission noted that “history was an emotional and, above all, a subjective matter.”²¹⁴ He reasoned that the purpose of the report forward-looking; “it was not intended to be a historical analysis. If such an analysis were to be made, it would be necessary to go back a little further in time ... perhaps to the sack of Carthage or the occupation of the American continent.”²¹⁵ Notably, this reference to North American settler colonialism did not elicit a response. But however reasonable the Pakistani delegate’s argument may appear, Ruhashyankiko deliberate decision to remove a reference to the Armenian genocide was fairly singled out as a critical shortcoming.

²¹⁰ Ibid, para. 457.

²¹¹ Ibid, para. 618.

²¹² Schabas, *Genocide in International Law*, 556.

²¹³ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Thirty-First Session: Summary Record of the 822nd Meeting,” UN Doc. E/CN.4/Sub.2/SR.822 (15 September 1978), para. 30.

²¹⁴ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Thirty-Fifth Session: Summary Record of the 1520th Meeting,” UN Doc. E/CN.4/SR.1520 (16 March 1979), para. 24.

²¹⁵ Ibid, para. 25.

Due to this controversy, the Ruhashyankiko report languished, and in 1982 the Sub-Commission requested a mandate for a new Special Rapporteur.²¹⁶ After receiving approval from the ECOSOC, the Sub-Commission appointed Benjamin Whitaker, a lawyer from the United Kingdom and former director of the NGO Minority Rights Group.²¹⁷ His preparatory work was influenced by fellow Sub-Commission member, Erica-Irene Daes, a Greek lawyer and long-standing advocate for Indigenous rights. She will be a central figure in Chapter Four, when we review the institutional history of the UN Working Group on Indigenous Populations. She urged Whitaker to take into consideration the urgency of cultural genocide.²¹⁸ Other Sub-Commission members agreed that “there might also be a case for widening the definition of genocide beyond the notion of the physical destruction of persons.”²¹⁹ “Genocide could be carried out in a number of ways,” another added. “For example, people had the right to live in a clean and pollution-free environment, and mass pollution could in fact lead to unintentional genocide.”²²⁰ Whitaker’s interim report reflected such innovative interpretations. “He considered that the issue of genocide should include such aspects as cultural genocide or genocide by negligence.”²²¹

²¹⁶ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1982/2, “Study on Genocide” (7 September 1982).

²¹⁷ United Nations Economic and Social Council resolution 1983/33, “Study on Genocide” (29 August 1985).

²¹⁸ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Thirty-Seventh Session: Summary Record of the 4th Meeting,” UN Doc. E/CN.4/Sub.2/1984/SR.4 (13 August 1984), para. 4.

²¹⁹ *Ibid.*, para. 46.

²²⁰ *Ibid.*, paras. 21 and 22.

²²¹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Thirty-Seventh Session: Summary Record of the 3rd Meeting,” UN Doc. E/CN.4/Sub.2/1984/SR.3 (14 August 1984), para. 6.

In 1985 Whitaker submitted his final report. Much more so than his predecessor, Whitaker stressed the history of colonial genocides, noting that “genocide, particularly of indigenous peoples, has often occurred as a consequence of colonialism. ... The English for example massacred native populations in Ireland, Scotland and Wales in order to deter resistance and to ‘clear’ land for seizure. ... Africa, Australasia and the Americas witnessed numerous other examples.”²²² He even included a reference to the genocide of the Aché people in Paraguay.²²³ The Whitaker report also suggested opening up the notion of intent to include acts of omission, as well as degrees of “criminal negligence or recklessness.”²²⁴ Finally, the report revisited the question of whether “the definition of genocide should be broadened to include cultural genocide or ‘ethnocide,’ and also ‘ecocide,’” the latter of which referred to environmental destruction. “Indigenous groups are too often the silent victims of such actions,” he added. He concluded with “the possibility of formulating an optional protocol” along such lines.²²⁵

The Whitaker report was positively received by Indigenous rights advocates at the UN. Russel Barsh of the Saskatoon-based Indigenous organization, Four Directions Council, urged Whitaker “to undertake a study on ethnocide and ecocide, with the aim of preparing an interpretive declaration by the General Assembly and, to the extent necessary, the formulation of a draft optional protocol on the prevention and punishment of ethnocide and ecocide.”²²⁶ Another representative, from the National Aboriginal and

²²² United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker,” UN Doc. E/CN.4/Sub.2/1985/6 (2 July 1985), para. 21.

²²³ Ibid, para. 24.

²²⁴ Ibid, para. 39.

²²⁵ Ibid, para. 33.

²²⁶ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Thirty-Eight Session: Summary Record of the 20th Meeting,” UN Doc. E/CN.4/Sub.2/1985/SR. 20 (19 August 1985), para. 62.

Islander Legal Services Secretariat, stressed the urgency of the report, saying “that certain States Members of the United Nations were still pursuing the criminal aim of destroying indigenous peoples. ... In many areas of the world, it was still Government policy to remove indigenous children from their cultural environment.”²²⁷ Even members of the Sub-Committee who were not otherwise part of the Indigenous rights movement were still open “to the possibility of formulating an optional protocol” to cover the issues related to cultural genocide, ethnocide, and ecocide.²²⁸

Others disagreed, however. Some of the pushback effectively repeated old arguments against cultural genocide that were originally aired during the 1948 Convention. For example, one Sub-Commission argued that “for the layman,” the term effectively meant physical, not cultural destruction. “The act of genocide was such a serious act that it should not be given too broad a definition, since that would be ineffective, and there should be greater stringency in the criteria used to define the act.”²²⁹ Another contended that “ethnocide and ecocide were crimes against humanity but not genocide.”²³⁰ Much like the opponents of cultural genocide during the drafting of the 1948 Convention argued that such a provision would be better placed in the Universal Declaration of Human Rights (which, of course, never materialized), the contrarian argument in the Sub-Commission was that the issues of ethnocide and ecocide would be better dealt with by UNESCO and the UN Environment Programme, respectively.²³¹

²²⁷ Ibid, paras. 63-64.

²²⁸ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Thirty-Eighth Session: Summary Record of the 19th Meeting,” UN Doc. E/CN.4/Sub.2/1984/SR.19 (21 August 1985), para. 27.

²²⁹ Ibid, paras. 26-28.

²³⁰ Ibid, para. 21.

²³¹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Thirty-Eighth Session: Summary Record of the 17th Meeting,” UN Doc. E/CN.4/Sub.2/1985/SR.17 (21 August 1985), para. 31.

Finally, there was also pushback from some member states. In particular, the Whitaker report attracted ire from the Paraguayan government for labelling the situation of the Aché people as one of genocide. The governmental observer from Paraguay stated frankly, “there was no evidence that there had been any genocide of the Aché.”²³² Instead, the observer argued that what was happening to them was an unfortunate yet natural occurrence. He characterized them as “nomads and hunters living in the forest,” and that “their numbers had been dwindling following settlement in those areas by more numerous groups which were largely engaged in agriculture. Between 1940 and 1950, clashes had taken place with the settlers, who had sought to defend their crops and their livelihoods.”²³³ He concluded that the Aché were not victims of genocide, but were in fact “a flourishing community ... enjoying special programmes for their education, security, health and gradual integration into the national development process on an equal footing with other Paraguayan citizens.”²³⁴

In any case, nothing really happened as a result of the Whitaker report.²³⁵ His appeal to amend the 1948 Convention with an optional protocol never gained any traction. Moreover, the response of the Paraguayan government to the charge of genocide, as well as the earlier controversy with the Ruhashyankiko report regarding the Armenian genocide, illustrated just how politically challenging this issue area was for member states. Nevertheless, both reports, especially the Whitaker report, indicate the rising concern with the concepts of cultural genocide and ethnocide.

²³² United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Thirty-Eighth Session: Summary Record of the 21st Meeting,” UN Doc. E/CN.4/Sub.2/1985/SR.21 (23 August 1985), para. 43.

²³³ Ibid, para. 44.

²³⁴ Ibid, para. 47.

²³⁵ Schabas, *Genocide in International Law*, 559.

UNESCO Meeting of Experts on Ethno-Development and Ethnocide

Just as the Whitaker report was raising the profile of Indigenous peoples in relation to the problem of genocide, UNESCO was taking the lead in elevating the new concept of ethnocide. Some of the literature in both genocide studies and Indigenous studies has cited the 1981 UNESCO Declaration of San José, which said that “ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language.”²³⁶ However, very little work has been done putting this intervention into institutional and normative context. The mandate behind these meetings trace back to the 1980 UNESCO General Conference, which promoted “the attainment of endogenous and integrated development with man at its center, in accordance with the unique character of each people,” as well as “the possible identification of new human rights” that would safeguard the cultural identities of peoples in the process of economic development.²³⁷ In that sense, the concept of “ethnocide” was conjoined with the notion of “ethnodevelopment.”

In order to explain these normative innovations, we must put them into institutional context. The 1980 UNESCO mandate was part of the agenda for a New International Economic Order, which was set forth in a UN General Assembly resolution in 1974.²³⁸ This called for a fundamental rethinking of the global economy away from the

²³⁶ United Nations Educational, Scientific and Cultural Organization, “UNESCO and the Struggle against Ethnocide: Declaration of San José (December 1981),” in “Meeting of Experts on Ethno-Development and Ethnocide in Latin America: Final Report,” UNESCO Doc. SS 82/WS.32 (12 July 1982), 32-34. See also Schabas, *Genocide in International Law*, 220; and S. James Anaya, *Indigenous Peoples in International Law* (Second ed.) (New York: Oxford University Press, 2000 [1996]), 51 and 192-193.

²³⁷ United Nations Educational, Scientific and Cultural Organization resolution 3/01, “General Resolution on the Programme for Culture and Communication,” in *Records of the General Conference: Twenty-first Session, Belgrade, 23 September to 28 October 1980*, Vol. 1, *Resolutions* (Paris: United Nations Educational, Scientific and Cultural Organization, 1980), 47-48 and 50.

²³⁸ United Nations General Assembly resolution 3201 (S-VI), “Declaration on the Establishment of a New International Economic Order,” (1 May 1974).

Bretton Woods system that was put in place during the post-World War II transition period. As an outcome of the decolonization process in the UN, which shifted the balance of power in the General Assembly towards the so-called “Third World,” this New International Economic Order was geared towards the favor of “developing nations.”²³⁹ Such a fundamental rethinking was also the result of the 1970s economic crisis, which opened the door for neo-Marxist critiques of modernization theory and developmentalism. According to anthropologist James Ferguson, there were two pillars to this critique.²⁴⁰ First, with the rise of “dependency theory,” the impoverishment of countries in the global South (particularly those in Latin America) was attributed not to endogenous or internally generated factors, but was rather posited as a structural condition of global capitalism.²⁴¹ Secondly, “the assumed identity of development with a process of moral and economic progress” was brought into question.²⁴² No longer was it simply assumed that all countries would converge along a similar path of growth, nor was it believed that there would or should be a benign transition from “traditional” to “modernity.”

Meanwhile, similar normative developments regarding new ideas about development were occurring at the same time in the UN’s budding environmental agenda. The United Nations Conference on the Human Environment was held in June 1972 in Stockholm, Sweden. As we noted earlier, George Manuel attended this meeting, where he forged important connections with the Sámi people through the assistance of

²³⁹ Nils Gilman, “The New International Economic Order: A Reintroduction,” *Humanity* 6, no. 1 (2015): 1-16.

²⁴⁰ James Ferguson, “Development,” in *The Routledge Encyclopedia of Social and Cultural Anthropology*, eds. Alan Barnard and Jonathan Spencer (Second Ed.) (New York: Routledge, 2010 [1996]), 193.

²⁴¹ André Gunder Frank, *Capitalism and Underdevelopment in Latin America: Historical Studies of Chile and Brazil* (New York: Monthly Review, 1967).

²⁴² Ferguson, “Development,” 193.

the IWGIA. In 1983, the UN established the World Commission on Environment and Development. Norwegian Prime Minister Gro Harlem Brundtland was appointed chairperson, and the so-called “Brundtland Report,” officially titled *Our Common Future*, was published in 1987. This introduced the concept of “sustainable development,” which redefined economic development as meeting “the needs of the present without compromising the ability of future generations to meet their own needs.”²⁴³ In retrospect, the terminology of “sustainable development” had staying power, but there was a profusion of conceptual alternatives during this period, such as “bottom-up development” and “participatory development.” What all of these alternatives shared was an emphasis on “grassroots movements, local knowledge, and popular power in transforming development.”²⁴⁴

It was in this context that UNESCO organized a series of regional meetings of experts on the study of ethnodevelopment and ethnocide were then held. The first one dealt with Latin America and was held in San José, Costa Rica, in December 1981. The second concerned Africa and was held in Ouagadougou, Upper Volta (now known as Burkina Faso), in February 1983. Finally, the third meeting focused on Europe and was held in Karasjok, Norway, in June 1983. In many respects, each of the meetings reflected different regional concerns. For example, some of the topics discussed during the meeting in Europe concerned minorities such as the Romani people, as well as one of the few Indigenous peoples in Europe, the Sámi. Additionally, there was also a focus on immigrant communities, particularly of West Indian and South Asian immigrants in

²⁴³ World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987), 8.

²⁴⁴ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 1995), 215.

Britain.²⁴⁵ The African conference distinguished between two types of minorities. The first included non-Africans, including the Afrikaners in South Africa as well as economic migrants from South Asia, whereas the second category included African minorities, such as San and Khoi peoples in Southwest Africa. With the latter category in particular, there was a concern that since the era of colonialism such peoples have been treated as “savages,” and that such stereotypes denied their cultural identities and threatened their collective existences as peoples.²⁴⁶

As far as we are concerned, however, the Latin American conference was the most significant. Many of the same themes and participants discussed above in the context of the decline of *indigenismo* were present in San José. Moreover, unlike the other two regional conferences, the meeting in San José did slightly more conceptual work in clarifying the terms of operation, although there was more of an emphasis on ethnodevelopment rather than ethnocide. For example, the most important claims for ethnodevelopment included the following:

Political self-determination, recovery of land within with collective tenancy and self-management at all levels, revival of Indian history, upgrading and development of traditional skills, full and genuine participation, partial or total control of Indian policy, multicultural education and multilingualism, development of Indian organizations, and so on.²⁴⁷

One of the participants, the Mexican anthropologist Guillermo Bonfil Batalla, who was highlighted earlier in the chapter, defined ethnodevelopment as such: “The exercise of a

²⁴⁵ United Nations Educational, Scientific and Cultural Organization, “Meeting of Experts on Ethno-Development and Ethnocide in Europe: Final Report,” UNESCO Doc. SS 83/CONF.616/11 (March 1984), 10-26.

²⁴⁶ Idem, “Meeting of Experts on Ethno-Development and Ethnocide in Africa: Final Report,” UNESCO Doc. SS-82/C/39/5 (3 June 1983), 5, 6, and 10.

²⁴⁷ Idem, “Meeting of Experts on Ethno-Development and Ethnocide in Latin America: Final Report,” 4.

people's social capacity to build its own future, drawing upon the lessons of its historical experience and the real and potential resources of its culture, in accordance with a project based on its own values and aspirations."²⁴⁸ This notion entailed a strong and absolute rejection of integrationism as a form of "cultural aggression and therefore unacceptable in light of the right to be different."²⁴⁹ The 1957 Indigenous and Tribal Populations Convention (No. 107) singled out as being especially problematic and contrary to the goal of ethnodevelopment, the latter of which was instead feared towards "a sincere commitment to pluralism."²⁵⁰

Slightly less time was focused on the conceptual development of ethnocide. Robert Jaulin, the French anthropologist who was also highlighted above, was in attendance, and he described ethnocide as "a negation of the Indian."²⁵¹ Another participant described the ethnocidal effects of the formal education system in Latin America. "Every country in Latin America with an Indian population has committed various forms of ethnocide, using the educational system to assimilate Indian cultures. ... School is a vehicle for ethnocide through which many languages have been lost."²⁵² The representative from the Indian Council of South America even claimed that UNESCO itself "had been a party to ethnocide through supporting government education projects for Indigenous peoples."²⁵³

It was only in the final outcome document, the Declaration of San José, where the concept of ethnocide was given a clear definition as the denial of a people to their culture and language. The declaration identified this as a "massive violation of human rights, and

²⁴⁸ Ibid, 8.

²⁴⁹ Ibid, 7.

²⁵⁰ Ibid, 11.

²⁵¹ Ibid, 10.

²⁵² Ibid, 15 and 16.

²⁵³ Ibid, 27.

in particular the right of ethnic groups to respects for their cultural identity.” It further declared that “ethnocide, that is cultural genocide, is a violation of international law equivalent to genocide.”²⁵⁴ On the one hand, this definition problematically conflates the concepts of ethnocide and cultural genocide, although the assumption of synonymy is a common tendency in the relevant literature.²⁵⁵ As analyzed above, cultural genocide was originally conceived by Lemkin and the Secretariat draft as a distinct category of genocidal techniques. In other words, it was included under the master concept of genocide, per se, whereas ethnocide was re-conceived by Jaulin and others as distinct from genocide altogether. As elaborated by Clastres, genocide implied more pessimistic motivations with the extermination of the “Other,” ethnocide involved the relatively more optimistic motivation with the absorption of the “Other.”²⁵⁶ By conflating ethnocide with cultural genocide, this important motivational distinction is lost. Moreover, as we will see in Chapter Four, the confusion surrounding the distinction between ethnocide and cultural genocide left both of these concepts at risk for omission in the 2007 Declaration.

On the other hand, the definition provided by the Declaration of San José does provide some conceptual clarification. By setting up ethnocide as a distinct concept, it promises to maintain the rigorous definitional standard of genocide, even if the latter often involves a misplaced emphasis on physical destruction. For better or worse, the layman understanding of genocide revolves around the prototype of the Holocaust, so

²⁵⁴ Idem, “UNESCO and the Struggle against Ethnocide: Declaration of San José (December 1981),” in “Meeting of Experts on Ethno-Development and Ethnocide in Latin America: Final Report,” 32-33.

²⁵⁵ James W. Nickel, “Ethnocide and Indigenous Peoples,” *Journal of Social Philosophy* 25, 1 (1994): 84; and Samuel Totten, William S. Parsons, and Robert K. Hitchcock, “Confronting Genocide and Ethnocide of Indigenous Peoples: An Interdisciplinary Approach to Definition, Intervention, Prevention, and Advocacy,” *Annihilating Difference: The Anthropology of Genocide*, ed. Alexander Laban Hinton (Berkeley: University of California Press, 2002), 60.

