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(Ref)Using Human Rights:

Indigenous Activism and the Politics of Refusal in Settler Colonial Contexts

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Abstract

This thesis is a critical history of ideas—or a history of repressed and repressive ideas (and histories)—that analyses how liberal internationalism, in the form of human rights, presses upon, covers over, brushes against, interacts with, or is used instrumentally by Indigenous activism and political life. By situating these interactions between human rights and Indigenous political life in the context of *settler colonialism*, it aims to bring out the complexity of a politics of (ref)usal that permeates this relationship, in this context. First, the thesis reads critiques of human rights against emerging literature in settler colonial studies, showing how the irreducible element of an eliminatory drive for land, which characterizes settler colonialism, is not accounted for in the existing critical literature on human rights. Second, it presents a critical history of the normative evolution of the right to self-determination in both law and discourse as these relate to Indigenous peoples, showing how the norm is constructed both to make illegible other forms of Indigenous political life and to reify anthropological tropes about Indigenous culture. Third, it tests proposals for 'saving' human rights from its colonial-hegemonic past—by *repoliticizing* it—against writing on settler decolonization, to ask about the role of human rights in/as decolonial politics. The thesis, finally, considers how the normative and historical terrain it has mapped might help us think through the politics of human rights and Indigenous activism (namely, the *Idle No More* movement) in Canada in light of Justin Trudeau's election as Prime Minister in October, 2015. Ultimately, the aim of this work is to interrogate the normative political optics of the settler state—what it can and cannot make legible—as it makes use of liberal internationalist discourse to make illegible (to *eliminate* from view) other, Indigenous, modes of political life which stubbornly (*politically*) refuse this imposition.

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CHAPTER ONE

Indigenous Rights, Human Rights, and Settler Colonialism

I. Indigenous Rights at the UN

The stories that movements, institutions, and peoples tell about themselves matter—they matter because narrating where they came from and where they are in part determines where they might go and what they might become. Such stories also, as Gordon Christie says, "police meaning": "the stories we tell define who we are and how we think of the world—while they also work to control what can be thought (and so what we can see as 'possible' action)" (2011: 338). Stories, the imaginative parameters of thought, and action, are inextricable entwined. The story that the global Indigenous rights movement tells of itself is both specific and general. It usually starts with Cayuga chief Deskaheh (1872-1925), travelling to Switzerland on his Haudenosaunee Confederacy passport in September 1923, walking into the halls of the League of Nations in Geneva, demanding an audience, and *creating a space* of/for Indigenous activism and engagement in a globalizing world of nation-states.[1] Deskaheh's powerful originary claim to attention, so the story goes, would then develop over the next century, culminating in institutional recognition through the United Nations (UN) Working Group on Indigenous Populations (WGIP) in 1982 and the UN Permanent Forum on Indigenous Issues (PFII) in 2000. Between Deskaheh's intervention and the PFII, the narrative is punctuated by a number of key moments and achievements: International Labour Organization (ILO) Convention 107 (1957) and its revision as ILO Convention 169 on Indigenous and Tribal Peoples (1989); the UN-

[1] Two years after Deskaheh's trip, in 1925, Maori T.W. Ratana made a similar journey to the League to bring international attention to New Zealand's violation of treaty agreements. A number of scholars, including Aileen Moreton-Robinson (2015), see the actions of these two men, combined, as forming the "political roots" (174) of the UN Declaration on the Rights of Indigenous Peoples.

[2] The year 1977 saw the first national or regional meetings of Indigenous leaders in Panama, Ecuador, and Sweden,

sponsored International Nongovernmental Organization Conference on Discrimination against Indigenous Populations in the Americas in 1977; the North American regional Indigenous rights movement that developed in the 1970s, having gained advocacy experience from civil rights movements;[2] Martinez Cobo's monumental report on discrimination against Indigenous people presented to the UN between 1981-1983; the UN Conference on the Environment and Development in Rio in 1992; and the naming of 1995-2004 as the first UN Indigenous Decade (Lawlor 172-173).[3]

This is the specific picture the international Indigenous rights movement paints, its characters, actions, and settings. The broader narrative arc, however, like many origin stories, is moral: it makes an argument for the value and validity of the movement's existence. In this story, the Indigenous rights movement is one of struggle for a seat at the human rights table—and, above all, the carving out of *meaningful space*. The battle, the tale goes, was fought by Indigenous peoples in an arena where the deck was stacked against them: states did not want indigenous peoples to succeed; states were threatened by them; states were products, in some cases, of Indigenous dispossession. Thus, the space for articulation that emerges amongst these hostile states cannot be one with its surroundings—it must be *exceptional*. The idea of 'Indigenous exceptionalism' at the United Nations (Stamatopoulou 2014: 205) is meant to explain how a potentially incommensurable relationship has turned into a purportedly productive one; as much as Indigenous peoples learned to speak the language of the UN to the UN, so too did they change the institution itself. This story is especially triumphalist (and optimistic) when it claims that the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the General Assembly on September 13, 2007, was mostly a result of moral

[2] The year 1977 saw the first national or regional meetings of Indigenous leaders in Panama, Ecuador, and Sweden, as well as the Inuit's first Circumpolar Conference.
[3] See, for a truncated version of this history, "UNPFII History" on the UN website.

persuasion, of Indigenous peoples making their case to states until the latter viewed Indigenous issues less through the patronizing lens of humanitarianism and more through the dignified one of human rights. Elsa Stamatopoulou suggests that a certain "international ethic" during the era of decolonization in the 1950s and 1960s "fed the guilt of States" and led to "some permissiveness on the part of governments in UN processes" that "allowed the birth of exceptional, unprecedented and extensive participatory procedures for Indigenous Peoples" (2014: 205; also Steinhilper 2015: 552).[4] Right(s) won the day, and Indigenous peoples were afforded a seat at the UN table to call their own.

This is not a fringe account. From the beginning of the UN's Indigenous rights framework, prescriptive statements about what the space *would* ideally be have morphed into descriptive statements about what it purportedly *is*. These statements come in three genres: the 'exceptional space' thesis, the 'complicit, but…' thesis, and the 'transformational' thesis. All three genres are closely intertwined, but distinguishable. First, by the early 2000s, Patrick Thornberry (2002) could write of the UN as a space where we find "formidable batteries of argument against government representatives" (8-9), with "ideas grinding their way through the morass of argument and rebuttal" (10). Writing around the same time, Ronald Niezen (2003) asserts that the United Nations, "in its regular meetings between indigenous and state representatives…has created an original institutional space constituting a distinct social world" (4). Later, Dahl (2012) describes this as "a particular indigenous space" (2) or "alternative space" (6) for the articulation of Indigenous concerns to the international community, a space "over which [Indigenous peoples] exert control and where they play the tune, set the agenda, and are

[4] For a historical account of the rise of this sense of 'guilt' by modern states, see Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000); specifically pp. 159-261 for guilt relating to the abuse of Indigenous peoples. In Barkan's account, the rise of reparation politics and historical apologies indicate that "questions of morality and justice are receiving growing attention as political questions" such that "a new threshold of morality in international politics" is developing (xvi-xviii).

proactive participants" (6). These 'exceptional space' theories anoint UN Indigenous rights institutions as something new—original, particular, alternative—in the UN, standing to the side of, yet within, the system as it exists. The 'complicit, but…' thesis is somewhat more sophisticated, acknowledging the complicated history of international law and the state system, but ultimately concluding that they are still effective as sites for contestation and change. James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, thus concedes that, "[h]istorically, international law developed to facilitate empire building and colonization," but thinks that "today it promotes a very different model of human encounter and provides grounds for remedying the contemporary manifestations of the oppressive past" (2004: 289). For Mary Lawlor, although the UN

> has overtly and inadvertently helped to sustain the inherited order of neglect of indigenous rights, it has also created openings in the dense fabric of international state politics, such that indigenous peoples have been able to assert their claims to human rights with increasing effectiveness. (2006: 164-165)

These accounts often make a distinction between the international system—historically compromised and mired in asymmetrical power dynamics—and human rights—normatively positive, theoretically effective, and desired by all. Finally, the 'transformational' thesis takes the 'complicit, but…' thesis a step further, suggesting that the system's complicity in oppression might be coming to an end. Elvira Pulitano argues that the Indigenous presence at the UN has changed the institution, in spite of history: while there is "a certain irony" in framing the UNDRIP "in the language of international human rights law, the same law that legitimized the superiority of imperial colonial powers and the destruction of indigenous cultures," we must remember that "international law is not immune to change any more than any other system of legal norms" (2012: 6). Similarly, as a "space for reciprocity" (2002: 428), Indigenous rights mechanisms, for Thornberry, have been "capable of engendering important systemic

modifications to international law" (10). And perhaps most dramatically, Alexandra Xanthaki cites

> the transformative effect of indigenous rights for international law and international organizations, as [Indigenous rights] have changed the very ground rules of the Westphalian order that had privileged state actors over non-state actors, and privileged state sovereignty over principles of justice and democratic inclusion. (2014: 69)

From the relatively modest claim that the exceptional UN Indigenous space allows for argument and rebuttal, we have come to a point where it is this space (rather than forces like neoliberalism or globalisation) that is actually changing the most fundamental precepts of the Westphalian order.[5]

What are the dangers of this move to exceptionalize the UNDRIP and its attendant Indigenous rights mechanisms as exceeding the normative structure of the UN's liberal human rights framework? Why do we think of the UN as a space of self-articulation that does not itself pre-determine the boundaries or contours of what might be articulated? Or one that can change the international system itself? As Illan Rua Wall argues, "[l]aw is more likely to crush the attempt to open the existing order, than to remain responsive to it" (2014: 109). A number of recent commentators have challenged the 'exceptionalism narrative' by adding texture to the tactics employed by states. Political scientists Jeff Corntassel and Sheryl Lightfoot, for instance, highlight the dangerous sense of accomplishment that can develop as a result of "illusions of inclusion" (Corntassel 2008: 109). In this account, rights-based discourse has fostered a sense of accomplishment that elides and supports more subtle structures of power. Thus Corntassel notes how states and INGOs, through rights-based discourses, have framed self-determination claims in a way that separates "political/legal recognition of a limited indigenous autonomy within the existing framework of the host state(s)" from crucial questions of natural resources and lands

[5] Etienne Balibar describes this as "a Platonic view of politics, which sees it as a continuous (but also essentially desperate) attempt at reaching the harmony of ideas and realities and bridging the gap between them" (2013: 20).

(107). The material accouterments necessary *to live meaningful self-determination* is divorced from the abstracted "political/legal entitlements" offered benevolently by the government (107-108). Corntassel also worries that energy spent appealing to the global Indigenous rights regime is energy diverted from the hard work of sustainable community regeneration (113): "[t]he pursuit of a political/legal rights-based discourse leads indigenous peoples to frame their goals/issues in a state-centered (rather than a community-centered) way" (115), which is precisely what states have tried to do year after year at the PFII in an attempt "to reinforce an agenda of Indigenous rights 'domestication'" (2007: 142). This domestication is supported by a process of 'cooptation': when, "in a system of power, the power holder intentionally extends some form of political participation to actors who pose a threat" (139). In the case of the UN system, this occurs primarily through two tactics: blunting and channelling. Through blunting, "an Indigenous political agenda is shifted and altered to fit the dominant norms of existing institutional structures," and channelling refers to 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" (140).[6] What results, he concludes, "is a cadre of professionalized Indigenous delegates who demonstrate more allegiance to the UN system than to their own communities" (161). Beyond this, those rights that *are* successfully claimed have no robust enforcement mechanism. The PFII can only respond to human rights abuses through "reporting, standard-setting, and occasionally making recommendations to other UN agencies" rather than through strong remedial or preventative action (141). Corntassel's take-away from this critique is that Indigenous political

[6] An example of channeling would be the acceptance by Indigenous delegates that their 3-5 minute speech at the PFII counts as effective political mobilization, despite the fact that states are allowed 10-15 minutes for their interventions (Corntassel 2007: 140-142). As Richard Falk cautions: the "statist character of [such] international arenas means that those who are being challenged [i.e. states] exert comprehensive control over such matters as agenda and budget, thereby impairing even the claiming process" (1988).

mobilization needs to shift from accepting state-given rights to investing in community responsibilities as one way to "de-center the state" (2008: 123) and the cooptation, blunting, and channelling that protects it.

However, in arguing that current rights discourse "can take indigenous peoples only so far" (2008: 105), Corntassel nevertheless invests in the idea that this rights discourse *has* taken Indigenous peoples *somewhere*: "I am not advocating a complete abandonment of a rights-based discourse, as it can be a useful tool for facilitating political maneuverability and *opening new indigenous spaces* within the statecentric system…" (121, emphasis added). Despite his critique, Corntassel does not resist the idea that international human rights discourse offers a space for the articulation and activation of Indigenous demands. Creating an entirely new space within a global hegemonic structure goes well beyond the claim that human rights might be a tactical tool, which Corntassel makes at the beginning of his statement. Sheryl Lightfoot's work, however, should give pause to any thought that this state-centric system will easily provide such a space. Lightfoot seeks to understand the "paradoxical and puzzling compliance behavior in the area of indigenous rights" (2012: 85); that is, why some states actually go *beyond* the standards of international norms in domestic legislation (are 'over-compliant') while refusing to assent to (sign or ratify) those standards in international legal documents. "[W]hat type of commitment behavior," Lightfoot asks, "can occur when an international human rights regime emerges that directly conflicts with the interests of liberal, democratic, human rights-advocating states?" (101). Lightfoot identifies three such states: Canada, New Zealand, and Australia. These are all common law countries, "founded on the Doctrine of Discovery" and caught in a tension between nurturing their national identities as 'strong human rights supporters' (which would require a renunciation of the Doctrine and its sordid history), and the need to protect state borders and

sovereignty (which would preclude any renunciation of the Doctrine) (2010: 92). To reconcile this tension, Canada is encouraged to make 'positive changes' vis-à-vis indigenous peoples, which within its tradition of multiculturalism leads to a framework "that emphasizes equality and correcting socio-economic disparities as an end goal" (101). This approach then both provides absolution for Canada's past while also "creating certainty for the future by securing land tenure and state sovereignty" (102). Thus over-compliance, like Corntassel's 'cooptation', is a form of *resistance* to the norms of international Indigenous rights discourse which could pose a challenge to the liberal state, suggesting that states like Canada will happily implement 'soft rights' "in order to resist developments in 'hard rights' areas that would threaten the liberal framework and the sovereignty status quo" (103).[7] This scholarship should give pause to Niezen's claim that groups "subscribe to human rights for their effectiveness in resisting the abuses of states" (2003: 216), a tactic which seems, after Lightfoot and Corntassel, to be anything but effective.

Yet Lightfoot recognizes that Indigenous peoples are in a bind: by 2010 there was a backlog of some 800-1000 land claims cases in Canada to be litigated on a case-by-case basis, and so it is understandable that First Nations communities would turn to the international sphere to exert external pressure on the Canadian government (2010: 100-101). Yet, despite diagnosing these practices of over-compliance and selective endorsement as indicative of a "colonial ambivalence" in liberal settler-states' approach to Indigenous rights (2010: 104; 2012: 103), Lightfoot fails to explore what this 'ambivalence' indicates about the viability of the human rights project in such settler contexts. Rather, like Corntassel, Lightfoot ultimately focuses on the problems of implementation: "[i]n order to advance Indigenous rights in practice, the moral and

[7] Elsewhere Lightfoot develops the related practice of 'selective endorsement'. This occurs when a community of states that values adherence to human rights as constitutive of their communal identity "collectively and unilaterally 'writes down' the international [human rights] norms in such a way that their compliance occurs automatically, thus making further efforts at implementation unnecessary," while "avoiding the international and domestic political costs of under-commitment and preserving their identity as human rights supporting states" (2012: 102).

political campaign should look beyond issues of state endorsement and concentrate squarely on *the status of state implementation* of Indigenous rights norms as articulated in the [UNDRIP]" (2012: 119). This perspective not only falls in line with the dominant trend in "existing literature on the Declaration to date," which mostly seeks to "[draw] attention to the necessity of implementing its provisions" (Pulitano 2012: 10), but also fails to consider the dangers of 'successfully' implementing these norms, which both scholars seem to take as a self-evident good.[8] Karen Engle, differently, is less willing to invest in either Indigenous rights discourse as opening up some space for political mobilization (Corntassel) or the UNDRIP as articulating an effective set of norms that need only be properly implemented (Lightfoot). She sees the UNDRIP instead as representing "the continued power and persistence of an international human rights paradigm that eschews strong forms of indigenous self-determination and privileges individual civil and political rights" (2011: 141). In Engle's reading, the victories won so far, and the further implementation of UNDRIP, have and would result in "the reification of indigenous culture, alongside the rejection of self-determination claims and the acceptance of a cultural rights framework by international institutions" that "fits quite comfortably with…neoliberal development models" (141).[9] Further, Engle is careful to note that it was only in the late 1980s

[8] A typical instance of this is Elias Steinhilper's article, "From 'the Rest' to 'the West'? Rights of Indigenous Peoples and the Western Bias in Norm Diffusion Research" (2015: 536–55), which applauds the success of 'rights of Indigenous peoples' (RIP) norm diffusion as a non-paternalistic joint effort between Indigenous peoples, NGOs, and academia (543). In this way, important RIP advancements like 'peoples' rather than 'populations', self-determination, collective rights, and cultural rights have 'diffused' into human rights discourse, effectively changing the system's very language. Steinhilper's account of norm creation, however, does not account for how these norms are either coopted or resisted by the states charged with 'respecting, protecting, and fulfilling' them. Rather, he believes that "RIP constitute a case in which normative innovations were to a significant extent spread from the 'Rest to the West'" (551). The work of Marjo Lindroth on the imbrication of the UN Special Rapporteur's reports with neoliberal governance practices (2014) and Lindroth and Heidi Sinevaara-Niskanen's work on the biopolitics of indigeneity sustained in part through the UNPFII (2014), should give pause to any too-easy acceptance of the virtues of international RIP norm diffusion. Corntassel is worried about the local costs of going international and Lightfoot is sceptical that the UNDRIP could be genuinely adopted by states, but neither question the status of the actual norms.

[9] Engle's observation aligns with the work of Watson and Venne (2012), who show through a comparative reading of the first 'Indigenous' draft of the UNDRIP (the 'Geneva declaration') against the one ultimately adopted by states

and early 1990s that "indigenous rights advocates began to turn to human rights law as a site for legal and political struggle" (152). Engle thus importantly offers a corrective to the Deskaheh narrative cited above: his action at the League of Nations can only very awkwardly be linked to today's human rights-based Indigenous rights movement, because for much of the history of (international) Indigenous activism the claims made were not ones easily legible within the human rights *legal* framework that defines contemporary UN human rights culture.[10] For the contemporary international Indigenous rights movement to claim Deskaheh as a forefather is to tell a very partial story, one which reads 'human rights' claims into the past, in the process making *alternative political claims* and actions at earlier periods and in the present less visible.[11] Such 'human rights'-washing of Indigenous activism, combined with the limited and limiting provisions of the UNDRIP, make the effective implementation of international Indigenous rights norms politically dangerous—because investing in international norms that exist by way of the assent of (settler) states makes less visible/audible political challenges to the constitutive claims

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(the '2007 declaration'). The Geneva declaration refers to colonization, which is removed in the 2007 declaration; the 2007 declaration adds reference to individuals instead of the collective rights of Indigenous peoples; the 2007 Declaration included that it is subject to 'rights of the child' (historically used by states to remove Indigenous children); reference to genocide is watered down in the 2007 declaration; and the 2007 declaration purports to protect Indigenous cultures (histories, languages, traditions, philosophies, writing systems, literature) "without any reference to the foundation which holds those indigenous knowledges—that is, the land" (91-100).

[10] Deskaheh's claim, for example, was one of treaty-based sovereignty; he went to the League "to address the erosion of Indigenous sovereign rights following the introduction of the Indian Act" in 'Canada' (Pearcey 2015: 449). Pearcey notes the parallel between how 'peoples' of the League of Nations mandate territories were understood to be wards of states ripe to be civilized, and Indigenous peoples within existing (settler) states thought to be minority populations equally fit for civilizing. Despite this parallel, the League was the only option standing to the side of national courts for the assertion of sovereign rights at the time; thus, "even though the League of Nations perpetuated the European discourse on civilization through the mandate system, several Indigenous leaders viewed it as a tool with which they could draw international attention to their issues" (448-449). This was in part because infringement on the territorial rights of the Six Nations by Canadian government officials amounted to an 'act of war', that "required redress at the international level" (449). For a detailed account of Deskaheh's political goals (focusing on sovereignty) that situates the League's response in its wider "move to secure a hegemonic global political system of nations represented by states" (40), see Yale D. Belanger, "The Six Nations of Grand River Territory's Attempts at Renewing International Political Relationships, 1921-1924" (2007).

[11] It is important to distinguish the critical move being discussed here—the pull to claim Deskaheh and Ratana for *human rights*—from the positioning of these two men in a history of Indigenous activism, of which engagement with international human rights mechanisms in the 20th century is just one instantiation. The latter, for instance, is what Moreton-Robinson (2015) is doing when she invokes their trips to the League of Nations.

of that system, challenges that exist in long histories of Indigenous action and politics. In this sense, Engle comes closest to developing a critique of international Indigenous rights consonant with the more general ideological critique of human rights explored in the next section. However, like these other general critiques, Engle's also tends to homogenize the ideological effects of the human rights regime, assuming that the relationship between the reification of Indigenous culture, neoliberal development models, and international human rights law is manifest everywhere the same, without adequate attention to context—notably, that of settler colonialism, which will be introduced in section III of this chapter.

II. Critiquing and Defending Human Rights

> "In Southeast Asia and North Africa, anger was building against Britain, France, the Netherlands, and other powers loath to relinquish their overseas empires. Over 250 million people were still living under colonial rule, and millions more belonged to disadvantaged minorities in the United States, Latin America, and the Soviet Union. A new chapter in the history of human rights was about to unfold."
>
> — Mary Ann Glendon, *A World Made New*, 10

This passage from Mary Ann Glendon's *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001)—a widely read history of the UDHR—is typical in the way it claims decolonization for the human rights project.[12] However, as a broad and growing literature has demonstrated, human rights bear anything but an uncomplicated relationship to (de)colonization. As Makau Mutua says in a classic essay, the human rights corpus "falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions" (2001: 204). This is the case because "[t]he grand narrative of human rights contains a subtext that depicts an epochal contest pitting

[12] Elsewhere, Glendon claims for human rights, in addition, "the fall of apartheid in South Africa and the collapse of the Eastern European totalitarian regimes" (2001: 236).

savages, on the one hand, against victims and saviors, on the other," (201), thus rendering the whole "normative edifice of the human rights corpus" (207) and its discourse "unidirectional and predictable" (202), "arrogant and biased" (206), and marked by "a troubling abundance of zealotry" (207). Mutua goes on to analyze the SVS metaphor—savage, victim, saviour—to demonstrate how through the grand narrative of human rights "the Third World is asked to follow a particular script of history" (243), belying the human rights regime's claim to universality.[13]

Glendon responds to Mutua's indictment of the universality of the human rights project by arguing that, "[w]here basic human values are concerned, cultural diversity has been exaggerated" (2001: 222). She notes that the UNESCO philosophers charged with mining ancient traditions for fundamental human norms during the drafting of the UDHR

> found, after consulting with Confucian, Hindu, Muslim, and European thinkers, that a core of fundamental principles was widely shared in countries that had not yet adopted rights instruments and in cultures that had not embraced the language of rights…The philosophers concluded that even people who seem to be far apart in theory can agree that certain things are so terrible in practice that no one will publicly approve them... (222)

This response is inadequate for three reasons. First, Glendon does not take seriously the fact that the institutional structure in which such a basic human understanding was to be instantiated and *enforced* was not universal, and would instead rely on Western power and coercion.[14] In her own words, "while it is hard to stick the label 'Western' on the Declaration itself, that description can fairly be applied to the membership and finances of the most influential human rights

[13] Mutua's critique aligns with that of Balakrishnan Rajagopal, who says that "human rights discourse has…turned out to be a core part of hegemonic international law, reinforcing pre-existing imperial tendencies in world politics" (2006: 768). Both are suggesting that in an international system forged through colonialism, those colonial relations will find their way into the discourses and institutions on which that system relies.

[14] Similarly, it is important to remember that the vital human rights documents were largely drafted and voted on prior to the decolonization movement. This means that missing from those countries able to vote on (and therefore assent to) the UDHR "were three-quarters of the nations that self-determination and decolonization would soon bring to the world" (Fawcett 2014: 293).

organizations" (229). This fact cannot easily be discarded. Second, even if certain values seem universal, the ways in which they are codified, lived, expressed, or enforced across different cultures will almost certainly not be. Finally, Mutua's critique is less about the normative project of human rights—he in fact agrees that "the quest to craft a universal bundle of attributes with which all societies must endow all human beings…is a noble one" (2001: 209)—but rather aimed at showing how the human rights regime, despite this noble quest, has come to rely on a colonial construction (the SVS metaphor) and take part in a civilizing mission. Mutua, then, is making an argument about the success of human rights in achieving its aims, rather than a fault in the aims themselves.[15]

The Mutua-Glendon exchange, then, flirts with a deeper debate about the foundations of the human rights project. The foundationalism debate has essentially sought to interrogate the status of human rights as 'universal'—whether this is the case, whether it is possible, and whether it is desirable.[16] While this has been productive insofar as it combats harmful habits of thought that too easily accept the basis of the human rights project, it has come to something of a standstill. Cultural relativists, though they often go too far towards moral relativism, have revealed universalism to be a wolf in sheep's clothing by showing the ways the discursive

[15] Mutua's argument here dovetails with a body of literature that indicts human rights for practical inefficiencies—resulting from legalization, bureaucratization, and institutionalization—rather than foundational deficiencies. For instance, Gerd Oberleitner bemoans the "pathologies of international bureaucracies": "insensitivity to situations, alienation of stakeholders, insulation from reality, and self-referential dwelling in perpetual reform" (2013: 182), and notes that there were as many as 13,600 NGOs in 2004 (a number that has certainly grown) (164). Indeed, the United Nations website contains a page on "Universal Human Rights Instruments" which presents a "non-exhaustive selection" of 102 different declarations, resolutions, conventions, protocols, conferences, principles, standards, codes of conduct, safeguards, minimum rules, recommendations, and statutes ("Universal Human Rights Instruments"). Courtney Hillebrecht (2011), in an article critical of the recently established Universal Periodic Review, asks: "why have member states facilitated and encouraged the development of yet another UN human rights instrument when they…are at their breaking point?" (2).