²⁵⁶ Clastres, *Archaeology of Violence*, 101-113.

rather than challenge this conventional interpretation, advocates of the ethnocide concept (including Jaulin and Clastres) have instead embraced it, thereby potentially opening up conceptual space for an alternative. Some genocide scholars seem to agree, such as Helen Fein, who argued that we need a separate convention on ethnocide rather than tamper with the concept of genocide.²⁵⁷ Moreover, by suggesting that ethnocide is, or should be, equivalent to genocide promised to spotlight the distinct harm caused by the former relative to the latter.

Study of the Problem of Discrimination against Indigenous Populations

Compared to the Whitaker report and the UNESCO Meeting of Experts on Ethno-Development and Ethnocide, an even more momentous institutional development during this time occurred with the Study of the Problem of Discrimination against Indigenous Populations. This study is perhaps most well-known for its attempted definition of what constitutes “Indigenous” peoples:

Indigenous communities, peoples and nations are those which, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on their territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²⁵⁸

This definition was a marked improvement from that which was provided by the ILO during the 1950s.²⁵⁹ Recall that those earlier definitional standards on the basis of not

²⁵⁷ Helen Fein, “Genocide: A Sociological Perspective,” *Current Sociology* 38, no. 1 (1990): 82-83.

²⁵⁸ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Problem of Discrimination against Indigenous Populations: Chapter XXI: Conclusions,” UN Doc. E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983), para. 379.

²⁵⁹ International Labour Office, *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries* (Geneva: International Labour Organization, 1953), 25-26; and 1957 Indigenous and Tribal Populations Convention, Art. 1.

being modern. Essentially to be Indigenous, according to the ILO, was to be “primitive,” with the expectation that such peoples would eventually be integrated into dominant national units and thereby no longer be “Indigenous.” Instead, this new definition affirmed the intrinsic dignity of Indigenous cultures, as well as the fundamental commitment to “their continued existence as peoples.”²⁶⁰

This commitment represented a new normative agenda, as far as Indigenous issues in global governance was concerned. As such, the innovative definition of “Indigenous peoples” provided by the Study of the Problem of Discrimination against Indigenous Populations is evidence of the important transformations under analysis here in Chapter Three. For our purposes, perhaps the most consequential outcome of this study was its firm rejection of integrationism and the normalcy of assimilation. When the study was originally proposed during the 1970 session of Sub-Commission on Prevention of Discrimination and Protection of Minorities, it was still believed “that integration was the most appropriate way of eliminating discrimination against indigenous populations.”²⁶¹ Yet when the Study of the Problem of Discrimination against Indigenous Populations was finally published in piecemeal over the course 1980s, it stated unequivocally that “one of the first principles to be affirmed is the acceptance of [Indigenous peoples’] right to be ... regarded as different from the remainder of the population.”²⁶² This marks a crucial normative turning point in our genealogy.

²⁶⁰ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Problem of Discrimination against Indigenous Populations: Chapter XXI: Conclusions,” para. 379.

²⁶¹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Report of the Twenty-third Session of Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights,” UN Doc. E/CN.4/Sub.2/316 (14 October 1970), para. 139.

²⁶² United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Problem of Discrimination against Indigenous Populations: Chapter IX: Fundamental Policy,” UN Doc. E/CN.4/Sub.2/1983/21/Add.1 (10 June 1983), para. 7.

The authorization of the Study of the Problem of Discrimination against Indigenous Populations dates back to a 1971 ECOSOC resolution, the normative basis remained very much rooted in the older way of thinking that was reflected in the 1957 Indigenous and Tribal Populations Convention (No. 107). It began by noting that Indigenous peoples “may themselves earnestly wish to maintain ... their unique culture and identity,” but that “with the passage of time,” any special measures designed to protect their culture may “become unnecessary or excessive.” Rooted in the principles of individual equality and non-discrimination, the underlying logic seemed to be that any such special measures that treated Indigenous peoples differently should only be temporary in nature. The resolution was further “convinced that the policy of integration of indigenous populations in the national community, and not segregation or assimilation, is the most appropriate means of eliminating discrimination against those populations.”²⁶³

Following this authorization, the Sub-Commission named José Ricardo Martínez Cobo of Ecuador as Special Rapporteur to carry out this study.²⁶⁴ As such, the literature commonly refers to the study as the Cobo report. In fact, however, the task of preparing the report fell to Augusto Willemssen-Díaz (1923-2014), a non-Indigenous Guatemalan lawyer who was deeply concerned with the Mayan people in his country and who had been involved with the human rights agenda at the UN since the 1950s.²⁶⁵ The report took well over a decade to complete and became the most voluminous human rights study ever

²⁶³ United Nations Economic and Social Council resolution 1589 (L), “The Problem of Indigenous Populations” (21 May 1971).

²⁶⁴ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 8 (XXIV), “Complete and Comprehensive Study of the Problem of Discrimination against Indigenous Populations,” (18 August 1971).

²⁶⁵ Augusto Willemssen-Díaz, “How Indigenous Peoples’ Rights Reached the UN,” in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, eds. Claire Charters and Rodolfo Stavenhagen (Copenhagen: IWGIA, 2009), 22-25.

produced by the UN.²⁶⁶ It was very comprehensive, covering topics such as administrative arrangements, health, housing, education, language, cultural, social, and legal institutions, employment and vocational training, property and land rights, political rights, religious rights and practices, and equality in the administration of justice.²⁶⁷

As suggested above, the Cobo report remarkably critiqued the status quo normative system built around integrationist policies and the normalcy of assimilation. The concept of assimilation was critically defined as being “based on the idea of the superiority of the dominant culture.” Assimilation was geared towards forging national homogeneity “by getting indigenous groups to discard their culture in favor of that of the dominant one.”²⁶⁸ In other words, assimilation was a process of cultural erasure. In contrast, the report differentiated assimilation from integration, the latter of which was said not to necessarily insist on “the disappearance of indigenous institutions and traditions.” Rather, integrationist policies sought “to eliminate all purely ethnic lines of cleavage” and “to guarantee the same rights, opportunities and responsibilities to all citizens, whatever their group membership.”²⁶⁹ With that said, the two policy options were not at all seen as being mutually exclusive, as “most countries seem to have adopted social integration policies with assimilationist characteristics in varying degrees.”²⁷⁰

²⁶⁶ Elsa Stamatopoulou, “Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic,” *Human Rights Quarterly* 16, no. 1 (1994): 67.

²⁶⁷ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Problem of Discrimination against Indigenous Populations: Final Report (Supplementary Part) Submitted by the Special Rapporteur, José R. Martínez Cobo,” UN Doc. E/CN.4/Sub.2/1982/2 (10 August 1982).

²⁶⁸ Idem, “Study of the Problem of Discrimination against Indigenous Populations: Chapter IX: Fundamental Policy,” para. 17.

²⁶⁹ Ibid, para. 18.

²⁷⁰ Ibid, para. 6.

This line of critique challenged conventional normative understandings about the value of integration. On the surface, the promise of integration to deliver equality might seem like a good thing, at least from a liberal perspective. Yet from a more critical perspective, the promise of equality can end up perpetuating colonial structures. “Indeed, formal equality in law has been found to result very often in marked inequality, in fact, adversely affecting the indigenous persons and groups living within societies ruled by non-indigenous institutions, economies and people.”²⁷¹ For example, we saw in Chapter Two that post-independence governments in Latin America attacked the collective property rights of Indigenous peoples in the name of promoting individual equality. This was also the case in North America as well, where the promise of “equality” has been used to divide up and alienate communal lands.

Along this line of critique, the Cobo report deployed the concept of “ethnocide” in order to label the destructive consequences of the status quo. In this regard, the report drew from the parallel developments in the Sub-Commission regarding the Study of the Question of the Prevention and Punishment of the Crime of Genocide. It drew extensively from the Ruhashyankiko report, and it made note of the Whitaker report that was then underway. After outlining the debate over cultural genocide as part of the international legal definition of genocide established by the 1948 Convention, as well as citing the aforementioned 1981 Declaration of San José, the Cobo report deferred on the question of whether or not a new international legal instrument should be devised.²⁷² Nevertheless, it noted that

²⁷¹ Ibid, para. 60.

²⁷² Idem, “Study of the Problem of Discrimination against Indigenous Populations: Chapter XV: Culture and Cultural, Social and Legal Institutions,” UN Doc. E/CN.4/Sub.2/1983/21/Add.3 (17 June 1983), para. 43.

States which adopt – under whatever name – policies of assimilation ... one is faced with a system that does not give the indigenous culture its true place and postulates as an ideal solution the abandonment of that culture in favor of the culture of the dominant non-indigenous groups. This may lead in extreme cases to measures which, by deliberately seeking that solution, involve the elimination of the indigenous culture in circumstances that will constitute a trend towards ethnocide.²⁷³

Later in the same chapter, the Cobo report said that “assimilation implied a series of measures of direct or indirect coercion ... negating the rights of individuals from their own identity ... and from that point of view it could be considered to approach the threshold of genocide.”²⁷⁴ Apart from the conceptual confusion in these quotes, the line of critique is unmistakable. Quite simply, the Cobo report passes a relatively severe judgment against the normalcy of assimilation.

In marked contrast to the status quo, the Cobo report responded positively to Indigenous peoples’ growing demands for self-determination. It noted that “in recent years” there was a “widespread and open rejection by indigenous peoples of the concept of integration.”²⁷⁵ The old model of integrationism, as inspired by the mid-20th century *indigenismo* movement, was criticized as an approach that “systematically served the interests of the groups in power.”²⁷⁶ Instead, Indigenous peoples were calling for an entirely new ideological approach, one that promised “to recognize and to protect the right of indigenous populations to preserve, develop and perpetuate their culture and cultural, social and legal institutions by transmitting their cultural heritage to future

²⁷³ Ibid, para. 46.

²⁷⁴ Ibid, para. 76.

²⁷⁵ Idem, “Study of the Problem of Discrimination against Indigenous Populations: Chapter IX: Fundamental Policy,” para. 67.

²⁷⁶ Ibid, para. 96.

generations.”²⁷⁷ The concept of “cultural integrity” was not used in this context, although that seems to be the underlying idea here. Instead, the Cobo report resolutely affirmed Indigenous peoples’ fundamental “right to be different, to consider themselves as different and to be regarded as such.”²⁷⁸

At the same time, the right to be different did not preclude the right to participate in the planning and implementation of socioeconomic development schemes, nor did it necessarily invoke strong political claims for decolonization and secession. There was increasing emphasis on “the concept of self-management as an important element in the policy favored by indigenous peoples to make themselves masters of their own destiny.”²⁷⁹ In this sense, the concept of self-management was synonymous with autonomy and the ability “to achieve a measure of political and economic independence.”²⁸⁰ Moreover, this concept was also synonymous with the notion of ethno-development, insofar as these ideas stressed the decision-making capacity of Indigenous peoples. However, the language of “self-management” and “ethno-development” were ultimately not as prominent as Indigenous peoples’ claim to self-determination, “which they consider the only form that would enable them to take over the reins of their destiny and which they claim as an inalienable right to determine for themselves the future course of their existence.”²⁸¹ Although the Cobo report admits that, for some Indigenous peoples, the claim to self-determination was meant in the fullest extent of the concept, as

²⁷⁷ Idem, “Study of the Problem of Discrimination against Indigenous Populations: Chapter XV: Culture and Cultural, Social and Legal Institutions,” para. 92.

²⁷⁸ Idem, “Study of the Problem of Discrimination against Indigenous Populations: Chapter IX: Fundamental Policy,” para. 7.

²⁷⁹ Ibid, para. 27.

²⁸⁰ Ibid, para. 28.

²⁸¹ Idem, “Study of the Problem of Discrimination against Indigenous Populations: Chapter XVIII: Political Rights,” UN Doc. E/CN.4/Sub.2/1983/21/Add.6 (24 May 1984), para. 148.

in the right to full independence and complete sovereignty. “As contemplated in United Nations language,” this was self-determination “in the largest sense of its ‘external’ manifestations.”²⁸² Yet for most other Indigenous peoples, the claim to self-determination was limited to an “internal” sense, “where a people or group having a defined territory might be autonomous in the sense of having a separate and distinct administrative structure and judicial system determined by and internal to themselves.”²⁸³ Whatever form it took, self-determination was taken as “a basic pre-condition if indigenous peoples are to be able to enjoy their fundamental rights and determine their future, while at the same time preserving, developing and passing on their specific ethnic identity to future generations.”²⁸⁴

The ILO Revision Process

As seen over the course of this chapter, so much in the world had changed as a result of the 1970s that the 1957 Indigenous and Tribal Populations Convention (No. 107) had become outdated. Indeed, instrument was a source of embarrassment for the ILO, as some countries were using the 1957 Convention to provide ideological cover for the invasion of Indigenous lands and the destruction of Indigenous lives. For example, during the 1980s the government of Bangladesh waged what has been described as a “creeping genocide” against the Indigenous peoples of the Chittagong Hill Tracts into the Bengali nation-state, all under the guise of the ILO’s integrationist agenda.²⁸⁵ As a result, the

²⁸² Ibid, para. 150.

²⁸³ Ibid.

²⁸⁴ Study of the Problem of Discrimination against Indigenous Populations: Chapter XXI: Conclusions,” para. 269.

²⁸⁵ Mark Levene, “The Chittagong Hill Tracts: A Case Study in the Political Economy of ‘Creeping’ Genocide,” *Third World Quarterly* 20, no. 2 (1999): 339-396. See also International Labour Conference, *Seventy-Second Session, Geneva 1986: Record of Proceedings* (Geneva: International Labour Office, 1987), 31/50; and Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (New York: Oxford University Press, 2005), 250, fn. 138.

Indigenous rights movement focused on the ILO as part of the problem. Even the Cobo report noted that “Convention 107 has increasingly been a target for criticism,” and it encouraged the ILO to revise this faulty instrument.²⁸⁶

In his authoritative account of the ILO regime, Luis Rodríguez-Piñero notes that even by the late 1970s, “the ILO’s official position was still that Convention No. 107 should not be revised ... A decade later, however, Convention No. 169 had been adopted.”²⁸⁷ The key turning point occurred in 1984, when the ILO’s Governing Body decided to establish a Meeting of Experts on the Revision of Convention No. 107, the latter of which eventually met in 1986, before the matter was eventually turned over to the Committee on Convention No. 107, which met at the 75th and 76th sessions of the International Labour Conference in 1988 and 1989, respectively.²⁸⁸ There were ulterior motives behind this institutional process, however. Since the 1977 NGO Conference, the UN was becoming the locus of the Indigenous rights agenda in global governance, and as we will see in Chapter Four, in 1982 the Sub-Commission established a Working Group on Indigenous Populations to begin setting standards for what would eventually become the 2007 Declaration. In light of this development, the ILO decision, as one critical commentator put it at the time, was primarily motivated by “no small element of bureaucratic territoriality.”²⁸⁹

²⁸⁶ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of the Problem of Discrimination against Indigenous Populations: Chapter XXI: Conclusions,” para. 11.

²⁸⁷ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 271.

²⁸⁸ Lee Swepston, “Indigenous and Tribal Populations: A Return to Centre Stage,” *International Labour Review* 126, no. 4 (1987): 451.

²⁸⁹ Howard R. Berman, “The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988,” *International Commission of Jurists Review* 41 (1988): 49.

The 1989 Indigenous and Tribal Peoples Convention (No. 169) was therefore the product of a heavily politicized institutional context, and as such, it captures the Janus-faced paradox of rights. On the one hand, the ILO revision process symbolizes the hopeful promise for the progressive advancement of international norms. The world no longer openly tolerates the assimilation of Indigenous peoples, whose cultural diversity is now cherished as part of the common heritage of mankind. Moreover, although the 1989 Convention (No. 169) has only been ratified by only 22 countries, the instrument continues to be cited in a number of domestic and international courts, especially in Latin America.²⁹⁰ On the other hand, however, there is also a danger of naively giving all the way into this promise of hope, as the ILO regime has once again reproduced and normalized the dominant pattern in Indigenous-state relations according to the basic rules of sovereignty. This is evident in the actual drafting process of the 1989 Convention, which violated its own spirit of participation by leaving Indigenous organizations out of the negotiating table. Moreover, we can see in the debate over whether to call them Indigenous “peoples” or “populations” the anxieties of settler states to secure their sovereign prerogatives above all else. After a critical review of these issues, we will ask how much has *really* changed or stayed the same as a result of the ILO revision process.

The Rejection of Integrationism

Perhaps the most important reason for the ILO revision process was to remove the paternalistic and integrationist approach of the 1957 Indigenous and Tribal Populations Convention (No. 107). As noted, the latter had borne the brunt of criticism for over the past decade. A representative of the Indian Council of South America, speaking at the

²⁹⁰ International Labour Office, *Application of Convention No. 169 by Domestic and International Courts in Latin America: A Case Book* (International Labour Organization, 2009).

1989 International Labour Conference, denounced it as a “colonialist” instrument that pushed for the “forced assimilation of our peoples into the so-called ‘national societies’ of the member States of the ILO.”²⁹¹ A year earlier, the Meeting of Experts unanimously concluded “that the integrationist language” of the 1957 Convention was outdated, “and that the application of this principle is destructive in the modern world. ... In practice,” it added, in reference to the former emphasis on integration, “this concept has led to the extinction of ways of are that are different from that of the national society.”²⁹² Thus, without referencing the concept of colonialism, even the Meeting of Experts tacitly acknowledged that the 1957 Convention was complicit in the eliminatory structures of settler colonialism. In any case, there was a broad consensus, that “integrationism was no longer an acceptable doctrine,” as acknowledged by a representative of the ILO Secretary-General.²⁹³

Indeed, given the transformative effects of the post-1970s era, as well as the renewed activism of the global Indigenous rights movement, the ILO had little choice but to revise. Three decades prior, there was no such movement that advocated for the continued existence, cultural integrity, and self-determination of Indigenous peoples. Rather, the ILO responded to the shifting global landscape of the 1950s that was shaped by the “blue-water” doctrine of decolonization. Recall from Chapter Two that the rules of sovereignty were written in such a way that the official process of decolonization was strictly limited to the former territories of overseas European empires, leaving Indigenous peoples within independent countries were ineligible for self-determination. As outlined

²⁹¹ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 31/7.

²⁹² International Labour Office, *Report VI(1): Partial Revision of the Indigenous and Tribal Populations Convention (No. 107)* (Geneva: International Labour Office, 1988), 18.

²⁹³ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 25/2.

above, by the 1970s Indigenous peoples began looking for alternative routes to press their claims. The Chairman of the Committee on Convention No. 107, who was also the governmental delegate from Bolivia, thus said that, “if there is something we should remember in the light of the new concepts, the new sociological and anthropological insights, and on the basis of experience, it is that the indigenous and tribal populations have never ceased to affirm their own cultural identity.”²⁹⁴ The Vice-Chairman of the Committee, who was an adviser from the Mexican employers’ delegation, reluctantly admitted that “the world has changed and the ILO cannot be indifferent to the need for change.”²⁹⁵

This normative change is explicitly evident in the final text of the 1989 Indigenous and Tribal Peoples Convention (No. 169). The preamble thus begins by considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards.²⁹⁶

Many of the operative paragraphs in the 1989 Convention provide further substance to this normative change. Although the concept of “cultural integrity” does not specifically appear in the text, the keyword “integrity” does show up twice. Article 2, for instance, implores governments “to protect the rights of these peoples and to guarantee respect for their integrity.”²⁹⁷ Part of Article 5, meanwhile, says that “the integrity of the values,

²⁹⁴ International Labour Conference, *Seventy-Fifth Session, Geneva 1988: Record of Proceedings* (Geneva: International Labour Office, 1989), 36/3.

²⁹⁵ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 31/2.

²⁹⁶ Preambular paragraph 3, 1989 Indigenous and Tribal Peoples Convention.

²⁹⁷ Art. 2(1), *ibid.*

practices and institutions of these peoples shall be respected.”²⁹⁸ As a whole, therefore, the 1989 Convention pulls away from the normalcy of assimilation assumed by earlier generations, and instead pushes for Indigenous peoples fundamental right to be different.

Yet there was not a unanimous consensus for the rejection of earlier integrationist standards. In particular, some of the employers’ delegations from Latin America pushed back against the growing critique against the normalcy of assimilation. For example, one delegated noted that “paternalism ... existed in all countries and that its desirability should be carefully examined before being condemned.”²⁹⁹ Sometimes this conservative counter-argument veered into long-standing racist discourses related to social Darwinism. The employers’ delegate from Venezuela thus argued that “it is wrong to offer a people which has been backward for centuries the opportunity to accede to progress, if they so wish, in the field of health, education, training, vocational qualifications, standard of living, employment, leisure, culture, etc., achieved by the rest of the population.” He added that “paternalism is an attitude and an attribute of a father consisting of the authority and affection he has towards his children. Therefore, it is inconceivable that a State should not exercise authority over its citizens or afford them the greatest possible well-being, which is a token of affection.” His concern, however disingenuous it may have been, was that this turn away from integrationism would condemn Indigenous peoples “to perpetual marginalization and isolation.”³⁰⁰ Of course, this antiquated view was in the minority, and the overwhelming consensus was against the principle of integrationism.

²⁹⁸ Art. 5(b), *ibid.*

²⁹⁹ International Labour Conference, *Seventy-Fifth Session, Geneva 1988*, 32/2.

³⁰⁰ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 12/52.

“Peoples” versus “Populations”

The pushback against the anti-integrationist basis of the ILO revision process was just the beginning, however, as other elements of the process engendered further counter-arguments against the advancement of Indigenous rights discourse. One of the most contentious issues at stake during the deliberations was one of labelling: should they be called Indigenous “populations” or Indigenous “peoples”? This difference is evident in the respective titles of the ILO instruments: the 1957 Indigenous and Tribal Populations Convention (No. 107) versus the 1989 Indigenous and Tribal Peoples Convention (No. 169). Nearly all of the Indigenous organizations that attended the International Labour Conferences in Geneva during the late 1980s as outside observers insisted on being identified as “peoples,” not “populations.” As explained by a representative of the Four Directions Council, “peoples” denoted the continued existence of “organized groups, not ... aggregations of individuals,” as implied by the notion of “populations.”³⁰¹ “The continued use of the term ‘populations’ would undermine the credibility of the revision process,” the representative added, “would undermine the credibility of the revision process since indigenous peoples would be depicted in inadequate and inaccurate terms.”³⁰² In particular, the concept of “peoples” underlined legal claims for collective rights, including “the right of indigenous and tribal peoples to control their own lives, cultures and territories.”³⁰³

The emphasis on labelling Indigenous peoples as “peoples” and not “populations” was concomitant with Indigenous peoples’ central claim for self-determination. A representative from the World Council of Indigenous Peoples “stressed that the desire for

³⁰¹ Ibid, 25/5.

³⁰² International Labour Conference, *Seventy-Fifth Session, Geneva 1988*, 32/5.

³⁰³ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 25/6.

a recognition of self-determination for indigenous peoples was a desire for their cultures and values to be recognized.”³⁰⁴ To borrow the distinction suggested above between self-determination in the “internal” versus “external” sense of the term, the claims for Indigenous self-determination did not necessarily imply the external sense, as in full political independence and state secession. As explained by the representative from the Four Directions Council, the question of self-determination in the external sense “was a matter for the United Nations,” particularly with regard to the ongoing negotiations over the draft UN Declaration on the Rights of Indigenous Peoples. This issue could not be settled by the ILO, but the 1989 Convention “should not foreclose the possibility of achieving self-determination in appropriate circumstances by any peoples.”³⁰⁵

Yet the title change from “populations” to “peoples,” as well as the emphasis on Indigenous self-determination, made several member states and employers’ delegations nervous. It was not lost on these opponents that the term “peoples” had important “political connotations.” As such, the Canadian government felt that the usage of this terminology “could imply rights which went beyond the scope” of the ILO. Government delegates from India and Argentina agreed, adding that use of this new word “might create difficulties for some States,” could thus possible “inhibit the number of ratifications of the revised Convention.”³⁰⁶ In fact, the Indian government questioned whether or not the very category of “Indigenous” even applied to his country.³⁰⁷ The Congolese representative agreed.³⁰⁸ As we will see in Chapter Four, the idea that

³⁰⁴ International Labour Conference, *Seventy-Fifth Session, Geneva 1988*, 32/4.

³⁰⁵ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 25/6.

³⁰⁶ International Labour Conference, *Seventy-Fifth Session, Geneva 1988*, 32/3.

³⁰⁷ *Ibid*, 13/23.

³⁰⁸ *Ibid*, 24/32.

“Indigenous peoples” do not exist in Africa and Asia would resurface in the debates behind the drafting of the 2007 Declaration.

This opposition was concerned that any terminological implications that would confer the right to self-determination would essentially upset what we are calling the settler colonial status quo. As we have seen, the perfection of settler sovereignty entails the uncontested territorial jurisdiction over space and does not tolerate any degree of legal pluralism.³⁰⁹ Such a logic was exemplified by the Venezuelan employers’ delegate, who worried that the terminological replacement of “populations” with “peoples” would open up a Pandora’s Box of problems: “These guide-lines could serve to set up micro-States within States as sanctuaries to shelter subversion, guerilla warfare, drug trafficking, and common delinquency, at least in Latin America.”³¹⁰ Similarly, the Ecuadorian government was concerned that this would give

rise to extremely dangerous situations which are conducive to the national disintegration of many member States; this orientation would weaken national unity and facilitate the strategies of foreign powers which seek to use substantial sectors of the populations of other nations against their legitimate interests, endangering the strategic resources of these nations.³¹¹

In Chapter Four, we will see how such settler state anxieties would give rise to a territorial integrity “escape clause” in the 2007 Declaration, thereby ensuring that the legalization of Indigenous rights would do nothing to threaten the political unity of sovereign states.³¹²

³⁰⁹ Ford, *Settler Sovereignty*, 158 and 182.

³¹⁰ International Labour Conference, *Seventy-Fifth Session, Geneva 1988*, 10/36.

³¹¹ International Labour Office, *Report VI(2): Partial Revision of the Indigenous and Tribal Populations Convention (No. 107)* (Geneva: International Labour Office, 1988), 9.

³¹² On such “escape clauses,” see Margaret R. Somers and Christopher N.J. Roberts, “Toward a New Sociology of Rights: A Genealogy of ‘Buried Bodies’ of Citizenship and Human Rights,” *Annual Review of Law and Social Science* 4 (2008): 393.

Faced with this opposition, the Committee on Convention No. 107 was forced to compromise. In fact, the key compromise came from the government representative from Canada, who proposed that “if the Committee should decide to use the term ‘peoples,’ the use of that term in the revised Convention would ‘not imply the right to self-determination as that term is understood in international law’.”³¹³ As a result, Article 1 of the final text of the 1989 Indigenous and Tribal Peoples Convention (No. 169) includes the following caveat: “The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”³¹⁴ It should be noted, however, that this “compromise” was very much skewed in favor of the dominant interests at stake in the settler colonial status quo, insofar as the Committee did not feel the need to reach an agreement with Indigenous peoples. Yet without a seat at the negotiating table, Indigenous organizations were left without a voice.

Violating the Spirit of Participation

There is a terrible irony at the heart of the 1989 Indigenous and Tribal Peoples Convention (No. 169). On the one hand, a basic principle of the ILO revision process, as stated by the Meeting of Experts, was that “Indigenous and tribal peoples should enjoy as much control as possible over their own economic, social and cultural development.”³¹⁵ Some variant of the keyword “participation” appears nearly a dozen times throughout the entire final text.³¹⁶ Likewise, variants of the keywords “consult,” “agreement,” and

³¹³ International Labour Conference, *Seventy-Fifth Session, Geneva 1988*, 32/5.

³¹⁴ Art. 1(3), 1989 Indigenous and Tribal Peoples Convention.

³¹⁵ International Labour Office, *Report VI(1)*, 27.

³¹⁶ Art. 2(1), Art. 5(c), Art. 6(1)(b), Art. 7(1), Art. 7(2), Art. 15(1), Art. 15(2), Art. 22(1), Art. 22(2), Art. 23(1), and Art. 29.

“consent” show up not as many times, but they too reflects this core principle.³¹⁷

Generally speaking, the 1989 Convention has been celebrated for recognizing a wide array of participatory rights for Indigenous peoples, thereby affirming the principle that Indigenous peoples should be included in deciding matters that affect them.³¹⁸ On the other hand, however, the strict participation rules of the ILO did not afford Indigenous organizations a seat at the negotiating table. Therefore, in the words of Rodríguez-Piñero, the 1989 was born out of “original sin,” insofar as it violated its own spirit of participation.³¹⁹

To be fair, the 1989 Indigenous and Tribal Peoples Convention (No. 169) has successfully legalized the new norm of ethnodevelopment, even though that precise language is absent in the text itself. In short, the basic principle at stake here is that the decision to pursue any form of development must be taken by Indigenous peoples themselves, and that the proper mechanism to achieve this is in the form of consultation. This is a cornerstone of not only the 1989 Convention, but of the ILO’s contemporary development agenda. Moreover, this principle was emphasized by all Indigenous organizations that were able to participate (even if only in limited form). For example, the representative of the Four Directions Council stated that “the right of these peoples to be represented effectively in all levels of decision-making which might affect them” was

³¹⁷ Art. 6(1), Art. 6(2), Art. 15(2), Art. 16(2), Art. 16(4), Art. 17(2), Art. 20(2)(d), Art. 22(3), Art. 27(3), Art. 28(1), Art. 32, and Art. 35.

³¹⁸ Lee Swepston, “A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989,” *Oklahoma City University Law Review* 15, no. 3 (1990): 690; International Labour Office, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual* (Geneva: International Labour Office, 2003), 15-20; idem, *Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169* (Geneva: International Labour Office, 2009), 48-79; and Athanasios Yupsanis, “ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview,” *Nordic Journal of International Law* 79, no. 3 (2010): 437.

³¹⁹ Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law*, 291.

absolutely fundamental. “He stated that experience had shown that participation and self-determination were essential in achieving positive economic and social change, and were in fact perfectly consistent with the ILO's own basic principles.”³²⁰

Yet even this principle engendered dispute, as some states apparently feared that the duty to consult would give Indigenous peoples too much say over development projects. For example, the representative from the Indian government “stressed that national governments could not surrender the right to make decisions on economic development.” Similarly, the Canadian government suggested that the requirement “to seek the consent of indigenous groups before adopting legislation that affected them” would somehow interfere with “the need to preserve the independence of legislative bodies in democratic societies.”³²¹ As we will see in Chapter Four, in regards to the Canadian government’s initial opposition to the 2007 Declaration, Indigenous peoples’ participatory rights were misconstrued as implying some sort of veto power over decision-making processes. In any case, these objections were not the most predominant or pressing issue at stake, and the principle of participation was carried through to the final text.

As noted, the real controversy regarding participatory rights was not with the final text, but with the drafting process itself. The tripartite structure of the ILO, which is comprised of governmental, employers’ and workers delegations, leaves little room for NGOs to participate in the standard setting process. Only international NGOs are eligible for observer status, meaning that community- or national-level Indigenous organizations were not included. As a result, only some of the most important international Indigenous

³²⁰ International Labour Conference, *Seventy-Fifth Session, Geneva 1988*, 32/4.

³²¹ *Ibid*, 32/3.

organizations were able to attend the International Labour Conferences in Geneva, including the WCIP, the Four Directions Council, and the IWGIA. Even so, they were severely limited in terms of the actual business of deliberations, as they were granted only very few time-constrained presentation periods. Thus, although Indigenous voices found their way into the official records, they were still few and far between.³²²

Perhaps not surprisingly, the ILO leadership was too busy patting themselves on the back to fully take notice of how upset Indigenous representatives truly were. The Chairman of the Committee on Convention No. 107 acknowledged the unprecedented role played by non-state Indigenous actors in providing a “new philosophical approach.”³²³ He did manage to acknowledge that they “were often very dissatisfied with our procedures ... One can sympathize with their strong feelings,” he added, “but nevertheless I am confident that the ILO must establish ever closer links with these organizations ... We feel that this should be a relationship of partnership in a common endeavor.”³²⁴

Of course, most Indigenous representatives did not see it that way. Sharon Venne, who was sent on behalf of the IWGIA, decried “the sorely inadequate ILO procedures that relegated us to an indirect and demeaning level of participation.” Just as before, with the 1957 Indigenous and Tribal Populations Convention (No. 107), the 1989 Indigenous and Tribal Peoples Convention (No. 169) was fashioned “behind closed doors” and with Indigenous peoples themselves left “invisible. ... It is highly inappropriate and prejudicial for governments which have been cited for violations of Convention No. 107

³²² Berman, “The International Labour Organization and Indigenous Peoples,” 50-51.

³²³ International Labour Conference, *Seventy-Fifth Session, Geneva 1988: Record of Proceedings* (Geneva: International Labour Office, 1989), 36/3.

³²⁴ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 31/2.

to have been in a position of influence throughout the process.”³²⁵ Another representative declared that “we did not come here to be passive observers while diplomats, labor leaders and executives decided what to do with us. We did not come here to give your deliberations our tacit approval by our presence.”³²⁶ The danger alluded to here was one of co-optation, as if the presence of Indigenous peoples at the ILO proceedings gave the image of true consultation and participation.

In sum, according to the imposed constraints of the global system as classically defined by realism, the ILO revision process was forced to follow the basic rules of sovereignty. This fundamental state-centric constraint is evident in another part of the preamble of the 1989 Convention (No. 169), which recognizes “the aspirations of [Indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, *within the framework of the States in which they live*.”³²⁷ For all of the change promised in the first part of this statement, it is ultimately all qualified by the emphasized portion in the second part. This crucial caveat indicates that the sovereignty of settler states was (and is) a priority above the official acknowledgement of Indigenous peoples’ aspirations. Once again, settler sovereignty was normalized as the ILO revision process made Indigenous rights a responsibility of states, first and foremost. As one critical voice at the time wryly put it, the appearance of progress was strictly limited in the sense that it “is now subtly assimilationist as opposed to being blatantly assimilationist.”³²⁸

³²⁵ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 31/6-7.

³²⁶ International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, 31/6.

³²⁷ Preamble.

³²⁸ Ms. Sayers (Workers’ adviser, Canada), in International Labour Conference, *Seventy-Sixth Session, Geneva 1989*, p. 31/10.

Neoliberalism and the Janus-Face of Human Rights

The post-1970s turning point was a double-edged sword. This period witnessed an historical change in global attitudes towards Indigenous peoples. As a result, they were able to take advantage of the breakthrough in human rights in order to put their own issues and concerns on the agenda of global governance. At the same time, this period was also defined by the arrival of neoliberalism. This refers to a political economic philosophy that gained ascendance in the 1970s, when there was a resurgence of 19th century laissez-faire economics; policy program involved privatization, free trade, deregulation, fiscal austerity, and reductions in government spending. Unfortunately, the 1989 Indigenous and Tribal Peoples Convention (No. 169) reflects both sides of the coin. On the one hand, by disavowing the integrationist logic of previous standards, it advanced the cultural rights of Indigenous peoples. On the other hand, the fine print of its provisions regarding land and labor rights, for example, should be treated with a bit more circumspection. For example,, Article 15 enables states to exploit mineral and sub-surface resources on Indigenous lands. Article 17 provides mechanisms for the alienation of Indigenous lands. And Article 20 encourages Indigenous peoples to enter national labor markets.

As Mark Goodale argues, following the insights of Nancy Fraser, the mobilization of Indigenous rights has been circumscribed into a program for cultural recognition rather than the broader and more radical quest for socioeconomic redistribution. “It is significant, in this respect, that indigenous rights have been closely associated with – even derived from – International Labor Organization (ILO) initiatives.”³²⁹ As he

³²⁹ Mark Goodale, “Dark Matter: Toward a Political Economy of Indigenous Rights and Aspirational Politics,” *Critique of Anthropology* 36, no. 4 (2016): 442-443. See also Nancy Fraser, “From Redistribution to Recognition? Dilemma of Justice in a ‘Postsocialist’ Age,” *New Left Review* 212 (1995): 68.

reminds us, over the course of the ILO's institutional history, and through its various iterations, its fundamental purpose has been to regulate capitalist labor markets. This fundamental purpose has been preserved, even as the assimilationist agenda of the 1957 ILO Convention No. 107 was replaced by the cultural rights framework of the 1989 ILO Convention No. 169. Despite the relative advances made by the latter instrument, particularly concerning the theme of cultural human rights, at the end of the day, it "was never intended to become a mechanism through which indigenous peoples could challenge the underlying political-economic structures of the countries of which they were ambiguously citizens."³³⁰ Rather, the 1989 ILO Convention No. 169 continues the basic theme inherited from the 1957 ILO Convention No. 107: that of integrating Indigenous peoples into capitalist economies.