[16] A useful summary of the foundationalism debate is found in Jerome Shestack, "The Philosophic Foundations of Human Rights" (1998), especially pp. 205-15. A more critical and recent discussion is Conor Gearty, "Human Rights: The Necessary Quest for Foundations" (2014: 21-38); he argues that the *necessary* quest for foundations is itself a foundational (and positive) element of popular human rights agitation, "a thirst for justice which is itself a kind of truth" (38).

construction of the Enlightenment individual was built on a series of exclusions and assumptions, and enforced through a reign of epistemic violence that led to scientific racism and eugenics, among other iniquities. The 'truth' and 'reason' that it used to (supposedly) found the modern world have been accused of attempting to win "a universal validity and legitimacy for accounts of the world which are partial and particular," which is how Stuart Hall defines ideology (1994: 61).[17] Succinctly, any partial and particular worldview that is taken to be universal is an example of ideology, and ideology is an apparatus by which those who seek power sustain and further their agendas. While foundationalists will often object that recourse to a transcendental value outside the human mind is a necessary check on the whims of politicking (a number of scholars choose God or a vague public theology as this value, including Stackhouse 1999 and Perry 2000), those who attack this position say that foundations are equally contingent (and partial) but far deadlier because they claim not to be.[18] This ideological critique of human rights comes from multiple corners:

> Those in the Marxian tradition have diagnosed [human rights] as nothing more than an ideological revision of nineteenth-century bourgeois rights that re-entrenches class exploitation and oppression…Postcolonial theorists have shown that human rights often function as tools of Western cultural imperialism and as means to implement neocolonialist economic policies and justify military interventions. Critical legal scholars have…analyzed the limitations of appeals to both human rights and constitutional rights as a means of gaining power for minority groups in liberal constitutional states. Meanwhile, feminist theorists have noted the limitations human rights impose by naturalizing a masculinist notion of an unencumbered and self-sufficient subject as the model rights-holder. Perhaps most infamously, Giorgio Agamben…argued that [human rights] corroborated a biopolitical regime of domination in which…life itself became the

[17] In the words of Thomas McCarthy, "as the shock-effects of Foucault's genealogies have made clear, the familiar enlightenment metanarrative of universal principles discovered at the birth of modernity and gradually realized ever since fails to acknowledge the impurity of the demands that have historically been made in the name of pure reason" (2009: 38).

[18] The argument can be made that we now have the intellectual tools—psychology, anthropology, sociology—to zero in on the fundamentals of humanness and so can begin thinking about human nature outside of culture. Yet, these very disciplines are part of a 'Western' story charting the rise of the university and social sciences from 16th century Europe, giving the lie to any claim to their transcendental, value-free, culture-less origin. Useful in charting this rise and its importance for the current hegemonic world order is the first chapter of Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (2004), pp. 1-22.

subject of state-based mechanisms of juridical power. (Manfredi 2013: 5-6)[19]

What these various critiques show is that any substantive foundation for human rights will present a vision of the world—in the dominant genre, it will be a masculinist, Western, bourgeoisie one—that excludes a vast portion of the globe's population in practice, while claiming to be universal.[20] International Humanitarian Law (IHL) and International Human Rights Law (IHRL) not only see their mission as rescuing this liberal individualist subject, but also presuppose state sovereignty as regulative of their respective bodies of law.

A number of prominent thinkers position themselves against maximalist foundationalists and this problematic ideal of universalism. The human subject, they understand, is a complex conglomeration of ever-changing assemblages that does not fit any sort of universal mould; shaped by unique histories, places, and encounters, this subject cannot be spoken for by anyone but him/her/itself/themselves. How could we possibly still support human rights as a project with this amorphous post-structuralist subject at its center? While it might seem counterintuitive, a number of thinkers have shown that anti-foundationalism is by no means incompatible with a commitment to human rights. Richard Rorty, in "Human Rights, Rationality, and Sentimentality"

[19] The biopolitical critique is the latest to emerge, and scholars have furthered it productively. Hans-Martin Jaeger's article (influenced by Hardt and Negri's vision of 'Empire'), "UN Reform, Biopolitics, and Global Governmentality" (2010) argues that efforts to reform the UN in 2004-2005 turned the institution into "a project of managing and regulating the global population through a variety of securitizing, economizing, and normalizing rationalities and techniques" (50). The reforms ushered in a "shift in emphasis from state security to human security" (51), with 'human security' being the "securitization of human rights" (80). Pheng Cheah's "Second-Generation Rights as Biopolitical Rights" (2014) argues that when human rights came to encompass 2nd-generation economic, social, and cultural rights (ESCR) based on "positive duties to fulfill human needs," they exploded the juridical form of 1st-generation rights by putting rights "into communication with…the biological or natural dimension of human life" (215). Thus, for Cheah, human rights are a language through which "humanity as a collective subject" uses its self-determining reason to articulate crucial dimensions of human life (218). But such human capacities to determine these dimensions are necessarily furthered by the juridical instruments of the state, showing that ESCR do not actually contradict the individual's civil and political rights to "freedom vis-à-vis the sovereign state" (218-219).

[20] For a provocative account of the rise and consolidation of the current dominant genre of Man (the primary subject of the human rights project), see Sylvia Wynter's "Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument" (2003). For the implications of this genre of Man for contemporary human rights discourse, through a reading of Fanon's humanism, see Drucilla Cornell (2014: 121-136).

(1993), aims to move thinking about human rights from a Platonist argument to a Pragmatist argument. He sees the Platonist (or foundationalist) paradigm as a practical dead end, and the Pragmatist (or anti-foundationalist) paradigm as offering a more viable future for human rights discourse. Rorty's problem with foundationalist arguments is that he cannot locate *transcultural facts that are morally relevant* (116), and does not think that the philosophical tradition before him has been able to do so either. Philosophers, thinks Rorty, have failed in their attempts to discover the ontological, essential nature of human beings. Instead of searching for these facts, we ought to look at *what actually works* to reduce human suffering—and this, he thinks, is "hearing sad and sentimental stories" (119). As a pragmatist wary of metaphysical propositions, he says out with 'reason' and in with the affective, emotive, and sentimental. The conclusion he arrives at is that 'respecting dignity' does not presuppose knowledge of a distinct human nature. Dignity, rather, can be respected on an affective basis and can be located in a shared *experience* of humanness rather than the ontological *definition* of humanness.[21]

Like Rorty, Michael Ignatieff wants to discard most foundations in favour of 'what works', which involves protecting the agency of individuals to live the life they choose; for him, "human rights is only a systematic agenda of 'negative liberty,' a tool kit against oppression" (2001: 57). Ignatieff's vision accommodates the cultural relativist critique of Western foundationalism by arguing that human rights should not prescribe the ways of life that are good, but merely protect "the minimum conditions for any kind of life at all" (56). This is an attempt to reclaim the value of moral individualism, insisting that individualism is both at the heart of

[21] Rorty's pragmatist thinking provides what is probably the most philosophically robust account of an antifoundationalist vision of human rights attempting to transcend the dead-end foundationalist debate. His canonic (and controversial) statement, using an analytic philosophical framework, is *Philosophy and the Mirror of Nature* (1980). However, he more usefully elaborates on this perspective (dropping the analytic philosophy) in *Contingency, Irony, and Solidarity* (1989); see in particular for our purposes the chapter 'The Contingency of a Liberal Community," pp. 44-70, where he shows the immense cruelty that often results from questions about what it means to be human—or substantive visions of 'the good life'—and how they allow for the dehumanization of the other.

rights, and that it is not necessarily a carrier of Western ideological imperialism (67). Thus Ignatieff is not unaware that foundations secret within them theories of human nature, histories of global development, understandings of power, and visions of ideal futures. This is one of the reasons why anything but a 'thin' or 'minimalist' foundation appears overloaded with ideological baggage and susceptible to corruption. Any one of these associated theories, histories, understandings, or visions can be a life-line as well as a noose for those individuals and cultures that organize their experience of the world under different terms. Thus, a minimalist human rights discourse "is the only universally available moral vernacular" (68) because it places the story of human history against theories of human nature (80). Ignatieff's emphasis on the language of deliberation—the story of human history leading to a shared minimalist moral vernacular—makes his vision flexible, for it focuses on a method rather than a rule. Consequently, both Rorty and Ignatieff ask: instead of thinking about what *could* absolutely compel adherence to a human rights regime, what is it that currently *does* propel individuals to invest in a human rights culture? Ultimately, Ignatieff asserts, in terms that Rorty would endorse, that our moral intuitions "derive simply from our own experience of pain and our capacity to imagine the pain of others" (88). In this way, the Glendon-Mutua exchange is addressed and transcended by these thinkers, who propose a minimalism that neither aspires to hardline universalism nor gives up on the normative project of human rights.[22] Importantly for later

[22] Importantly, neither author adequately engage with the problem of what epistemic violence is done in the name of moving people's emotions, which often involves manipulation. Sentimentalism, for instance, too often allows assumptions to persist, plays upon those assumptions, reifies them, and exports them to wider audiences. This dynamic is illustrated by Binyavanga Wainaina in his brilliant article "How to write about Africa" (2005). Wainaina offers advice to anyone who is attempting to write about Africa: "Never have a picture of a well-adjusted African on the cover of your book, or in it, unless that African has won the Nobel Prize," he advises. "An AK-47, prominent ribs, naked breasts: use these" (2005). Earning the sympathy of your reader, he suggests, is a simple formula: "include The Starving African, who wanders the refugee camp nearly naked, and waits for the benevolence of the West…She can have no past, no history; such diversions ruin the dramatic moment. Moans are good" (2005). And alongside the racial other in the pantheon of sentimental gods we must also place the child, which Lee Edelman has shown exists (much like 'the African') in an "economy of sentimentality" (2004: 134) and constitutes a site of what we may call *sentimental normativity*. This 'sentimental norm' has yet to be historicized or denaturalized. As

chapters, both these accounts (Ignatieff's explicitly, Rorty's implicitly) sound decidedly liberal, for as Edmund Fawcett says, "[y]ou are a strange sort of liberal if you cannot give in to indignation and outrage" (2014: 301).

This minimalist, pragmatic (and, I argue, liberal) defence of human rights is related to another defence that claims human rights can be thought of as itself a 'culture'—one that is fluid and adaptable to its various contexts. As Kate Nash explains in *The Cultural Politics of Human Rights* (2009):

> If we understand human rights as being a dynamic and fluid culture, rather than a static entity, then we can understand why this search for a foundation is so futile: it is irrelevant to what keeps human rights alive and vibrant… This cultural politics…does not pose a blandly static, universalist human rights regime rooted in one historic, philosophic, cultural, or religious tradition. Instead it focuses on the everyday dynamism that has made human rights part of local politics around the globe… (508)

Because human rights are part of 'local politics', they are considered more 'authentic' and therefore less dangerous as exporters of Western values. This argument implies, with Clifford Geertz, that "man is an animal suspended in webs of significance he himself has spun" (1973: 5), and that 'human rights' are the thread with which man now weaves. Nash's vision (like Geertz's) might sound compelling on a rhetorical or sentimental level, but where is the dividing line between creating a human rights culture to rest alongside existing cultures, and changing existing cultures to align more closely with the way human rights have already infiltrated 'Western' culture? Amy Gutmann takes the latter position, arguing that "what human rights protection seeks is not the destruction of cultures…but their *integration* of human rights protection" (2001: xxi). In her view, cultures must "change" to "accommodate" human rights (xxii). But who defines when change and accommodation become the destruction of a culture? And the concept

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Ignatieff himself, in his early book *The Needs of Strangers* (1984) acknowledges, "pity is a complex human emotion, mingling compassion and contempt" (43). A crucial and innovative analysis of this is Stephen Hopgood's chapter, "The Moral Architecture of Suffering", in *The Endtimes of Human Rights* (2013), pp. 69-95.

of 'culture' is by no means a safe or blameless one: scholars like Siba Grovogui (1996), Talal Asad (2003) and Mahmood Mamdani (2012) recognize that the (ab)use of power is an inevitable aspect of individual and group interactions and is key to understanding how structures of governmentality (including international law) define and confine subjects through the language of culture. Asad, in "What Do Human Rights Do? An Anthropological Enquiry" (2000), argues that in spite of the general decline of theological foundations and rising consensus that "human rights are intended for a secular world," theorists have failed to understand that the human rights project is nonetheless "part of a great work of *conversion*" (2000: ¶49). Thus, in addition to being about universal aspirations and reducing harm, human rights discourse "is also about undermining styles of life by means of the law as well as by means of a wider culture that sustains and motivates the law" (¶48). This claim is supported by debates within the field of law about why laws are followed: Harold Koh, a chief legal advisor to the State Department under President Obama, argues that "norm-internalization, and not coercion, is the ultimate reason why most people obey the law" and "most norm-internalization comes from participation in legal process, particularly transnational legal process" such as human rights law (2004: 339). Similarly, in his classic book *How Nations Behave* (1979), human rights legal scholar Louis Henkin argues approvingly for "the educative roles of law, which causes persons and nations to feel that what is unlawful is wrong and should not be done" (94). The idea that collective rights (such as self-determination) protect against this alteration-impulse does not hold up under scrutiny, for even the most 'generous' theorists of multicultural liberalism such as Will Kymlicka (2001: 69-90) see to it that individual rights always take precedence over such collective rights, ultimately 'resolving' the conflict of cultural difference on the side of assimilation.[23] The human

[23] Seán Patrick Eudaily's "Indigenous Legal Claims Beyond the Limits of Liberalism" (2004) provides a useful account of different genres of liberal arguments attempting to accommodate Indigenous political claims, and which

rights regime, contends Asad, is thus heavily invested in a redemptive narrative whereby states and cultures not yet redeemed are to be brought into the fold of human rights; it tries to make the foundation of some (the West) into the foundation for everyone by changing the 'everyone' (namely 'the rest') rather than finding a truly universal foundation. Making a foundation speak universally is different than finding a foundation that speaks universally.[24]

Balakrishnan Rajagopal's analysis helps periodize when such a 'conversion' imperative entered the human rights project, and suggests some of the mechanisms through which the new norms were forcefully spread throughout the globe. That is, he assess whether and when human rights discourse has been hegemonic or counter-hegemonic, allowing him to think human rights discourse relationally to other hegemonic political discourses and structures. So, for instance, in the 1980s human rights discourse was used counter-hegemonically in Eastern European and Latin American democratic struggles (2006: 770). The same could not be claimed, however, for earlier decolonization movements because of the relatively marginal status of human rights discourse at that time. True, it was also used hegemonically (because of its "imperial history" and "complicity with Western political agendas") in the 1980s in Latin America, but the point is that it was not *solely* hegemonic, because counter-hegemonic examples of its usage persisted (770). The "new hegemonic role for human rights," rather, came at the end of the Cold War (770), when a "new-found mood of consensus at the UN Security Council led the UN and human rights groups to more aggressively pursue humanitarian intervention" (770), and when the World Bank and IMP "embraced" human rights, incorporating them into their neoliberal development schemes (770): "[i]n this new hegemonic role for human rights, such rights began to be seen as

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ultimately fail to do so (229-252).

[24] In a recent article, Asad has carefully considered similar questions about conversion, but this time in the context of *humanitarianism*. See his "Reflections on Violence, Law, and Humanitarianism" (2015).

the language of military intervention, economic reconstruction and social transformation—a totalizing discourse" (770).

In this account, human rights became the ideology justifying intervention, reconstruction, transformation—in short, conversion to a certain standard and image of political life. A recent and prominent group of critics essentially agree on this point, arguing that the grand act of conversion occurs in part through a redefinition of what counts as politics. The human rights regime has not just sought to change cultures to accord with its worldview, they claim: as an ideology, it also contributes to, and is symptomatic of, the delimiting of horizons of political action and thought. Robert Meister's *After Evil: A Politics of Human Rights* (2011) argues that denouncing physical atrocity is an essential part of our current conception of what it means to be human, and a fundamental part of human rights advocacy (1). This is an "ethically centered approach to human rights" (5) that is meant to 'transcend' the revolutionary and counterrevolutionary politics (in the form of Nazism and communism) "that together produced the horrors of the twentieth century" (7). Human rights is then seen as an antidote to "the mind-sets that made those twinned evils intelligible to their proponents as moral good": the 20th century was "initially welcomed as coming *after* evil, a century in which the atrocities committed in the name of either revolution or counterrevolution are supposed to have become unthinkable" (7). As such, the current human rights dispensation is 'defensive' (or in Ignatieff's liberal vernacular, 'negative'), "standing for the avoidance of evil rather than a vision of the good" (1). Because of this defensive stance, says Meister, the weak have come to possess an

> illusion of victory over those whose power they still have reason to fear…[T]he former victim tries not to think about who really won and *eschews the temptation to engage in a political analysis that might open the question of whether that evil has finally been defeated*. Today's mainstream literature on transitional justice tends to assume that past victims never really win…and that stopping [the struggle] makes sense if they can declare a moral victory that seems to put oppression in the past. (9-10, emphasis added)

Thus, in human rights discourse, political struggle is delegitimized as a route to change and in its place is raised the virtues of "moral consensus"—the ascendance, perhaps, of Ignatieff's human rights 'moral vernacular' as a *lingua franca*—meaning that the victims "get to claim a moral victory when, and insofar as, the beneficiaries get to keep their gains" (14). Meister says that human rights "addresses a time between times, when evil has ended but before justice has begun" (10). Thus when a minimalist like Ignatieff stresses that his ideal human rights project is merely about stemming human cruelty and suffering, Wendy Brown responds with a sobering reminder and question:

> No effective project produces only the consequences it aims to produce. Whatever their avowed purpose, then, do human rights only reduce suffering? Do they (promise to) reduce it in a particular way that precludes or negates other possible ways? (2004: 453)

This question tries to bridge the chasm between pragmatic and ideological accounts of human rights by insisting that the moral traction needed for this reduction of suffering comes at a political-philosophical price.[25]

To understand how 'moral traction' has itself gained traction is to understand how the rise of human rights as an ideology is a story of the fall of other, specifically *political*, avenues for effecting change. Meister's argument thus converges with work by John Torpey (2006) and Samuel Moyn (2010) investigating the relation between human rights as an ideology and its relation to prior visions of emancipatory politics. For Torpey and Moyn, the advent of human rights is an indicator (if not entirely a cause) of a loss of faith in previous utopian visions for the

[25] Joshua Cohen, in "Minimalism About Human Rights: The Most We Can Hope For?" (2004), argues that in Ignatieff's rendition "human rights minimalism draws the boundaries of hope too narrowly" (191)—differently than Brown, who sees minimalism as still too laden with ideological content. Cohen makes a distinction between *substantive minimalism* and *justificatory minimalism*: "we do not specify the concept or the content of a human rights conception by looking to worldviews and values, taking them as determinate, fixed, and given, and searching for points of de facto agreement. Instead, we hope that…different traditions can find resources for fresh elaboration that support a conception of justice and human rights that seems independently plausible as a common standard of achievement with global reach" (213).

future *political* (re)organization of the world. Differently from communism and anticolonialism, the rise of human rights reveals "an unmistakable decline of a more explicitly future-oriented politics" (Torpey 2006: 5). The proliferation of backward-looking calls for reparations is one indication that "something profound has taken place in our ways of thinking about possible human futures" (24). And in this contemporary "age of diminished political expectations" (5) human rights have emerged as 'the last utopia', the current—albeit "recent and temporary" (Moyn 2013: 100)—normative idealism. This is why Moyn claims that human rights have done more to transform "the terrain of idealism than…the world itself" (2010: 9). The human rights regime says politics is bad, law is good, and that political utopias, with their collective languages and bold projects, are dangerous and bloody, so we need *rights* protected by *law* because law stands to the side of politics. This amounts to the creation of a new liberal norm: the displacement of politics (discourses of freedom) by law (discourses of justice), and then the moralization of law, effectively foreclosing older horizons of political freedom. A binary is elaborated: visions of past evil replace visions of future hope as horizons of identification; narratives of order replace narratives of expectation; rubrics of individual harm replace rubrics of political organization, injustice, and systemic violence. The juridical focus of human rights within liberal regimes insists on ameliorating *specific harms* of the past rather than the systemic injustices of the present, amounting to an ideological erasure by which we are no longer able to see *general histories* as crimes against humanity or emancipatory movements as legible forms of politics beyond human rights claims. We can begin to see how inaugurating Deskaheh as the father of Indigenous claims *for human rights* at the UN not so much misreads as entirely replaces emancipatory and historically grounded, imaginative political articulations with legalized pleas for protection *from* the outcomes of politics.

These critiques of the human rights regime and the defenses of it seek to make claims about the influence of human rights—as ideology, institution, discourse—on the terrains of culture and politics. When accused of universalist homogenization by cultural relativists, the human rights project is defended as forming a basis for the protection of cultural expression (minimalism) and, in its use by local politics, as forming a part of developing cultures (culturalism). When defended as being organically welcomed as part of culture, human rights are exposed by others as a Trojan Horse secreting Western values into foreign lands in a grand act of conversion, and to define as legible or illegible certain visions of politics and political futures. But when thought of in relation to Indigenous peoples, for instance in Canada, both these defenses and critiques fail to account for the situatedness of the actors making human rights claims (Indigenous peoples), those the claims are made to (states, the international system, human rights organizations), those the claims are made against (often states and corporations), and the specific setting that configures the power relations between all these actors and how each defines 'success' or 'resolution' or 'failure'. For instance, who is to say that Indigenous political imaginaries are delimited by using human rights discourse? Is not something altogether more complex going on? The normative statements made against and in defense of the human rights project employ such broad strokes that they miss vital details about how power operates differently through that project's mechanisms and ideologies in different contexts.

III. Settler Colonialism and the Critique of Human Rights

One of the central claims of this thesis is that both the discussions of the UN's Indigenous rights instruments and the critiques and defenses of human rights presented above fail to adequately account for or even consider our settler colonial present.[26] Both theorize power,

[26] This formulation is taken from Lorenzo Veracini's book *The Settler Colonial Present* (2015).

possibility, success, and failure without meaningfully incorporating (or testing these analyses against) how they intersect with the *specific* logics and structures of the *settler colonial formation*. This omission of settler colonialism as a historical (as well as contemporary) fact *and* as a heuristic or analytic, has limited how these thinkers are able to understand the relations between power, Indigenous peoples, and human rights. When the settler colonial context is acknowledged, much about the ideological workings of human rights—its complicity and possibility—comes into view. In sum, this thesis aims to force human rights onto the scene of settler colonialism.

Forcing this rapprochement is important because of the way settler colonial studies has theorized the specific operations of power in settler colonies. The accounts of settler colonialism articulated by this field are complex and multiple, but they contain a number of core assertions, the most significant of which is the centrality of the state. By highlighting how the originary violence of the state is ongoing—and archiving the relation between modernity and violence via the conduit of the state—settler colonial studies disrupts the idea that colonialism is over. 'Human rights' are often said to have developed (and become crucial, in Ignatieff's view) in response to the deep violence of modernity in the garb of 20th century totalitarianism. Settler colonial studies adds another and perhaps more complex location to the totalitarian state: the settler state. While human rights says 'never again' to the extermination of whole peoples made possible by totalitarianism—as Hannah Arendt attempts to make sense of in *The Origins of Totalitarianism* (1951)—Indigenous bodies make claims against sovereign power simply by *remaining*.[27] In so doing, they signify the defeat of a continuous extermination by settler states

[27] For a provocative critique of the way the human rights regime has used the events of WWII as a symbol necessitating and validating its purported moral authority, see Stephen Hopgood's, "The Holocaust Metanarrative" (2013: 47-68). G. Daniel Cohen, in "The Holocaust and the 'Human Rights Revolution': A Reassessment" (2012:

that inhabits a very different temporality (a different duration) than the totalitarian exterminations so richly laden in human rights iconography and mythmaking. This Indigenous refusal is made even while the human rights regime—as a language of liberalism, as a liberal moral vernacular—reproduces a fantasy states have about themselves: that there do not exist forms of political action outside the parameters they set. This neo-Kantian fantasy is a kind of Fukuyama-esque investment by the liberal mainstream in the idea that a universalized liberal democracy might be the ultimate horizon of political action and social organization (Fukuyama 1992).

As Jeanne Morefield helps us recognize in *Empires without Imperialism* (2014), liberals like Ignatieff who are deeply invested in human rights and the liberal state system are willing to condone illiberal means—torture (2004) and 'empire lite' (2003)—to secure democracy around the globe while performing a rhetorical agonizing over the 'tragic' choice liberals must make in the name of reducing human suffering even by dubious methods. Morefield presents this as a need to show that liberals have robust internal debates (the self-proclaimed definition of liberal political life)[28] even if the outcomes are illiberal actions, thus confirming the essential liberal *character* or essence of the state/people despite contradictory behaviour: "who 'we' are consistently trumps what 'we' do by wrapping the imperializing society in the gauzy sheen of a liberal identity that protects it from the barbs of those who are consistently imagined to be illiberal in nature" (202).[29] This dynamic becomes especially significant in settler colonies,

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53-71), makes the argument that the Holocaust was not invoked at the founding stages of the human rights regime (as Ignatieff asserts), but was memorialized by that regime later in its history.

[28] Morefield explains: "Ignatieff uses the confrontation with illiberalism, and the impossibility of this choice, as an opportunity to stage precisely the qualities he believes are so essential to liberal society—in particular, its endless 'trial of self justification'" (2014: 196).

[29] David Luban, in his important article "Liberalism, Torture, and the Ticking Bomb" (2005), sharpens this picture by showing how even this robust debate becomes less and less as liberal benchmarks of what counts as 'illiberal' behavior become increasingly less restrictive: "we judge right and wrong against the baseline of whatever we have

where the justification of illiberal action has occurred over centuries and adopted and adapted whatever moral-historical concepts are in currency—barbarism, civilization, development, human rights. Thus, it is significant that Jennifer Tunnicliffe notes that "[s]upport for human rights is an increasingly important element of Canadian identity" (2014: 807), and cites "the 'sanctimonious' attitude of Canadians toward their own human rights history" (809).[30]

I would argue that this kind of human rights pride and national identity, when seen in relation to the liberal dynamic Morefield describes, is an example of what Mark Rifkin calls settler common sense, whereby "quotidian affective formations among non-natives"—such as a shared, 'sanctimonious' national human rights identity and the community of human rights-endorsing states Lightfoot describes—"can be understood as normalizing settler presence, privilege, and power, taking up the terms and technologies of settler governance as something like a phenomenological surround that serves as the animating context for nonnatives' engagement with the social environment" (2014: xv). Thus 'who we are' comes to matter more than 'what we do'—in a splitting of the contingent self and the essential self—so long as we worry over this essential self, or soul, as Jasbir Puar (2007) and Steven Salaita (2011) show is also the case in another settler colony, Israel. Another way to make sense of this is to follow Illan Rau Wall, who argues that

> [h]uman rights remain part of the distribution of the sensible. '[T]he distribution of the sensible sets the divisions between what is visible and invisible, sayable and unsayable, audible and inaudible.' The everyday politics of this order is a process of counting, of managing who and what counts, and the manner in which they count. (2014: 207)

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come to consider 'normal' behavior, and if the norm shifts in the direction of violence, we will come to tolerate and accept violence as a normal response" (1451).