Several scholars have noted the coincidence of neoliberalism and human rights in the 1970s. As intellectual historian Samuel Moyn stresses, this was just a *coincidence*, as he subtly pushes back against Marxist critiques of human rights as *causing* the displacement of alternative visions for global justice, although he admits that this has indeed been an effect.³³¹ Arguments about causation aside, the simultaneity of these developments is striking enough. Indeed, the concurrent breakthroughs in neoliberalism and human rights (at least a minimalist account of human rights, one that focuses on the negative liberties of civil and political rights, rather than the positive liberties of economic and social rights) shared many key features, including a predilection for individualism and an antipathy towards the state. Even a broader account of human

³³⁰ Goodale, "Dark Matter," p. 443.

³³¹ Samuel Moyn, "A Powerless Companion: Human Rights in the Age of Neoliberalism," *Law and Contemporary Problems* 77, no. 4 (2014): 149. Cf. Wendy Brown, "'The Most We Can Hope For ...': Human Rights and the Politics of Fatalism," *South Atlantic Quarterly* 103, nos. 2-3 (2004): 461-462.

rights, one that embraces multiculturalism, has not been entirely out of place in the framework of neoliberalism. Anthropologist Terence Turner points out that the collapse of the welfare state after the early 1970s also led to the demise of the social and ideological ideal of an integrated and homogenous nation-state.³³² Stated differently, as the social-democratic commitment to equality has been weakened by the rise of neoliberalism, this had the unintended effect of undermining once dominant assimilative state policies.

This leaves us once again with a peculiar ambiguity, insofar as the post-1970s resurgence of Indigenous rights discourse has overlapped with the radical transformation of the global economy. On the one hand, such macro-level structural changes provided an opportunity for Indigenous organizations and activists to press their demands for greater recognition, especially as the once dominant model of the homogenous nation-state has given way to a “turn to roots.”³³³ On the other hand, however, these very changes in global political economy are still nevertheless very threatening, particularly as creeping environmental catastrophes, such as accelerating climate change and cataclysmic biodiversity loss, are severely menacing to the survival of Indigenous peoples worldwide. Moreover, however much international human rights law purports to limit state sovereignty, there remains a paradox between rights and power. As we will see in greater detail in the following chapter, the institutionalization human rights may actually end up reinforcing and consolidating the superior sovereign authority of states, thereby

³³² Terence Turner, “Indigenous Resurgence, Anthropological Theory, and the Cunning of History,” *Focaal – European Journal of Anthropology* 49 (2007): 120.

³³³ Jonathan Friedman, “Transnationalization, Socio-Political Disorder, and Ethnification as Expression of Declining Global Hegemony,” *International Political Science Review* 19, no. 3 (1998): 243.

undercutting the original demands of many Indigenous activists since the 1970s for decolonization.

CHAPTER FOUR

Promising Rights (1980s-Present): The 2007 United Nations Declaration on the Rights of Indigenous Peoples

Historical Spotlight: New York, September 13, 2007

On the morning of September 13, 2007, the Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly of the United Nations (UN). In a press release that day, then UN Secretary-General Ban Ki-moon hailed it a “triumph,” while the president of the General Assembly (GA) acclaimed this as a “major step forward ... in setting international standards.”¹ This was the outcome of tortuously long legislative process: 25 years, 4 months, and 6 days, to be precise. That is how long it took the Declaration work its way through the bureaucracy of the UN, from start to finish.² As explained by the chairperson of the UN Permanent Forum on Indigenous Issues (UNPFII), which was established in 2000 as a high-level advisory body to the UN Economic and Social Council (ECOSOC), “the long time devoted to the drafting of the Declaration by the United Nations stemmed from the conviction that indigenous peoples have rights as distinct peoples and that a constructive dialogue among all would eventually lead to a better understanding of diverse worldviews and cultures.”³

¹ Press release from the United Nations Secretary-General, “Secretary-General Says Indigenous Rights Declaration ‘Triumph’ for Indigenous Peoples around the World,” UN Doc. SG/SM/11156-HR/4931 (13 September 2007), available at <http://www.un.org/press/en/2007/sgsm11156.doc.htm>; and Press release from the United Nations General Assembly, “General Assembly Adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Forward’ Towards Human Rights for All, Says President,” UN Doc. GA/10612 (13 September 2007), available at <http://www.un.org/press/en/2007/ga10612.doc.htm>.

² United Nations Economic and Social Council resolution 1982/34, “Study of the Problem of Discrimination against Indigenous Populations,” (7 May 1982); and United Nations General Assembly resolution 61/295, “United Nations Declaration on the Rights of Indigenous Peoples,” (13 September 2007).

³ Press release from United Nations Permanent Forum on Indigenous Issues, “Adoption of Indigenous Rights Declaration ‘Major Victory’ for United Nations in Long History of Developing Human Rights,” UN Doc GA/10613-HR/4932 (13 September 2007), available at <http://www.un.org/press/en/2007/ga10613.doc.htm>.

It is not altogether clear in this statement why the 2007 Declaration's emphasis on Indigenous cultures necessarily resulted in such a long legislative process. With that said, it is certain that the 2007 Declaration's significance in this regard is monumental. In particular, it promoted an emerging international normative framework in terms of "the right of all peoples to be different," as stated in its preamble.⁴ As a whole, the 2007 Declaration marks an innovative turn towards the category of cultural rights. Once called the "Cinderella of the human rights family," the category of cultural rights has traditionally been marginalized by the international legal canon of human rights.⁵ However, this category is absolutely central to the 2007 Declaration. Variations of the word "culture" appear at least 30 times in the final text, and cultural rights are reflected in over one-third of the 2007 Declaration's 46 articles. An important example is Article 8, which states that "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."⁶

As monumental as this particular provision may be, its final text obscures deeper levels of contestation. Recall from the Introduction that the original version of this text, which was submitted in 1994, read as follows: "Indigenous peoples have the collective

⁴ Preambular paragraph 2, United Nations Declaration on the Rights of Indigenous Peoples. Cf. Farooq Hassan, "The Right to be Different: An Exploratory Proposal for the Creation of a New Human Right," *Loyola of Los Angeles International and Comparative Law Review* 5 (1982): 67-99.

⁵ Yvonne Donders, "The Legal Framework of the Right to Take Part in Cultural Life," in *Human Rights in Education, Science and Culture: Legal Developments and Challenges*, eds. Yvonne Donders and Vladimir Volodin (Burlington, VT: Ashgate, 2007), p. 232. See also Janusz Symonides, "Cultural Rights: A Neglected Category of Human Rights," *International Social Science Journal* 50, no. 158 (1998): 559-572; Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Boston: Martinus Nijhoff, 2007), 4-6; Francesco Francioni, "Culture, Heritage and Human Rights: An Introduction," in *Cultural Human Rights*, eds. Francesco Francioni and Martin Scheinin (Boston: Martinus Nijhoff, 2008), 1; and United Nations Human Rights Council, "Report of the Independent Expert in the Field of Cultural Rights, Ms. Farida Shaheed, Submitted Pursuant to Resolution 10/23 of the Human Rights Council," UN Doc. A/HRC/14/36 (22 March 2010), para. 3.

⁶ Article 8.1, United Nations Declaration on the Rights of Indigenous Peoples.

and individual right not to be subjected to ethnocide and cultural genocide.”⁷ Raphael Lemkin’s forgotten keywords had been resuscitated, but the moment was fleeting. As the issue moved up the hierarchy of global governance, control over drafting process was taken out of the hands of Indigenous rights advocates and invested in the superior powers of UN member states. Having thus effectively commandeered the situation, member states were able to force through a number of small and seemingly innocuous revisions in the “agreed upon” language without the consent of Indigenous participants.⁸ Hence, the final text of the Article 8 was arguably the product of co-optation.

In fact, if we want to understand why the 2007 Declaration took so long to finally get adopted, we should not look at its progressive statements on cultural rights, but rather towards the political opposition it engendered. For example, when a final roll-call vote was taken in the General Assembly that day, the 2007 Declaration was adopted with a landslide affirmative vote of 143 member states, with 11 abstentions and 4 votes against it.⁹ The 4 opponents were Canada, Australia, New Zealand, and the United States – otherwise known as the CANZUS bloc. Perhaps not surprisingly, these countries also happen to be the most prominent settler colonial countries in the world. The reasons for their opposition varied.¹⁰ They argued that Indigenous peoples already have full political

⁷ Article 7, Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1994/45, “Draft United Nations Declaration on the Rights of Indigenous Peoples,” (adopted 26 August 1994), in “Report of the Sub-Commission on Prevention and Discrimination and Protection of Minorities on its Forty Sixth Session,” UN Doc. E/CN.4/Sub.2/1994/56 (28 October 1994).

⁸ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), 40.

⁹ Abstaining countries included Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine.

¹⁰ United Nations General Assembly, “General Assembly Adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Forward’ towards Human Rights for All, Says President,” (17 September 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. See also Sheryl R. Lightfoot, “Indigenous Rights in International Politics: The Case of ‘Overcompliant’ Liberal States,” *Alternatives: Global, Local, Political* 33, no. 1 (2008): 83-104; and Kristy Gover, “Settler-State Political Theory:

rights to equally participate in democratic governance, and that domestic structures have already been set up to deal with Indigenous issues. Moreover, they were concerned that the principle of free, prior, and informed consent was tantamount to a special right for Indigenous peoples, who would therefore have veto power over development projects. Finally, and most significantly, they objected to the language of self-determination and stressed that the territorial integrity of states could in no way, shape, or form be compromised.

It should be noted that this opposition eventually rescinded, as by 2010 all four CANZUS countries officially reversed their positions. Moreover, two of the abstaining countries have since announced their recognition of the 2007 Declaration, which therefore remains one of the most widely supported instruments in international law. Nevertheless, the political debates at stake in its drafting process reveal that the limits of realism have effectively disciplined the aspirations of Indigenous peoples. Once again, we will deploy the concept of co-optation to explain this disciplinary process. With this theoretical framework in mind, Chapter Four will trace the three-stage drafting process. The first phase began in 1982 and ended in 1994 when the first draft was completed. Thus began the second drafting phase, which ended in 2006, followed by the third and final stage, which culminated with the September 13, 2007 adoption date.

Productive Power and the Dynamic Theory of Co-optation

As usual, we begin this chapter by recalling the parallel four-part structure between different concepts of power and theories of co-optation. While elaborating these parallel perspectives, we also turn back to our ongoing conceptual mapping of the

‘CANZUS’ and the UN Declaration on the Rights of Indigenous Peoples,” *European Journal of International Law* 26, no. 2 (2015): 345-373.

discursive field of IR as like a “colonial household,” which is where we begin our analysis.¹¹ Here in Chapter Four, as we look at the liminal inside-outside status of Indigenous peoples as part of the international system, we thus consider the ambiguous position of constructivism in the “family tree” of IR theory.¹² Then we turn to the concept of *productive power* as a means of opening up the polymorphous features. More specifically, drawing from Foucault, we will see how power is never a “one-way street,” and how “power and resistance are mutually implicated.”¹³ Finally, this section also sets up the so-called *dynamic theory of co-optation* as one that includes particular strengths from all of the prior concepts and theories in our ongoing four-part series. More specifically, such a theorization shows how co-optation is indeed like a “double-edged sword” that mediates systems of power and oppression.

Over the course of this dissertation, we have been elaborating the dynamic “myth function” in IR theory. Chapter One looked at the “anarchy myth” of realism, whereas Chapter Two concerned the “myth of international society” at the center of liberalism. Over the course of the mid-20th century, the mythical traditions behind spousal couple of “*pater* realism” and “*mater* liberalism” served to naturalize the crystallization of an international system defined by the rules of sovereignty and capitalism. As we turned to the post-1970s turning point in Chapter Three, we saw how once dominant assumptions were upended by revolutionary discourses, such as neo-Marxism as well as Indigenous rights discourse. At the same time, we also saw how Indigenous rights discourse as

¹¹ Anna M. Agathangelou and L.H.M. Ling, “The House of IR: From Family Power Politics to the *Poiesis* of Worldism,” *International Studies Review* 6 (2004): 21-49.

¹² J. Samuel Barkin, “Realist Constructivism,” *International Studies Review* 5, no. 3 (2003): 325.

¹³ Michael Barnett and Raymond Duvall, “Power in Global Governance,” in *Power in Global Governance*, eds. Michael Barnett and Raymond Duvall (New York: Cambridge University Press, 2005), 22; and Michel Foucault, *History of Sexuality*, Vol. I. *An Introduction* (translated by Robert Hurley) (New York: Vintage, 1990 [1978]), 95.

counter-power itself elicited a response in the form of neoliberalism, thereby further rendering the status quo as somehow commonsensical. Now in Chapter Four, we will considering these back-and-forth dynamics between power and resistance as an ongoing and unresolved problem in IR theory. In doing so we draw from the basic premise of the constructivist paradigm in IR theory, which is “that identities and interests in international politics are not stable – they have no pre-given nature.”¹⁴

From this position we turn to our fourth and final conceptual category: *productive power*. Like the concept of structural power (Chapter Three), *productive power* works through “social relations of constitution,” rather than through the “interaction of specific actors,” as in the cases of compulsory power (Chapter One) and institutional power (Chapter Two).¹⁵ That is to say, rather than understanding power as the direct interaction of “pre-constituted social actors,” the alternative position is “irreducibly social,” as “constitutive arguments examine how particular *social* relations are responsible for producing particular kinds of actors.”¹⁶ Yet there is a crucial difference between structural and productive power, according to Barnett and Duvall, for “whereas the former works through direct structural relations, the latter entails more generalized and diffuse social processes.”¹⁷ The latter thus involves a move away from structures in terms of hierarchical and binary relations of domination, and instead turns to how discursive systems of signification and meaning are perpetually shaping the constitution of all social

¹⁴ Cynthia Weber, *International Relations: A Critical Introduction* (Second ed.) (New York: Routledge, 2005 [2001]), 60.

¹⁵ Barnett and Duvall, “Power in Global Governance,” 12

¹⁶ *Ibid*, 9. Emphasis original.

¹⁷ *Ibid*, 20.

subjects. As such, structural power can be defined as the diffuse constitutive relations that produce “the situated subjectivities of actors.”¹⁸

Barnett and Duvall’s concept of productive power usefully considers how power is a fundamentally relational practice. It is never simply a case of the proverbial “one-way street,” as the targets of power are almost always capable of withstanding the control and influence of others to varying degrees. Barnett and Duvall thus acknowledge that “power and resistance are mutually implicated,” and while they provide a few brief yet promising suggestions as to the nature of this relationship, it nevertheless remains under-theorized and tautological.¹⁹ Indeed, reflecting on the observation that the concept of power is largely ignored in the study of global governance, it is striking to consider how the notion of resistance is neglected even more so.²⁰ As such, alternative theoretical and conceptual tools are needed in order to supplement Barnett and Duvall’s taxonomy of power.

A suitable place to begin in this regard is with Michel Foucault, who said that “where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power.”²¹ This oft-quoted passage, along with Foucault’s entire corpus, has sometimes been critiqued, perhaps unfairly, to mean that resistance can never escape the clutches of domination, or that the omnipresence of

¹⁸ Ibid, 12.

¹⁹ Ibid, 22. See also Mark Laffey and Jutta Weldes, “Policing in Global Governance,” in Barrett and Duvall, *Power in Global Governance*, 68, who note that “we might characterize resistance as being orthogonal to power: it encompasses all four forms we have discussed, but their social orientation is shifted.” They do not fully develop this tantalizing insight.

²⁰ An exception is David Armstrong, Theo Garrell and Bice Maiguascha, eds., *Governance and Resistance in World Politics* (New York: Cambridge University Press, 2003); and Himadeep Muppidi, “Colonial and Postcolonial Global Governance,” in Barrett and Duvall, *Power in Global Governance*, 289-293. Oliver P. Richmond, “Critical Agency, Resistance and a Post-Colonial Civil Society,” *Cooperation and Conflict* 46, no. 4 (2011): 419-440, notes how the topic of resistance has been elided by the discipline of IR at large.

²¹ Foucault, *The History of Sexuality*, 95.

power precludes possibilities for liberation.²² However ambivalent Foucault may or may not have been regarding the liberatory promises of revolution, the crucial point here is that power and resistance are inextricably intertwined. Quite simply, where there is no resistance, there is no need for power.²³ Other scholars working from Foucault's theoretical contributions, most notably James Scott, have thus shown how the behaviors and discourses of both the superordinate and subordinate are constrained by, and can indeed feed off of, one another.²⁴ Such insights are applicable to the phenomenon of the transnational indigenous rights movement, whose deployment of the very same international legal discourse which has traditionally been used as an instrument of colonization vindicates Foucault's point that discourses of the powerful can be appropriated as tools of resistance by the less powerful.²⁵

The ability of indigenous rights discourse to repurpose such instruments of oppression reflects deeper changes in the broader normative landscape of global governance. In this sense, following the work of anthropologist Lila Abu-Lughod, it is possible to "use resistance as a diagnostic of power," that is, as an indicator of transformations in the ways in which control and influence are exercised.²⁶ While forms of resistance thus respond to shifts in configurations of power, the reverse is also true,

²² Such a critique is apparent in the writings of Jürgen Habermas, Nancy Fraser, Charles Taylor, among others. For a defense of Foucault on these points, see Kevin John Heller, "Power, Subjectification and Resistance in Foucault," *SubStance* 25, no. 1 (1996): 78-110; and Brent L. Pickett, "Foucault and the Politics of Resistance," *Polity* 28, no. 4 (1996): 445-466.

²³ Michel Foucault, "Sex, Power, and the Politics of Identity," in *Ethics: Subjectivity and Truth*, ed. Paul Rabinow (New York: New Press, 1997), 167.

²⁴ James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990), 45, where he notes that "relations of domination are, at the same time, relations of resistance."

²⁵ Foucault, *The History of Sexuality*, 100-101. Cf., H. Patrick Glenn, "Three Ironies of the UN Declaration on the Rights of Indigenous Peoples," in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, eds., Stephen Allen and Alexandra Xanthaki (Portland: Hart, 2011), 171-182.

²⁶ Lila Abu-Lughod, "The Romance of Resistance: Tracing Transformations of Power through Bedouin Women," *American Ethnologist* 17, no. 1 (1990): 42.

insofar as forms of domination adjust to its counter-movements. As noted by Abu-Lughod, it is important not to romanticize resistance as a heroic struggle against external forces. There are limits to resistance, for, as noted by Foucault, it never operates outside any relationship of power. Abu-Lughod thus shows how it is possible for subordinates to both resist *and* support systems of power at the same time.²⁷

A theory of co-optation not only mediates the power-resistance dynamic, but it also explains the puzzle of normative change and continuity, as well as the Janus-faced paradox of rights discourse as both liberatory and regulatory. As seen with the organizational theory of co-optation (Chapter One), this mechanism is used as a self-defense mechanism by powerful institutions to adaptively respond to potential challengers. At the same time, the liberal theory of co-optation (Chapter Two) suggests how international norms can diffuse successfully by tapping into domestic political cultures. The most common connotation of co-optation, however, is provided by the critical theory of co-optation (Chapter Three), which is essentially a form of deradicalization, as threatening elements of resistance are politically neutralized and brought under control. Yet, as noted in the Introduction, the question of whether or not co-optation results in a negative outcome must be bracketed.²⁸

As such, we finally arrive at our preferred theoretical explanation, which we are calling the *dynamic theory of co-optation*. The best example of this is the stage model of

²⁷ Ibid, 47.

²⁸ Michael G. Lacy, "The United States and American Indians: Political Relations," in *American Indian Policy in the Twentieth Century*, ed. Vine Deloria, Jr. (Norman: University of Oklahoma Press, 1985), 85; Rhiannon Morgan, "On Political Institutions and Social Movement Dynamics: The Case of the United Nations and the Global Indigenous Movement," *International Political Science Review* 28, no. 3 (2007): 274.

social movement co-optation proposed by Patrick Coy and Timothy Hedeem.²⁹ Before outlining this model, a word of caution is in order. As noted in the Introduction, there is an implicit teleology in any notion of “stage,” so rather than think of this as evolutionary steps, we should rather appreciate the following categories as four conceptually discrete parts of a dynamic non-linear process. With that said, the process begins with the emergence or inception stage, whereby a challenging movement arises in response to grievances against perceived injustices. A sense of indignation or a dissatisfaction with contemporary world and dominant rule structure is thus a crucial impetus for setting in motion a process of change. Challenging movements often set up alternative institutions that undermine once dominant assumptions behind the status quo, thereby constructing a new “social problem” needing to be addressed. State or other vested interests can thus feel pressured, and institutional “gatekeepers” thus allow new issues into official rule-making.³⁰

Next is the appropriation stage, as the promise for institutional reform leads to the appropriation of the challenging movement’s language. Appropriation involves the inclusion and participation of challenging movement norms and actors within the prevailing system of power. The “paradox of collaboration” in the process of institutionalization is two-fold.³¹ On the one hand, inclusion can enable positive normative change by bringing a certain degree of legitimacy to the challenging

²⁹ Patrick G. Coy and Timothy Hedeem, “A Stage Model of Social Movement Co-optation: Community Mediation in the United States,” *Sociological Quarterly* 46, no. 3 (2005): 405-435.

³⁰ Ibid, 410-412. See also Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (New York: Oxford University Press, 2009), 10-11; and R. Charli Carpenter, “Governing the Global Agenda: ‘Gatekeepers’ and ‘Issue Adoption’ in Transnational Advocacy Networks,” in *Who Governs the Globe?* eds., Deborah D. Avant, Martha Finnemore, and Susan K. Sell (New York: Cambridge University Press, 2010), pp. 202-237.

³¹ Coy and Hedeem, “A Stage Model of Social Movement Co-optation,” 417.

movement, but on the other hand, this entails the loss of challenging movement's autonomous sources of moral and political authority. By seeking legitimacy from within the system, the challenging movement can become dependent upon the state and other vested interests for maintaining such authority. As such, the challenging movement's power to define their own norms are dispossessed. In other words, inclusion can enable change, but this entails the loss of autonomy.

The loss of autonomy leads to the third stage, which Coy and Hedeem call assimilation, whereby the challenging movement is fully absorbed into the dominant system of power. By this point, the state and other vested interests have developed institutions and programs that appropriate the language and personnel of challenging movements, whose leadership and membership is often formally employed within official channels of law, policy, and scholarship. Challenging movement actors thus become acculturated into the social world of the status quo, and challenging movements restructure to meet dominant interests. As a result of this assimilation, the original goals of the challenging movement can be transformed, as the state and other vested interests set the priorities and measures of success.³² Other scholars have called this effect “coercive isomorphism,” which explains institutional homogenization as a result of desires for greater organizational prestige and resources.³³ This aligns with the critical theory of co-optation, which entails the “channeling” or redirecting the goals of the challenging movement towards softer, less radical conditions, effectively depoliticizing the original motivations for normative change.³⁴

³² Ibid, 420.

³³ Paul J. DiMaggio and Walter W. Powell, “The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields,” *American Sociological Review* 48, no. 2 (1983): 147-160.

³⁴ Coy and Hedeem, “A Stage Model of Social Movement Co-optation,” 416 and 418.

Yet this is not the end of the co-optation process. In fact, the final stage of Coy and Hedeén's model is actually like a bifurcation of sorts. On the one hand, the process can result in regulation, whereby the state or other vested interests effectively routinize or standardize new norms as part of their otherwise standard operating procedures. In other words, by fully assimilating the challenging movement and its norms into dominant power structures, potentially disruptive agents and ideas are neutralized. On the other hand, however, and this is crucial to our conception of a dynamic theory of co-optation, the challenging movement can respond in such a way that guards against such assimilative pressures. As Coy and Hedeén put it, "when the co-optation of a challenging movement engages the stage of codification and regulation, the movement and some of its organizations may adopt reactive strategies and defensive measures to protect the integrity of the movement's alternative institutions, practices, and cultures."³⁵

As such, this dissertation thus works towards a more nuanced model of co-optation. While co-optation may lead to a transformation of the challenging movement's original goals, it also provides a buffer or insulation against the dominating tendencies of hegemonic forces. As such, social movements can operate within "oscillating spaces" that are simultaneously engaged with and distanced from formal institutions of power.³⁶ Engagement does not necessarily have to be a Faustian bargain, nor does appropriation or assimilation have to be wholesale, as social movement can tact between institutionalized and non-institutionalized routes of politics.³⁷ Depending on the circumstances, as well as

³⁵ Ibid, 426.

³⁶ Ibid, 427; and Andrew Woolford and R.S. Ratner, "Nomadic Justice? Restorative Justice on the Margins of Law," *Social Justice* 30, no. 1 (2003): 188.

³⁷ Jack A. Goldstone, "Bridging Institutionalized and Noninstitutionalized Politics," in *States, Parties, and Social Movements*, ed. Jack A. Goldstone (New York: Cambridge University Press, 2003), 2.

the organizational responses to challenging movements, activists can move in and out of dominant institutions, as social protests and routine political participation can be complimentary strategies for change. For example, we will see below that Indigenous rights advocates never abandoned direct action, even as they pushed their issue up the UN agenda. Indeed, we will see how a hunger strike at a crucial moment in 2006 managed to get the legislative process back on track, after it was temporarily derailed by an African bloc of member states that were worried about Indigenous peoples' self-determination claims. Thus, the value of a dynamic theory of co-optation is that it can potentially measure these "oscillating spaces" as Indigenous rights advocates mediate relations of power and resistance.

Advancing Indigenous Rights (1985-1995)

With this theoretical framework in tow, we are now ready to trace the legislative process in which the 2007 Declaration was created. Following the series of post-1970s institutional moves at the UN covered in Chapter Three, especially after the 1977 NGO Conference, a certain momentum was gained in the issue area of Indigenous peoples' rights. In 1981, Special Rapporteur Cobo made an adamant proposal during the 34th session of the Sub-Commission for the establishment of a working group that would be specifically focused on Indigenous issues.³⁸ The Sub-Commission agreed with this proposition and issued a resolution that articulated "the need for special measures to be taken urgently in order to promote and protect the human rights and fundamental

³⁸ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty-Fourth Session," UN Doc. E/CN.4/Sub/2495 (28 September 1981), para. 222.

freedoms of indigenous peoples.”³⁹ Commission on Human Rights (CHR), the parental body of the Sub-Commission, approved this consideration the following year, thereby moving the issue up the organizational ladder to the ECOSOC.⁴⁰ The latter body was responsible for formally authorizing the establishment of the Working Group on Indigenous Populations (WGIP) on May 7, 1982.⁴¹

As a subsidiary body of the Sub-Commission (which in turn was a subsidiary of the CHR, which in turn was a subsidiary of the ECOSOC), the WGIP was comprised of five independent human rights experts. At first it was envisioned as a typical working group. Over the entire history of the UN, there have been many “working groups” formed by various organs, not just the ECOSOC. Generally speaking, they are typically ad hoc committees that focus on particular problems or issue areas, and once they reach their specific goals they cease to exist. Many of them are quasi-judicial bodies that produce non-binding legal opinions.⁴² Nevertheless, these bodies play important roles in instigating the legalization process, especially those within the ECOSOC. They lay the groundwork by providing reports and recommendations, organizing international conferences, and occasionally preparing draft conventions for eventual consideration by the GA.⁴³

³⁹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 2 (XXXIV), “Study of the Problem of Discrimination against Indigenous Populations” (9 September 1981).

⁴⁰ United Nations Commission on Human Rights Resolution 1982/34, “Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty-Fourth Sessions Study of the Problem of Discrimination against Indigenous Populations” (10 March 1982).

⁴¹ United Nations Economic and Social Council resolution 1982/34, “Study of the Problem of Discrimination against Indigenous Populations,” (7 May 1982).

⁴² Cf. Jared M. Genser and Margaret K. Winterkorn-Meikle, “The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice,” *Columbia Human Rights Law Review* 39, no. 3 (2008): 690.

⁴³ UN Charter, Article 62.

A conventional starting point for any working group is to collect relevant information via the distribution of a questionnaire to member states. Yet in this case, to have done so would have preemptively made the WGIP very state-centric, thereby betraying the underlying goal to provide a forum for dialogue between Indigenous peoples and governments.⁴⁴ Rather, it was deemed necessary to receive input directly from Indigenous organizations, although this presented certain practical difficulties. After all, it required considerable financial resources to be able travel to the annual Working Group sessions in Geneva, so the possibility of setting up a fund was discussed early on as a means to this end. Moreover, in accordance with Article 71 of the UN Charter, there were specific rules for NGOs to obtain consultative status in order to participate in ECOSOC affairs.⁴⁵ Yet the process of applying for consultative status requires access to institutional knowledge and often political connections as well, resources of which were not typically readily available to many Indigenous organizations.

Some in the UN were sympathetic to these constraints.⁴⁶ In response to the financial limitations on Indigenous groups being able to travel to Geneva, in 1985 the UN General Assembly established the Voluntary Contributions Fund for Indigenous Populations.⁴⁷ As far as requirements for consultative status, discussions were had about

⁴⁴ Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Report of the Working Group on Indigenous Populations on its Fifth Session," UN Doc. E/CN.4/Sub.2/1987/22 (24 August 1987), para. 30.

⁴⁵ Art. 71 UN Charter; ECOSOC Resolution 1296 (XLIV), "Arrangement for Consultation with Non-Government Organizations" (23 May 1968).

⁴⁶ Augusto Willemssen Diaz, "How Indigenous Peoples' Rights Reached the UN," in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, eds. Claire Charters and Rodolfo Stavenhagen (Copenhagen: International Work Group on Indigenous Affairs Doc. No. 127, 2009), 26 and 29.

⁴⁷ General Assembly resolution 40/131, "United Nations Voluntary Fund for Indigenous Populations" (13 December 1985).

making possible exceptions to these rules.⁴⁸ Eventually, the extraordinary decision was made by the WGIP's first Chair, Asbjørn Eide, to waive these regulations in favor of a more open and flexible approach.⁴⁹ Unlike the concurrent ILO revision process, which as we saw in Chapter Three excluded Indigenous organizations from any substantive role in standard setting, the UN was willing to offer them a greater voice in their own affairs. The open-ended participation policy did not come unconditionally, however. UN administrators only agreed to loosen the conventional restrictions against groups without official consultative status "with a proviso that the WGIP could take this permission away from them if they departed from the applicable procedures in the WGIP's sessions and that, if necessary, this would be done without hesitation."⁵⁰ In other words, the UN maintained its institutional authority despite loosening the rules for participation.

At first, only the most well established Indigenous organizations were able to participate. This included the International Indian Treaty Council, the World Council of Indigenous Peoples, and the Indian Law Resource Council. All three were based in North America, and they all happened to have consultative status with the ECOSOC. After the participation rules were opened up, they were joined by other Indigenous organizations, such as Four Directions Council, the South American Indian Council, the National Indian Youth Council, Grand Council of the Crees (of Quebec), National Aboriginal and Islander Legal Services Secretariat, Nordic Saami Council, and the Inuit Circumpolar Conference. Organizations from Latin America and Asia followed as well, including La

⁴⁸ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Report of the Working Group on Indigenous Populations on its First Session," UN Doc. E/CN.4/Sub.2/1982/33 (25 August 1982), paras. 23 and 111-112.

⁴⁹ Asbjørn Eide, "The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples," in *Making the Declaration Work*, 34.

⁵⁰ Diaz, "How Indigenous Peoples' Rights Reached the UN," 27.

Confederación de las Nacionalidades Indígenas de la Amazonia Ecuatoriana and the Chakma People from Chittagong Hill Tracts. Additionally there were non-Indigenous NGOs, such as the Anti-Slavery Society, the International Commission of Jurists, and Survival International. Indigenous peoples and their allies were thus afforded unprecedented access. As noted by Ted Moses of the Grand Council of the Crees (of Quebec), the WGIP “was the first forum within the context of the United Nations at which government representatives and representatives of indigenous peoples met on an equal footing.”⁵¹ In fact, by the end of the decade, its sessions were drawing over 1,000 participants, giving this body a high profile despite its relatively low level in the UN organization.⁵²

Just as the rules of participation were being figured out, the early sessions of the WGIP had to interpret its two-part mandate from the ECOSOC. First, it was instructed to review existing international standards that were pertinent to the promotion and protection of Indigenous peoples’ rights.⁵³ The WGIP thus began its work by considered the existing body of standards at their disposal, including the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the 1948 Genocide Convention, the International Convention on the Elimination of All Forms of Racial Discrimination, as well as certain parts of ILO Convention No. 107.⁵⁴ At least one government observer said that “drafting new international standards might not be necessary,” and that the WGIP should instead use these existing standards.⁵⁵ Yet many

⁵¹ Idem, “Report of the Working Group on Indigenous Populations on its Seventh Session,” UN Doc. E/CN.4/Sub.2/1989/36 (25 August 1989), para. 27.

⁵² Willemsen-Diaz, “How Indigenous Peoples’ Rights Reached the UN,” 28

⁵³ United Nations Economic and Social Council resolution 1982/34.

⁵⁴ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Report of the Working Group on Indigenous Populations on its First Session,” para. 47.

⁵⁵ Ibid, para. 57.

observers from Indigenous organizations disagreed and argued “that existing international instruments did not offer adequate protection or not effectively implemented regarding indigenous populations.”⁵⁶

Thus, the second part of the WGIP’s mandate was to “give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and differences in the situations of indigenous populations throughout the world.”⁵⁷ Stated differently, in addition to reviewing already existing international standards, this second part of the mandate opened the possibility of developing entirely new substantive standards altogether.⁵⁸ This call for standard setting was the more controversial of the two parts of the mandate. The conservative position that aimed to focus on already existing standards was very much in the minority, as many participants were skeptical as to whether existing standards had demonstrated any impact on government behaviors or public attitudes.⁵⁹ In the third annual session of the WGIP, which met in August 1984, Geneva, it became clear that an entirely new normative framework was necessary in order to respond to the “particular and pressing needs” of Indigenous peoples.⁶⁰ During the fourth annual session, the following list of issues were highlighted as pressing concerns requiring new normative standards:

Inequalities and oppression suffered for centuries; ethnocidal practices; the actual dismal situation and marginalized existence in many countries, notwithstanding lofty statutes and policies; lack of understanding and knowledge reflected in accusations of backwardness and primitiveness; and forced assimilation and

⁵⁶ Idem, “Report of the Working Group on Indigenous Populations on its Second Session,” UN Doc. E/CN.4/Sub.2/1983/22 (23 August 1983), para. 103.

⁵⁷ Economic and Social Council resolution 1982/34.

⁵⁸ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Report of the Working Group on Indigenous Populations on its First Session,” para. 44.

⁵⁹ Ibid, para. 59.

⁶⁰ Idem, “Report of the Working Group on Indigenous Populations on its Third Session,” UN Doc. E/CN.4/Sub.2/1984/20 (8 August 1984), para. 89.

integration by majority populations, were brought up as reasons underlining the need for new standards concerning indigenous rights and freedoms.⁶¹

From the outset, therefore, the protection of Indigenous peoples from cultural genocide and ethnocide was highlighted as an urgent issue that needed to be addressed through the creation of new jurisprudence.

Although it became clear that entirely new standards were needed, it was not obvious what type of format through which these new standards should be issued. There were three possible formats that varied in terms of formality, substance, and authority. In the first case, the WGIP could have simply issued a statement of principles that, while perhaps deeply substantive in terms of its normative thrust, would politically not have been very impactful. The second option was to prepare a declaration, which could also be comprehensive in terms of normative content but at the expense of not being legally binding. Finally, the third option would be to draft a convention that, while legally binding after adoption, would have possibly had to sacrifice normative content in order to achieve the requisite level of formal consensus.⁶² Ultimately, the second option was chosen, and in 1985 the WGIP started to draft a declaration.⁶³

Just as the second part of WGIP mandate was interpreted in terms of a draft declaration, the first part of its mandate concerning a “review of developments” instead descended into a series of allegations by Indigenous peoples of state abuses. For example, in the 1983 session of the WGIP, allegations of genocide were made in regards to the

⁶¹ Idem, “Report of the Working Group on Indigenous Populations on its Fourth Session,” UN Doc. E/CN.4/Sub.2/1985/22 (27 August 1985), para. 61.

⁶² Idem, “Report of the Working Group on Indigenous Populations on its First Session,” para. 54; and idem, “Report of the Working Group on Indigenous Populations on its Second Session,” para. 101.

⁶³ Idem, “Report of the Working Group on Indigenous Populations on its Fourth Session,” para. 85.

situation in Guatemala. According to the official records, “it was stated that, in that country, torture, murder, disappearances, massacres of entire indigenous communities, the burning of their houses and crops and persecution were carried out by official armed groups.”⁶⁴ Similarly, during the following year’s session, it was noted that Indigenous individuals in several countries faced many physical and mental harms, such as the imposition of birth control measures, all of which were “threatening the destruction of those communities as a whole.”⁶⁵ Even the dispossession of Indigenous peoples’ lands and other resources was said to threaten “their very right to life.”⁶⁶ Given such critical concerns, “the collective right to exist and to be protected against genocide” was amongst the first already existent norms to be included in a working list of principles.⁶⁷

In the face of such allegations, many government observers repeatedly warned against the WGIP from becoming a “chamber of complaints.”⁶⁸ Many Indigenous representatives wanted a special Rapporteur or a member of the Working Group to be authorized to investigate claims of human rights abuses against Indigenous peoples.⁶⁹ In response, the leadership of the WGIP emphasized the pursuit of “constructive dialogue,” in this sense meant non-accusatory.⁷⁰ Nevertheless, considering the dire human rights situations faced by Indigenous peoples all over the world, attention was often drawn to serious infractions, including “inter alia, unlawful taking of life and actions which ... led

⁶⁴ Ibid, “Report of the Working Group on Indigenous Populations on its Second Session,” para. 35.