[30] For recent takes on Canada's 'unique' relationship to human rights see: Michael Ignatieff, *The Rights Revolution* (2007), Andrew Lui, *Why Canada Cares: Human Rights and Foreign Policy in Theory and Practice* (2012), the essays collected in *Taking Liberties: A History of Human Rights in Canada* (2013), eds Stephen Heathorn and David Goutor, and Jennifer Tunnicliffe's helpful review of the literature, "Canada and the Human Rights Framework: Historiographical Trends" (2014).

Internal critique—worrying over the soul of the nation—would merely "shuffle the positions in the distribution of the sensible" and so maintain "the withdrawal of the political" (112).

Morefield, Rifkin, Salaita, and others draw attention to the language games and rhetorical tricks that lend legitimacy and texture to the distribution of the sensible that is at the same time 'settler common sense', and the wider claims about sovereignty, territory, citizenship, and liberal order implicit in these that, viewed beyond such ideological structures, actually index the Westphalian state's inherently violent nature in settler colonial contexts. While these activities make a pretence of interrogating the actions and identity of the *nation*, they actually "shield the settler-colonial legal and political apparatuses from the same reciprocal form of critical examination as is exercised over indigenous peoples and their claims" (Nichols 2013: 177-178). In a prescient passage, Franz Fanon identifies a similar dynamic while writing from another settler colony, Algeria, in the 1960s: "[in] its narcissistic monologue the colonialist bourgeoisie, by way of its academics, had implanted in the minds of the colonized that the essential values—meaning Western values—remain eternal despite all errors attributable to man" (1963: 11). What better way to describe, say, Michael Ignatieff, then as a colonialist bourgeoisie academic advocating, through a narcissistic monologue, the essential goodness of Western values (human rights) despite the human errors and costs they entail?[31] While the inherent unimpeachability of the liberal state is certainly used to reproduce colonial relations in non-settler colonial settings through concepts such as humanitarian intervention (R2P) and neoliberal development institutions (the World Bank and IMP), the 'liberal state identity' tactic is used in *different*

[31] Of course, the limit here is the extent to which such belief in these essential values has been successfully 'implanted' in the minds of the colonised in different contexts. The most sophisticated use of Fanon in the North American settler context is Glen Coulthard's recent *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (2014), see esp. 131-150.

though related ways *at home* to buttress the state's sovereign defenses against external scrutiny of its domestic behaviour.

Thus, when a critique of human rights from an Indigenous or Native Studies perspective is filed under 'colonialism', a significant and irreducible element of its analysis is assimilated into a more ambiguous 'colonial relation'. For instance, Mahmood Mamdani (2012) and Karuna Mantena (2010) have developed an account of liberal empire, showing how utilitarian, direct rule was replaced by indirect rule structures during the mid-19th century crisis of empire.[32] However, their critique aims to understand techniques of *maintaining* power over a territory already under external colonial rule so as to consolidate extractive resource bases and increase international clout. The crisis of empire was more about how to treat external others so as to protect global economic interests rather than how to treat internal others that destabilize the claims to the developing settler political community in its entirety; perhaps accordingly, Mantena's theorization of a general shift from utilitarian direct rule to an indirect, less invasive rule in India does not help us make sense of the fact that in Canada, "Indian Act policy tended to become more coercive over time" as the government became increasingly frustrated (Miller 2013: 241). Management of territory for the sake of continued exploitation will utilize different (though related) tactics as the settlement of territory for the sake of erecting a new state on it.[33] Similarly, the school of critique described above, led by Torpey (2006), Moyn (2010), and Meister (2011), looks at how the contemporary human rights regime has circumscribed political thinking,

[32] Mantena and Mamdani summarize this shift: the mission and justification of colonial rule went "from civilization to conservation and from progress to order" (Mamdani 2012: 8). Instead of viewing empire as "a self-consciously willed project," it would come to be reactively and retrospectively defended as "the lesser evil to leaving native societies to collapse on their own" (Mantena 2010: 12). Thus as time went on, these policies "would be normatively defended as a deference to native agency, and…as a form of cosmopolitan pluralism, one that recognized and respected the cultural specificity of native society" (6).

[33] As such, Crosby and Monaghan (2012) use an idea of 'settler governmentality' (as the partner concept to David Scott's 'colonial governmentality') "to describe the unique rationalities that animate colonial transformations in settler states such as Canada because, through the process of mass settlement, colonial practices target an increasingly isolated minority population" (425).

limiting the horizons of whole peoples' utopian imagination. However, these theorists orient this critique mostly in relation to the 1960s decolonization struggle on the African continent (which largely adopted the European state form), ultimately doing little to help us understand Indigenous North American forms of control/resistance or the very present political imaginaries and claims Indigenous activists erect against this limiting and limited façade. Finally, many ideological critiques of human rights indict liberalism (and the liberal state), treating it as a proxy for human rights. This recent strand of scholarship in the history of political thought has elaborated the links between liberalism and imperialism by showing how exclusions are structured into the way liberalism works.[34] Thus, when we acknowledge that the human rights regime is at base (whether in theory or in practice) a liberal one coming out of the tradition of liberalism—a connection laid out clearly by John Charvet and Elisa Kaczynska-Nay in *The Liberal Project and Human Rights: The Theory and Practice of a New World Order* (2008)—it is hard to take seriously that regime's stated claims to universalism, whether minimalist or not.[35] However, as Duncan Bell

[34] The classic version of this argument is Udah Sing Mehta's *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (1999). Recent elaborations include Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (2005), Jeanne Morefield, *Covenants without Swords: Idealist Liberalism and the Spirit of Empire* (2005), Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (2010), and Lisa Lowe, *The Intimacies of Four Continents* (2015). The debate continues regarding the extent to which such an imperial orientation is *intrinsic* to liberalism. A useful article surveying this work is Duncan Bell, "The Dream Machine: On Liberalism and Empire" (2016, forthcoming). Others have explored the essential relationship between political theory—ideas of sovereignty, property, natural rights—and European expansion. These include Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France, c. 1500-c. 1800* (1995), Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (1996), Richard Tuck, *The Rights of War and Peace: Political Thought and the International order from Grotius to Kant* (1999), and Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2004). Jennifer Pitts surveys this work in "Political Theory of Empire and Imperialism" (2010), and a collection featuring prominent contributors to the field is *Empire and Modern Political Thought* (2012), edited by Sankar Muthu. Andrew Fitzmaurice offers another survey, "Liberalism and Empire in Nineteenth-Century International Law" (2012), but focuses on *critiques* of empire found in liberal international law.

[35] As Anthony Pagden states: "It is undeniable that, at present, the 'international community' derives its values from a version of a liberal consensus which is, in essence, a secularized version of a Christian ethic, at least as it applies to the concept of rights" (2015: 246). This is broadly congruent with Stephen Hopgood's account of the ideological origins of the 'humanist international', outlined in his chapter "Moral Authority in a Godless World" (2013: 1-23). Edmund Fawcett, in his history of Liberalism, calls the UDHR "a postwar restatement of liberal-democratic ideals," the first 20 articles of which, "[t]aken together,…may be seen as reflecting key elements of liberal civic respect, nonintrusion, and nonobstruction taken democratically in a nonexclusive way" (2014: 290-292).

demonstrates (2016), the current scholarly flurry on the inherent or contingent relationship between liberalism and empire has failed to take adequate account of settler colonialism: "a tendency to overlook the significance of *settler colonialism*" is one of the

> main weaknesses run[ing] through scholarly commentary on liberalism and empire…Settler colonialism played a crucial role in nineteenth century imperial thought, and liberalism in particular, yet it has largely been ignored in the burst of writing about the intellectual foundations of the Victorian empire. (2)[36]

If liberalism is a theoretical cornerstone for both the history of human rights and its contemporary normative architecture, then it is imperative that analyses of the relationship between human rights and colonial power utilize the tools of settler colonial studies to correct for this absence, not least because, as Dian Million points out, post-WWII calls in North America for self-determination and treaty rights have spoken "firmly to and from liberalism" (2013: 87). What such calls for self-determination in the language of liberalism mean, then, is that we need to account for how *inclusions* (not just the exclusions elucidated by Mehta and others) can also be violent: the inclusion of who, in what, and on whose ground? Not to do so, proposes Scott Morgensen, might itself be a violence:

> Settler colonialism directly informs past and present processes of European colonisation, global capitalism, liberal modernity and international governance. If settler colonialism is not theorised in accounts of these formations, then its power remains naturalised in the world that we engage and in the theoretical apparatuses with which we attempt to explain it. (2011: 53)

Part of the reason for this is that settler colonialism "is not merely a global phenomenon, it is also constitutive of the global" (Cornellier and Griffiths 2015: 1); as such, when theorizing settler colonialism in accounts of liberalism and rights, we should follow the lead of Lisa Lowe,

[36] For instance, Bell notes how J.L Hammond, a historian writing at the turn of the 20th century, adopted a line of reasoning whereby "empire was legitimate if it was motivated by broadly liberal ambitions and functioned according to broadly liberal norms…Dismissive of imperialism, he praised the value of settler colonialism…Echoing this distinction, liberal internationalists today often scramble to differentiate 'hegemony' from 'empire,' with the former typically construed as normatively desirable and the latter as both obsolete and objectionable" (2016: 4-5).

who acknowledges that "the differentially situated histories of indigeneity, slavery, industry, trade, and immigration give rise to linked, but not identical, genealogies of liberalism" (2015: 11). Ultimately, then, the various critiques of human rights and liberalism described above are insightful, but insufficient to an analysis of how liberalism and rights operate within settler colonial states.

So how do we go about correcting for this insufficiency? The first step is to get a grip on the nature of the power structures for which we are trying to account. The irreducible element that a settler colonial perspective on human rights adds to the analysis is the state's drive for land. Settler colonialism's main actor, the state (rather than just colony, nation, or metropole), is specific, and its motivation, land (rather than labour, wealth, power), is also specific, though *all* these actors and motivations are entangled in settler colonialism and analyses of it. The crucial focus is on a state structure trying to disavow its history of *land dispossession* and indigenous *elimination* in an attempt to erect the myth of the state on the territory of pre-existing nations and then have that myth solidified in and supported by the international community. Settler states and their institutions, in the words of James Tully, "constitute structures of domination…because they are now relatively stable, immovable and irreversible vis-à-vis any direct confrontation by the colonised population" (2000: 37). Patrick Wolfe's classic account of the processes by which this comes to pass describes settler colonialism as operating under a "logic of elimination" whereby the native must be eliminated, whether through genocidal extermination or liberal assimilation, to consolidate the settler project of land dispossession (2006: 387).[37] Wolfe's other

[37] One exemplary account of this process of elimination in the name of land dispossession is James Daschuk's *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (2013). Daschuk, in painstaking historical detail, shows how elimination and dispossession are manifest over time, how the differential power dynamics of settler colonialism emerge, take root, expand, and consolidate. See also Matthew Wildcat's useful survey of recent literature connecting 'genocide' and settler colonialism, "Fearing Social and Cultural Death: Genocide and Elimination in Settler Colonial Canada—an Indigenous Perspective" (2015). Wildcat's article appears in a special issue of the *Journal of Genocide Research* (Volume 17, Issue 4, 2015) on "Canada and Colonial

key contribution is his observation that this logic of elimination is not situated at some specific moment in time that has 'happened'; rather, in his formulation, "invasion is a structure not an event" (388). Settler colonialism, for Wolfe, employs mechanisms that are both negative (dissolution of native societies) and positive (erection of a new colonial society). In other words, "settler colonialism destroys to replace" (388). Of course, these are broad assertions that scholars have recently qualified and nuanced. For instance, Tully notes that while both the assimilation approach and the accommodation approach give

> different degrees of recognition…to indigenous peoples, both do so within the indubitable sovereignty of the Canadian state over indigenous peoples and so do not question, let alone challenge, the continuing colonisation of indigenous peoples and their territories, but serve to legitimise it. (2000: 45)

Lisa Stevenson introduces the example of government programs of 'care' for the Inuit in Canada to show how, contrary to 'elimination', the aim of settler states can actually be to keep Indigenous 'populations' around:

> Arctic administrators sought to keep Inuit alive (if just barely) to demonstrate sovereignty with respect to other states. Instead of being physically eliminated from their land (cf. Wolfe 2006) or unsettling Canadian claims to sovereignty through their status as a distinct people (cf. Rifkin 2009), Inuit bodies were reinscribed as Canadian to support Canada's international claim to sovereignty over the Arctic. (2014: 180, note 9)

As Canada's most recent Indigenous Affairs Minister, Carolyn Bennett, said in her first month in office: "[w]hat we want is for the health, education and economic outcomes [for indigenous peoples] to be the same as Canadian averages" (Hall 2015). Stevenson's history of 'care' in the Canadian arctic thus should serve as a caution for today, and help us think differently about what 'elimination' entails. Alongside physical/biological death, on the one hand, and assimilation, on the other, we must think about 'making anonymous', which is neither physical death nor

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Genocide," which provides detailed historical and theoretical accounts of settler colonialism's eliminatory aim in the Canadian colonial context. See in particular Andrew Woolford and Jeff Benvenuto's introduction, "Canada and Colonial Genocide" (2015).

assimilation, but a kind of preserving of an identity (in this case, Inuit) but only in an aggregate that produces statistics which prove a point (about nation, responsibility, etc.) to/for the powers that be. As Stevenson shows in the case of the Inuit, "becoming Canadian meant, in part, to die at Canadian rates" (30). Here we see how 'elimination' might mean the disappearance of Indigenous bodies as well as "the disappearance of the indigenous peoples *as* free peoples with the right to their territories and governments" (Tully 2000: 40). Together, these analytic foci of settler colonial studies—the logic of elimination, and the form of a structure rather than event—and their complications, qualifications, and elaborations, introduce at least two specific challenges to human rights discourse.

First, the human rights regime is designed and suited to point out *events to be condemned* rather than *structures to be changed*. Examining human rights norms and discourse, Moyn and others have noted a "failure of structural modes of thinking and more activist political strategies to retain widespread appeal," finding instead that as a system it is more suited to "singling out state abuses" (2014: 159-160). That is, the human rights regime is far better at identifying specific events that constitute human rights violations than at articulating a sustained critique of structural modes of domination that form the context of those violations.[38] However, as scholars of settler colonialism insist: settler colonialism is a structure, not an event. While state abuses are the stuff human rights are made of, the structural dispossession constituted by the existence of the state remains beyond the reach (and perhaps even sight) of the human rights regime. Specific

[38] Indeed, Moyn (2014) notes that "human rights do not purport to provide an egalitarian agenda", which is why they have been less successful against neoliberal pressures in reducing human suffering caused by extreme poverty (161). Human rights have been "condemned to watch" but "powerless to deter" (151) the machinations of the neoliberal global order. In fact, both phenomena—neoliberalism and human rights—"revive a version of classical liberalism in new form" (155) and "share a commitment to the prime significance of the individual" over "collectivist endeavours" (156), rejecting the "moral credentials" of the state even while "rely[ing] on its agency for enacting policy reforms" (156). And while human rights make only 'rhetorical inroads' into the economic sphere, "neoliberalism has transformed the globe" (168)—doing more for ill than human rights (global inequality) as well as more for good (poverty reduction) (168).

to the question of Indigenous peoples, Million argues that in North America "human rights campaigns seek to affectively and empirically educate 'publics' on what feels to them like repetitive crises rather than the regular, ongoing outcomes of 'colonial' relations" (2013: 53). Thus the government of Canada has characterized the crisis of Missing and Murdered Indigenous Woman (MMIW)—over 1,200 'missing' or murdered in the past decade—as individual instances of crime rather than the result of structural dynamics ("Harper Rebuffs"). This kind of talk is one way in which human rights offers a language and framework that, through its 'eventing' of violence, distracts attention from settler colonialism's structural project.[39] Moyn's observation articulates with Peter Kulchyski's argument in "Aboriginal Rights are Not Human Rights" (2011) that "the universalist human rights discourse is poorly equipped" to take up Indigenous cultural rights "threatened by capitalism" (33), and with Illan Rua Wall's observation that human rights "consistently re-inscribe sovereignty and find no place for the politics of anti-capitalism or anti-imperialism in their more expansive forms" (2014: 107).

Second, and perhaps more fundamentally, human rights rely on the very states through which settler colonialism's 'logic of elimination' is most often carried out, despite human rights originally developing as a 'check' on state power. As Arendt famously showed, human rights as we would like to think of them are not really *natural* rights, but closer to the *positive* rights accorded to citizens of a state—meaning that if you are a stateless person, you do not have human rights, and if you have human rights, you have them by virtue of the power wielded over you by some or another state (1951: 267-302).[40] In this way, as Jacques Rancière glosses the

[39] For an exemplary account showing how the settler context structures the intersection of racial and gendered violence as it relates to Indigenous women in Canada, see Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2002), pp. 121-155.

[40] For a generous assessment of this point, see Ayten Gündoğdu's "'Perplexities of the Rights of Man': Arendt on the Aporias of Human Rights" (2014: 13-35), which presents Arendt's critique less as a limiting gesture (as in Rancière's opinion of Arendt, see note 41), and more as an opening up of possibility through paradox (aporia) so that "human rights can be politically navigated to contest inequality" (15). Similar moves are made to turn

argument, human rights are actually "the rights of those who have no rights, the mere derision of right" (2004: 298).[41] Nonetheless, human rights are still commonly spoken about as 'in theory', at least, providing a check to the whims of states. Indeed, during the UDHR drafting debates the relative power the state should have was fiercely contested—with Western liberal democracies arguing against overly powerful states and Soviet-bloc representatives claiming such power was needed to implement rights to health and education—but *not* their legitimacy or the plights of those not residing willfully within them (Glendon 2001: 187). Instead, it is over the claiming, adjudication, and administration of (human) rights that the game of a state's legitimacy is often rhetorically played out though never entirely questioned. In *Why Canada Cares: Human Rights and Foreign Policy in Theory and Practice* (2012), Andrew Lui stresses "the influence of Canada's national unity crisis," arguing that

> the rise of separatism in Quebec caused the federal government to look for issues around which it could 'forge national ties'; the pursuit of human rights helped to affirm the sovereign authority of the Canadian government, and federal officials used human rights to project 'a particular self-image of Canada as a just society that was undivided despite its diversity'. (Tunnicliffe 2014: 811)[42]

The human rights regime is integral to state solidification, both in terms of self-image (as a human rights loving state)[43] and in terms of the institutional and legal instantiation of the state as

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Agamben's critique of human rights into an opening of potential mobilization through them (Lechte and Newman 2013).

[41] Joseph Slaughter notes that both Burke and Marx came to similar conclusions before Arendt (2007: 12). Of course, Rancière (2004) offers an important critique of Arendt (and Agamben): there are no humans truly living as merely 'bare humans', and so when 'human rights' are claimed such people are not invoking rights they do not have (because they are not citizens), but rather, in Drucilla Cornell's words, "are contesting the reality that denies them those rights by acting now as if they had them." (2014: 132). Thus, for Rancière, such people "acted as subjects that did not have the rights [experienced as citizens] that they had [by virtue of being human] and that had the rights that they had not" (2004: 304).

[42] See also Morton-Robinson's analysis (2015: 173-189) of 'virtue' "as a strategic device to oppose and subsequently endorse the [UNDRIP]," effectively "dispossess[ing] Indigenous peoples from the ground of moral value" (176).

[43] For example, Canada frequently tops lists of 'the best place to be' gay, disabled, or a multitude of other minority identities. A 2015 report from the Reputation Institute ranks Canada as the "most reputable" and the "most admired" country in the world, an honour it held between 2011-2013 as well ("Canada Ranked"). The Institute also produced a list ranking countries in order of their self-perceived reputation, on which Canada placed second, indicating that

the primary location for human rights 'in practice'. As one prominent introduction to human rights puts it:

> human rights apply in the first instance to states, in the sense that the protections guaranteed by human rights are supposed to be achieved…by means of the laws and policies of that state. Second,… states are the principle guarantors of the human rights performance of other states, both through their collaborative activities in international organizations and by unilateral action. (Beitz, 2009: 122)[44]

Or in Anaya's terms, with regard to Indigenous rights: "the state as a corporate whole is bound to implement relevant conventional and customary norms concerning indigenous peoples" (2004: 290). Illan Rau Wall's analysis is useful here:

> In terms of institutional mediation, by reaching to a different order of right—other than the state's conception of public right—human rights displace the state as the site of the mediation of law. Yet they do this by generating their own mediation in the sphere of international law. Crucially this is then designed to loop back into state practice, allowing human rights to become the institutional mechanism of public right. In this sense, they become the acme of the legitimation of state practice. (2014: 114-115)

Human rights buttress state jurisdiction and legitimate state practice as well as the entire construction of international society and law; these two spaces provide force to a notion of 'public right' that is forged within a certain distribution of the sensible that is analogous with settler common sense.

So is not just that states have *historically* used human rights for their self-image, or that the *theory* of human rights mobilizes states as primary actors. It is also that human rights could not exist without the real power and financial resources of states. As Stephen Hopgood observes, while once upon a time American power purported to guarantee human rights universally,

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this global opinion has been to a large extent internalised. Reports like this make it hard for criticisms of the country to stick. The government's Foreign Affairs spokesperson at the time, Johanna Quinney, responded to one particularly scathing UN report by stating, bluntly, "Canada is the best country in the world. We are proud of our human rights record at home and abroad. Just last week the Reputation Institute found that Canada was the most admired country in the world" (cited in Vincent 2015).

[44] Jack Donnelly, in another one of the foremost introductions to human rights, writes that, in the UN 'universal declaration' model, "although these are universal rights, held equally by all human beings everywhere, states have near-exclusive responsibility to implement them for their own nationals" (2013: 28).

> a shift in the distribution of power globally, away from a unipolar American-led system toward a more multipolar world, has revealed just how much Human Rights institutions rely on liberal state power and its reinforcement by the middle classes who staff and finance humanist organizations. (2013: 3)

In an increasingly multipolar world, liberal state power will become (to an even greater degree) the force ensuring and implementing human rights. The relationship between the state and Indigenous peoples is thus solidified through the human rights language of obligation, responsibility, rights-holder and duty-bearer, standards and norms, without much thought to how the relation being consolidated is by its very existence continuing a violence. States are willing to talk because talking itself verifies their validity in the conversation. In this way, the human rights regime might at times ostensibly reject the state's "moral credentials" while simultaneously relying on its agency (Moyn 2014: 156), and, "[i]n so doing, it presumes precisely what is contested" (Nichols 2013: 178). Human rights become a primary index against which to 'worry' about the soul of the nation, and also by which to measure the state's *goodness* without interrogating its *premise*.

These are some of the many reasons why we cannot take 'recognition' as the sole guiding site for thinking through relations with the liberal, multicultural settler state.[45] Glen Coulthard describes this "structural problem of colonial recognition": "when delegated exchanges of recognition occur in real world contexts of domination the terms of accommodation usually end up being determined by and in the interests of the hegemonic partner in the relationship" (2014: 17). As Tully (2008: 127-165) and other scholars assert, the context of domination is very much still present, such that the modern state system, "whose origin is usually traced to the Treaty of Westphalia of 1648, simply carried on the Eurocentric idea held by sixteenth-century Spanish intellectuals that indigenous peoples could not be included in the judicial system of nation states"

[45] There is a compelling body of work on this, notably Povinelli (2002), Coulthard (2014), Simpson (2014).

(Pulitano 2012: 13). Thus, attempts, for instance by Chantal Mouffe (2014), to retain something in liberal democratic theory by turning human rights to an agonistic democracy frame might not be effective in the case of *settler* colonialism because it reifies the legitimacy of the state. The *institutions* this refashioning of human rights might need to rely on would simply continue business as usual, being products of and integral to the state.[46] Settler colonial studies shows that contrary to Glendon's argument that "[t]he most intractable problems arise where rogue nations are themselves the rights violators and in the increasing number of cases where anarchy prevails" (2001: 237), the most intractable problems occur when respected, powerful, 'liberal' nations—in which order is thought to exist, rather than the anarchy lived by many at the margins of society—are rights violators. These states' violations create the most intractable problems, and the ones that the human rights paradigm is most ill-suited to address.

There are other ways, as well, in which settler colonial studies brings into sight the complicities of the human rights regime and international state system. First, the settler colonial analytic draws attention to the fact that states are constantly reconstituting themselves, and the international human rights movement is arguably a primary contemporary actor seeking the alteration—read: reconstitution—of states as legitimate (and converted) actors in the international community (cf. Asad 2000). Second, International Human Rights Law and International Humanitarian Law are premised on protecting the liberal individualist subject in sovereign states, and the legal framework they erect works within this assumed starting point. Third, arguments that characterize the UN as a space of self-articulation for indigenous peoples[47] do not seem to consider that it pre-determines the boundaries or contours of that articulation. This is to say, the UN system makes a claim about how Indigenous peoples should *think*

[46] See Chapter 3 for a full account of the problems with conceptions of agonistically re-made human rights.
[47] See for instance Dahl (2012: pages 33-80)—who has subheadings like 'The Subaltern Speaks'—and Morgan (2011: 1-7).

politically, domesticating their political discourse within a liberal state framework (as the arguments of Corntassel and Lightfoot outlined above show), even if that framework is designed in the name of holding states accountable. It is true that the UNDRIP provides a number of routes through which to claim wrongs against the state; but, as Audra Simpson notes "[c]hoices are not choices if they are bestowed rather than self-generated" (2014: 193).

Perhaps surprisingly, there is almost no scholarship that attempts to bring the ideologies or analytics of 'human rights' and 'settler colonialism' together.[48] Many scholars working on settler colonialism or in Native Studies are understandably suspicious of rights regimes and the international system; still, this rarely garners sustained analysis, with the notable exception of Scott Morgensen's *Spaces Between Us: Queer Settler Colonialism and Indigenous Decolonization* (2011). Morgensen thinks rigorously about the relation of civil rights, sexual rights, and transnational identity rights movements—if not *human rights* specifically—to the settler colonial project. However, only Isabel Altamirano-Jimenéz, Danielle Celermajer, and Diana Brydon, address the convergence of settler colonialism and human rights explicitly.[49] Altamirano-Jimenéz's article "Settler Colonialism, Human Rights, and Indigenous Women" (2011), explores "how the relationship between human rights law and imperialism conceals multi-layered experiences of dispossession, racialization and patriarchy," concluding that "by emphasizing Eurocentric ideals, the human rights discourse operates to classify people and

[48] The same is true for the unexamined connection between humanitarianism and settler colonialism, though this is starting to be explored largely through historical work on early settler colonial missionary activity, which engages with Indigenous peoples in settler colonial contexts. This work looks at the historical dimensions of settler capitalism and settler governance as it was consolidated and related to wider metropolitan imperial concerns; this historical work is important, but it does not so thoroughly engage with the normative dimensions of settler colonial theorizing and what it says about humanitarian practice today. For a helpful account of what scholarship does exist, see Rob Skinner and Alan Lester, "Humanitarianism and Empire: New Research Agendas" (2012).