⁶⁵ Idem, “Report of the Working Group on Indigenous Populations on its Third Session,” para. 57.

⁶⁶ Idem, “Report of the Working Group on Indigenous Populations on its Fourth Session,” para. 35.

⁶⁷ Ibid, Annex II.

⁶⁸ Idem, “Report of the Working Group on Indigenous Populations on its First Session,” paras. 24 and 114; idem, “Report of the Working Group on Indigenous Populations on its Second Session,” para. 16; idem, “Report of the Working Group on Indigenous Populations on its Third Session,” para. 16.

⁶⁹ Idem, “Report of the Working Group on Indigenous Populations on its Seventh Session,” para. 48.

⁷⁰ Idem, “Report of the Working Group on Indigenous Populations on its Fourth Session,” para. 13.

or were leading to ethnocide and/or cultural genocide.”⁷¹ As one Indigenous observer point out, such allegations “were made with the understanding that they did not constitute outright complaints [but] should rather be seen as examples of factual situations of the concern to Indigenous societies.”⁷²

Some government observers were also keen to take control over the procedural standards of the process. Subtle threats were issued, as in one government representative who said “that the extent to which Governments would be able to cooperate with the Working Group would depend very much on the procedures established.”⁷³ Accordingly, member state delegations were trying to conservatively set the rules and impose limits to the discourse. They frequently used terms like “realistic” and “consensus.” For example, one government observed “suggested that a realistic and practical approach is necessary in order to reflect a broad international consensus, adding that expectations of obtaining 100 per cent of goals are bound to lead to impasse and disappointment.”⁷⁴ Likewise, a delegate from the United States government pointed out that some of the demands of Indigenous peoples were “overbroad and unrealistic.”⁷⁵ In other words, states were saying that in order for the draft declaration to be “realistic,” Indigenous peoples would have to lower their expectations.

Yet such subtle threats of state resistance did not deter Indigenous representatives who commonly linked allegations of genocide and forced cultural change to demands for new substantive standards. In doing so, they often unwittingly blurred the boundary

⁷¹ Idem, “Report of the Working Group on Indigenous Populations on its Fifth Session,” para. 34.

⁷² Ibid, para. 32.

⁷³ Idem, “Report of the Working Group on Indigenous Populations on its First Session,” para. 45.

⁷⁴ Idem, “Report of the Working Group on Indigenous Populations on its Seventh Session,” para. 51.

⁷⁵ Idem, “Report of the Working Group on Indigenous Populations on its Tenth Session,” UN Doc. E/CN.4/Sub.2/1992/33 (20 August 1992), para. 52.

between genocide, in the strict sense of the term, and so-called “cultural genocide” (or “ethnocide,” as the terms were used interchangeably). One Indigenous representative thus warned “that his people were in danger of extinction” and “that their language was forbidden and that their women were forced into mixed marriages.”⁷⁶ These keywords were often used to critique state policies of integration. For instance, another Indigenous representative alleged that “education was being used to forge one nation with one language, one history and one culture. ... In this same process of homogenization, all forms of dissent or opposition to these policies were being brutally suppressed.”⁷⁷ As one member of the WGIP put it, forced integration typically involved “political repression, ethnocide or genocide and economic pressure.”⁷⁸ Some indigenous observers stressed that the students are ongoing, alleging that “many indigenous populations still continue to be subject to systematic destruction of their cultures in distinct identity.”⁷⁹ This was even true in some liberal democratic countries, where “there were laws authorizing in some instances the forced removal of indigenous children from their families.”⁸⁰

The line between genocide and ethnocide/cultural genocide was not always so blurred, however, as many Indigenous observers were keen to stress the latter as a distinct harm. Some participants in the WGIP pointed out that the 1948 Convention was too narrow, and “that the definition did not apply in some case where “the word ethnocide would be more appropriate.”⁸¹ A number of Indigenous observers point out that “certain activities pursued by governments, even if not explicitly hostile, often lead to the

⁷⁶ Idem, “Report of the Working Group on Indigenous Populations on its Eleventh Session,” para. 90.

⁷⁷ Idem, “Report of the Working Group on Indigenous Populations on its Sixth Session,” para. 54.

⁷⁸ Idem, “Report of the Working Group on Indigenous Populations on its First Session,” para. 68.

⁷⁹ Idem, “Report of the Working Group on Indigenous Populations on its Second Session,” para. 70.

⁸⁰ Idem, “Report of the Working Group on Indigenous Populations on its Second Session,” para. 71.

⁸¹ Idem, “Report of the Working Group on Indigenous Populations on its First Session,” para. 78.

destruction of the indigenous peoples as groups and ought there for them to be recognized as ethnocidal.”⁸² A representative of another Indigenous group called attention to “what he called his government’s policy of cultural genocide. The government was transporting non-natives from other areas onto his group’s resource-rich traditional lands in order to culturally overwhelm the local population.”⁸³ There was a tendency to move between these terminological alternatives – ethnocide and cultural genocide – despite the fact that, as we argued in Chapter Three, there is an analytical distinction between them. And as we will see momentarily, the terminological inconsistency here would pose problems down the road. Nevertheless, the emphasis in this regard was significant, as “the question of ethnocide ... was at the heart of the task entrusted to the Working Group.”⁸⁴

However, it took some time before “cultural genocide” or “ethnocide” were fully introduced as part of the official language in the WGIP’s work on the “evolution of standards.” Even though these particular keywords were evident throughout the proceeding records, they were still notably absent in the several initial declarations of principles that were submitted by different Indigenous organizations during first few annual sessions. For example, the preliminary wording that was first introduced in 1985 included a statement on “the collective right to exist and to be protected against genocide,” but none of the remaining statements even implied anything close to “cultural genocide” or “ethnocide.”⁸⁵ In fact, the actual terminology of “ethnocide” was not used as part of the preliminary wording until 1988, when Erica-Irene Daes, who chaired the WGIP during these crucial early years, completed an important working paper that

⁸² Idem, “Report of the Working Group on Indigenous Populations on its Fifth Session,” para. 60.

⁸³ Idem, “Report of the Working Group on Indigenous Populations on its Tenth Session,” para. 84.

⁸⁴ Idem, “Report of the Working Group on Indigenous Populations on its Fifth Session,” para. 60.

⁸⁵ Idem, “Report of the Working Group on Indigenous Populations on its Fourth Session,” Annex II.

provided the basic structure of preambular paragraphs and articles that would inform the remainder of the drafting process. Here, for the first time in the legislative process, it was declared that Indigenous peoples have “the collective right to protection against ethnocide,” which included the prevention “of any form of forced assimilation or integration, of imposition of foreign life styles and of any propaganda directed against them.”⁸⁶

No sooner had the language of “ethnocide” been introduced that objections were raised by member state delegations. The main reason for this was the apparent lack of definitional clarity. For instance, during the 1989 session, “one Government observer expressed support for the right to protection against ethnocide,” at least in principle, but qualified this support with a request for greater precision, adding that “this principle should either provide a definition of ‘ethnocide,’ or alternatively, the list of acts enumerating the concept should be an exhaustive one.”⁸⁷ Another government observer added that “the imposition of foreign lifestyles ... was too vague and too general.”⁸⁸ In 1992, several member state representatives stated that this terminology was “undefined and unclear,” and that “they felt uncomfortable with respect to the inclusion of the concept of ‘cultural genocide’ in the draft declaration.”⁸⁹ These objections foreshadowed the eventual reasoning for dropping the terminology of “cultural genocide” or “ethnocide” in favor of a more descriptive construction.

⁸⁶ Economic and Social Council resolution 1988/36, “Draft Declaration of Principles on the Rights of Indigenous Populations” (27 May 1988).

⁸⁷ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Report of the Working Group on Indigenous Populations on its Seventh Session,” UN Doc. E/CN.4/Sub.2/1989/36 (25 August 1989) para. 70.

⁸⁸ *Ibid.*

⁸⁹ *Idem*, “Report of the Working Group on Indigenous Populations on its Tenth Session,” UN Doc. E/CN.4/Sub.2/1992/33 (20 August 1992), para. 79.

Chairperson Daes responded to these critiques by promising to include a commentary on this terminology in order to avoid any misunderstanding.”⁹⁰ This came during the following annual session, in 1993, when “the Chairperson-Rapporteur explained that ‘cultural genocide’ referred to the destruction of the physical aspects of a culture, while ‘ethnocide’ referred to the elimination of an entire “ethnos” and people.”⁹¹ Unfortunately, no further clarification was provided. A technical review by the Language Services of the UN offered no more insight into the distinction between “the physical aspects of a culture” and an “ethnos.”⁹² Presumably, the former referred to the objective features of a group, such as their material artifacts, or even their lands, territories, or resources, whereas the latter referred to the more subjective characteristics, as in the “spirit” of a people or their “way of life.” Such a distinction can only be inferred, however, and Daes’ lack of clarity would come back to bite this provision later on in the process. [tangible vs intangible]

Nevertheless, these keywords managed to hold on, despite the criticism from member state delegations and the lack of clarity from the chairperson. They were retained in the final text of the draft declaration that was agreed upon in the 1993 annual session of the WGIP, which then submitted the text for approval from its parental body.⁹³ This first draft, which is henceforth referred to as the Sub-Commission text, was approved in August 1994.⁹⁴ The entire text of Article 7 of the Sub-Commission draft reads as follows:

⁹⁰ Ibid, para. 80.

⁹¹ Idem, “Report of the Working Group on Indigenous Populations on its Eleventh Session,” UN Doc. E/CN.4/Sub.2/1993/29 (23 August 1993), para. 48.

⁹² Idem, “Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples: Note by the Secretariat,” UN Doc. E/CN.4/Sub.2/1994/2 (5 April 1994), para. 15.

⁹³ Idem, “Report of the Working Group on Indigenous Populations on its Eleventh Session,” para. 209.

⁹⁴ Idem, resolution 1994/45, “Draft United Nations Declaration on the Rights of Indigenous Peoples,” (26 August 1994), in “Report of the Sub-Commission on Prevention and Discrimination and Protection of Minorities on its Forty-Sixth Session,” UN Doc. E/CN.4/Sub.2/1994/56 (28 October 1994).

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.⁹⁵

As with the rest of the text, this provision was said to be “comprehensive and reflected the legitimate aspirations of indigenous peoples as a whole.”⁹⁶ It thus serves as the original standard by which the subsequent two drafts, including the final version, can be compared.

Disciplining Indigenous Rights (1995-2006)

In July 1995, the draft declaration moved up the UN bureaucracy, as the ECOSOC authorized the CHR, the parental body of the Sub-Commission, to establish new working group that is henceforth referred to as the Working Group on the Draft Declaration (WGDD).⁹⁷ As this second stage of the drafting process commenced, the influence of member states increased vis-à-vis Indigenous peoples. Previously, WGIP’s unprecedented participation policies under the Sub-Commission enabled Indigenous organizations to fully contribute without having to first obtain official consultative status from the UN. However, this requirement was reinstated under the WGDD, making it

⁹⁵ Ibid, Annex.

⁹⁶ Idem, “Report of the Working Group on Indigenous Populations on its Eleventh Session,” para. 133.

⁹⁷ Economic and Social Council resolution 1995/32, “Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214” (25 July 1995).

formally less accessible than its predecessor.⁹⁸ As such, there was concern that government observers were dictating the proceedings, and Indigenous participants had to remind the WGDD “that they should have full input” in the process and “must be equally able ... to play a direct role in the development of the agenda.”⁹⁹ Moreover, unlike the Sub-Commission, which was primarily composed of independent experts, the CHR was a political body. As a result, the negotiations during this second phase of the drafting process was marked by a mutual mistrust between member state delegations and Indigenous organizations.¹⁰⁰

Tensions were evident almost immediately, as many Indigenous organizations insisted that the Sub-Commission text be adopted without amendment, whereas member states claimed that certain parts of draft declaration needed clarification or improvement.¹⁰¹ According to Kenneth Deer of the Kahnawake Mohawk community, “our position was that the text of the draft declaration adopted by the WGIP [i.e. the Sub-Commission text] ... was what we wanted. We would not settle for anything less.”¹⁰² Yet this “no change” strategy was no match for the dominant state interests that dictated the

⁹⁸ Willemsen-Diaz, “How Indigenous Peoples’ Rights Reached the UN,” 28; and Luis Enrique Chávez, “The Declaration on the Rights of Indigenous Peoples Breaking the *Impasse*: the Middle Ground,” in *Making the Declaration Work*, 97.

⁹⁹ Commission on Human Rights, “Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 [Second Session],” UN Doc. E/CN.4/1997/102 (10 December 1997).

¹⁰⁰ Asbjørn Eide, “The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples,” 38; John B. Henriksen, “The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process,” in *Making the Declaration Work*, 81; and Adelfo Regino Montes and Gustavo Torres Cisneros, “The United Nations Declaration on the Rights of Indigenous Peoples: the Foundation of a New Relationship between Indigenous Peoples, States and Societies,” in *Making the Declaration Work*, 141.

¹⁰¹ Luis Enrique Chávez, “The Declaration on the Rights of Indigenous Peoples Breaking the *Impasse*: the Middle Ground,” 97.

¹⁰² Kenneth Deer, “Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples,” in *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, eds. Jackie Hartley, Paul Joffe, and Jennifer Preston (Saskatoon: Purich, 2010), 22.

proceedings. Many member states had been frustrated with the WGIP process under the Sub-Commission, and now in the more state-centric environs of the CHR, they found a more amenable climate. At the first session of the WGDD in 1996, the Chairperson, Ambassador José Urrutia of Peru, refused to acknowledge Indigenous representatives, who subsequently staged a dramatic walkout.¹⁰³ Recall our theoretical discussion above regarding the “oscillating space” afforded by the dynamic theory of co-optation, as challenging movements are able to move in and out of formal institutional politics. As we will see later, this was not the last time when Indigenous activists were forced to resort to direct action.

Although Indigenous organizations were thus able to reclaim their voice, the nature of the debate henceforth was set. Generally speaking, states argued that “the draft declaration should be consistent with the existing body of international human rights law, be sufficiently precise to give rise to identifiable and practicable rights and obligations and attract broad international support,” whereas Indigenous organizations contended that “the draft should not be a mere repetition of rights laid down in other instruments but should be a reflection of existing progressive legal concepts.”¹⁰⁴ One of the biggest test of these competing perspectives concerned Article 3 of the Sub-Commission text, which concerned Indigenous peoples’ right to self-determination. Previewing what would become perhaps the most contested issue in the drafting process, some states contended that this provision “went beyond existing international and national law and practice.”¹⁰⁵

¹⁰³ Ibid, 21; and Andrea Carmen, “International Indian Treaty Council Report from the Battlefield – The Struggle for the Declaration,” in *Making the Declaration Work*, 89-90.

¹⁰⁴ United Nations Commission on Human Rights, “Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 [First Session],” UN Doc. E/CN.4/1996/84 (4 January 1996), paras. 23 and 24.

¹⁰⁵ Ibid, para. 43.

In response, “several indigenous organizations stated that such an approach would lead to freezing international law in time and inhibit progress,” adding that “the right of self-determination was also applicable to internal, non-colonial situations. The gaining of national independence by a State through decolonization does not extinguish the applicability of the right of self-determination of indigenous peoples.”¹⁰⁶ This disagreement would persist throughout the remainder of the process and would only be satisfied after the principle of the territorial integrity of states was absolutely reaffirmed.

In a manner recalling the “peoples” versus “populations” debate in the ILO revision process, covered in Chapter Three, there was further contestation over proper labelling. This time, however, it was over whether to use the expression “indigenous people” in the singular sense, or “indigenous peoples” in the plural form.¹⁰⁷ Having lost the earlier battle in the ILO revision process over the retention of the label, “populations,” many states sought to recast the subject in the generic and singular form of “people.” In contrast, Indigenous peoples insisted on the plural form, “peoples,” as in the phrase, “the Peoples of the United Nations,” which is famously enshrined in the UN Charter.¹⁰⁸ Once again, the issue of labelling was connected to Indigenous peoples’ claim for the right to self-determination. This made many states uncomfortable, including many African and Asian governments that insisted for a rigorous definition of “Indigenous peoples” in order to limit the scope of the draft declaration. As noted by John Henriksen, a Samí lawyer who participated in the WGDD, “it was frequently stated by African and Asian states that

¹⁰⁶ Ibid.

¹⁰⁷ United Nations Commission on Human Rights, “Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 [Second Session],” UN Doc. E/CN.4/1997/102 (10 December 1996), para. 3.

¹⁰⁸ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003), 161.

they did not have any indigenous peoples in their countries and that everyone there was indigenous.”¹⁰⁹ Looking ahead, some of these countries would play spoilers in the drafting process, concerned as they were that Indigenous rights to self-determination would threaten the political unity of their states.

There were other forms of pushback against the draft declaration. For example, the Mexican government supported the “general thrust” of article 6 of the Sub-Committee text, which covered “full guarantees against genocide ... including the removal of indigenous children from their families and communities *under any pretext*.”¹¹⁰ However, this support came with a caveat, insofar as the Mexican government felt “it was necessary to include provisions which allowed the authorities to remove indigenous children if, for example, they were being abused sexually.”¹¹¹ Other governments were similarly uncomfortable with the phrase “under any pretext,” as they argued “that there were circumstances under which it was in the child’s interest to be removed from their families and communities ... It was felt that in these circumstances indigenous peoples and communities should not receive preferential treatment over others since this could turn out to be harmful to the child.”¹¹²

Article 7 of the Sub-Commission text was also the subject of scrutiny, as some states highlighted it as one of the many “unclear, contradictory or repetitive provisions

¹⁰⁹ Henriksen, “The UN Declaration on the Rights of Indigenous Peoples,” 79.

¹¹⁰ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Annex in “Report of the Sub-Commission on Prevention and Discrimination and Protection of Minorities on its Forty-Sixth Session.”

¹¹¹ United Nations Commission on Human Rights, “Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 [Second Session],” para. 176.

¹¹² *Idem*, “Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 [First Session],” para. 61.

that were in need of revision.”¹¹³ Once again, they subtly threatened to withhold their “consensus” unless the language was adjusted accordingly. This was the case with the terms “ethnocide” and “cultural genocide” in Article 7 of the Sub-Commission text. “They stated that these terms were not clear concepts to be usefully applied in practice. Others said they had no problems with the term ‘genocide,’ which they considered to be as stated in the Genocide Convention, but did express reservations about the adjective ‘cultural’ and the term ‘ethnocide,’ or sought clarification as to the meaning of these terms.”¹¹⁴ It was not necessarily that the states objected to the underlying norm, or so they claimed, but just the peculiar language used to articulate it. For example, the representative of the United States

expressed concern that the terms ‘ethnocide’ and ‘cultural genocide’ in article 7 were not clear concepts that could be usefully applied in practice. He suggested that the provision could be rephrased to state that indigenous people had a right to be free not only from genocide but from actions aimed at destroying their rights to belong to the group and enjoy their own culture, language and religion.¹¹⁵

After these initial statements over article 7 of the Sub-Commission text, there was very little further discussion on the issue of ethnocide/cultural genocide. Indeed, the process was excruciatingly slow during these intervening years. For each annual session, the WGDD focused on a handful of articles at a time, subjecting them to intense scrutiny and negotiating precise language. It was not until the 8th session of the WGDD in December 2002 when article 7 was finally dealt with. Member state delegations were adamant that the terms “ethnocide” and “cultural genocide” were not generally accepted

¹¹³ Ibid, para. 23.

¹¹⁴ Ibid, para. 64.

¹¹⁵ Idem, “Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 [Second Session],” para. 188.

in international law. In particular, they reasoned that the 1981 Declaration of San José was the product of experts, not states, and was therefore not applicable.¹¹⁶ Rather than using this confusing terminology, many member states pressed for alternative language, such as “forced assimilation or destruction of their culture.” In fact, this specific proposition, which came from the Norwegian delegate, was ultimately what made its way into the final text.¹¹⁷ From this point forward, discussion was closed over the ethnocide/cultural genocide provision, although with a reworking of the draft declaration, it would eventually be renumbered as Article 8.

Over the course of the WGDD’s life span, changes were being made to the text without the full consent of Indigenous participants. At the tenth session of the WGDD in 2004, when the chairperson submitted his own text to the CHR for passage, a number of Indigenous representatives resorted once again to direct action as a form of protest. A half dozen representatives undertook a four-day long hunger strike and spiritual fast in front of the Palais des Nations. Led by Saul Vicente Vasquez, from the Zapotec people of Oaxaca, Mexico, they issued a statement that read, “We will not allow our rights to be negotiated, compromised or diminished in this UN process, which was initiated more than 20 years ago by Indigenous peoples.”¹¹⁸ In the end, the “no change” strategy failed. Nevertheless, according to Kenneth Deer, “the longer we delayed agreeing to changes ... the more time we had to educate governments ... and begin to make them feel comfortable with the wording. ... While some changes were eventually made to the [Sub-

¹¹⁶ Idem, “Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 [Eighth Session],” UN Doc. E/CN.4/2003/92 (6 January 2003), para. 52.

¹¹⁷ Ibid, para. 55.

¹¹⁸ Charmaine White Face (Zumila Wobaga), *Indigenous Nations’ Rights in the Balance: An Analysis of the Declaration on the Rights of Indigenous Peoples* (St. Paul, MN: Living Justice, 2013), 2; and Carmen, “International Indian Treaty Council Report from the Battlefield,” 91.

Commission] text, our persistence in holding to our ‘no change’ strategy granted us time to convince states to agree to the core right of self-determination.”¹¹⁹

By 2006, just as Indigenous peoples and states were reaching a compromise, the entire process found itself in the middle of a major restructuring of the UN. UN Secretary-General Kofi Annan gave the inaugural address to the first session of the United Nations Human Rights Council (HRC) in June 2006. His presence was fitting, as the creation of the HRC was part of his comprehensive reform agenda, which included strengthening human rights protections and peacekeeping operations. This broader sentiment of reform was reflected at the September 2005 World Summit in New York, where there was a growing consensus to create a new, more authoritative human rights body to replace the fifty-nine-year-old Commission on Human Rights. The Commission had been established in 1946 as one of the UN Economic and Social Council, under which capacity it drafted the Universal Declaration of Human Rights. Yet by the turn of the 21st century, the Commission was being discredited by activists and states alike, either for systemically failing to adopt resolutions condemning abuses by the permanent five members of the Security Council or for appointing questionable representatives to the Commission, as when the Libyan ambassador was elected to chair in 2003 or the 2004 election of the Sudanese delegate. As such, there were increasingly prevalent

¹¹⁹ Deer, “Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples,” 22.

sentiments to either reform or abandon the Commission.¹²⁰ In this context, the HRC was created by GA Resolution 60/251, adopted on 15 March 2006.¹²¹

Despite this institutional change, the WGDD finished its work under the HRC. The 11th and final annual session of the WGDD met from late December 2005 to early January 2006, at which point it submitted the second draft (the HRC draft).¹²² At its inaugural session in June 2006, the HRC promised to adopt this most recent version.¹²³ Having thus put the working group towards the top of its agenda at its inaugural session, on June 29, 2006, the HRC adopted the second draft version of the Declaration based on the eleventh session of the working group of the Commission. With 30 votes in favor (mostly Latin American and European states, including the United Kingdom, as well as a few from Asia and Africa), two votes against (Canada and Russia), and 12 abstentions (Philippines, MENA, some from West Africa, Argentina, Ukraine), the HRC recommended the General Assembly to adopt this draft resolution.¹²⁴

Finalizing the Official Text (2006-2007)

Following the draft resolution prepared by the HRC, the issue moved up to the Third Committee of the General Assembly, which deals with social, humanitarian and cultural matters. In late November 2006, Peru sponsored the draft resolution prepared by

¹²⁰ Yvonne Terlingen, "The Human Rights Council: A New Era in UN Human Rights Work?" *Ethics and International Affairs* 21, no. 2 (2007): 167-178; and Bertrand G. Ramcharan, "Norms and Machinery," in *The Oxford Handbook on the United Nations*, Thomas G. Weiss and Sam Daws, eds. (New York: Oxford University Press, 2007), 450-1.

¹²¹ Sixtieth session of the UN General Assembly, Resolution 60/251, "Human Rights Council," (UN Doc., A/RES/60/251, 3 April 2006).

¹²² Sixty-second session of the Commission on Human Rights, "Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on the work of its eleventh session," (UN Doc., E/CN.4/2006/79, 22 March 2006).

¹²³ First session of the Human Rights Council, "Joint draft resolution submitted by Peru on behalf of forty-three Governments," (A/HRC/1/L.3, 23 June 2006).

¹²⁴ First session of the Human Rights Council, "Report of the Human Rights Council to the General Assembly on the work of its first session, 19-30 June 2006," in *Official Records of the General Assembly, Sixty-first session, Supplement No. 53* (UN Doc., A/61/53).

the HRC. Speaking to the Third Committee, the Peruvian representative “said the revised text had been geared to addressing matters of significant concern for many delegations, namely the principle of self-determination of peoples and respect for the territorial integrity of States.”¹²⁵ We have already seen at least some of the changes from the Sub-Commission text to the HRC text, and these changes were intended to ameliorate any states’ reservations towards the process. Nevertheless, the Peruvian proposal was defeated by an alternative resolution co-sponsored by a group of African member states that voted to defer action in the Third Committee concerning the Declaration, arguing that further consultations were necessary in order to achieve greater consensus among member states before the end of the current sixty-first session of the GA.

Led by Namibia, this African group framed their objections in plausibly positive and supportive terms. They argued that further consultations would broaden the consensus of member states, thereby plausibly enhancing the legitimacy of the Declaration. Indeed, representatives from the African bloc maintained that they agreed to the Declaration in principle, but they had misgivings about the process by which the HRC resolution was drafted. Egypt, for example, objected to the apparent expectation that the GA should adopt the HRC draft resolution without review. After all, not all member states in the Third Committee were represented in the first session of the HRC. These concerns were with the institutional process behind the draft resolution, but underneath these concerns were more serious concerns with the content of the Declaration.

¹²⁵ Sixty-first session of the General Assembly, Third Committee, 53rd meeting (AM), “Third Committee Approves Draft Resolution on Right to Development; Votes to Defer Action Concerning Declaration on Indigenous Peoples,” Department of Public Information, News and Media Division, New York, (UN Doc. GA/SHC/3878, 28 November 2006). Hereafter, this document is referred to as Third Committee, “Votes to Defer Action Declaration on Indigenous Peoples.”

The more substantive concerns with the Declaration are evidenced in a draft *aide memoire* prepared by the African group. This document was prepared in early November 2006 and appears to enumerate a list of objections to be used in the Third Committee proceedings later that month.¹²⁶ Its first concern was the absence of any official definition of “Indigenous peoples” in the draft resolution, and that this lack of clarity could have divisive implications, providing a pretext for secessionist movements. As noted in the draft aide memoire, “Africa is still recovering from the effects of ethnic based conflicts,” and the open interpretation of who can use Indigenous rights “can also create tensions amongst ethnic groups and instability within sovereign States.”¹²⁷ This argument was later echoed in the Third Committee by the Rwandan delegate, who was likely reflecting his government’s antipathy towards ethnonationalist sentiments.¹²⁸

Another substantive objection of the African group towards the Declaration concerned the provisions for Indigenous peoples’ right to self-determination, and the implications this would have in domestic systems organized as sovereign states. According to the draft aide memoire, “the principle of self-determination only applies to peoples under colonial and/or foreign occupation,” referring to the blue-water thesis embodied in the UN Charter. Under such a narrow understanding of self-determination, the relevant provisions in the Declaration (pp. 13 and Art. 3 and 4) could “be misrepresented as conferring a unilateral right of ... possible secession ..., thus threatening the political unity and territorial integrity of any country.”¹²⁹ Later, in the

¹²⁶ African Group, “Draft Aide Memoire on the United Nations Declaration on the Rights of Indigenous People,” (New York, 9 November 2006). Available at http://www.docip.org/greenstone/collect/cendocdo/index/assoc/HASH1970/3677c432.dir/draft_africangroup.pdf.

¹²⁷ African Group, “Draft Aide Memoire,” paragraph 2.2.

¹²⁸ Third Committee, “Votes to Defer Action Declaration on Indigenous Peoples.”

¹²⁹ African Group, “Draft Aide Memoire,” paragraph 3.0.

Third Committee, the Kenyan representative argued that “self-determination only applied to those under colonial rule.”¹³⁰

As such, any pretense of the Declaration implicitly promoting the decolonization of Indigenous peoples was tacitly rebuffed. Indeed, the draft aide memoire even cited the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples as normative support for its rejection of Indigenous peoples’ right to self-determination. Articles 6 and 7 of the 1960 Declaration reaffirm the United Nations’ core principles of preserving the “national unity and territorial integrity of a country” and of maintaining “non-interference in the internal affairs of all States.”¹³¹ For these post-colonial countries, which since independence have often struggled to survive and compete in the international system, these principles of territorial integrity and inviolability of state sovereignty are paramount, and the concern was that Indigenous peoples’ rights to self-determination could possibly violate these principles.

Several member states that had endorsed the draft resolution adopted from the HRC, most notably those from Latin America, responded to the African group in a heated debate in the Third Committee on 28 November 2006. After 24 years of negotiation between the representatives of Indigenous peoples, NGOs, human rights bodies, and member states in the Commission and HRC, the delegate from Mexico argued that this “no-action motion” put forth by the African group “would jeopardize the viability of the Declaration and send a signal of inability to act on the issue.”¹³²

¹³⁰ Third Committee, “Votes to Defer Action Declaration on Indigenous Peoples.”

¹³¹ (Which session of the) General Assembly, Resolution 1514 (XV), “Declaration on the Granting of Independence to Colonial Countries and Peoples,” (citation, 14 December 1960).

¹³² Third Committee, “Votes to Defer Action Declaration on Indigenous Peoples.”

Yet despite such statements of support, other member states supported the African group's proposed delay and echoed their concerns. Most notable were the delegations of Australia, Canada, and New Zealand, all of which endorsed the African group's alternative resolution. Along with the United States, this bloc of English-speaking countries (referred to in the drafting process of the Declaration under the abbreviation of CANZUS) had already established a reputation for being antagonists of the Indigenous rights movement. This is apparent in the response of the Indigenous Peoples' Caucus to the African group, which is suggested having been "exploited for political purposes" by the CANZUS countries.¹³³ Ultimately, the US was actually one of the 25 abstentions to the African group's alternative resolution, although the three other CANZUS countries were among the 82 votes in favor of Namibia's proposal to defer action on the Declaration.¹³⁴ This deferral was approved by General Assembly Resolution 61/178 in late December 2006.¹³⁵

The African bloc was supported behind the scenes by the CANZUS bloc. In February 2007, the Canadian, Australian, New Zealand, and United States Missions to the United Nations (UN) met to discuss looming negotiations concerning the Declaration on the Rights of Indigenous Peoples (hereafter, simply the Declaration). According to a declassified American diplomatic cable regarding this four-party Anglophonic meeting,

¹³³ Indigenous Peoples' Caucus, "African Group of States' Proposed Revised Text: A Model for Discrimination and Domination," (15 June 2007), available at http://www.docip.org/greenstone/collect/cendocdo/index/assoc/HASH0196/dd90e9a3.dir/UNDecl_African_Gr36BDE5.pdf.

¹³⁴ The amendments to the draft resolution on the Declaration on Indigenous Peoples (A/C.3/61/L.57/Rev.1) were approved by a recorded vote of 82 in favour to 67 against, with 25 abstentions, available at Third Committee, "Votes to Defer Action Declaration on Indigenous Peoples."

¹³⁵ Sixty-first session of the General Assembly, Resolution 61/178 adopted 20 December 2006, "Working Group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994," (UN Doc. A/RES/61/178, 6 March 2007).

this delay was welcomed by the governments of Canada, Australia, New Zealand, and the United States. According to the cable, they admitted to being seen as “spoilers” and “obstructionists” said to be “harboring the end goal of scuttling the declaration entirely.” Because of such “conspiratorial suspicions,” an alliance with the African bloc was suggested in order to further promulgate their own concerns, adding that efforts like this “should be made to ‘educate’ delegations on the many flaws of the current document.”¹³⁶ From their perspective, such imperfections included both the alleged lack of state participation in the drafting process, as well as contested interpretations of specific rights and norms included in the Declaration, such as self-determination or land and resource rights.¹³⁷

Nevertheless, in early June 2007, the President of the 61st General Assembly appointed the Permanent Representative of the Philippines to undertake consultations on the Declaration.¹³⁸ For approximately five weeks, it met with member states on either side of the Third Committee debate, as well as some representatives of Indigenous groups and human rights organizations, hoping to find some “middle ground” or a “hybrid model” that would reconcile the contested understandings of the Declaration. This proposition promised to be one that “represents an adjustment that does not undermine the essence and purpose of the Declaration, but rather one that can be a vehicle for the

¹³⁶ From United Nations (New York) to Secretary of State and United Nations (Geneva), “Declaration on the Rights of Indigenous Peoples: Negotiations Slowly Coming to Life,” (2 February 2007), Wikileaks ID: 07SUNNEWYORK93_a, available at https://wikileaks.org/plusd/cables/07USUNNEWYORK93_a.html#.

¹³⁷ For brief explanations of the CANZUS positions regarding the Declaration at this time, see United Nations General Assembly, 61st Session, 107th Plenary Meeting, *Official Records*, UN Doc. A/61/PV.107 (13 September 2007), pp. 11-15.

¹³⁸ Permanent Representative of the Republic of the Philippines to the United Nations, “Report to the President of the General Assembly on the Consultations on the Draft Declaration on the Rights of Indigenous Peoples,” (July 13, 2007), available at <http://www.un.org/ga/president/61/letters/23July07/Report-13July07.pdf>.

proper contextualization of the Declaration.”¹³⁹ In this sense, the Declaration had to be further adjusted to meet the concerns of states.

Ultimately, the CANZUS endeavor to “educate” other member states was ultimately unsuccessful. For one thing, they lost their potential allies, as the concerns of the African bloc were alleviated once greater emphasis on the principle of inviolable state sovereignty was ensured for the final draft.¹⁴⁰ All of this is evidence of how the Declaration was increasingly altered to fit into a state-centric international system over the course of the drafting process.¹⁴¹ Because of this general reorientation, the Declaration was overwhelmingly adopted by the GA in September 2007 with 143 member states voting in favor. Apart from 11 abstentions, the only four against it were the CANZUS countries, who were not fully satisfied by the most recent revisions.¹⁴² The CANZUS countries were embarrassingly isolated from the rest of the international community on this issue. Accordingly, within three years they all changed their official

¹³⁹ Ibid, paragraph 18.

¹⁴⁰ Permanent Representative of the Republic of the Philippines to the United Nations, “Report to the President of the General Assembly on the Consultations on the Draft Declaration on the Rights of Indigenous Peoples,” (July 13, 2007), available at <http://www.un.org/ga/president/61/letters/23July07/Report-13July07.pdf>.

¹⁴¹ For the three drafts, see “Draft declaration on the rights of indigenous peoples: Revised working paper submitted by the Chairperson-Rapporteur, Ms. Erica-Irene Daes, pursuant to Sub-Commission resolution 1992/33 and Commission on Human Rights resolution 1993/31,” UN Doc. E/CN.4/Sub.2/1993/26 (8 June 1993); “Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994,” UN Doc. A/C.3/61/L.18/Rev.1 (20 November 2006); and “United Nations Declaration on the Rights of Indigenous Peoples,” (2 October 2007), UN Doc. A/RES/61/295. For an article-by-article account of the drafting process, see White Face (Zumila Wobaga), *Indigenous Nations’ Rights in the Balance*.

¹⁴² Department of Public Information, News and Media Division, “General Assembly Adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Forward’ towards Human Rights for All, Says President,” (September 13, 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>; and United Nations General Assembly, 61st Session, 107th Plenary Meeting, “Official Records,” (September 13, 2007), UN Doc. A/61/PV.107, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/61/PV.107&Lang=E.

positions and each verbally committed to the Declaration, albeit in qualified terms still reflective of their original concerns.¹⁴³

Such couched rhetoric from CANZUS underscores their apparent unwillingness to fully live up to the principles of the Declaration. In their respective endorsements, government spokespeople emphasized the protocol's "aspirational" and non-binding authority to compel states to act accordingly.¹⁴⁴ Without strict obligations to fully adhere to these international normative standards, the CANZUS countries were able to make such verbal commitments with relatively little risk. Accordingly, a compliance gap has emerged in which state promises have not been followed up with actual policy changes.¹⁴⁵ While this is a global predicament for all sorts of international agreements, whether they are hard-law treaties or soft-law protocols, the problem of the compliance gap is especially glaring with regards to the CANZUS countries and Indigenous rights.