[49] Others are beginning to acknowledge this connection. Thus Bruno Cornellier and Michael Griffiths note that the UNDRIP "relies on the enforcement of the very settler nation states that continue to structure indigenous dispossession in their respective territories" (2015: 3). Yet, sustained analysis of this relationship has still to be developed.

places that are both within and outside of the modernist notion of progress and humanity" (105). Celermajer's article, "The Politics of Indigenous Human Rights in the Era of Settler State Citizenship: Legacies of the Nexus between Sovereignty, Human Rights, and Citizenship" (2014) describes an aporia at the heart of human rights: the liberal human rights discourse starts from the premise of state sovereignty and citizenship, but this means the 'universal' element also constitutive to human rights stands in tension with the *necessarily exclusionary* nature of political communities. Each assertion of collective political identity, in this view, creates new forms of marginalization because the criteria to legitimate such sovereignties bear particularistic qualities (making some citizens unable to claim rights, even though these are purportedly universal). Celermajer thus adopts Arendt's argument that "the very political community within which the idea of rights became viable, was also liable to annul the conditions of individual freedom on which such rights rest" (141). However, neither Altamirano-Jimenéz nor Celermajer really include settler colonialism as a *specific* analytic that is different from 'colonialism' writ large, instead using it as an example of a general colonial relation. As Veracini reminds us, "that settler colonialism is both a global and contemporary phenomenon means that we need to learn to 'read' a settler colonial world where we simply see a 'normal one'" (2015: 8). Generalized critiques of human rights as ideology need to be read through and attenuated by the specific context of settler colonialism, which configures power in a certain way and in the name of a particular goal: elimination. Finally, Brydon's "Postcolonial and Settler Colonial Studies Offer Human Rights a Revised Agenda" (2015) considers lessons from the "longstanding geographies of struggle" represented by "settler colonial politics and indigenous sovereignty movements" and how these lead us to ask: "what might ethical internationalism in support of human rights involve?" (189). In the course of her discussion, Brydon draws attention to key critiques of

human rights, suggesting that, "[w]ithout [a] fundamental rethinking, rights claims can constitute one of the chief obstacles blocking the creation of a more just society" (185). This rethinking would move human rights from "the politics of salvation and recognition towards reciprocity and accountability" (190). This is an admirable vision, but it falters when pressed against the imperatives of *decolonization*. Brydon writes that "the postcolonial is committed to a decolonizing agenda based on respect for the ability of human beings collectively to imagine and negotiate better ways of living together" (190). Thus in Canada, she writes,

> the task is to rework mainstream society's interactions with indigenous peoples, developing a truly respectful multicultural society…That means that in Canada, for many, human rights involve recognizing land rights and the importance of indigenous self-government. (191)

First, as Chapter 3 will show, decolonization cannot clearly be part of even a 'revised agenda' for human rights in settler colonial contexts given the human rights regime's liberal foundations and assumed political subjectivities. Second, settler decolonization, as also discussed at length in Chapter 3, might not be commensurable with a (implicitly liberal) 'multicultural society'—decolonization is not a metaphor for struggles for more equitable *inclusion* within an already existing 'Canada'. Brydon does not ask why human rights are the way to go if historically they have been so imbricated in oppression—or if its inherent universalizing pull can accommodate such diversity of decolonizing imperatives. This account, then, does not acknowledge the way that the human rights regime occludes or displaces other political claims and imaginaries; human rights, coming to mean any progressive direction in the world, is seen in Brydon's account as compatible—if awkwardly so—with the analyses of these other fields of study. The following chapters will put pressure on such a proposition.

IV. Outline and Argument

This thesis is animated by a number of questions made possible by the intersection of settler colonial studies and critiques of human rights. How does making the UN the form of global legibility for Indigenous politics in North America (or elsewhere) in effect erase or distort *long histories* of Indigenous resistance to settler colonial encroachment? What does it mean to remain in the structure that is the site of your negation? How does the human rights framework figure or imagine 'success' for Indigenous peoples in settler colonial settings? What kind of construction of power (settler colonial, postcolonial, neoliberal, etc.) most allows us to see the implications, if not the danger of a structure like human rights? How would focusing more attention on the *colonial dimensions of existing states* (rather than neocolonial relations between them) change the way criticize human rights discourse? How might the state's conceit of legitimacy be facilitated by human rights, which recognizes it, even if to criticize its practices while not critiquing its constitution? Or put in Frederick Cooper's words,

> If we think of people as socially located—as members of a community defined in religious or ethnic terms, as a working class, as a minority within a heterogeneous population—how do we think of the political unit within which rights are defined, exercised, and contested, and what, if any, role do people outside that unit have in debating such questions? (2012: 476)

When we open up the entanglements between liberal political orders and colonial relationships, what radical politics might emerge? Perhaps an agency not predicated on liberal action and institutions? How might we rethink a vocabulary of the political? Or is it true, as Lisa Lowe suggests, that "liberal emancipation" requires a "self-authoring autonomous individual" (2015: 50)—and if so, where does this leave the usefulness of human rights in emancipatory projects? Following Ben Golder,

> [w]hat is gained and/or lost in the political encounter with rights, and do we thereby relinquish the possibility of thinking a political alternative to rights? In thinking rights

> differently and critically, do the possibilities of alternative organizations and figurations of the political become fainter? (2015: 3)

What would it mean to refuse human rights—to refuse the gifts of human rights, and by proxy the liberal state and subjecthood upon which they rely? What would a human rights practice that turns away from the machinery of the state look like, and is such a thing even possible? Is there room in settler decolonial projects for human rights? Alternatively, if Indigenous peoples "should find themselves speaking the liberal lingua franca of the exogenous forums of the United Nations, must we assume a shift in 'being' occurs?" (Lawlor 2006: 179-180). And following Saidyia Hartman, how do peoples pressed by oppression and attempted subjection "advance political claims and mak[e] their gestures legible?" (2010: 1105). These questions inch towards a final question with high stakes: what if "the recognition of humanity" guaranteed by the human rights framework "held out the promise not of liberating the flesh or redeeming one's suffering but rather of intensifying it?" (Hartman 1997: 5).

This introductory chapter has sought to make a case for understanding the international human rights movement's relation to Indigenous peoples through the frame of settler colonialism by demonstrating the failure of existing work on this topic to account for the specific structures of power under which this kind of colonialism operates. Not accounting for the project of settler colonialism—and therefore assuming it as an invisible backdrop to activism or political thinking—is dangerous, and Audra Simpson and Andrea Smith warn us of "the genocidal logics that disappear Native peoples into intellectual and political projects that assume the continuation rather than the end of settler colonialism" (2014: 10). This first chapter, then, has begun a pushback—to be continued throughout the proceeding sections—against Lorenzo Veracini's assertion that the UNDRIP can or should "constitut[e] an anti-settler manifesto" (2015: 67). Veracini's claim is derived from the relatively commonplace and under-theorized understanding

of human rights as a check on state power, and conflicts with his own later argument that "settler colonialism…arguably persists in the demand that Indigenous peoples 'adapt' to the normative frameworks of international forums" (88). Despite the way that normative framework holds hands with settler colonialism, he still claims that the Declaration constitutes "a potential challenge to the sovereign orders of polities that are primarily defined by settler colonial relations" (66). I have tried to show that such a claim misses a significant degree of the nuance introduced by settler colonial studies into the workings of power and the state on and against Indigenous peoples. The next sections will add texture to the assertions made in this chapter through a series of case studies highlighting the epistemological presumptions and discursive tactics of settler colonial imaginations and institutions as they hold hands with the contemporary and historical human rights regime.

Like any relation, the one between the international human rights regime and Indigenous peoples goes both ways. As such, the next two chapters explore both ends of the dynamic. Chapter 2 investigates how the assumptions made by the institutional bodies of the international Indigenous rights movement—relying on UN structures and the human rights framework—are dangerously settler colonial ones. The normative development of the right to self-determination (as it has come to exist in international law) has shifted from meaning decolonization (external self-determination) to meaning democratic good governance (internal self-determination). This is due in part to the rise of human rights in the international system in the 1960s and 1970s, and the problematic 'Blue Water thesis' that protected settler colonies from the UN's decolonization practices. Further, the watered-down right to international self-determination articulated in UN documents and human rights practices/activism maintains and invests in an old colonial-anthropological division between culturally 'pure' and protectable peoples and those whose

sovereign claims are weakened by their relations with the settler colonial state. The human rights movement, then, participates in an erasure of already-existing polities, and makes illegible Indigenous political activity for some others and not other others. Thus, the chapter "accepts [an] urgent invitation to rethink history…in relation to the demands of our political present" (Wilder 2015: 15). I offer a way into the intellectual architecture of settler colonial mindsets that occupy a familiar world and are based on familiar presumptions to those of the human rights regime; to limn the contours of this architecture helps untangle the ways the settler state is buttressed by the idea and practice of human rights. This is a chapter about what is presumed and assumed by the human rights framework.

Chapter 3 takes up the possible use of human rights discourse by Indigenous peoples in efforts to achieve settler decolonization. It asks: what can human rights do for and to decolonial politics? Given the human rights regime's complex relation of complicity with settler colonialism, there is no easy answer to the question of the role it must or must not play. The language of human rights appears to remain a feature in activist movements that also profess to be decolonial. Human rights are read onto and assumed desirable for Indigenous communities by the international human rights movement, but are also used consciously, unconsciously, creatively, opportunistically, and so forth as a tool by peoples who are themselves wary of the complicity of human rights in an international system that does not recognize their polity as equal to others. The chapter is divided into three sections. First, it presents recent proposals to 'save' human rights from their colonial inheritance by making them *overtly political*. Second, it tests this newly-politicized human rights against recent writing that details what settler colonialism must involve or look like, ultimately finding this reformed vision of human rights to still be lacking. Third, it returns to human rights discourse and practice to ask what role specific

elements of such discourse and practice might play *if disaggregated from the larger ideological package*, and if this is possible. If Chapter 2 looks at the normative content of ideas, Chapter 3 delves into the differential claims made possible by either grassroots or human rights-oriented assertions of political change. If Chapter 2 is about what is presumed by human rights, Chapter 3 is about what is missed by it, what it cannot encompass.

Finally, the Post-Script will reflect on recent events in Canadian mainstream, liberal politics (the election of Justin Trudeau, or Trudeau 2.0) as well as Indigenous activism (Idle No More) to summarize and push forward some of the claims of this thesis. The 'nation-to-nation' rhetoric of Trudeau's successful campaign has galvanized a push towards reconciliation politics and generated an atmosphere of hope. The present hope around the prominent place of First Nations issues in Trudeau's platform, I argue, is part of a settler hope that what was once called the 'Indian problem' might be coming to an end. Yet the ideas of self-determination and decolonization that emerge in the writings and activities of Idle No More are complex, historically informed, deeply contextualized, and sensitive to the workings of power in its multiple forms. If Trudeau represents the 'best version' of accepting, liberal politics, will this prove satisfying for the claims of Idle No More? If both Trudeau 2.0 and Idle No More draw on the language of human rights, what do we make of this move in the crowded field of political meaning-making? This thesis, in short, is asking about the tenability of the audibility of dissent through human rights structures in settler colonial settings, given the framework's necessary investments in the state system and many Indigenous communities' commitment to accepting no less than meaningful forms of self-determination as sovereignty. The decision to (ref)use human rights must contend with the complex terrain of hegemonic political optics and how this might be negotiated.

CHAPTER TWO

The Normative Politics of Self-Determination

In the early 2000s, during the heady days of excitement over the UNPFII, the naming of the second Indigenous decade (2005-2014), and momentum towards achieving the UNDRIP, the international Indigenous rights movement articulated a specific (and resolutely discursive, rhetorical) account of what Indigenous rights would or could achieve through UN human rights mechanism. The international Indigenous rights movement was not primarily seeking recognition of citizenship in the form of greater inclusion in the state by way of non-discrimination in the enjoyment of civil rights, which would merely make Indigenous peoples into any other minority *population* and represent an acceptance of the state's assimilationist (and therefore eliminatory) goals.[50] Rather, in place of mere 'non-discrimination', Indigenous rights involved *self-determination*, whereby a greater range of self-government would be afforded to Indigenous communities in recognition of their *collective* rights and recognition as 'peoples' under international law. Time and again, this collective right to varying degrees and forms of autonomy beyond the purview of—but also *within*—the state is what is identified as 'exceptional' about the focus of international Indigenous rights claims and the 'space' they hold in the UN system. The invocation of self-determination against international law's complicity in the historic subjugation of Indigenous peoples is used to get out of the bind discussed in chapter 1 (that the human rights legal regime relies on the states whose existence constitute a crime

[50] This was the perspective adopted by the older Indigenous rights framework, as seen for instance in the assimilationist orientation of ILO Convention 107 of 1957. That 'assimilation' should be considered tantamount to 'elimination' is effectively argued by James Tully, who observes that "the complete disappearance of the indigenous problem" often comes in the form of "the disappearance of the indigenous peoples *as* free peoples with the right to their territories and governments" (2000: 40). Eliminating bodies and extinguishing lives is not the only way to exterminate whole peoples *as those distinct peoples*.

against the Indigenous peoples whose lands they took). Self-determination is a principle thought to transcend this complicity of human rights with oppressive structures because of its unique understanding of collective rights. However, as this chapter will argue, such an account of international Indigenous rights is profoundly hypothetical and rhetorical, and gives little credence to the costs of employing this international legal concept as it has come to be defined, or to the exclusions, reifications, and assumptions it would involve. The way the right to self-determination is articulated by international human rights law and discourse both delimits what that norm means and to whom it applies, while relying on settler colonial assumptions about the inherent normativity of the Westphalian state system.

The chapter will proceed in three sections. First, the norm of self-determination's historical evolution from meaning anticolonial resistance (*external* self-determination = total sovereign rule, succession) to meaning democratic good governance (*internal* self-determination = some self-government within an already existing state) will be shown to exclude Indigenous peoples in settler colonial settings from enjoying meaningful, autonomous self-government in the name of protecting the sanctity of state borders as they exist(ed) in the international system. This exclusion is enacted through the 'Blue Water' thesis, which distinguishes between two kinds of colonies in international law (oversees colonies vs. those internal to existing states) and the forms of self-determination each might enjoy. Thus the whole UN decolonization project has effected a kind of legal dualism whereby the same philosophical concept of self-government by distinct peoples formerly subject to colonial powers is given legal life in two distinct and unequal ways. The chapter then places these distinctions and dualisms pertaining to the human right to self-determination in the context of the intellectual construction of settler states—specifically the United States—that tries to characterize such states as uniquely able to incorporate, internally,

diverse populations because of such states' exceptional relation to freedom. Internal self-determination—what international law allows Indigenous peoples—is given traction and plausibility, and indeed validity, when we invest in the stories of inclusivity that settler states tell about themselves. This section analyses one of the stories referred to in chapter 1 that 'police meaning', controlling what can be thought in a given context—a settler colonial one.

Section two, through a reading of UN documentation on the rights of Indigenous peoples living in voluntary isolation (IPVI, 2009) within existing states, asks how even this weaker *internal* self-determination—today's norm—invests in the same anthropological assumptions that arose with and buttressed the settler state by recognizing 'purer' Indigenous peoples (those less corrupted by the muddle of modernity-*cum*-colonialism) as having a stronger claim to self-determination and 'no contact' than those groups who have complex (often economic and confrontational) ties to the settler states that surround them. This, I argue, represents a kind of discursive dualism whereby the seeming universal right of at least internal self-determination (for those distinct peoples living in sovereign nation states) is rhetorically presented as more legitimate, important, or urgent for some others than for other others.

The third and final section brings these histories and close readings together to ask how this legal and discursive dualism reveals the international system—including international institutions such as the UN and international human rights law—to remain a sphere structured by and inextricable from settler colonial assumptions. Once we see the settler state for what it is, and see past the liberal rhetorical-mythical façade, the watered-down idea of internal self-determination appears as merely one more pawn in a liberal chess match played by the state against itself to convince the international community that it abides by the rules of the game. How does this historical reconstruction of the principle's normative evolution, and this

description of its present context and implementation, make us think about its possible future use? How do the stories told by settler states and the international human rights regime define—and limit—how we might think about the world and proposals for its reconfiguration?

I. Self-Determination from Decolonization to Democratisation: The Norms of 'Human Rights' and Settler States

The history of the norm of self-determination is extremely long and complex, and cannot be offered here in the detail that it deserves.[51] Rather than going back to the Westphalian state system's early history, my account will begin with the modern doctrine of self-determination as it came to be understood in international law through international institutions such as the League of Nations and the UN.[52] This section follows self-determination as the norm shifts from meaning primarily decolonization (from states) to meaning exclusively democratic legitimacy (within states).[53] Both of these moments have complexities. Self-determination as decolonization allowed the human rights framework and international law to claim anticolonialism as its own, which has to this day obscured the multiple ways in which the game continues to be rigged by the powerful players on the international scene. [54] This story, then, must be placed in the context of the *complicit structuring* of international law (not merely its contingent effects) with state

[51] The following account draws from: Paul Keal, "Indigenous Self-Determination and the Legitimacy of Sovereign States" (2007); Samuel Moyn, "Imperialism, Self-Determination, and the Rise of Human Rights" (2012); David Scott, "Norms of Self-Determination: Thinking Sovereignty Through" (2012); Kalana Senaratne, "Internal Self-Determination in International Law: A Critical Third-World Perspective" (2013). Other key historical accounts are Hurst Hannum, "Rethinking Self-Determination" (1993) and Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995).

[52] For a useful account placing this Westphalian story in relationship with the constitution of international society today, see Daniel Philpott, "Westphalia, Authority, and International Society" (1999). In Tully's summation: "the so-called 'Westphalian' system is actually an imperial system of hegemonic and subaltern states constructed in the course of 'interactions' between imperial actors and imperialised collaborators and resisters. It is the foundation of contemporary imperialism, laid in the colonial period and strengthened during decolonisation. Informal imperialism would scarcely work at all if these colonial foundations did not provide a historically sedimented background structure of institutions and relations of domination within which the more flexible relations of informal imperialism are exercised in the foreground" (2008: 140-141).

[53] The literature generally uses the term 'external self-determination' for the former and 'internal self-determination' for the latter, terminology which I will employ throughout this chapter.

[54] For instance, Samuel Moyn provides the standard refutation of this claim in "Why Anticolonialism Wasn't a Human Rights Movement," in *The Last Utopia* (2010), pp. 84-119.

violence and continuing disparities of power. Second, self-determination as democratic legitimacy—or internal self-determination—has been similarly structured to present qualified versions of autonomy as legitimate expressions of self-government for distinct peoples. This story must be situated in a history parallel to that of external self-determination: the rise of democratic accountability as the standard against which to judge state legitimacy in the international system. These two histories of international organizing systems and power structures—international law and democratic legitimacy theory—help us see the character and limitations of the international human rights legal principle of self-determination as it exists today, and why it might not be fair to consider it the 'solution' to the problem of difference in international law that it is so often touted to be.

(External) Self-Determination and Decolonization

Many in the human rights world consider the international legal principle of self-determination—enshrined in Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (the ICCPR and ICESCR)—to be the key to unlocking the conflict between the universalist project's Western lean and the understandable pushback against this by those who organise themselves under different visions of the world (see Tully 2008: 152-158). Decolonization, as a manifestation of the right to self-determination in the form of internationally-recognized state sovereignty for a number of African nations in the 1960s, "supported the powerful claim that international law had finally become, for the first time, truly universal" (Anghie 2005: 196). It had become universal, argues Antony Anghie, both in the sense that by the close of the 19th century "the international law which originated in Europe became universally applicable as a consequence of colonial expansion" (2005: 196-197; Pitts 2015: 550) and in the sense that those

who had "been excluded from the realm of sovereignty even while being subject to the operation of international law, could now participate in that system as equal sovereignty states" (Anghie 2005: 197). In allowing distinct peoples the right to self-government, this argument goes, the international human rights system threw off its imperial past.

A closer look at the history of the principle and its normative development, however, suggests otherwise. Originally, the doctrine developed post-WWI in the context of Eastern European peoples, and only later came to be "adopted and adapted by the United Nations to further and manage the transformation of colonial territories into independent, sovereign states" (196). It is in the post-WWII era that self-determination shifted from being merely a 'political ideal' aimed "at dismantling the old Westphalian doctrine of balance of power" (desired by both Wilson and Lenin), to a "legally binding principle of international conduct, an international legal norm" proclaiming Third World sovereignty (Scott 2012: 201). In the standard historiography, it was the UN system that in the 1950s and 1960s took it upon itself to see to the enjoyment of such self-determination for formerly colonized peoples. On account of its rich history of colonial assumptions about the readiness of peoples for self-rule, the UN went about the project in a step-by-step, provisional way. This culminated in Resolution 1514, the "Declaration on the Granting of Independence to Colonial Countries and Peoples", adopted by the General Assembly on December 14, 1960. Colonies achieved formal independence at a rapid-fire rate (17 alone in 1960, the year of the Declaration); a 'Decolonization Unit' within the Department of Political Affairs and a Special Committee on Decolonization were established to see to the implementation and monitoring of the Declaration; and the UN named three decades in a row as International Decades for the Eradication of Colonialism ("The United Nations and Decolonization"). It seemed that, at least on the face of it, after "hundreds of unapologetic years,

Europe's overseas empire all but vanished as an international legal order in a few short decades" (Scott 2012: 203).

There is, of course, a prehistory to all of this: the League of Nations mandates system that governed the former colonies of Germany and the Ottoman empire, between 1919 and 1945, and then its successor, the UN's Trusteeship Council, operational between 1945 and 1994.[55] While it is highly debatable whether or not these institutions and arrangements had the *independence* of subject peoples in mind, they are often folded into histories of the end of colonization in the sense that the mandate and trust territories were thought of as something 'other-than-colonies'. This is done through the claim that the language of the 1960 Declaration articulated "an unqualified *moral right* to self-determination" of peoples, rather than an *empirical claim* to the actual entailments of statehood. Article 3 of the Declaration states: "Inadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence" (Declaration). The story goes that this language then trumped, but also *actualized the latent self-determination content of*, the League's mandate or the UN's trusteeship ideas of "gradual readiness for government" (Scott 2012: 205). Thus, with the 1960 Declaration and UN decolonization mechanisms, the mandates and trusteeship institutions form a story the international community tells about itself about the way Western institutions could be created in the name of dismantling Western imperial power.[56] This is a teleological story, at the end of

[55] On the history of the mandates system, see Susan Pedersen's impressive account, *The Guardians: The League of Nations and the Crisis of Empire* (2015). For a critique from a political science perspective of trusteeship from the East India Company, through imperialism in Africa and the mandates system of the League, to the UN Trusteeship Council and current instances of neo-trusteeship, see William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (2003).

[56] This is, broadly, Pedersen's argument: "Thus was the League subsumed into a genealogy that would credit enlightened European internationalism with the extension to all men of that Hegelian destiny: the construction of the state as the achievement of national freedom" (2015: 402). In fact, "the mandates system served…less as a means of reconciling mandated populations to their rulers than of reconciling the quarrelsome imperial powers among themselves" (403).

which liberal internationalism is congratulated for offering seats at the world decision-making table for all peoples.

Something very different transpired on the ground. As soon as we define 'empire' as the exercise of informal, rather than just 'formal' sovereignty over an area, as Michael Doyle does in *Empires* (1986: 30-47), we see that the proffering of such sovereignty cannot be taken simply at face value.[57] This point has been elaborated in great detail in the African context first (and problematically) by Robert Jackson (1990), and later by Siba Grogovui (1996), Antony Anghie (2004), and others, who describe the way in which 'quasi-states' lack the institutions or real power that might make the practice of sovereignty actual.[58] Anghie, for instance, shows how these new states in no way "emerged as fully-fledged personalities with rights and responsibilities, as well as immunities and prerogatives" (Scott 2012: 202). Anghie is part of a growing body of literature from the past two decades articulating a critical history of international law that is important for qualifying the story the international system tells about itself and its ability for self-change or reconstitution.[59]

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[57] Doyle defines empire as "a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social, or cultural dependence. Imperialism is simply the process or policy of establishing or maintaining an empire" (1986: 45).

[58] See, also, Obiora Chinedu Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (2000). It should be noted that much of this literature pointing to the continuity of imperial structures through analyses of the actual sovereignty of African states dovetails dangerously with more normative writing on 'failed states', which does not tend to think broadly about the expressions, gestures, or affects of lived sovereignty, or the conditions of/for it.

[59] For a review essay charting this literature, see Jennifer Pitts, "The Critical History of International Law" (2015). The key works include: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (2002), Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2004), and Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (2014). Andrew Fitzmaurice argues that international law also afforded *critiques* of colonialism from a liberal orientation, see "Liberalism and Empire in Nineteenth-Century International Law" (2012). Koskenniemi and Anghie can be considered as working in the tradition of the 'Third World Approaches to International Law' movement of the 1950s and 1960s (Pitts 2015: 542) that rose concomitantly with decolonization politics on the African continent. A key text in this vein is the collection *The Third World and International Order: Law, Politics, and Globalization* (2003), eds. Antony Anghie, Bhupinder Chimni, Karin Mickelson, and Obiora Okafor.

Despite these very significant complications and complicities in implementation, however, "the doctrine of self-determination…served as the revolutionary language of freedom from colonialism" during the key post-WWII period (209). A reason why this might be so can be seen in the ideological struggle over what the principle *should* mean. Crucially, the story of self-determination *up until* the 1960 Declaration is largely one of Soviet support for "self-determination as an anti-colonial principle" (Lenin's writings about this are clear) and the West's opposition, mostly through Woodrow Wilson and his legacy, to this understanding (207). For Wilson, the right to self-determination instead "amounted to an obligation to choose representative democracy" (207, note 29).[60] Once the principle made its way into the 1945 Charter of the United Nations the battle continued over its meaning, with Western states taking the Charter's language of "friendly relations" amongst states to mean that secession or the independence of colonial peoples was off the table, and the Soviet Union angling it in a more anticolonial direction (208). Human rights, for the Western-oriented powers, shared common ideological ground with trusteeship, which is why South Africa's Jan Smuts, leading a racially divided state, could endorse their inclusion in the UN Charter. Saul Dubow explains that,

> [i]n Smuts' s view, [human rights] concerned the need to restore personal dignity and spiritual values to a world that had endured one form of totalitarianism and was now threatened by another, in the form of communism. Human rights concerned basic or minimal needs like security and life, and they pertained to matters like freedom of expression and religion. But they were not synonymous with equality—whether of a political, social, or racial variety. (2008: 72, quoted in Grant 2013: 577)

While South Africa tried to frame human rights as a limited check against communism (but not meaning necessarily equality), the government of Britain, also trying to reduce what human rights could achieve worked to frame self-determination as "a privilege contingent upon civilized

[60] Wilson, a man of the League of Nations, was thus in line with the general understanding of the later UN Charter that the organization's aim of "preserving the peace trumped the 'sacred trust' advanced countries were supposed to have in the interests of subject populations, which did not include any definite obligation to move them toward independence" (Moyn 2012: 167).

development" rather than a right (578). As Samuel Moyn describes it, "the United Nations, far from being the forum of a new and liberatory set of principles, appeared set at first on colluding in the attempted reimposition of colonial rule after the war" (2012: 166). However, as anticolonial agitation increased in the colonies themselves, the "accent of the principle" started to shift in the Soviet direction, such that by the time Resolution 1514 came to a vote, it was passed with 89 votes for and 0 votes against, with only 9 abstentions (Scott 2012: 209).[61]

Thus when self-determination was enthusiastically greeted by peoples after WWI and again in the 1960s, notes Moyn, it was a principle still largely articulated by Lenin and the Soviet bloc. As such, it was a right uniquely and independently attractive to Third World peoples, but was *not* particularly tied to the whole interlinking system of human rights and its humanist worldview (2012: 162). In other words, when self-determination was tied to anticolonialism, "the idea of human rights had strikingly little global circulation compared to other concepts, including other emancipatory universalisms" (163). Other scholars take a more laudatory view. Roland Burke argues in *Decolonization and the Evolution of International Human Rights* (2010), that "[b]etween 1950 and 1979, the process of decolonization transformed the UN and the shape of human rights discourse" because of the "central importance of Arab, Asian, and African participation" (1-2). As such, like Mary Ann Glendon in *A World Made New* (2001), Burke is at pains to refute "the assertion that rights were formulated exclusively by the West" (4). He makes the further claim that "[t]he relationship of rights and anticolonialism combined both political self-interest and natural ideological affinity. Instrumental use of human rights in anticolonial politics was certainly a feature of UN debates" (5).[62] However, first, this genre of argument

[61] Mark Mazower provides a full and rich account of the ideological complexities and background to this moment in *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009).

[62] There is also a body of scholarship charting a middle course, arguing that anticolonial "nationalists created an ideological combination of human rights and self-determination" that combined human rights talk and indigenous

makes the category error of presuming that *involvement* and *influence* (which are themselves conflated) in the early history of the UN Third Committee and in the drafting of the International Bill of Rights is somehow relevant in assessing the validity of the human rights program's historical and contemporary claims to universality.[63] Second, it does not distinguish between self-determination as a non-human rights based principle and the later normative life of the idea as yoked to human rights. Contrary to Burke's reading, Moyn shows how at the time when self-determination and anticolonialism were linked, human rights were decidedly subordinate to self-determination in terms of the normative principles subject peoples rallied behind;[64] but, "in an astonishingly short space of time, the UN moved from seriously considering a proposal to exempt colonial…territories from coverage by the draft Covenants on Human Rights to placing the right of self-determination of peoples first of all human rights in those drafts" (168). Though self-determination was not included in the UDHR, proposals by Afghanistan and Saudi Arabia to do so "caused a sensational debate" in the Third Committee (in 1951) and in the General Assembly (in 1952) (169). This proposal was opposed, for instance, by Belgian delegate Fernand Dehousse, who worried about multiplying borders and carving up nations (169). Nonetheless, the proposal was accepted, and from this point on the human rights discourse of the UN (and the historiography on them) 'absorbed' the principle, taking it to be one of its own. By the time the

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ideas of justice (Grant 2013: 578). An example of this is Bonny Ibhawoh's work on Nigeria, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (2007). A useful review article of literature on human rights and decolonization that arrives at a similar middle ground is Jan Eckel, "Human Rights and Decolonization: New Perspectives and Open Questions" (2010: 113). Eckel writes that in "the process leading to the end of colonialism, human rights were neither highly significant nor completely absent…[Rather, we see a] story of their occasional importance and relative weight, of experimental and shifting strategies, ambiguous appropriations, and limited effects" (113). As a 'new international language', human rights were marginal in these anticolonial political projects, and were used tactically rather than as an expressed commitment to universal norms.

[63] Burke and Glendon also both problematically frame decolonization as a discrete period (1950s-1970s) and *in the past*, rather than as an ongoing struggle for many today.

[64] Balakrishnan Rajagopal's important work supports Moyn's case. Rajagopal points out that the UDHR "did not apply directly to the colonial areas" because of British 'maneuvering'; anti-colonial struggles were almost never scrutinized by the UN Commission on Human Rights before 1968; and anti-colonial nationalist actions in Kenya and Malaya were dealt with as 'emergences' under British law, "thereby avoiding the application of either human rights or humanitarian law" (2006: 769).

1960 Declaration was proposed, we find "the near equivalence of human rights and self-determination" (170). It was the move to self-determination as part of a singular universal political ideology that removed whatever attractiveness it originally had for colonized peoples revolting against the legacy of that very Western universalist aspiration.

(Internal) Self-Determination and Democratic Legitimacy

In this history of human rights discourse's absorption of self-determination (which was essentially complete in the late 1970s) the norm loses its anticolonial edge and acquires a curious new connotation having to do with the democratic legitimacy of already-existing sovereign states. Ultimately, internal self-determination came to be "perceived as a right to democratic governance applicable to peoples within states" (Senaratne 2013: 307). When the concepts of 'development' and 'human rights' come together, argues Anghie, we get the idea of 'good governance', which he critiques as affording development only to those states who play by the rules of the now-hegemonic human rights game (Scott 2012: 220). David Scott's helpful summary of this shift is worth quoting at length:

> If the old norm was centrally a critique of empire in which the West found itself morally and legally on the defensive internationally, and numerically out-voted in the UN General Assembly, the new norm is centrally an endorsement of the post-Cold War (and post-9/11) global political scenario in which an aggressively triumphalist West offers its ideological creed, liberal democracy, as the only acceptable political option; if the old norm sought to legally shelter the territorial integrity of young Third World states from coercive interference, and to protect their natural resources from rampant exploitation, the new norm explicitly seeks to make them vulnerable and compliant and available for scrutiny and discipline and further integration into the circuits of global capital. (213)

This is, then, "a norm of self-determination as democratic entitlement" (203). States that do not practice good governance are deemed illegitimate and their sovereignty less sacrosanct; those states who do practice good governance—which means demonstrably democratic governance—are free to go about the internal business of their polities without interference. It was in the early

1990s that this norm truly solidifies, as seen in Thomas M. Franck's seminal essay, "The Emerging Right to Democratic Governance" (1992). Here Franck argues that "[i]ncreasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states…Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes" (46).[65] 'Promoted and protected by collective international processes', in retrospect, seems like portentous phrasing—for today the norm Franck describes has been given even stronger, interventionist language in the Responsibility to Protect principle, a favourite of humanitarian interventionists and liberal peace theorists.[66] Today, connecting democratic governance with respect for human rights is commonplace: the Human Rights Committee (treaty body for the ICCPR), Human Rights Commission, and the European and Inter-American Commissions of Human Rights, "have suggested that the right to democratic governance is indispensable to compliance with other human rights" (Alvarez 2001: 191).

This turn to the internal workings of the state rather than its right to external sovereignty has been brought into international legal terms through the distinction between *internal* and *external* self-determination. The distinction, particularly as it exists with regards to the right of Indigenous self-determination, is made possible by the 'Blue Water' or 'saltwater' thesis—found in the 1960 Declaration, and discussed as early as 1952 by the Netherlands at the UN (Senaratne

[65] A useful reassessment of Franck's work is Susan Marks, "What Has Become of the Emerging Right to Democratic Governance?" (2011), where she looks at how this developing right to democracy has been strengthened (democratic legitimacy in international law), weakened (through security discourse and antiterrorism measures), morphed into something else (development work), and finally revealed as ideology (neoliberalism). Her question thus becomes: "What can we reveal, in particular, about its place within that phase of capitalist consolidation we now call neoliberalism?" (510). Relatedly, Wendy Brown, in *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015) suggests that neoliberalism imperils both 'liberal democratic practices' and 'radical democratic dreams' by remaking the categories they rely on "in the image of *homo oeconomicus*" rather than *homo politicus*. If democracy helped usher in, or is part of, neoliberal ideology (Marks), it is now being 'undone' by that dynamic's very own 'stealth revolution' (Brown)—becoming something of an empty signifier. This should temper how much faith we place in discourses of democratic legitimacy.

[66] For an excellent and critical account reading R2P alongside the 'liberal peace' thesis, see David Chandler, "The Responsibility to Protect? Imposing the 'Liberal Peace'" (2004), pp. 59–81.

2013: 305-306)—"which developed effectively to preclude from decolonization procedures consideration of enclaves of indigenous or tribal peoples living within the external boundaries of independent states" (Anaya 2004: 54).[67] According to this thesis, "colonialism requires sea-based conquest…Thus the domination that follows land-based conquest quietly becomes normal, an unremarkable outcome of the natural course of human events, unworthy of comment or complaint" (Robbins 2015: 2). So at the same time that formal sovereign control over the distinct peoples of external colonial territories "was eroding in the face of normative precepts deployed internationally," such control remained unquestioned over distinct peoples within already existing (almost exclusively Western, and often settler) states (Anaya 2004: 54). This effectively "protect[ed] the exclusive jurisdiction of the major drafters of the Declaration," while "denying Indigenous peoples the same right as other colonised peoples" (Tully 2000: 54-56). As Tully points out, this is because the modern international system essentially does not recognize indigenous peoples "as colonized peoples" to whom a meaningful principle of self-determination applies (ibid.). This dubious principle and the internal/external distinction have been questioned in many quarters; and "[o]ne question that immediately arises" about this arrangement, "is whether it is more than just a semantic solution to the issue of the disputed meaning of indigenous self-determination?" (Pitty 2001: 59). Nevertheless, whether or not it is a mere semantic solution, this internal/external distinction has been promoted by "mainstream international lawyers from the West" (Senaratne 2013: 306), and "the Blue Water principle continues to define the legal status quo with respect to colonialism in the postcolonial era" (Robbins 2015: 3-4). It constitutes a 'legal dualism' because, as the prevailing view, says Michael Asch, it "precludes the possibility that Indigenous peoples [in already existing states]

[67] Kalana Senaratne points out that even here the Netherlands promoted internal self-determination "as a divide-and-rule tactic" that could give federalists "within Indonesia the option to break away and if necessary to form a loose association with the Netherlands" in a game of high (neo)colonial politics (2013: 331).

have the same right to self-determination that elsewhere we have acknowledged to be accorded to colonized peoples" (2014: 11).[68] The irony of this situation is brought out by Tully's devastating summation of the self-determination available to Indigenous peoples:

> Their internal self-determination exists within the constitution, which functions as a structure of domination. They will be free and self-determining only when they governed themselves by their own constitutions and these are equal in international status to western constitutions. Internal self-determination, therefore, is not a form of self-determination or freedom. It is a form of indirect colonial rule, not unlike earlier forms of British indirect colonial rule, which Canadians, Americans, Australians and New Zealanders found to be an intolerable form of unfreedom and the justification for their own successful and purportedly universal struggles for freedom. (2000: 57-58)

Tully highlights the audacity with which settler states claim the right to decide what is an 'intolerable form of unfreedom' and what is legitimate government.

It thus seems understandable that some states would be willing to invest in this version of self-determination. Indeed, in 1996, when a draft of the UNDRIP was being debated in the WGIP,

> a breakthrough seemed to occur when Canada stated that it now accepted 'a right to self-determination for indigenous peoples which respected the political, constitutional and territorial integrity of democratic states and which was implemented through negotiations between states and indigenous peoples'…[Canada] seem[ed] less concerned than other states to prevent international scrutiny of indigenous rights. (Pitty 2001: 61)

Why would this be the case if, as Glenn Morris claims, the debates over the Draft UNDRIP amounted to "an ideological battle pitting the legitimacy of hundreds of ancient nations of indigenous peoples against the asserted legitimacy of Westphalian states?" (2003: 125, quoted in Keal 2007: 293). Yet on closer inspection this 'Canadian breakthrough' should not be surprising, because in the typical line touted by states like Canada, "indigenous peoples are said already to

[68] Steinhilper (2015) looks at this situation another way, arguing that Indigenous peoples, through the idea of 'internal self-determination', have successfully articulated an "alternative understanding" of the norm, "explicitly reframe[ing] these traditionally state-centered notions" (543). Steinhilper is arguing that internal self-determination actually allows Indigenous peoples to have self-determination, which was previously restricted from them entirely. However, this argument ignores the links between *meaningful* self-determination and *decolonization* in settler colonies.

enjoy the right of self-determination within [the] existing nation state" (Tully 2000: 54-56). What we see here, then, is an example of 'selective endorsement' as articulated by Sheryl Lightfoot and described in the chapter 1, whereby an international norm is written down in such a way that the assenting states are already compliant with it (2012: 102). That Indigenous peoples are said to already enjoy self-determination thus essentially endorses the liberal settler-state. The sudden attractiveness of this version of self-determination is related to the hegemonic status of democracy-talk in the international system. As Scott observes: "the attractiveness…of the picture of democracy that underpins this norm of self-determination as democratic entitlement depends on the idea of freedom, selfhood, and participation that sustains its promise", and which "comports almost seamlessly with the contemporary self-image of American liberal democracy" (2012: 217). 'Democracy-talk' "is now the currency of nearly all normative political exchange" (218), while also becoming the primary language bolstering the legitimacy of the western liberal settler state as 'free' and democratic and therefore in line with the human rights principle of (internal) self-determination.

Self-Determination, Discourses of Freedom, and the Legitimacy of Settler Empires

Even as scholars like Scott carefully think through the implications of the normative evolution of self-determination in this specific direction, they almost all overlook the role of the specifically *settler* colonial state in this international order. They identify how the new iteration of the norm allows for scrutiny inside the post-colonial state (finding ways to impeach and negate its newly-won sovereign legitimacy) but fail to see how settler colonial states might use it 'positively' to proclaim, cite, and reify their democratic (and implicitly territorial) legitimacy, as part of the *positive* or constructive aspect of settler colonialism identified by Wolfe (2006: 388). As Quentin Skinner notes, to "describe a political system as democratic is to perform a speech

act within the range of endorsing, commending, or approving it" (1973: 298-299, quoted in Scott 2012: 218). So if one side of this new norm of self-determination-as-democratic-good-governance is the condemnation of formerly colonized states and the qualifying of their sovereignty, the other side is the celebration of 'formerly' colonial states and the buttressing of their sovereign legitimacy. This new self-determination norm thus "comports well with the larger project of Pax Americana" (Scott 2012: 213-214).

As we have already seen, human rights are often deeply linked not only to the institutional life of a state, but also to its national myths and present identity. For instance, American exceptionalism with regards to human rights—whereby the United States under-commits to the instruments of international human rights while simultaneously (claiming to be) championing human rights promotion abroad—is enabled by a number of visions of how the American polity developed historically and functions today.[69] However, as Aziz Rana argues in *The Two Faces of American Freedom* (2010), the very 'democratic ideals' that form the core of the nation's 'exceptionalism' are facilitated by its history of settler colonialism, for the "settler society's ethnic basis flattens internal inequalities while justifying the construction of dependent external communities, be they slaves or indigenous natives" (10). This is one more example of the exclusions inherent in liberal orders described by Mehta and other theorists of liberal imperialism, but with the attention to settler colonialism called for by Duncan Bell. Focusing on human rights promotion (but not practice)—undergirded by a sense of exceptional democratic institutions at home—is just one more way to gloss over "the extent to which [America's] democratic ideals were themselves produced and sustained by colonial domination" (10). The individual 'liberty' and freedom so foundational to American's burden of spreading it to other

[69] See on this the volume edited by Michael Ignatieff, *American Exceptionalism and Human Rights* (2005), especially Ignatieff's introduction, pp. 1-26, and the chapter by Andrew Moravcsik, "The Paradox of U.S. Human Rights Policy," pp. 147-197.

parts of the globe (often exported in the form of human rights) turns out to be inextricable from settler colonial projects of legitimation through social exclusion, dispossession, elimination, and unfreedom.[70] This is the 'dual face' of American sovereign power:

> Internally, settler society sought to eliminate all vestiges of royal prerogative in the name of casting off a 'Norman Yoke' and establishing political and economic independence. Externally, the new polity imagined the west as vacant land and Congress as possessing a right of colonial conquest still derived from this royal prerogative. Such a duality meant that the new republic legally rejected the permanence of its borders and imagined settler society as maintaining a basic right of territorial expansion, in fulfillment of its colonial mandate. Rather than casting off imperial pretension, settlers saw independence as reclaiming empire from British corruption and reestablishing the link between colonization and republican liberty. (108-109).

What Rana is theorizing is the way that checking a state's power over its citizens—casting off the 'Norman Yoke' internally, much in the same way as human rights aims to hold states accountable—can easily participate in the disenfranchisement of those already marginal to that polity and excluded from it. The strengthening of liberty *internal* to such states exists on top of and at the expense of the liberty of those whose lands the state occupies.

Claims about the democratic legitimacy of the settler polity—and the tacit adherence to the current normative understanding of self-determination that accompanies them—can be understood in part through Robert Nichols' important work on what he calls the 'Settler Contract.' For Nichols, the 'Settler Contract' refers to "the strategic use of the fiction of a society as the product of a 'contract' between its founding members when it is employed in [certain] historical moments to displace the question of that society's actual formation in acts of conquest, genocide and land appropriation" (2013: 168). This "appeal to an 'ideal' original contract, even as a heuristic device for the generating of 'first principles'," thus "has served and continues to serve the function of justifying ongoing occupation of settler societies in indigenous territory"

[70] As Rana notes, "the success of the revolt by the thirteen British colonies spawned a unique settler ideology" which "fused ethnic nationalism, Protestant theology, and republicanism to combine freedom as self-rule with a commitment to territorial empire" (2010: 12).

(169). The whole field of contract theory within political philosophy has the 'strategic function' of "relieving the burden of the historical inheritance of conquest" (169). By employing a history of throwing off the yoke of tyranny in the name of freedom described by Rana, and quelling concerns over the historical inheritance of conquest that might have crept in alongside this founding act through the equally foundational 'Settler Contract' described by Nichols, countries like the United States are able to adopt self-determination-as-democratic-legitimacy and good government as a banner under which to stake their claim to goodness. Internal self-determination was thus "greatly favoured by Western states as it embodied and reflected those ideals which were considered to be cherished by the West", namely "democracy, political freedom, and human rights" (Senaratne 2013:307). The international community is happy to invest in this because, generally, "the Peace of Westphalia resulted in the belief that difference in international relations had been dealt with by making states the containers of it" (Keal 2007: 301). In the face of Indigenous peoples using 'self-determination' against settler states, we find a textbook example of how "settler polities structur[e] themselves in ways that bolster[r] their legitimacy through sheer legal temerity, innovating doctrine, and demanding adherence to settler law in settler territory in order to obliterate indigenous rights" (Byrd 2014: 151).[71]

We have already seen how tenuous are claims by scholars like Niezen that there is "nothing in the values of liberal democracy inherently at odds with the notion of self-governing indigenous peoples, and there is decreased resistance to power sharing with them, especially

[71] José E. Alvarez's article "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory" (2001) critically assesses whether liberal states 'behave better', using their own criteria for this (such as following international law, etc.). In an echo of Rana's history, Alvarez summarizes that, "[a]ccording to this latest version of liberal theory, 'how states behave depends on how they are internally constituted'" (184). And this internal constitution must be in the form of a 'functional democracy', meaning that it: has a freely elected government, strong civil society, respect for human rights, and free market respecting private property (186). Slaughter's is a neo-Kantian view of perpetual peace, influenced by Michael Doyle and advocating for democratization through the steady spread of liberal norms globally. His answer to the question posed in his title is that he is sceptical, and that there is not significant evidence to suggest they do behave better (194). This is the audacity of settler states: their legal temerity is not backed up by any sort of positively definable 'good' state practices.

when developed through constructive arrangements with nation-states" (2003: 219). Other scholars, like Pitty, disagree, investing less in the softening of state opposition to power-sharing, and maintaining that self-determination-as-democratic-legitimacy might be resisted by states because "this idea raises crucial issues of political representation that can call into question the legitimacy of a government" (2001: 60). Pitty also notes that government elites' fear that internal self-determination might lead to succession actually "reflects the fact that such elites are averse to genuine political representation" (Pitty 2001: 60), an admission that would make such a polity unfit to have its sovereignty respected by the international community. Similarly, Paul Keal thinks that at present "self-determination claims made by Indigenous peoples do not…constitute an immediate crisis of political legitimacy for the institution of the state" but that if these states fail to recognize Indigenous rights an "increasing number of Indigenous peoples" may adopt "a more categorical conception of self-determination as sovereignty, conventionally understood" (2007: 288). However, these arguments play into not only the recognition paradigm,[72] but also the old liberal imperial conceit that the constitution of the imperial polity justifies its own actions, ignoring the historical and contemporary record whereby these same states want Indigenous land and resources while demonstrating their devaluation of Indigenous life. For settler states, like liberal imperialists of old, "who 'we' are consistently trumps what 'we' do by wrapping the imperializing society in the gauzy sheen of a liberal identity that protects it from the barbs of those who are consistently imagined to be illiberal in nature" (Morefield 2014: 172).

[72] The recognition paradigm can broadly be understood as the way settler states deal with 'the Indian problem' by recognizing difference so as to manage it—employing a liberal performance of toleration to eliminate/assimilate Indigenous peoples *as distinct sovereign peoples* through democratic inclusion/incorporation (Simpson 2014: 19-21). This "tricky beneficence" (20) can be found in diverse settler colonial contexts. See, for critiques and historical description, Elizabeth Povinelli (2002) on Australia, Patrick Wolfe (2011) on the United States, and Glen Coulthard (2014) on Canada. One foundational account of recognition—drawing from Hegel's originary theorization—is Charles Taylor's "The Politics of Recognition" (1994), alongside whom should be read theorists of liberal multiculturalism, especially Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1996) and Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2006).

This section has demonstrated—through the work of scholars like Rana and Nichols—how settler states that adopt 'a liberal identity' have been able to make claims of both adhering to and championing the human rights norm of self-determination. Reference to this norm simply becomes "a reference to the broader democratic freedom guaranteed within the internal political framework of the state" (Senaratne 2013: 312). This has been made possible through the history of the construction of settler states and of the norm of self-determination in international law, which rose simultaneously in the modern period at the expense of colonized peoples everywhere. It is merely an old story in new garb: while "the old nineteenth century 'standard' of civilization was 'liberalism'…the political doctrine that defines the new standard of civilization, is 'democracy'," with a concomitant move from a "post-Waterloo Pax Britannica" to a "post-Cold War Pax Americana" (Scott 2012: 197-198). With the "internal nature of political regimes" now determining "the legitimacy of sovereignty" (200), the old anticolonial ideal of self-determination cannot gain traction against states that wave the banner of liberal democracy (the lingua franca of virtuous, recognizable political existence), regardless of the illiberal costs of its actual practice. In this way, we can see how "the modern doctrine of self-determination…was formulated in response to the whole phenomenon of colonialism" (Anghie 2005: 196), and continues to be so today. Indeed, as Mahmood Mamdani observes:

> If the race question marks the cutting edge of American reform, the native question highlights the limits of that reform. The thrust of American struggles has been to deracialize but not to decolonize. A deracialized America still remains a settler society and a settler state. (2015: 607)

Thus the history of anti-imperialism does not seem to include human rights; and the present human right norm of self-determination does not seem to be genuinely anti-imperial.[73]

[73] A related question is whether antislavery was a human rights movement. A number of histories allude to this, Micheline Ishay, *The History of Human Rights* (2004), Lynn Hunt, *Inventing Human Rights* (2007), and notably Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2012). However, I follow

II. The Double (Discursive) Standards of Internal Self-Determination

> "Within Indigenous contexts, when the people we speak of speak for themselves, their sovereignty interrupts anthropological portraits of timelessness, procedure, and function that dominate representations of their past and, sometimes, their present."
>
> — Audra Simpson, *Mohawk Interruptus*, 97

> "[I]solation is often politically effective to the degree that it erases or disavows the mediations—of history, empire, culture—by which indigeneity has become a meaningful category in the first place."
>
> — Lucas Bessire, "The Politics of Isolation", 488

We have come to a point where the current normative meaning of self-determination—internal self-determination as evidence of the democratic ideals of settler states—is what the international Indigenous rights movement has to work with, and behind which is placed a tremendous amount of hope. Further, the judiciability of the UNDRIP, and the immense body of scholarly work on the question of how to go about implementing it, has been a defining feature of the discourse of contemporary international Indigenous rights. This section, then, is about how the principle of self-determination as it exists today is put to use by those who do have the best interests of Indigenous peoples in mind. It asks, how might the vigorous attempt to implement the UNDRIP through UN mechanisms pressure groups to conform to its mandate while giving less credence to those groups that employ a different political grammar—for instance, civil disobedience, or the rejection of settler colonial legal and governance structures?

The UNDRIP, as a living document, and the best Indigenous peoples have in terms of comprehensive, Indigenous-specific international law, needs to be put under pressure to see how well it can account for peoples who do not see themselves as part of the international system in which it operates. This section will attempt to apply this productive pressure, and will proceed in

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Moyn's (2010) argument that whatever 19th century social movements might have been, they were not what we today think of as 'human rights' movements. As he states elsewhere: "abolitionists very rarely used the idea of rights, activated as they more typically were by Christianity, humanitarianism or other ideologies" (2014a: 58).

three parts. First, the existing framework for approaching and understanding Indigenous peoples in voluntary isolation (hereafter 'IPVI') will be examined. Second, this framework will be read and analyzed specifically in relation to IPVIs as well as Indigenous communities, such as the Kahnawà:ke Mohawk, who while living on a federally-recognized reserve actively refuse/resist the authority of the nation-state system to confer upon them recognition. Here the chapter will suggest that the framework views the right of self-determination differently for these two groups. It will also comment on how international law and human rights norms contribute to defining the 'proper' subject of certain rights, as well as defining the importance of certain rights for certain groups. Finally, this section will reflect on the importance of reading the UNDRIP in light of a wide array of possible political subjectivities and grammars. The goal is to stage a rapprochement between the human rights regime's admirable will to fight for the internal self-determination of IPVI, and the dangerous representational politics this fight propagates when compared with the self-determination struggles of other, quite different, Indigenous peoples. Ultimately, the section tries to ask questions not so much about the implementation of the UNDRIP, but about the ideological work done in the *discourse around* its implementation, the way identities beholden to the Declaration are constructed differently, and what is at stake in perpetuating or challenging these representations.

The Existing Framework

Who are Indigenous peoples in voluntary isolation? Research on IPVIs is limited, soft law or guidelines concerning them are even more rare, and binding law is near non-existent.[74]

[74] As it stands, most information on IPVIs can be found in a handful of reports and articles, including: the Inter-American Commission on Human Rights, *Indigenous peoples in voluntary isolation and initial contact in the Americas* (2013); International Work Group for Indigenous Affairs, *Indigenous Peoples in Voluntary Isolation and Initial Contact* (2013); and Lucas Bessire "The Politics of Isolation: Refused Relation as an Emerging Regime of Indigenous Biolegitimacy" (2012).