¹⁴³ Sheryl R. Lightfoot, "Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere," *International Journal of Human Rights* 16, no. 1 (2012): 100-122.

¹⁴⁴ Jenny Macklin, MP, Minister for Families, Housing, Community Services and Indigenous Affairs, "Statement on the United Nations Declaration on the Rights of Indigenous Peoples," Parliament House Canberra, (April 3, 2009), available at http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf; Pita Sharples, "Supporting UN Declaration Restores NZ's Mana," (April 20, 2010), available at <http://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana>; New Zealand Parliament, "Questions for Oral Answer: UN Declaration on the Rights of Indigenous Peoples—Government Support," (April 20, 2010), available at http://www.parliament.nz/en-nz/pb/business/goa/49HansQ_20100420_00000001/1-un-declaration-on-the-rights-of-indigenous-peoples%E2%80%94government; Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," (November 12, 2010), available at <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>; and United States State Department, "Announcement of US Support for the Declaration on the Rights of Indigenous Peoples," (December 16, 2010), available at <http://www.state.gov/s/tribalconsultation/declaration/index.htm>.

¹⁴⁵ In his final report to the GA before his mandate expires, the outgoing UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, lamented that, "despite expressions of commitment to the Declaration ..., a great deal remains to be done to see the objectives of the Declaration become a reality." See "Report of the Special Rapporteur on the Rights of Indigenous Peoples," submitted to the General Assembly, 68th Session, (August 14, 2013), UN Doc. A/68/317, available at <http://unsr.jamesanaya.org/docs/annual/2013-ga-annual-report-en.pdf>.

CONCLUSION

The goal of this dissertation has been to trace a historical process of normative transformation. We began with the controversial omission of a provision against cultural genocide from the 1948 Genocide Convention, which we juxtaposed with the 1957 Indigenous and Tribal Populations Convention (No. 107) to highlight the normalcy of assimilation. This was a time when the normative goodness of assimilation, or the erasure of cultural differences, was widely taken for granted. At least since the late 19th century and into the 20th, nation states regularly pursued policies designed to forge homogeneity. In this context, the aspirational norm against cultural genocide cut too far against the grain, and its inclusion threatened to sink the entire drafting process. As a result, the idea of cultural genocide was abandoned and left for dead. Conversely, the idea of integration was dominant, as was the assumption that Indigenous peoples should undergo processes of social and cultural change in order to become integrated into dominant national units.

By the 1970s the normalcy of assimilation was upended. As Indigenous peoples began organizing internationally, they managed to gain access to the institutions of global governance. By pressing for normative change, they were able to force the International Labour Organization to revise its regime, leading to the adoption of the 1989 Indigenous and Tribal Peoples Convention (No. 169), which firmly repudiated the older standards. Additionally, Indigenous organizations successfully pushed for the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples, Article 8 of which included a provision against forced assimilation and other forms of cultural destruction. In fact, previous iterations of this Article included the actual terminology of “cultural genocide” and its apparent synonym, “ethnocide,” although this language was deemed too

controversial and was thus replaced in the final stage of the drafting process. Succinctly paraphrased as “cultural integrity,” the underlying principle of Article 8 represents an important normative development in international law, which is that peoples have a right to preserve and protect their cultural identities from any external attempts at assimilation. Accordingly, Article 8 represents an important transformation in international norms. Whereas assimilation was once considered a normal and even desirable technique of achieving national homogeneity, it has now been ostensibly delegitimized and supplanted by the new norm of cultural integrity.

As we have traced this historical process of normative transformation, we have been faced with a conundrum. On the one hand, the trajectory of global normative development seem to have evolved more favorably for Indigenous peoples, at least if we compare the situation now to a century ago. Quite simply, the assimilation and elimination of Indigenous peoples is no longer openly tolerated, as new norms have affirmed the value of global cultural diversity. On the other hand, however, Indigenous peoples are still not free, and settler colonial structures continue to operate in the contemporary global system. There is a danger that the advancement of Indigenous rights discourse has effectively ratified the settler colonial status quo. Historically there have been a wide variety of eliminatory strategies, ranging from explicitly violent acts, like frontier homicides and removals, to more subtle transgressions, such as the breaking down of collective landholdings into individual tracts of alienable property and the forcible transfer of children.¹ Even officially sanctioned projects of “reconciliation” that

¹ Patrick Wolfe, “Structure and Event: Settler Colonialism, Time, and the Question of Genocide,” in *Colony, Empire, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. A. Dirk Moses, (New York: Berghahn, 2008), p. 103.

are ostensibly designed to reckon with historical injustices can fall into the assimilationist agenda of the settler colonial state.² Similarly, the “recognition” initiatives of liberal multicultural states that grant certain rights to Indigenous peoples further cements the ongoing settler colonial dynamic of usurping Indigenous sovereignty, insofar as the act of “recognition” presumes that states have the primary power to confer or revoke the rights of Indigenous peoples.³

This same line of critique can be extended to cover Indigenous rights discourse as well. Accordingly, this dissertation engages a trenchant critique of liberal rights theory. Quite simply, limited forms of multiculturalism and recognition may serve as tools of cooptation that can effectively reproduce colonial relations between states and Indigenous peoples.⁴ The key insight here derives from anthropological and critical legal theories concerning the “social life of rights.”⁵ As noted by one contributor, “such studies show that ‘rights’ are not simply givens, but products of social and political creation and manipulation.”⁶ Thus, even if the institutionalization of the 2007 Declaration, for example, marks an improvement upon previous standards related to assimilation and integration, some scholars and activists nevertheless remain concerned that the focus on

² Damien Short, “Australian ‘Aboriginal’ Reconciliation: The Latest Phase in the Colonial Project,” *Citizenship Studies* 7, no. 3 (2003): 291; Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave, 2010), pp. 50-51; and Andrew Woolford, “Nodal Repair and Networks of Destruction: Residential Schools, Colonial Genocide, and Redress in Canada,” *Settler Colonial Studies* 3, no. 1 (2013): 69.

³ Samson and Short, “The Sociology of Indigenous Peoples’ Rights,” p. 180; Alfred, *Peace, Power, Righteousness*, pp. 81-82; and Glen S. Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada,” *Contemporary Political Theory* 6, no. 4 (2007): 438-439.

⁴ See especially Glen S. Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada,” *Contemporary Political Theory* 6, no. 4 (2007): 439; and Charles R. Hale, “Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America,” *Political and Legal Anthropology Review* 28, no. 1 (2005): 10-28.

⁵ Richard Ashby Wilson, “Afterword to ‘Anthropology and Human Rights in a New Key’: The Social Life of Human Rights,” *American Anthropologist* 108, no. 1 (2006): 77-83.

⁶ Damien Short, “The Social Construction of Indigenous ‘Native Title’ Land Rights in Australia,” *Current Sociology* 55, no. 6 (2007): 858.

cultural rights is displacing more transformative possibilities.⁷ According to this line of criticism, the “gift” of rights effectively renders the global subject of “Indigenous peoples” strictly within the sovereign territorial boundaries maintained by the international system.⁸ In other words, due to the continued primacy of sovereign states in defining the basis of international law, Indigenous peoples “are free to demand their rights but only within the boundaries set by these acceptable forums and instruments.”⁹ After all, international law is progressive, but only on its own terms.

If Article 8 of the 2007 Declaration is seen as being at the surface level of history, this dissertation provides a “history of the present” regarding the cultural integrity norm. The goal is to dig beneath the surface of this contemporary idea in order to uncover its tangled intellectual roots. Such an genealogical approach describes the conditions of possibility that ultimately facilitated the emergence of Article 8. Of course, this approach does not assume that the precise idea of the cultural integrity norm, as it is now understood, has always been there, lying in the shadows of history, waiting to be discovered by Indigenous rights advocates. Nor does it assume that the emergence of Article 8 was nothing more than the ultimate outcome of a teleological process of normative and institutional development in the field of global governance. Instead, this

⁷ Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, 2010), 1-7; and Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (2nd ed.) (New York: Oxford University Press, 2009 [1999]), 71-72.

⁸ The “gift” of rights is explained below in Chapter Two. The inverted commas are intended to mark a sense of irony, as “gifts” can be expressions of what Pierre Bourdieu called “symbolic violence.” In other words, the “gift” of rights can serve as a hidden form of domination. See Pierre Bourdieu, *Outline of a Theory of Practice* (Translated by Richard Nice) (New York: Cambridge University Press, 1977), 191-192; and Ilana F. Silber, “Bourdieu’s Gift to Gift Theory: An Unacknowledged Trajectory,” *Sociological Theory* 27, No. 2 (2009): 175.

⁹ Marjo Lindroth, “Indigenous Rights as Tactics of Neoliberal Governance: Practices of Expertise in the United Nations,” *Social and Legal Studies* 23, no. 3 (2014): 346.

genealogical approach sees the language of Article 8 as the tip of an iceberg, a mere surface presence atop a much larger discursive formation.

We can use this critical lens to question the nature of the cultural integrity norm. By situating it as an outcome of a larger discursive formation, we can relate this development to the late 20th century pattern of identity politics, which refers to a type of political activity and theorizing in which certain social collectivities, bound together by common identities and shared experiences of injustice, assert their cultural distinctiveness, typically in order to secure “group-differentiated” or “special” rights.¹⁰ Although historically rooted in the new social movements of the 1960s and 1970s, identity politics became increasingly prevalent in global affairs after the end of the Cold War, sometimes with devastating consequences. At a time when the increased mobility of capital and rapid technological innovations were said to be bringing about “the end of the nation state,” there was also a rash of communal violence around the world during the 1990s.¹¹ As exemplified most brutally in the genocidal dissolution of the former Yugoslavia, for example, the once dominant model of the homogenous nation state has been undermined by what anthropologist Jonathan Friedman calls “ethnification.” This refers to a process in which sub-state groups abandon state-sanctioned national identities in favor of a “turn to roots,” which are imagined to be primordial and “organic” identities that supposedly precede the modernist constructions of state-based nationalities.¹²

¹⁰ James Tully, “Identity Politics,” in *The Cambridge History of Twentieth-Century Political Thought*, eds. Terence Ball and Richard Bellamy (New York: Cambridge University Press, 2003), 517-533. For “group-differentiated rights,” see Kymlicka, *Multicultural Citizenship*. For “special rights,” see Jeffrey R. Dudas, “In the Name of Equal Rights: ‘Special’ Rights and the Politics of Resentment in Post-Civil Rights America,” *Law & Society Review* 39, no. 4 (2005): 723-757.

¹¹ Arjun Appadurai, *Fear of Small Numbers: An Essay on the Geography of Anger* (Durham: Duke University Press, 2006).

¹² Jonathan Friedman, “Transnationalization, Socio-Political Disorder, and Ethnification as Expression of Declining Global Hegemony,” *International Political Science Review* 19, no. 3 (1998): 243. See also

The frame of identity politics is helpful in order to understand the global diffusion of “Indigenous peoples” as a category. Indeed, the question of how to define “Indigenous peoples” has elicited an international controversy, as leaders from many African and Asian countries have sometimes claimed that this identity is specific only to the Americas and Oceania, where the difference between “settlers” and “Indigenous peoples” is more obvious.¹³ According to more cynical accounts, moreover, the global diffusion of this category of identity is a result of the aforementioned ethnification process, which in turn is a product of political struggles for power. For example, the anthropologist Adam Kuper controversially argues that the rhetoric of Indigenous rights is simply another manifestation of ethnonationalism, and that it evokes imagery and ideas strikingly similar to the “blood and soil” trope used by many xenophobic rightwing movements.¹⁴ Kuper’s argument is misleading in many ways, not least for drastically understating the enduring legacies of discrimination suffered by Indigenous peoples around the world, as well as their aspirations for individual and collective equality.¹⁵ Nevertheless, Kuper’s polemic is directed against popular notions of culture and identity as static and essentialized objects, and this critique can be usefully extended to the notion of cultural integrity.¹⁶

Robert M. Hayden, “Imagined Communities and Real Victims: Self-Determination and Ethnic Cleansing in Yugoslavia,” *American Ethnologist* 23, no. 4 (1996): 783-801.

¹³ Benedict Kingsbury, “Indigenous Peoples’ in International Law: A Constructivist Approach to the Asian Controversy,” *American Journal of International Law* 92, no. 3 (1998): 414; and André Béteille, “The Idea of Indigenous People,” *Current Anthropology* 39, no. 2 (1998): 188-189.

¹⁴ Adam Kuper, “The Return of the Native,” *Current Anthropology* 44, no. 3 (2003): 392.

¹⁵ Michael Asch and Colin Samson, “On the Return of the Native,” *Current Anthropology* 45, no. 2 (2004): 261-262. For more balanced analyses of Indigenous peoples and ethnonationalism, see David Maybury-Lewis, *Indigenous Peoples, Ethnic Groups, and the State* (Boston: Allyn and Bacon, 1997); Jeff J. Corn tassel, “Who is Indigenous? ‘Peoplehood’ and Ethnonationalist Approaches to Rearticulating Indigenous Identity,” *Nationalism and Ethnic Politics* 9, no. 1 (2003): 75-100; and Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003), 1-28.

¹⁶ Kuper, “The Return of the Native,” 395. See also Peter Sykora, “Essentialism,” in *Encyclopedia of Anthropology*, ed. H. James Brix (Thousand Oaks, CA: SAGE Publications, 2006), 841-842.

Etymologically, “integrity” shares a common root word with “integer,” which refers to a complete and indivisible entity. In that sense, integrity generally means being pure or uncorrupted.¹⁷ Accordingly, the idea of “cultural integrity” implies that cultures are separate, bounded, and internally consistent. Insofar as contemporary anthropological theories have turned away from such a notion of culture, the cultural integrity norm thus has a potential pitfall. Indeed, this idea ventures dangerously close to the problems of ethnification and essentialism, a point that is further discussed in the conclusion of this dissertation. Such a critique highlights the challenges of identity politics, especially as they relate to the politicization of cultural differences.

In any case, despite predictions from the immediate post-Cold War era that processes of “ethnification” would contribute to the demise of the nation state, this traditional form of political organization has survived mostly intact.¹⁸ Quite simply, the sovereign nation state remains the dominant entity in world politics. Even if traditional mechanisms of national integration have become outdated, new modes of domestic incorporation have recently emerged in response to the demands of identity politics. Especially in liberal democracies since the 1990s, the values of multiculturalism and the politics of “recognition” have been promoted in order to accommodate minority populations into the framework of the nation state. Most famously associated with philosopher Charles Taylor, as well as political theorist Will Kymlicka, this modified form of liberalism begins with the premise that the failure to recognize the self-ascribed cultural identity of a person or community constitutes an injustice in and of itself. As

¹⁷ Thomas P. Kasulis, *Intimacy or Integrity: Philosophy and Cultural Difference* (Honolulu: University of Hawaii Press, 2002), 25.

¹⁸ Jonathan Friedman and Kajsa Ekholm Friedman, “Globalization as a Discourse of Hegemonic Crisis: A Global Systemic Analysis,” *American Ethnologist* 40, no. 2 (2013): 250.

such, group rights are justified to the extent that they enable individual freedom and autonomy.¹⁹ While traditionally framed in the context of domestic politics, the values of multiculturalism and the politics of recognition have undergone a process of “internationalization” since the 1990s, as they have been promoted by international organizations like the UN.²⁰

Indeed, international human rights law has recently begun adapting to the challenges of identity politics, particularly with the development of cultural human rights, which marks the second significant theme in global affairs that is implicated here. When human rights began to be codified into international law following World War II, they were packaged into “civil and political rights” on the one hand, and “economic, social, and cultural rights” on the other.²¹ Even within the latter cluster, however, the subcategory of cultural rights has long been deemphasized. This has been due to a number of reasons, including the problematic concept of “culture” itself, the lurking ethical debate of cultural relativism versus universalism, the tension between individual and collective rights, and the perceived threat of national minorities to the territorial integrity of nation states.²² However, since the end of the Cold War, there has been a growing body of international law and global governance concerned with the promotion

¹⁹ Charles Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 25-74; and Kymlicka, *Multicultural Citizenship*. On how this modified version of liberalism fits into Indigenous rights discourse, see Duncan Ivison, Paul Patton, and Will Sanders, “Introduction,” in *Political Theory and the Rights of Indigenous Peoples*, eds. Duncan Ivison, Paul Patton, and Will Sanders (New York: Cambridge University Press, 2000), 7-9.

²⁰ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (New York: Oxford University Press, 2007).

²¹ The packaging of human rights into these two categories was the product of Cold War compromises. See Ruti Teitel, “Human Rights Genealogy,” 66, no. 2 (1987): 311

²² Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Boston: Martinus Nijhoff, 2007), 4-6; and Francesco Francioni, “Culture, Heritage and Human Rights: An Introduction,” in *Cultural Human Rights*, eds., Francesco Francioni and Martin Scheinin (Boston: Martinus Nijhoff, 2008), 3-6.

of cultural rights.²³ ILO Convention No. 169 (1989) and the 2007 Declaration are manifestations of this recent trend, as is the emergence of the particular right to cultural integrity.

Thus, the cultural integrity norm is evidence of both progressive and retrogressive patterns in contemporary global affairs. This fits into what we have noted is a paradox of human rights discourse, which can be both liberatory and regulatory, both a mechanism for positive change and oppressive continuity. This tension between normative change and continuity is analyzed through the concept of “co-optation.” Recall that this concept refers to “the process of absorbing new elements into the leadership or policy-determining structure of an organization as a means of averting threats to its stability or existence.”²⁴ This occurs when a challenging movement poses some sort of threat to the status quo, and in response, the prevailing power structure extends some form of political participation to resistant elements. Co-optation is an underappreciated yet common mechanism in international norm dynamics. It must be reiterated that co-optation is a double-edged sword, insofar as it can potentially be both restrictive and productive. As such, the crucial value of this concept, in terms of critical norm theory, is that it foregrounds important differentials in power when considering the question of how and why ostensibly new norms fit into already existing normative frameworks that define the status quo.

²³ For an overview, see Farida Shaheed, “Report of the Independent Expert in the Field of Cultural Rights,” UN Doc. A/HRC/14/36 (22 March 2010).

²⁴ Philip Selznick, *TVA and the Grass Roots: A Study of Politics and Organization* (Berkeley: University of California Press, 1949), pp. 13 and 259.

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