While specific legislation regarding these peoples has emerged in a number of the relevant countries starting in the late 1970s and increasingly in the early 2000s (see IACHR §64-69),[75] they have been given little attention at the international level. Nonetheless, processes starting in 2005 culminated in the 2009 *Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial contact of the Amazon Basin and El Chaco* (hereafter *Guidelines*), issued by the UN Expert Mechanism on the Rights of Indigenous Peoples. The document defines peoples in isolation—or "free, uncontacted, hidden or invisible peoples" (§8)—as "indigenous peoples or subgroups thereof that do not maintain regular contact with the majority population and tend to shun any type of contact with outsiders" (*Guidelines* 2009, §7). There are currently an estimated 200 indigenous groups totaling 10,000 persons living in voluntary isolation (IACHR 2013, §16), located mostly in the Americas (§15), though also notably in Papua New Guinea.[76]

The threats that IPVI face are real and pressing, and their political position is precarious at best. Besides the encroachment of their land by extractive industries like mining and logging (IACHR §101), and the constant threat of direct attacks (§123-128; Bessire 491),[77] IPVI are uniquely vulnerable to changes in their environment—on which they depend materially and spiritually—caused by capitalist accumulation throughout the world beyond their territory (IACHR §93-100). Furthermore, having lived entirely or for significant periods in isolation, these peoples are also more susceptible to serious harm through contagious disease, like the common cold, to which they have not developed immunities (IACHR §116; IWGIA 8). Perhaps

[75] Note, however, that there are a number of earlier national laws relating to the protection of territory containing IPVI which both directly and indirectly refers to this issue (IACHR §70-86).
[76] There are known IPVI in: Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, and Venezuela, and reports of their presence in Guyana and Suriname (IACHR §15). IPVI outside of the Americas, specifically those in Papua New Guinea, are underrepresented in the literature, including the IACHR and IWGIA reports.
[77] As Lucas Bessire writes in his article on the politics of isolation: "Once every two or three months during my fieldwork, a story would arrive over the two-way radio that the forest people had been murdered by a rancher. Their bodies buried in a pit, their camp dynamited by an airplane, their water source poisoned" (2012: 491).

even more insidious than these material dangers, however, is the existential harm done to IPVI by the wider world's pull to make contact with them. One of the most alarming instances of this is the phenomenon of 'tribal tourism' (IACHR §129).[78] The BBC*FOUR* documentary *First Contact*, aired in 2007 and hosted by Mark Anstice, offers a portrait of this disturbing trend in adventure tourism in which people seek thrills by being the first to connect tribal people in places like Papua New Guinea with the 'outside world'. This 'first contact for cash' scheme is deeply colonial both in its exploitative goal and its representational and epistemological superstructure. Throughout *First Contact*, IPVI are treated like animals in a zoo—or more fittingly, a safari expedition, where sighting rare game justifies the steep price. The deep racism displayed in the documentary (the terms 'savages' and 'wild men' are used)—by both the tour organizer and the documentary host—is just one of the many indicators that such activity is no less violent than that of capitalist loggers and evangelical missionaries.

More subtly still, the kind of representational work of tribal tourism and *First Contact* develops an idea of what IPVI *should* look like and want, and how they should function;[79] that is, it is far more prescriptive than descriptive, because it is trying to sell a certain experience to a (mostly Western) public still invested in antiquated ideas of the Noble Savage, romanticized beyond any possible existing referent. Tribal tourism thus propagates a narrative of *purity*, the

[78] See, for example, *Papua Trekking*: http://www.papuatrekking.com/first_contact_expedition.html. The website's main advertising tool is to play to the allure of *fear*—the possible danger faced when encountering for the first time unknown tribes who may, it suggests (and it is *hoped*), be hostile.

[79] A version of this representational work imbibed by a much larger audience is Jimmy Nelson's coffee-table book *Before They Pass Away* (2013), which, it is claimed, "presents us with stunning images of customs and artifacts, but also offers insightful portraits of people who are the guardians of a culture that they—and we—hope will be passed on to future generations in all its glory." This 'hope' implicitly prescribes an imminent death, necessitating that these customs and peoples be captured and preserved for posterities' sake. In the face of protests and criticism by Indigenous groups that the "pictures reflected neither political nor historical reality" (Vidal 2014), Nelson stuck to his position that he was working towards their protection—and did not shy away from admitting to the large sums of money he has made from the project, despite the subjects of his photographs receiving no recompense. This makes laughable the dismissive comment in a *Foreign Policy* review of the book that, "[f]or politically correct Westerners, there could be something uncomfortably colonial about this sort of voyeuristic globe-trotting ethnography, yet Nelson's sensitivity for his subjects is immediately apparent" ("Before They Pass Away" 2013).

uncontaminated native who gives hope to the disaffected Westerner by providing an image of a pre-capitalist utopia where alienation, violence, and exploitation have yet to wreak havoc. This simplistic idea erases very complicated histories of contact (or perhaps less neutrally and more accurately, *conquest*) and sociological responses to it: for instance, rather than existing in hermetically sealed, untouched paradises, most IPVI have had some form of contact through various means, including through other Indigenous groups who reside on the borders between these worlds (IACHR §20); they are often aware of elements of the outside world; many have previously been contacted and consciously decided to reject further contact (IWGIA 8); and they employ complex political grammars to communicate their will.

Given this precarious position and the ignorance surrounding it in the general public and state apparatuses alike, the UN and international human rights community have stepped in, articulating the protections available for these peoples. As such, the IACHR report provides a detailed account of how existing international and national laws can be brought to bear on the unique situation of IPVI,[80] looking at five different sources: the Inter-American human rights system (including the American Declaration of the Rights and Duties of Man, American Convention on Human Rights, and Draft American Declaration on the Rights of Indigenous Peoples); ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries; the universal human rights system (ICCPR, ICESCR, the Convention against Genocide, UNDRIP, and the *Guidelines* mentioned above); other regional protections (such as the International Alliance for the Protection of the Indigenous Peoples in Isolation and the Amazon Cooperation Treaty Organization); and domestic legislation (including specific policies concerning IPVI as well as general territorial protection principles and laws) (§27-86). Further, as Dinah Shelton

[80] The IWGIA report is significantly longer (264 pages), and is organized by country, containing detailed entries on Brazil, Peru, Bolivia, Venezuela, Ecuador, Colombia, and Paraguay, with a set of common recommendations at the end.

notes, the IACHR

> has granted two precautionary measures for the protection of indigenous peoples in isolation: precautionary measure 91-06 regarding the Tagaeri and Taromenani indigenous peoples in Ecuador, and precautionary measure 262-05 regarding the indigenous peoples of Mashco Piro, Yora and Amahuaca in voluntary isolation in Peru. (IWGIA 9)

From this 60-paragraph summary of protections available for IPVI, it is clear that the international human rights legal regime has the means to address the situations of IPVI.

While this represents the normative framework applying to everyone, the 2009 *Guidelines* were created to acknowledge that there is something *unique* about IPVI, and were designed "as an instrument for better contextualizing international law" (§5) in this regard. The *Guidelines* reiterate the international norms regarding Indigenous rights, notably those in the UNDRIP (§14), while emphasizing the *unique* vulnerability of IPVI—some of whom are "on the verge of extinction"—and the *strengthened* human rights mechanisms required for their protection (§15). In addition to explaining the unique circumstances of IPVI, the *Guidelines* also enumerate the UNDRIP Articles most relevant to their plight, touching on the entire Declaration (with special emphasis on Articles 3, 7, and 8)[81] and only omitting Articles 1, 2, 6, 9, 10, 14-17, 20-23, 33-37, 39-41, and 43-46 (mostly positive rights). Essentially, this means focusing on the rights to self-determination (Article 3), life, physical and mental integrity, liberty and security of person (Article 7), and the right not to be subjected to forced assimilation or destruction of one's culture (Article 8). The rights that are omitted are the right to a nationality (Article 6), to belong

[81] The *Guidelines* single out the importance of: "the right to self-determination (art. 3), the right to autonomy and self-government (art. 4), the right to maintain their own institutions (art. 5), the right to life, physical integrity, liberty and security of person and the collective right to live in freedom, peace and security (art. 7), the right not to be subjected to forced assimilation or destruction of their culture (art. 8), the right to preserve their traditions and customs (art. 11), the right to practise, develop and teach their traditions and customs (art. 12), the right to transmit their cultures and beliefs to future generations (art. 13), the right to participation (arts. 18, 27, 30 and 31), the right to consultation and to free, prior and informed consent (art. 19), the right to maintain their traditional medicines and health practices (art. 24) and rights over their lands, territories and resources (arts. 25-32). Also relevant are the obligations it establishes for States and for United Nations bodies and specialized agencies (arts. 38 and 42) to facilitate the exercise of the rights set out in the Declaration" (§31).

to an Indigenous nation or community (Article 9), to not be forcibly removed from lands (Article 10), to control over educational systems (Article 14), to the diversity of their cultures (Article 15), to establish their own media (Article 16), to rights under labour laws (Article 17), to develop their own political, economic and social systems (Article 20), to the improvement of their economic and social systems (Article 21), to protection without discrimination for elders, women, youth, children and persons with disabilities (Article 22), to determine priorities for their right to development (Article 23), to determine their own identity or membership (Article 33), to promote, develop, and maintain their institutional structures (Article 34), to determine the responsibilities of individuals in their communities (Article 35), to develop and maintain contacts across borders (Article 36), to the recognition, observation and enforcement of treaties (Article 37), to financial and technical assistance from States (Article 39), to fair procedures for resolution of conflicts with States (Article 40), and to financial and technical assistance in the implementation of the Declaration (Article 41). So while the *Guidelines* insist that IPVI "are individuals who are entitled to enjoy the full range of internationally recognized human rights" (§20), in fact the emphasis is overwhelmingly on negative rather than positive rights, an emphasis meant to account for the unique problems faced by implementation in this case.

The main thrust of the *Guidelines* is that the decision or fact of remaining in isolation represents "an expression of the right to self-determination" which, if respected, "guarantees respect for [their] other human rights" (§22) because it safeguards their territory and culture. In this schema, any 'contact' whatsoever is context and catalyst for "*possible* violations of their human rights," (§22, emphasis added), while the principle of 'non-contact' ensures the safeguarding of all their other rights. The *Guidelines*, however, go on to insist, forcefully, that contact *is itself* a human rights violation possibly tantamount to genocide (§51), offering a

hardline interpretation of what self-determination means in this context.[82] Finally, the *Guidelines* call for non-invasive monitoring (§50), and present four recommendations: that the right to self-determination be guaranteed; that lands, territories, and resources be protected; that health is safeguarded; and that free, prior, and informed consent is respected (§46). The *Guidelines* (2009) are thus consonant with the recommendations offered in the IACHR and IWGIA reports four years later (2013), suggesting a general consensus with regards to how to approach the complex question of IPVI. That consensus revolves around an understanding that self-determination is *uniquely* important for the survival of IPVI, who are especially vulnerable, and that it is their decision not to maintain contact or to 'participate' that communicates their demand for this right. The careful way these human-rights oriented documents and reports lay out the biological and cultural precariousness of IPVI and link it to the importance of self-determination for them sends a clear message: to place but one foot on their land is to dance with genocide.

Isolation, Refusals, and the Limits of the Framework

> "I want to push 'turning away' into the ambit of refusal—of simply refusing the gaze, of disengagement—and to the possibilities that this structures: subject formation, but also politics and resurgent histories. In my ethnographic work I was deeply mindful of the range of possibilities available for political life, for identification and identity within and against recognition, all instantiated in refusals."
>
> — Audra Simpson, *Mohawk Interruptus*, 106-107

What it means to respect the self-determination of IPVI—not state sovereignty, but a very strong respect for autonomy and non-interference—reveals its ideological weight when we place

[82] "Respect for this principle means that *any contact with indigenous peoples in isolation that is not initiated by those peoples themselves must be regarded as a violation of their human rights*. In the context of the Declaration, such contact would be viewed as a manifestation of the assimilation programmes and policies that are expressly condemned in article 8. Forced or unwanted contact should be subject to prosecution under the criminal laws of each State as a way of protecting the rights of indigenous peoples in isolation. In this connection, bearing in mind the knowledge accumulated thus far on the effects of forced contact, in certain circumstances such contact could be considered a form of the international crime of genocide" (§51, emphasis added).

it in comparison with other Indigenous peoples, such as those who, though sometimes highly integrated with wider society, *refuse* to acknowledge the nation states in whose territory they are told they reside. My use of the term 'refusal' draws on the work of Audra Simpson. In *Mohawk Interruptus: Political Life Across the Borders of Settler States* (2014), Simpson charts how the Kahnawà:ke Mohawk "simply refuse to stop being themselves" and so must, in the process of doing so, refuse the machinations and structures of the states—Canada and the United States—that press upon them (2014: 2); in other words, they "refuse the 'gifts' of American and Canadian citizenship" (7). This refusal is a matter of survival: for Indigenous peoples, writes Simpson, living in a settler colonial context means "living in the face of an expectant and a *foretold* cultural and political death" (3). This claim aligns with the work of Wolfe already discussed, which describes settler colonialism as operating under a "logic of elimination" whereby the natives must be eliminated, whether through genocidal extermination or liberal assimilation, to consolidate the settler project of land dispossession (2006). What emerges from this ethnographic work is that for Indigenous communities that are *not* isolated—that have in fact formed deep and complex ties with the settler communities around them—the imperative that their land and their cultural systems *not be touched*, that they *be left alone*, has just as much to do with survival, both physically and existentially, as the 'no-contact' principle does for IPVI.[83]

Is it far-fetched to compare IPVI to those Indigenous groups who choose to refuse certain policies of, or recognition by, the state? I argue that, first, it is not, and second, it is productive regardless because it interrogates the inconsistencies in international human rights self-

[83] For a disturbing and detailed portrait of the genocidal project of settler colonialism see the essays—especially those on residential schools, land claims, indigenous child removal, and truth and reconciliation—collected in *Colonial Genocide in Indigenous North America* (2014), eds. Andrew Woolford, Jeff Benvenuto, and Alexander Laban Hinton. James Daschuk's *Clearing the Plains* (2013) and Ned Blackhawk's *Violence Over the Land* (2006), along with the sources found in note 37, provide further historical cases for Canada and the United States. These works make it impossible to suggest that already-contacted indigenous communities are any less vulnerable than IPVI.

determination discourse. Isolation, or invisibleness, can have a wide range of interpretations. In Simpson's thinking, drawing from social theorist Lauren Berlant, the settler colonial state makes its power "real and personal…through the granting of citizenship" and thus *producing visibility* (2914: 18). Once such visibility is produced, it makes 'difference' apparent, and governs the grammar by which political claims and aspirations can be articulated (usually, a language of "culture, authenticity, and tradition"), effectively "homogenizing heterogeneity" (18).[84] In opposition, refusing this kind of settler colonial politics of recognition is a move to make oneself and one's community invisible to, operational outside of, the state's strangulating grasp. The central problem of this oppositional politics then becomes "how to imagine [your community] outside of the interstices of Empire while operating within it" (26)?[85] Refusal is thus a *kind* of isolation, but one premised not on discrete territorial boundaries, but rather on a commitment to exist beyond and removed from the workings of the Westphalian state. Seen in this way, the Waiãmpi people living in what we would call Brazil and the Mohawk of Kahnawà:ke living in what we would call Canada and the United States seem to be communicating a very similar political desire, because, in extraordinarily different ways using very different lexicons, they are asking: "[w]hat does it mean to be unrecognized" (23)?

And yet, something very curious becomes apparent. On one hand, the *Guidelines* and IACHR and IWGIA reports want to present IPVI as an instance where the *standard* and *expected* implementation of the international Indigenous rights' legal and normative apparatus enforcing

[84] Simpson argues that recognition, through citizenship, was tantamount to the 'translatability' of Indigenous peoples, evidencing a "deadly readiness for political absorption into the settler state, readiness that was owing to their 'civilized state'…Civilizational aptitude was perceived to be tantamount to the death of Iroquois culture—the death, really, of difference—so the remnants needed to be recorded and documented" by settler ethnographers (2014: 103).

[85] Coulthard's *Red Skin, White Masks* (2014) offers a rigorous critique of the cultural politics of recognition in Canada. He argues that "in the Canadian context, colonial relations of power are no longer reproduced primarily through overtly coercive means, but rather through the asymmetrical exchange of mediated forms of state recognition and accommodation" (15).

the right to self-determination is required as it is in all cases.[86] On the other hand, as demonstrated above, they are drawn to emphasize how *especially* necessary it is in *this* case because the safeguarding of these rights is uniquely integral to IPVI's *survival*.[87] If the UNDRIP is meant to ensure the survival of all Indigenous peoples, why do the *Guidelines* raise survival to a new level in the case of IPVI? How are we to understand their use of 'survival', for which no working definition is offered? An emphasis is always a comparison, it always places into relief that which is not emphasised; thus, ideological work is being done here. In linking self-determination to culture and territory, and these to the survival of a fragile biological-cultural entity for which *any* change means (in their rendering) 'death', these documents make the benchmark against which survival is measured a kind of purity-to-be-lost.[88] This contrasts markedly with the way rights are talked about for those who *refuse* the state system, where the language of social justice—'these are our *rights*'—is employed in a liberal game of 'discussing' and 'debating' in the legal and social spheres.[89] What seems remarkable is how nothing that pertains to IPVI is actually new, but somehow their decision to remain in isolation is taken as a more *pure* (or understandable or achievable or serious) expression of this desire than, say, that of

[86] "[T]hese are individuals who are entitled to enjoy the full range of internationally recognized human rights" (*Guidelines* §20); "[t]he Declaration is an important policy touchstone, as virtually all the rights it enumerates are important for the peoples to whom these guidelines refer" (*Guidelines* §31).

[87] "Governments need to pay special attention to peoples in isolation and in initial contact because such peoples are extremely vulnerable; in some cases they are even on the verge of extinction" (*Guidelines* §15); "the Declaration should guide and inform all actors, especially States, on the policies needed in order to guarantee these peoples' survival" (*Guidelines* §31); "[i]n short, these peoples' survival hinges on the protection of their lands and territories" (*Guidelines* §63).

[88] Anthony Pagden's important book *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (1982) provides an intellectual history of 'natural man' that charts a shift in dealing with difference from the language of nature to the language of culture, which can be seen as the primary analytic category through which difference is considered today and a cornerstone of anthropological theory.

[89] Consider, for instance, the Canadian Human Rights Museum's response to *A Tribe Called Red*'s decision to pull out of the opening ceremony concert: "We know that building dialogue and earning trust is a long-term process, and we hope this will again be an opportunity for respectful conversation on issues that historically haven't been easy to talk about" (MacNeil 2014).

Indigenous groups who want full control over their lands in the face of settler colonial states whose very existence is predicated on their elimination.

Why should 'no-contact' be a more absolute expression of the right to (internal) self-determination than claims for that same right made in the political grammar *of* the state *to* the state? Let me be clear: I am not suggesting that the human rights regime does not think that all Indigenous peoples have equally absolute claims on their rights, for this is certainly the case. Yet, the stress on the absoluteness of these rights to self-determination for IPVI is linked, in the literature, to anthropological, sociological, and scientific claims to its necessity for the survival of these people, rather than to legal claims for their right to have such rights. As such, the literature in effect erects a divide between a kind of scientific investigation, on the one hand, and political aspiration, on the other. All of the threats enumerated for IPVI invoke more essentialized (though in many cases no less true) ideas of connectedness with the land, cultural indivisibility, and uncontaminated ecologies than is the case in discussions of self-determination for other kinds of Indigenous communities. This trend connects dangerously (even if not intentionally) with a harmful thought-practice from the past: the ethnographic imagination. As Simpson writes, "anthropology has very much been the domain of defining the political for Indigenous peoples historically, and in fact was the mode for constructing and defining Indigeneity itself" (2014: 33). This definition of indigeneity was intimately tied to assumptions about what 'Indians' should look like and how they should act: because its citizens were travelers, showmen, and ironworkers, "Kahnawà:ke has *not* seized the ethnographic imagination the way that other Indigenous communities that are *more perfect, more culturally 'intact'*, such as Six Nations or Tonawanda, have" (65). These 'more culturally intact' communities were identified as the rightful subjects of ethnographic attention for two reasons: first, because it was

believed that they were a more perfect window onto a pre-colonial 'past', and second, because it was assumed that they were 'vanishing fast' and needed to be studied, categorized, and collected before it was too late.[90] It is not a coincidence that these are also the assumptions and beliefs of the 'tribal tourist' initiatives. The human rights movement, like anthropology, takes credit for being the space in which indigeneity as a global identity and movement was constructed and expressed (Dahl 2012: 3; Niezen 2003),[91] and, based on the documents on IPVI I have encountered, articulate, at least rhetorically, a higher threshold of 'absolute' protection for some Indigenous groups than for others, employing a lexicon of survival, fragility, and extinction.[92] Just as anthropology defined a particularly pure version of indigeneity as the proper subject of ethnography, human rights unwittingly speaks of a (even if just slightly) different kind of self-determination reserved for more 'culturally intact' Indigenous peoples such as IPVI.

There are a number of reasons why this might be so. Self-determination of a visible (territorially delimited) sort is easier to imagine and to talk about when there is a clear "tradition of having a tradition," which is precisely what early anthropologists desired because it offered "a culture unambiguously connected to the places they lived upon" (Simpson 2014: 73). This differs, for instance, from the case in Canada, where you have a high population of urban First Nations, or communities that engage in trade with the settler society, and whose culture and rootedness are as such easier to question because less visible than they are for IPVI. Such differential treatment has a long history. As J.R. Miller explains, the Government of Canada's

[90] Simpson describes this attitude as "a realization of early anthropological desire—a desire for order, for purity, for fixity, and for cultural perfection that at once imagined an imminent disappearance immediately after or just within actual land dispossession" (2014: 70).

[91] See Niezen for a more detailed ethnographic account of this (2003), where he argues that *indigenism* is an identity grounded in experience and memory, but articulated globally for local or national purposes.

[92] "For indigenous peoples in isolation, the guarantee of self-determination means absolute respect for their decision to remain isolated. It would thus be appropriate to refer to it as the guarantee of respect for the no-contact principle. For indigenous peoples in isolation, this principle is key to the subsequent implementation of other principles and rights, as it represents the highest expression of their will" (*Guidelines* §48).

assimilative "efforts to promote the electoral system fell with particular force on bands in Easter Canada, where, the [Department of Indian Affairs] thought, Indians were more acculturated and ready to participate in Euro-Canadian institutions" (2013: 241). Conceptually, both Indigenous groups are 'addressed' through the doctrine of internal self-determination, but IPVI claims to a kind of 'strong' or 'absolute' self-determination are "intelligible to outsiders" (Simpson 2014: 73) in the more soothing, comforting, culturally-couched language of the human rights world, while reserve First Nations in Canada demanded self-determination in ways disruptive to the state.[93] They use the language of political claims to articulate their fight for survival, whereas in the case of IPVI the outside (human rights) world speaks *for them* in the language of *culture* as survival.

The really challenging part of Simpson's argument, then, is that the desire to capture the culture before it disappears is actually, perversely, a desire for it to disappear, or be disappearing, because such immanent disappearance is an indication of its pre-modernity, and so its value. This is why the early ethnographic imagination and anthropological desire are part of the settler colonial project of dispossession that also desires the elimination of the native (2014: 74).[94] The adjudication of culture and tradition that characterizes both anthropological desire and tribal tourism *and*, more subtly, human rights-oriented writing on IPVI, is key today to settler-colonial states "that [use] anthropological and historical archives to determine legal presence, to adjudicate claims to land" (93). 'Compromised' cultures are seen as having weaker political claims to rights when placed in comparison with cultures that display an overt 'tradition of

[93] Dahl approvingly notes that the 'Indigenous space' of the UN provides an alternative to "violent resistance" (2012: 8), suggesting that such resistance does not use a political grammar that would gain as much traction in the global arena as would, say, NGOs advocating on behalf of IPVI. Violence is always-already normatively bad in this account.

[94] An increasingly robust body of work looks at kinds of care that can be dangerous, that can kill. The most insightful example of this is Lisa Stevenson's beautiful ethnography *Life Beside Itself: Imagining Care in the Canadian Arctic* (2014).

tradition'. Lucas Bessire, in his important article "The Politics of Isolation" (2012), makes a similar point, but looks at the effect of IPVI discourse on Indigenous peoples of the *same* group who are *not* in isolation:

> Actual Ayoreo-speaking subjects are stripped of rights and exposed to elimination to the same degree that the hyperreal isolated subject is imbued with human rights and vital content…For isolation defines the humanity of living Ayoreo-speaking people in relief…At the same time, it offers yet another justification for classifying more settled groups as the degraded biological "shadows of humanity" that remain when a cultural system is "broken" or "killed", or the ways they are routinely treated as sub-human matter out-of-place: a lumpen labor reserve for axe work or charcoal production, souls already won, a threat to civic hygiene, a source of myths and dissertations, and so on…The biopolitical force of isolation emerges from the shared investments in this hyperreality by several characteristic and seemingly opposed structures of the contemporary: multiculturalist state politics, international human rights law, global humanitarianism, genetic science, and anthropological expertise. (472)

Similar to my analysis (though I do not see how any of these 'structures of the contemporary' are actually opposed to each other), Bessire understands 'isolation' as a category—forged in the crucible of colonialism—that intellectually facilitates "graduated forms of sovereignty" and "sliding and contested scales of differential rights" (473). In this scale of differential rights, "[h]umanizing the hyper-real isolated man presumes dehumanizing Ayoreo personhood in the present" (487), such that the more culturally pure are more entitled to the recognition of their rights. This "essentialist sleight-of-hand" threatens to overwhelm "the agentive possibilities residing in more nuanced and painstakingly developed definitions of what constitutes legitimate culture or cultural difference for many indigenous peoples" (488), including, for instance, the Mohawk of Kahnawà:ke. It is this dynamic that leads to a "redefinition of self-determination and cultural difference":

> The category of isolation establishes a vertical hierarchy of cultural legitimacies within the transnational politics of indigeneity, in which bounded, ahistorical, and anti-relational difference is privileged over and above the kinds of difference asserted within local ontologies or those taken as the product of unequal relations and imperial histories. (489)

Both Bessire and I are concerned with what happens when "uneven cultural legitimacies are politically legible only as biological legitimacies" (489). Those cultural/biological legitimacies are then instantiated in the international human rights sphere by way of what I have called discursive dualism in writing on the right to internal self-determination. While in the first section of this chapter I distinguished this discursive dualism from the perhaps more direct legal dualism (between self-determination *from* states to form new states and self-determination *within* existing states), the rhetorical performance of the texts analysed here matters insofar as such texts constitute soft law, the most widely judiciable legal resource for international Indigenous rights today.

III. Settler Colonial Structures and the Erasure of the Political

> "It struck me that we do not have a robust critical language with which to speak postnational democracy, translocal solidarity, and cosmopolitan politics in ways that have not already been instrumentalized by human rights, humanitarianism, and liberal internationalism."
>
> — Gary Wilder, *Freedom Time*, xiii

It is not just that 'self-determination' is not legally designed for colonized people in settler colonial settings, but also that the sorry shadow of an idea introduced in its place (internal self-determination) rather than in any way qualifying the machinations of the settler state, might actually contribute to its anthropological imagination. If the internal/external distinction removes decolonization as a tenable legal choice for Indigenous peoples, the character of internal self-determination is one of the reasons why, in the words of Barbara Arneil, "[f]or the three centuries since the publication of Locke's *Two Treatises*, the choice for non-European peoples has been defined by [the] dichotomy between the state of nature and civil society" (1996: 210). Together, the legal and discursive dualism described in this chapter construct an international human rights legal concept that peddles settler colonial tropes while eliding any challenge to

settler colonial state structures. Self-determination is considered the cornerstone of the international Indigenous rights framework—ostensibly speaking to desires for self-government and autonomy—but has been *constructed* in such a way as to (legally) protect the very structure against which such claims are leveled. Moreover, it has been *enacted* in such a way as to (discursively) perpetuate some of the culturalist assumptions that justified the state system's domination over preexisting Indigenous governance structures in the first place. In this iteration, 'self-determination as a human right' becomes a tool for reifying certain settler colonial conceits about the liberal Westphalian nation state's ability (and right) to accommodate diversity because of its claimed ideals of freedom. As such, the internal limits of the legal concept of self-determination, and the tropes that it secrets into UN legal space, represent grand acts of delimiting the actual impact of the *intent* behind such claims.[95] By accepting this as the be-all-and-end-all of self-governance within settler colonial contexts, the human rights regime in effect refuses to call out the settler colonial conceit of legitimacy, and thereby admits into hegemonic discourse the very structure perpetuating the continuing violation of the 'human rights' of Indigenous peoples. And yet, it is to the law, this law, as Dian Million notes, that "Indigenous peoples are forced to go—to trust once more that law is a realm where we might stop the violence that is in fact a violence integral to this law" (2013: 55).[96]

[95] This history of self-determination mirrors what would happen latter when Indigenous peoples worked at the UN during the drafting of the UNDRIP: "In the early days of drafting the declaration Indigenous peoples were not thinking about individual human rights but rather the inherent rights of peoples to their lands and the right of the group to be self-determining": "[w]hy would we develop a separate and distinct set of human rights standards? It is the recognition of the right to self-determination which was claimed, the logic being that if the right to self-determination was realized, so would basic human rights. The process of recognition should have been in reference to international legal norms as expressed in the UN Charter and intended to apply to all peoples" (Watson and Venne 2012: 93-95).

[96] Consequently, Amy Maguire, in "Contemporary Anti-Colonial Self-Determination Claims and the Decolonisation of International Law" (2013), argues that removing restrictions like the Saltwater Thesis that remove from view contemporary colonialism and restrict populations from participating as international actors, would be one "means by which the international law on self-determination may itself be decolonized, in order to enable the fair evaluation of contemporary, anti-colonial self-determination claims" (240).

In articulating this dynamic, this chapter has sought to give some colour and character to the critique of the "normative ideological picture of sovereignty, the rules and entailments of which determinate historical actors, variously situated in the global order, are obliged to negotiate" (Scott 2012: 197). This ideological scene will not be easy to negotiate, and it requires the clearest possible picture of the structural and discursive barriers erected throughout a long history of the (ab)use of power by settler states. In the most basic equation, the *minimalist* human rights regime conceptualized by negative liberty-adherents such as Ignatieff to qualify the dangers of a strong universalism and to quell the fear of the cultural relativist challenge, insists upon the mere *protection* of the requirements for the possibility for life (instead of a vision of what the good life should be). In the process, however, it invests in a discourse of *survival* that is inflected by culturalist assumptions and prescriptions. Indeed, as David Scott reminds us, "[i]t is now widely held that 'culture' or 'civilization', not histories of colonial power, explain the differences…between the modern West and non-West" (2012: 198). This culturalist idiom is integral to both the historical constitution of the settler state and its current liberal multicultural image that justifies its illiberal behaviours. Protection and preservation, the heirs of this idiom, are central to international Indigenous rights discourse. We are told that Indigenous peoples are "those people whose position in the modern world is the least tenable" (Niezen 2003: 5) and that they are "conscious that human rights represent a contemporary instrument to underpin the survival of communities" (Thornberry 2002: 10). We are told that "international law already has developed in substantial measure to support [Indigenous] survival and flourishment" (Anaya 2004: 289), and that internal self-determination specifically can be "interpreted broadly to accommodate the collective survival of indigenous peoples within the territorial integrity of existing states" (Petty 2001: 59). But in this movement from 'robust vision of political

community' (the anticolonial moment for self-determination) to 'requests for survival', the normative evolution of self-determination leads actors in the international community (such as human rights advocates) to *read* communities in the frame of a foretold death that makes their claims politically legible only as in relation to this.

The human rights community needs to begin telling different stories about itself in order to unveil the danger of adopting, so unthinkingly, positions such as these. The history of self-determination and the way it is claimed by human rights contributes to the way in which "contemporary human rights history…has tended to be teleological and triumphalist" (Moyn 2012: 160). Thus I have sought to contribute, along with David Scott, to "a counter-story [seeking] to denormalize the conceit that renders the present norm of self-determination-as democracy the mere outcome of a story of universal history or the righteous vindicationism of the political idiom of the new Pax Americana" (2012: 203). In claiming the weak, minimalist version of internal self-determination that merely asks for the barest means by which to survive, the human rights movement does a great disservice to the historical fact that, in part through the norm of self-determination, "anticolonialism placed emphasis on *totalistic struggle*" (Moyn 2012: 171). That is, if anticolonialism won in the 1940s, it came to be replaced by (not *realized as*) human rights in the 1970s (172). Crucially, we can also see how human rights triumphed *after* decolonization—and in part *because* of it—in that "the loss of the empire allowed for the reclamation of liberalism shorn of its depressing earlier entanglements with formal rule abroad" (172):

> only the ideological dissociation of liberalism and empire, after more than a century of long and deep connection, paved the way for the rise of human rights. Scholars still debate whether liberalism has a genetic or only contingent relationship to imperialism, but what does seem clear is that only when formal empire ended did in fact (and perhaps could in theory) a powerful internationalism based on rights come to the fore. (172)

Thus the way that historiography claims decolonization as the UN's own, as part of a human rights story, participates in the theoretical legitimization of a liberal-state-free-from-empire. It is *this* story that must be included in the sermon the settler state preaches, if its citizens are to keep faith in its creed; it is a story that 'polices meaning' by accounting for counter-hegemonic political claims as accommodated by settler states.

Freed from this disreputable history, the human rights regime can focus on 'protecting' Indigenous peoples—helping them *survive* through the right to self-determination. But as the important work of Karuna Mantena in *Alibis of Empire* (2010) shows, this history is not so easily shrugged off. Rather, we see yet again the reemergence of 19th century assumptions born of colonial relations:

> nineteenth-century theorists…produced a distinctively apolitical model of traditional society, one that embodied a substantive and methodological investment in viewing societies as functional, cultural wholes. It was a view that stressed the internal cohesiveness and the communal/corporate orientation of native society, prioritizing the cultural determination of individual action and thought, and thus, de-emphasizing political conflict, change, and agency. This model of native society as an integral whole, held together by reciprocal bonds of custom and structures of kinship, would provide the theoretical foundation, and even a normative justification, for late imperial ideologies of protection, preservation, and collaboration…With the rise of social theory, the question of politics was thus reframed in a context that increasingly emphasized the limits of political action in relation to social, cultural, and historical imperatives. (14-15)

Mantena is here writing about India rather than Native North America, but the anthropological imagination's operation in this colonial context is striking in its parallels to the picture of settler colonialism in the Americas provided in this chapter. These parallels should help us think about the ways that settler colonialism is both deeply connected to as well as different than other forms of colonialism. The anthropological imagination obviously existed in both these contexts, but one achieved formal independence (and was brought into the history of decolonization) and the other has not. The crucial difference seems to be the element of settler colonialism, with its

irreducible drive for the land of the native so that a new state may be formed. This state, in the name of *its* survival, must read self-determination as *internal* rather than *external*, as a plea for (Indigenous) survival rather than a demand for autonomy and decolonization. By drawing freely on these tropes and assumptions, the UN and the human rights regime hold hands with the settler colonial state. Chris Tennant, in his review of international legal literature pertaining to Indigenous peoples from 1945-1993, notes the 'primitivization' of such peoples in the UN literature since the 1950s, and their characterization as 'noble' post-1971, in what he sees as an attempt to "represent alternatives to modernity" (Lawlor 2006: 180). In these frightening invocations of colonial idioms we can see what Saidiya Hartman describes as "the savage encroachments of power that take place through notions of reform, consent, and protection" (1997: 5). Without understanding the history of the norms it invokes, the human rights movement becomes, at best, a helpless bystander to—and more realistically, complicit in continuing—these savage encroachments.

CHAPTER THREE

Settler Decolonization and Human Rights

The preceding chapters have demonstrated how the international Indigenous rights movement, as it intersects with and uses the international human rights regime, is limited normatively and institutionally in settler colonial contexts. I argue that self-determination—considered the prize accomplishment of the international Indigenous rights framework—has been *constructed* so as to (legally) protect the very structure against which Indigenous political claims are directed and has been *enacted* in a way that (discursively) perpetuates culturalist colonial assumptions. If self-determination no longer means anticolonialism, and if *decolonization* remains a primary goal for Indigenous activists in settler colonies, then the human rights regime appears less and less useful. Given this situation, and as social reformers, radicals, and revolutionaries have asked for centuries: what is to be done? The answer in vogue for scholars of human rights is that we need to profoundly *repoliticize* their normative content. If chapter 1 was about how human rights have been 'used politically' to colonial ends (showing it to be complicit, narrow), and chapter 2 about how human rights contribute to the 'depoliticization' of 'the Native' through an investment in cultural purity, this chapter is about attempts to actively politicize human rights in an expansive, democratic register. Only when human rights become a tool of an expansive and inclusive version of 'the people', used to demand justice and equality, can it contribute meaningfully to a decolonial politics. Accordingly, this chapter will stage a rapprochement between two strands of literature: writing that attempts to (re)claim the emancipatory potential of human rights, and writing that reflects on the meaning, form, and difficulties of decolonization in settler colonial contexts. If Indigenous political claims

seem less audible when swathed in human rights' liberal tones, might settler decolonization nonetheless be advanced by a radically remade conception of human rights?

The chapter begins, in Section I, with a review of prominent attempts to 'save' human rights from charges of its ideological complicities. These proposals seek to open up—to *democratize*—the normative development of human rights, so that they becomes a tool made to the measure of a far broader conception of human community. I provide a generous reading of this literature that attempts to convey the rhetorical sway of the language of pluralism, debate, and contestation that it utilizes. When recast in this way, it seems plausible that human rights might function as a powerful tool for Indigenous peoples, insofar as the content of those rights are, as these scholars suggest, de-universalized and opened up for contestation. The section ends by juxtaposing this aspirational writing on human rights against accounts of robust culturally-derived debates rooted in mainstream liberal thinking to ask whether a 'politicized human rights' meaningfully diverges from this tradition. To continue pressing these proposals, Section II surveys accounts of what decolonization would entail (and obstacles to it) in settler colonial contexts, and finds that even the reworked 'human rights-as-politics' falters when tested against these accounts. Decolonization in settler contexts will involve settler uncertainty about (the form of) settler futurity, some element of land restitution, and that we do not predetermine what it will look like. The idea of 'politics' that such a revitalized human rights will constitute, I argue, is filled with normative content about the conditions (political and social) in which such contestation is possible; the kind of radical uncertainty that settler decolonization would require belies this new political human rights' ability to accommodate decolonial thought. If the implicit background conditions for a newly politicized human rights involve liberal (settler) state institutions and theories of political subjectivity and action, then it remains limited as an avenue

for settler decolonization. Section III, however, acknowledges that human rights have been a tool used in the past for good reason, and that they remains one of the options that there is to work with in the present. Accordingly, I offer a tentative account of positive directions in international Indigenous rights that *might contribute* to settler decolonization. The section then proposes a *disaggregation* both of human rights themselves, and of the specific, contingent political goals they could be used to advance.

I. Saving Human Rights

> "…human rights are not so much an inheritance to preserve as an invention to remake—or even leave behind—if their program is to be vital and relevant in what is already a very different world than the one into which it came so recently."
>
> — Samuel Moyn, *The Last Utopia*, 9

As critical scholars point out, there is a cost to giving up on human rights. While Moyn, for one, keeps on the table the possibility that they be 'left behind' entirely, others think that to abandon them would be more dangerous than productive. Zachary Manfredi argues that "the contemporary ubiquity of human rights language as a discursive framework for justice claims in domestic and international politics makes it a strategically essential point of engagement for left political theorizing" (2013: 7). Engagement, not refusal, is vital when it comes to human rights, for "their utter disavowal—as opposed to their transformation, re-signification, or displacement"—would mean that the Left is conceding "an extraordinarily wide array of institutions and sites of contestation to those liberal and conservative thinkers who deploy the language of rights to suit their own projects" (7). This assertion holds hands with Nikita Dhawan's argument that, even though we should be wary of cosmpolitanisms, "without the integration of subaltern groups into hegemonic structures, emancipatory politics will continue to

reproduce feudal relations despite contrary intentions" (2013: 140). Human rights are what there are to work with, and so giving them up would be admitting a kind of defeat or retreat. Consequently, Manfredi endorses Moyn's project of instead *destabilizing* the origin story of human rights as "a necessary—although not sufficient—condition for political projects of transforming human rights" (14-15). How do we transform human rights as they exist today? If human rights and its norm of self-determination are decidedly (at the least) *not* anti-imperial, can they still be made so?[97] A number of scholars reply with a tentative 'yes', believing that human rights' emancipatory potential can be activated by *repoliticizing* it—taking it down from its universal-moral high horse and into the muddy waters of political contestation. After all, asks Drucilla Cornell, "is this not our biggest challenge today, to rethink revolutionary possibility against the sorrowful, often self-righteous worldview of a certain human rights discourse?" (2014: 136).[98]

Four Proposals

First, Chantal Mouffe argues that we must refuse the seduction of consensus (for moral unanimity is a ruse almost always used to ideological ends) and instead utilize the insights of agonistic democracy theory. In "Democracy, human rights and cosmopolitanism: an agonistic approach" (2014), Mouffe tries to divorce human rights from the cosmopolitan perspective through which they have long been viewed. Cosmopolitanism, for Mouffe, "postulates the

[97] Human rights, of course, have never truly *transcended* politics, but rather have been made to seem to do so by taking a singular vision of political life as their hegemonic and implicit backdrop. David Scott notes that, "[h]uman rights are now obliged to speak in the language of a single political ideology" (2012: 199); their currency "is a sign that our morality has been redefined around the worst that can transpire in history, rather than some better order that could be achieved through political contest and struggle" (Moyn 2014a: 33). Duncan Bell suggests this is true not just in relation to human rights: "[m]ost inhabitants of the West are now conscripts of liberalism: the scope of the tradition has expanded to encompass the vast majority of political positions regarded as legitimate" (2014: 689). Illan Rau Wall says that the human rights framework "is the very epitome of the withdrawal of the political, by providing right answers to political questions through a pre-given law" (2014: 112).

[98] Rajagopal, similarly, insists that his critiques "should not lead to the dismissal of human rights, but rather to a search for the radical democratic potential in human rights that can be appreciated only by paying attention to the pluriverse of human rights, enacted in many counter-hegemonic cognitive frames" (2006: 768).

availability of a world beyond hegemony and beyond sovereignty, therefore negating the dimension of the political" (183). In its idealistic vein, cosmopolitanism is concerned "with the recognition of a plurality of allegiances and diverse forms of belonging" (ibid.) while simultaneously failing to recognize "the necessary conflictual character of pluralism" (185). It is not enough, suggests Mouffe, to *recognize* difference and plurality, we must *grapple with it*. To move forward, it is important to challenge "the idea that moral progress consists in the universalization of western liberal democracy" and accept that liberal human rights and their institutions "represent only one possible 'political language game' among others and [they] cannot claim to have a privileged relation to rationality" (188). Thus recent scholarship charting the lineage of multiple 'modernities' globally (Chakrabarty 2000; Gaonkar 2001) and multiple 'Enlightenments' within Europe (Hunter 2001; Tully 2003; Muthu 2003) are vital: they show how the institution of Western liberal democracy is contingent on a particular history of power and chance and does not follow ineluctably from the progress of human rationality. Taking seriously the implications of this work would involve establishing "a cross-cultural dialogue based on the acceptance that the notion of human rights as formulated in western culture is one formulation among others of the idea of the dignity of the person" (Mouffe 2014: 190). When this is accomplished, we can embrace a perspective that seeks "confrontation where the aim is neither the annihilation nor the assimilation of the other and where the tensions between the different approaches contribute to enhance the pluralism that characterizes a multipolar world" (192). In short, human rights in its current form is rooted in a *consensus* that is in fact a ruse, obliterating political struggle; to be true to the pluralism of the world in which they function and which they claim to reflect, human rights must be provincialized.

Stephen Hopgood, in *The Endtimes of Human Rights* (2013), agrees that something significant must change about human rights discourse and practice for it to remain relevant as a means to reduce suffering and deliver justice. To elaborate his vision, Hopgood develops a distinction between *human rights*—local/transnational networks that pressure governments, attract funds and media attention, using the language of freedom, brotherhood, charity, love, and so forth to make political claims about justice and equality, in a "flexible and negotiable language"—and *Human Rights*, capitalised—"a global structure of laws, courts, norms, and organizations that raise money, write reports, run international campaigns…and claim to speak with singular authority in the name of humanity as a whole", with norms neither flexible nor negotiable (vii-ix). This latter 'Human Rights' is "a kind of secular monotheism with aspirations to civilize the world" (ix), for becoming "the supreme authority—a court of law above all politics, national and international—is the inner logic of Human Rights" (x). Hopgood's 'Human Rights' are comparable to Mouffe's 'cosmopolitan-style human rights': a normative order purporting to exist above the political and to rain down judgments upon it. Like Mouffe's prescription, Hopgood says the goal must be to bring Human Rights back to politics, to reduce its ambition and so "create a more sustainable space for human rights as locally owned and interpreted principles for political action" (xiv): "[t]o achieve this, democratizing Human Rights (that is, transforming it into human rights) is an essential first step" (xv). Otherwise, he predicts, as American power wanes and the world becomes increasingly multipolar, the notion of a normative discourse existing above political contestation will lose its tenability, and we will witness the endtimes of Human Rights.[99] If Mouffe says that different visions of rights should

[99] Rajagopal agrees with Hopgood's basic point that without being remade, human rights will not remain tenable: "[b]y ignoring the history of resistance to imperialism, by endorsing wars while opposing their consequences, and by failing to link itself with social movements of resistance to hegemony, the main protagonists of the Western human rights discourse are undermining the future of human rights itself" (2006: 775).

interact agonistically, Hopgood makes an argument about who should develop, interpret, and own these visions: those grassroots communities who need them as a language for political struggle.

Third, in "The Future of Human Rights" (2014b), Samuel Moyn argues that while in the 1970s "a morality of human rights provided an 'anti-politics' to resist and indict the communist State" (59), for the idea to remain valuable today it will need to become avowedly political: "we can and should risk the development of more openly partisan enterprises in international affairs" (61). Otherwise, human rights will simply be an unrealistic moral utopia. Moyn proposes something like Hopgood's 'human rights': "deformalized…not absolute metaphysical principles but contingent tools of pragmatic social organization" (62). True, when this happens and human rights "descend into the world as a language of contest and struggle," the "other side will no longer be forced to defer to them as binding—a morality above politics" (63). But this is "a small price to pay" for retaining the idea's *political* function (63). While Moyn entertains the possibility that human rights have used up their utility, he insists that his critique is "not in the name of cynicism," for "[i]f humanitarianism had been purely rhetorical high-mindedness for Britain, or human rights were simply an apology for American power, they would never have become the highly mobile and contested categories they remain today" (2014a: xvii). That is, Moyn sees human rights as already inhabiting the terrain of contestation, proving their attractiveness to a variety of political actors, and making us think twice about abandoning them. Human rights "norms and organizations remain the chief source of idealistic passion in the world" and so "[a]ny future idealism will have to draw on the power of their current ethic and put it to good use" (18). Human rights represent just one episode in a long history of idealisms employed to alter the world, but it is the nature of history to make use of the ruins of the past—to

build things on their foundations rather than mock their disrepair. Moyn appears more open-ended than Mouffe or Hopgood in that he resists explaining *how* human rights will remain relevant, instead seeing them as a language to be picked up, adapted, or transformed for some future purpose.

Finally, in *Foucault and the Politics of Rights* (2015), Ben Golder seeks to revive human rights by, intriguingly, investigating how they were put to use by Michel Foucault, one of the great critics of liberal rights regimes. Golder first acknowledges the curious pull of human rights for "even those critical thinkers routinely suspicious of claims to universality, of liberal *doxa* concerning the subject of rights, and of the constraints of 'juridifying' political claims through rights and law" (2). In spite of these concerns, such thinkers "nevertheless…come to accept rights as forming some part of a critical, radical, or left politics" (2). This 'rights revisionism' "on the left" seeks to invoke human rights "not as an end in themselves" but rather "as a tactical means, as an opening to other forms of emancipation, rearticulation, and struggle—that is, as representing some form of political possibility" (2). Golder is concerned to show that Foucault, one such rights reviser, commits to "a critical politics of rights: anti-foundationalist, non-anthropologically grounded, openly political, and tactically oriented toward intervening into existing formations of law, state, and power" (3). This view of human rights, which he turned to in the mid-late 1970s, involves challenging relations of power and self in a way not "encompassed either by liberalism or by orthodox mainstream human rights thinking" (6). This 'late articulation' of rights is thus not a "shift to liberalism" in the form of an embrace "of the sovereign subject and an individualist ontology" (6), which would be impossible given Foucault's own detailed critiques of both "foundationalist understandings of subjectivity" and of

"traditional conceptions of sovereign power" (8).[100] Given this, Foucault tries to generate "a critical counter-conduct of rights" (20) by expressing political claims "via the liberal idiom of rights" while "'performative[ly] undermin[ing]' them in the process" (21). Foucault does not offer a simple "rejection of liberalism, but rather a contrary inhabiting of it, a destabilizing 'counterinvestment' which works within and against it" (21). Ideally, this will turn "government against itself from within the discursive and political field of possibilities opened up by government" (22) by *refracting* government power and goals to different ends. Crucially, what saves Foucault from 'becoming liberal' is that "he views the attainment and enforcement of these rights not as normative ends in themselves, but rather as part of an ongoing and often diffuse struggle conducted on a number of different fronts" (24). Instead of glorifying rights, he wants us "to occupy them, to appropriate and resignify them" (29), in a refractory, diffuse, non-hegemonic negotiation of the field of power as it exists (and is hopefully transformed).[101]

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[100] Golder explains that, in "liberal political thinking about rights," human rights are intended to "reflect and protect the originary freedom of the subject" against others and the community (9). But for Foucault, modern power functions "through juridically unauthorized and asymmetrical relations of discipline and biopolitics that subsist alongside or underneath the majestic spectacle of the sovereign discourse of right" (12)—so if rights discourse "cannot comprehend the operative movements of discipline, or of biopolitics" (or in fact advances them), "then of what use is a politics of rights in combating or reframing these relations?" (12-13).

[101] An astonishing number of recent commentators come to this conclusion from a wide variety of perspectives. John Lechte and Saul Newman's *Agamben and the Politics of Human Rights* (2013) argues that through Agamben's ideas we can renew human rights by breaking with "the traditional coordinates of Western political thought" that sees politics "in terms of the activity of sovereign states and law-making' in the public domain, and instead move to a 'political ontology based around notions of statelessness, inoperativeness, and the realization of the freedom and community that we already live in." Ayten Gündoğdu uses Agamben to similar effect in "Potentialities of Human Rights: Agamben and the Narrative of Fated Necessity" (2012), where she argues that through Agamben's idea of 'potentialization' we can "recast[] rights struggles as events with possibilities that are not fully consumed in any of their determinate actualizations" (15-16). Drawing on cultural analysis, Kate Nash's *The Cultural Politics of Human Rights* (2009) wants to understand human rights as "a dynamic and fluid culture" with "everyday dynamism" as a "part of local politics" (508). Joe Hoover, in "Towards a Politics for Human Rights" (2013) endorses the agonistic democracy of Bonnie Honig and William Connolly, suggesting we defend human rights "as a universal political ethos" that will democratize global politics (936). Illan Rua Wall, in "On a Radical Politics for Human Rights" (2014) develops an idea of 'right-ing': "[w]here human rights would ascribe a relation to the sovereign, right-ing would turn away from the authoritative sovereign power that might decide on the legitimacy of its claim. Instead, right-ing would consist of antagonistic right-claims without end" (108). These are just a small selection of such arguments. Andrew Schaap provides a critique and theoretically rich reading of the politics/the political and human rights in "Human Rights and the Political Paradox" (2013).

What is at stake in these discussions is the tenability of thinking about human rights through the lens of power. As Jack Donnelly notes, "[m]oral principles alone rarely determine political behaviour. International legal precepts regularly are interpreted and applied with an eye to power" (2013: 259). If it is the nature of power—the desire and quest for it—that compromises the moral projects and aspirations that underlie the human rights project, then our task is to think of a version of 'politics' that unveils it for what it truly is (partial and contingent), or that contains that grab for power in a way that allows it to be shaped by the greatest number of voices. Mouffe, Hopgood, Moyn and Golder provide four exemplary accounts attempting to do the latter.

Liberal Echoes

The proposals described above, though some consciously disavow a liberal outlook, seem difficult to distinguish from mainstream liberal thinking that preaches the virtues of letting many (divergent) voices speak. 'Accommodating' difference, after all, is a classic liberal trademark. So though it might be difficult, argues Ian Baruma, 'ideology' must be reclaimed as a productive concept:

> Ideology has caused a great deal of suffering…But without any ideology political debate becomes incoherent, and politicians appeal to sentiments instead of ideas. And this can easily result in authoritarianism, for, again, you cannot argue with feelings. Those who try are not denounced for being wrong, but for being unfeeling, uncaring, and thus bad people who don't deserve to be heard. (1999)

This is a plea for checks and balances, not of morality on politics but from within the sphere of (liberal) political argumentation itself. What do we mean when we say we want politics informed by culture (rather than, say, theology) to measure our moral horizons? As Hanif Kureishi argues in "The Arduous Conversation Will Continue" (2005),

> Governments may be representative but they and the people are not the same…States behave in ways that would shame an individual. Governments persuade individuals to behave in ways that individuals know are morally wrong. Therefore governments do not speak for us; we have our own voices, however muffled they may seem. If communities are not to be corrupted by the government, the only patriotism possible is one that refuses the banality of taking either side, and continues the arduous conversation. (92)

Kureishi is a liberal tired of the way liberalism removes the ingredients necessary for such arduous conversations—ingredients such as obscenity, anger, and grief—and instead replaces them with the banality of consensus, compromise, and moral conformity. We have the materials for this conversation *between* cultures because they exist *within* cultures. Indeed, says Kureishi, we must listen to "the whole carnival of culture which comes from human desire" (100), for "this is what an effective multiculturalism is: not a superficial exchange of festivals and food, but a robust and committed exchange of *ideas*—a conflict which is worth enduring, rather than a war" (100).

If agonistic conflict and liberal multiculturalism are not, for Kureishi, in any way at odds, how do the proposals for human rights above offer something beyond the current regime's liberal credentials? How do we distinguish, for instance, Mouffe's theory from the common liberal creed of finding for everyone a place at the table? Agonistic democracy theory does not sound so very different from the liberalism of Ignatieff, who dutifully notes that "[h]uman rights might become less imperial, if it became more political…if it were understood as…a discourse for the adjudication of conflict" (2001: 21). True, the important distinction is that for Ignatieff the goal of conflict is to eventually arrive at a consensus or a resolution that forecloses the continual process of debate by replacing it with an agreed-upon minimum. In short, Ignatieff is a proponent of deliberative democracy (where deliberation leads to consensus or compromise), while Mouffe's idea of agonistic democracy is more radical in its implications: it validates robust, culturally derived visions of world order rather than 'thin' or weak accounts of minimum

standards for life. For the sake of conversational traction, suggests agonistic democracy, we need different cultures to put forward their most utopian visions of the future of human rights and of humanity. Agonistic democracy claims that negative liberty (which Ignatieff, protégé of Isaiah Berlin, strongly endorses) is "insufficient to maintain political freedom" and is futile in the "struggle against domination, dependence, and arbitrary forms of power" (Wenman 2013: 5). Other philosophical traditions, notably pragmatism, also see contestation as the key. Amanda Anderson, in *The Way We Argue Now* (2006), uses a pragmatist-inspired idea of *proceduralism* to contend that it is "the process of argument…[that] enables the very act of pluralist self-clarification to occur, and the society in question must cultivate an ethos of argument if it is to meet the ongoing challenges of its political (re)constitution" (187).

Though these accounts differ in the details, all share the fundamental premise that argument, deliberation, contest, you name it, will be the only way to *understanding* (whether temporary/pragmatic, or ultimate). These thinkers invest in the idea that living in this world means daily embarking, to borrow Clifford Geertz's phrasing, on the "plaguing [of] subtle people with obtuse questions" so that our "progress is marked less by a perfection of consensus than by a refinement of debate" and where "what gets better is the precision with which we vex each other" (1973: 29). Such vexation is a first step towards understanding—an arduous undertaking, but one, they feel, well worth the trouble: "[u]nderstanding a people's culture," the argument goes, "exposes their normalness without reducing their particularity…It renders them accessible: setting them in the frame of their own banalities, it dissolves their opacity" (14). Geertz here articulates something very close to Andreas Huyssens's prescription that, for human rights to be viable in the future, "rights discourse need[s] to nurture a universalizing dimension that recognizes particularity without reifying it" (2011: 621). Mastery is to be avoided while

difficulty and enigma will be essential if we believe in the value of pluralism. There is therefore a danger in thinking of human rights as based on universal foundations, for it misses the point that it is really *a process*, and as such is always (or should always be) partial and contingent. Therefore, every disagreement, dispute, contestation, or complication is crucial. As Raymond Williams (admittedly a Marxist rather than a liberal) taught us, the language we use to discuss an issue, the keywords used to unlock it, constitute it. Understanding the ends to which we use words and their social histories, he says, can lead not to *resolution*, "but perhaps, at times, [to] just that extra edge of consciousness" which allows us to "see [them] as active: not a tradition to be learned, nor a consensus to be accepted…but as a shaping and reshaping" (1985: 24).

The four proposals described above are no less aspirational for being political, but what they aspire towards is a kind of process rather than a static vision of the way the world should be; they want to return a 'universal dimension' of a human rights idea, without reifying its form. What makes them appear so in line with liberal thinking is the motivating fear that to speak in one, hegemonic voice is to risk falling prey to the antithesis of liberalism: totalitarianism. Mouffe, Hopgood, Moyn, Golder, Kureishi, Ignatieff, and others want to invest in aspirational thinking (political claims to justice and equality) while simultaneously avoiding the pull of moral perfectionism, which can all too easily close the door to disagreement or open the door, as Isaiah Berlin (that quintessential liberal) knew, to worse outcomes still:

> There are men who will kill and maim with a tranquil conscience under the influence of the words and writings of some of those who are certain that they know perfection can be reached…If you are truly convinced that there is some solution to all human problems…then you and your followers must believe that no price can be too high to pay in order to open the gates of such a paradise…Those who resist must be persuaded; if they cannot be persuaded, laws must be passed to restrain them; if that does not work, then coercion, if need be violence…The root conviction which underlies this is that the central questions of human life, individual or social, have one true answer which can be discovered. (2014)

Berlin's warning and Amartya Sen's reflections on monolithic identity in *Identity and Violence* (2006) are reminders of the power of foundations and of the kind of idea that human rights, according to liberal thought, must *not* become.

While these are enticing notions, they remain mainstream liberal ones, and it is difficult to distinguish their form and motivation from the four proposals outlined in this section. The main arguments made by the 'human rights politicizers' amount to a pragmatist commitment to an ethos of argumentation. This seems to differ from the other accounts provided in this section only in that they claim not to invest in a specific political ideology and, on the face of it, hold up the virtues of radical political possibility. Is this claim enough to prove emancipatory for Indigenous peoples, or is the remade political human rights' liberal proximity actually *complicity*? To approach this question, it is first necessary to look at what such emancipation might involve.

II. Settler Decolonization

> "[We must consider] the distinct types of time and peculiar political tenses required or enabled by decolonization. Decolonization raised fundamental questions for subject peoples about the frameworks within which self-determination could be meaningfully pursued in relation to a given set of historical conditions. These were entwined with overarching temporal questions about the relationship between existing arrangements, possible futures, and historical legacies."
>
> — Gary Wilder, Freedom Time, 1

> "Decolonization, which we assert is a distinct project from other civil and human rights-based social justice projects, is far too often subsumed into the directives of these projects, with no regard for how decolonization wants something different than those forms of justice."
>
> — Tuck and Yang (2012: 2)

What does decolonization *want* in settler colonial contexts? Does it require "distinct types of time and peculiar political tenses?" Writing on decolonization is marked by three general

characteristics: affect, materiality, and aporia. First, decolonization will, for settlers, involve feeling things (such as *unsettlement*), or, as it were, not feeling things (such as *certainty*). Second, decolonization, to be meaningful, will contain an element of material redistribution or, in the case of land, restitution; decolonization is not a metaphor. Third, decolonization cannot really be known, and we cannot foretell the form it will take or its outcomes; it constitutes an aporia, an impasse of logic or chasm of unknowing wherein what is being sought cannot be defined.[102] In this section, I present an account of recent contributions to the growing work on decolonization in settler colonial settings—what I call settler decolonization. Each account does not contain all three elements; instead, these elements emerge from reading across the emerging literature.[103] Next, I look at how this body of work on settler decolonization poses a number of challenges to even the resuscitated, repoliticized human rights made (in theory) to the measure of the world. The aim here is to test this 'best version' of human rights discourse against the specificities of settler decolonial requirements.

Decolonization in/and Settler States

In "Decolonization Is Not a Metaphor" (2012), Eve Tuck and K. Wayne Yang argue that the "metaphorization of decolonization" makes possible a number of "settler moves to innocence" that attempt to "rescue settler futurity" (1). Folding 'decolonization' into other civil and human rights-based projects is a kind of inclusion that "domesticates decolonization," foreclosing it such that it merely "recapitulates dominant theories of social change" (3). Once

[102] Andrea Smith usefully links Audra Simpson's ethnographic refusal with Justine Smith's notion "of Indigenous texts as aporetic texts," identifying the ways Simpson "serves to decenter whiteness and the white gaze from her project" and the way this articulates with Eduardo Glissant's argument that "the project of deoclonziation includes insisting on the right *not* to be known"—in his words, "we demand the right to obscurity" (2014: 213). That is, Smith draws out the connection between textual/methodological aporia and the requirements of decolonization.
[103] This survey is not intended to be comprehensive, but rather aims for being representative by drawing on work in legal, rhetorical-discursive, historical, and philosophical registers. This intends to communicate the breadth of issues crucial to consider in a decolonial politics.

this is done, settler moves to innocence—positionings "that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege" (10)—become easily accessible as settlers invoke civil and human rights projects as/in place of decolonization: "decolonization is stillborn…already completed by the consciousness of the settler" (17). This "absorption of decolonization" is an attempt by the settler to "escape or contain the unbearable searchlight of complicity" (9). Against this tendency, they insist that decolonization "doesn't have a synonym" (3): it is "not a swappable term for other things we want to do to improve our societies" (3). Given this non-translatability of decolonization, they suggest that we need to look at what is *irreconcilable* and *incommensurable* between these differing projects in settler colonial settings in order to 'unsettle' settler innocence (4). When incommensurability is acknowledged, settlers will see that social justice or human rights projects are not ways for them to get "off the hook from the hard, unsettling work of decolonization" (4). What *will* this work look like? We cannot know exactly. Decolonization will "take a different shape" in differing colonial contexts, such that past postcolonial theories of decolonization "that ignore settler colonialism" and its concern with "land/water/air/subterranean earth," will not help us (5); for "empire, settlement, and internal colony have no spatial separation" in the settler context, making it "a site of contradictory decolonial desires" (7). When decolonization is turned into "an empty signifier" used for any liberatory project, settlers are able to "equivocate these contradictory decolonial desires" (28), and ultimately advance a settler future. The contradictory desires have most often to do with the fact that, in settler contexts, decolonization "must involve the repatriation of land" (7), placing this in tension with projects that want justice *on* the land or for it to be distributed more equally. Tuck and Yang's "ethic of incommensurability," therefore, "recognizes what is distinct, what is sovereign for project(s) of decolonization in relation to

human and civil rights based social justice projects" (28). The use of these latter projects, then, "can only ever be strategic and contingent collaborations" (28):

> An ethic of incommensurability, which guides moves that unsettle innocence, stands in contrast to aims of reconciliation, which motivate settler moves to innocence. Reconciliation is about rescuing settler normalcy, about rescuing a settler future. Reconciliation is concerned with questions of *what will decolonization look like?*...Incommensurability acknowledges that these questions need not, and perhaps cannot, be answered in order for decolonization to exist as a framework. (35)

Whatever decolonization might look like, it does not look like settler projects of social justice—including those of reconciliation—that protect and validate settler futurity.

Settler moves to innocence, however, cannot entirely save settlers from anxiety about their future or legitimacy. In "Unsettling Expectations: (Un)certainty, Settler States of Feeling, Law, and Decolonization" (2014), Eva Mackey analyses settler anxieties and uncertainty about loss of land: "[l]and rights, if not 'legally captured' within a land rights agreement, are seen as making property uncertain and are therefore threatening to economic development and 'capital and state sovereignty'" (236).[104] Such uncertainty "disrupts longstanding 'settled expectations' of entitlement" and leads to anger, suggesting that "settlers and the settler nation-state did, or believed it did, have certain and settled entitlement to the land taken from Indigenous peoples" (239). Thus, even though land-rights and 'self-government' agreements "are designed precisely to avoid uncertainty and threats to settler futures"—by employing an "assimilative logic of incorporation into existing power structures"—"they are often, in the public imagination, perceived as embodying a myriad of catastrophic and unpredictable risks and dangers to existing…political and economic arrangements" (239).[105] These reactions form what Mackey calls, following Mark Rifkin (borrowing from Raymond Williams), settler structures of feeling,

[104] These conclusions are drawn from her study of the land rights case of the Caldwell First Nation in what is known as Ontario, Canada, and opposition to this agreement by the Chatham-Kent Community Network.
[105] This parallels the reaction of governments against Indigenous rights internationally, which in effect buttress state power in construction while admonishing states rhetorically.

which "draw on and reproduce…the pivotal settler colonial and national assumption: that the Crown always already had and continues to have superior underlying title to Indigenous lands" (240). Such structures of feeling have a long genealogy tied to a related concept of certainty in property: "[t]he property-based concepts of terra nullius, doctrine of discovery, state of nature, and the practices that emerged from them, were and are mobilized to legitimize and defend settler fantasies and expectations of certainty" (243). These fantasies and 'settled expectations' then require law "to be transformed into material certainties" (243).[106] What she calls 'settler certainty' is first *assumed*—as earned and true—and then "defended through law" (246). 'Fantasies of entitlement' become over time "naturalized and self-evident," inscribed in law, and then reproduced in the material world (238); "epistemologies," after all, "have material consequences" (Simpson and Smith 2014: 4). Thus, the crucial question for Mackey becomes: "What might this normalization of certainty mean for decolonization?" (249). She concludes that a first step towards decolonization would be "denaturalizing settler beliefs…based on supposedly self-evident certainties about the primacy of settler-state sovereignty" (249). Thus, "settler *uncertainty* may actually be necessary for decolonization" (249, emphasis added), especially when placed against the *certainty* of Indigenous communities about their existence as sovereign nations, as Simpson's work explores (2014). Facilitating settler uncertainty involves unsettling settler common sense: "[o]nly a newly acquired capacity to make an unmarked 'settler common sense' visible can sustain genuinely decolonizing efforts" (Veracini 2015: 8). Yet this is only a first step, for like Tuck and Yang, Mackey is careful to note that "[a]s a 'tangible unknown'

[106] Mackey elaborates on this dynamic in relation to the Royal Proclamation of 1763, which "created, structured, and protected Crown fantasies of certain entitlement to future title through establishment of a jurisdictional imaginary that may have recognized, but also encompassed, the sovereignties of Indigenous nations" (244). Courts interpret "the wording of the Royal Proclamation 'not as signalling recognition of pre-existing claims' but instead as a 'granting of rights to pre-treaty Indians' to use and occupy lands reserved for them by the Crown. The difference between recognizing pre-existing rights and 'granting' temporary rights lies in transferring superior power to the Crown" (244).

decolonization cannot be pre-visioned; it cannot be certain" (249). Embracing the discomfort of this uncertainty is the task of the settler committed to decolonization, involving "a principled, historically aware stance of self-conscious refusal to mobilize axiomatic knowledge and action that have emerged from settler entitlement and certainty" (250). And it is self-consciousness that settler/settled expectations—structured through the law—try to prevent.

However, Leslie Thielen-Wilson, also working in the Canadian context, shows that the law will not give up easily in the fight for settler legitimacy. Thielen-Wilson's "Troubling the Path to Decolonization: Indian Residential School Case Law, Genocide, and Settler Illegitimacy" (2014) critically reads Indian Residential School (IRS) case law to uncover the Government of Canada's tactics of self-legitimation as it fought against 'loss of culture' from becoming an actionable tort (182).[107] If loss of culture became actionable, a strong case could be made that the IRS constitute an act of genocide on behalf of the Government of Canada[108]—cultural loss, IRS, land claims, and settler legitimacy are all discursively and legally intertwined in the Canadian context. Making a case for genocide, suggests Thielen-Wilson, would run the risk of exposing the *illegitimacy* of Canada's claim to sovereignty over its current lands.[109] To avoid this, the Government tried to delink the documented sexual abuse (actionable) from cultural loss, so that the arguments for genocide would lose legal merit. To do this, Government lawyers worked to *dehumanize* the Indigenous claimants. Such dehumanization has a long pedigree, given that

[107] Historical background to the Indian Residential School system can be found in two histories: J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (1996), and John Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (1999).

[108] For an account of actual legal claims arguing that in international legal terms—using the UN Genocide Convention—the IRS contribute to a charge of genocide (if the non-retroactivity principle did not apply), see David B. MacDonald and Graham Hudson, "The Genocide Question and Indian Residential Schools in Canada" (2012: 427–49).

[109] "Settler illegitimacy is more difficult to conceal when tethered to the unquestionably dishonourable behaviour of attempted genocide. The emphasis on cultural loss in IRS litigation thereby threatens to reveal not only past human rights violations, but the ongoing illegitimacy of settler sovereignty and occupation" (Thielen-Wilson 2014: 185). This was likely one reason the Government settled with the claimants of *Blackwater v Plint* (1996-2005) in the form of the IRS Settlement in 2006-2007.

settler colonialism was justified through a European idea of property, "rooted in the influential ideology of possessive individualism," by labeling those who did not hold such a view as "lack[ing] this capacity for self-possession" and as therefore "less than fully human and in need of a rational mind (or minds) to control, possess, and improve their bodies for them" (185-186). This history of dehumanization rears its head in IRS case law, where

> Indigenous survivors (of attempted genocide) are portrayed as perpetual children or as angry, vengeful, and irrational adults. They are portrayed as incapable of controlling their addictions and sexual urges and as inclined toward sexual violence. They are said to inherit low intelligence and to be biologically and culturally damaged collectives, both prior to and after their IRS experience. (186)

These 'faults' are grafted onto claims of "recall bias" and "credibility" deficit (189). Dehumanized in this way—"deemed incapable of asserting that their bodily integrity was unjustly violated"—they are "denied the experiential knowledge they claim for their own bodies" and so their ability to "vouch for historic sexual assault" (190). Like in Mackey's account, wider settler 'understandings' of Indigenous peoples and life influence all areas of legal reasoning, such that, if individual accounts of sexual assault cannot be trusted, "[t]he settler presumes that the collective memory of Indigenous people is even less reliable with regard to experiences (such as the signing of treaties or land and resource agreements) passed down to them through generations" (190). 'Culture' and claims to its continuity are read alongside individual assertions of 'damaged' individuals, delegitimizing *community* claims to land in the eyes of the settler/law, which says that "dysfunctional people cannot be awarded stewardship of land" (193). Dian Million (2013), similarly, notes the way human rights discourses of trauma and healing are linked to self-determination:

> Healing from trauma begins to be narrated as a prerequisite to self-determination. If the Indigenous don't heal, they may not be able to self-govern…This healing would occur while capitalist development might still displace one or require one's land—a little like

> accepting being bandaged by your armed assailant while he is still ransacking your house. (105-106)

Ultimately, then, severing "the sexual assaults committed within the IRS system from the cultural violence (across generations) committed through" that system, is to "obscure the connection between IRS genocide and land seized and occupied through dishonourable means" (194). What this history reveals, for Thielen-Wilson, is the deep problem of "the role of settler law in decolonization" (184).[110] As such, decolonization requires

> that settlers address the violence not only of genocide, but also of Canada's mere assertion of sovereignty over Indigenous nations and the ongoing violence of settlers' own (uninvited and unauthorized) physical occupation of Indigenous lands. (196-197)

This will require settlers to "challenge the arrogant assumption (and law) that we legitimately belong on Indigenous land" (197).[111]

Like Mackey and Thielen-Wilson, Michael Asch writes as a settler scholar hoping to unsettle the Government of Canada's asserted sovereign legitimacy over the territory it claims.[112] These scholars are taking up Mahmood Mamdani's observation that "[w]hat is exceptional about America, [or Canada], is that it has yet to pose the question of decolonization in the public sphere" (2015: 608). Through a discussion of jurisdictional authority and sovereign priority,

[110] Contrast this account to Niezen (2013): "Efforts to overcome the legacy of residential schools…reflect a shift in the consensual foundations of the state. The expectation that the state should act as a responsible moral actor is the most basic and compelling…The public dynamics of human rights accountability are central to this personification of the state" (39).

[111] Augustine Park (2015) moves from the unsettling of formal settler law to the decolonizing of the settler populations mind through transitional justice (TJ) mechanisms for IRS. Acknowledging the well-earned critiques of TJ, Park argues (drawing from Judith Butler) that such mechanisms can be decolonized if they are able to mobilise a politics of grief. This would mean recognizing Indigenous lives as grievable (countering the ideational precepts of settler colonailism's logic of elimination), and then, as the natural corollary to this, moving from the affective to actually "undoing the precarity to which Indigenous life is exposed" (287) in the form of structural and material change. Park's approach to a TJ that might aid decolonial politics is for it to have "the potential to challenge settlers to challenge settler colonialism" (290).

[112] Alongside these three scholars should also be considered Shiri Pasternak's "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014). Pasternak writes from settler colonial studies and critical legal geography to focus on decolonizing law through a deconstruction of the idea of jurisdiction—rather than sovereignty or territory, the usual terms of settler colonial critique—to interrogate "the specific forms of struggle that arise when competing forms of law are asserted over a common space" (146). Acknowledging Indigenous peoples' jurisdiction challenges Canadian law's claim to being the only legal order and so "reveal[s] the unfinished project of perfecting settler colonial sovereignty claims" (147).

Asch raises this question explicitly in *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (2014). Asch tries to navigate a path between two facts: Indigenous temporal priority and legitimacy, and the fact that settlers are likely 'here to stay'.[113] Ultimately, he turns to historical treaties because they "encourage Settlers to see the legitimacy of their settlement on these lands as linked to the fact that they gained permission to settle on them from people who had the authority to grant such permission" (6). In many cases, no legislation exists "that specifically extinguished these rights" and so they must be "presumed to remain in force" (15), and thus so too must Indigenous sovereignty.[114] Yet, to successfully make land settlement agreements, Canadian courts have decided that "an Indigenous party must agree to exchange whatever rights derive from their pre-existence as societies for financial compensation and state recognition of specified rights" (21). Thus, says Asch, throughout its history, the Government of Canada has asserted that it "alone had the final legislative authority with respect to the exercise of Indigenous rights" and that, "even if Indigenous peoples had a right to self-determination at one time, the fact that they found themselves within Canada was sufficient to have these rights extinguished" (22). Because Indigenous temporal priority destabilizes Canada's sovereignty (the burden of justification rightfully being on Canada, not Indigenous peoples), Asch sees treaties as a way to legitimate settlers 'being here'. Mobilizing treaties in this way would involve Canada fulfilling their spirit and intent at the time they were drafted, in an act of radical literalism of *intent* rather than *text*—suggesting that we assume both parties in these treaties actually meant

[113] Asch notes the that "the fact that, at the end of the day, whatever rights [First Nations] may have are subordinated to the legislative authority of the Canadian state," "logically ought not to be the case, if for no other reason than that the political rights of Indigenous peoples already existed at the time that Crown sovereignty was asserted and, therefore, it is the question of how the Crown gained sovereignty that requires reconciliation with the pre-existence of Indigenous societies and not the other way around" (2014: 11).

[114] As Kevin Brunyeel explains, "[b]ecause a treaty is a document codifying an agreement between sovereign governments, the recognition of a tribe's treaty rights is also recognition of the tribe's sovereignty, in some form" (2007: xi).

what they said.[115] If self-determination claims go to Canada's highest court, says Asch, a ruling in favour of them would simply be stymied by a vastly larger settler population unwilling for the words of nine individuals to have such consequences (72). Focusing on treaties allows Asch to sell to a settler population that their 'being here to stay' is not necessarily affected by accepting that there were prior peoples living on these same lands in accepted political societies (72). This is a limited (though Asch might say 'realistic') degree of settler uncertainty. I include Asch in this section because he provides a careful accounting, as Scott Kouri (2015) says, of a "concessionary approach toward decolonization" by accepting that "real power rests in the hands of the majority of Canadians" and that "such a majoritarian population will deny arguments based on temporal priority due to the implications they bring about" (138). While I agree with Kouri that this is ultimately "unacceptable from a decolonizing perspective" (138), it is nevertheless motivated by a belief that "the United Nations Declaration on De-Colonization applies to Indigenous peoples who find themselves within Canada" (Asch 2014: 5) and the complications that arise from such a position.[116] Further, taking these early treaties in a resolutely literal way might recall, as Gary Wilder writes, "Adorno's insight about the revolutionary efficacy of a 'literallness' that 'explodes [an object] by taking it more exactly at its word than it does itself,' an approach we might call the politics of radical literalism" (2015: 7). Wilder is writing about how Aimé Césaire and Léopold Senghor took the idea of colonialism literally, assuming their polity to be inextricably a part of 'France' and so able to make claims upon it; the paternalistic rhetoric of France, when taken literally, threatened to explode that nation itself,

[115] Settler colonial studies would have difficulty accepting his argument that the Crown acted 'in good faith' to implement the spirit and intent of the treaties, as this would seem to contradict what that body of scholarship has been at pains to prove is the eliminatory logic of settler states.

[116] More problematically, Asch seems to want to delegitimize the state, but not the *settler population*, constituting a possible settler move to innocence. This might not meet the 'ethics of incommensurability' that Tuck and Yang develop, given its investment in settler futurity and therefore metaphorisation of decolonization. His project is inarguably more in the vein of reconciliation than repatriation; closer to some kind of mutual recognition than of rejection or refusal.

destabilize the idea of it, and reconstitute it in a new formation. So while Asch's argument could go in the direction of 'business as usual', he ultimately suggests, in a related vein to Wilder, that "to implement these treaties we need first to conceptualize how to form a relationship that falls outside the range of possibilities offered to us in contemporary political thought" (Asch 2014: 7). Asch thus should be seen as interested in decolonization through unsettling settler claims to sovereignty, but also in limiting how far settler uncertainty should extend.

Moving now from the realm of the settler, Glen Coulthard, in his chapter on Fanon and decolonization in *Red Skin, White Masks* (2014), explores Sartre and Fanon's use of the Hegelian dialectic to think through the role of self-recognition and affirmation in decolonial politics. Following from Hegel, Sartre sees recognition as "forever mired in a power struggle" as each side of the equation objectifies the other (making them objects of their gaze) in order to reclaim their own self-conception and freedom. For those who have been degraded and who cannot reverse or return the gaze—like the Jew living in the grip of anti-Semitism—the options are either to pass as non-Jewish and so act *inauthentically*, or to affirm his or her Jewish identity and so act *authentically* (134-135). However, this choice will be limited in its effects "given that anti-Semitism is a *socially constituted* phenomenon": "while authenticity may serve as an important means through which to work over the individualized effects of objectification, on its own it will do little to undercut the *social relations* constitutive of anti-Semitism as such" (136). Self-affirmation, living authentically, is not the ultimate answer. This is why, in the case of the colonial context, Sartre sees "negritude as a transitional phase in a dialectical move from the particularity of identity politics to the universality of class struggle" (138-139). Any politics of difference are, in Sartre's reading, necessarily folded into a "struggle against capitalist exploitation" and so do not stand as an end in themselves (139). Fanon, like Sartre, sees

intersubjective recognition as "ultimately objectifying and alienating" (139), and also, like Sartre, thinks self-affirmation alone will not alter a structural context. Given this predicament, Coulthard asks, "what forms of decolonial praxis must one individually and collectively undertake to subvert the interplay between structure and subjectivity that sustain colonial relations over time" (140)? Though important, Negritude only addressed one side of this interplay, inadvertently "displac[ing] or downplay[ing] contemporary questions of colonial political economy by focusing too narrowly on revaluing the historical achievements of colonized cultures and societies" (143). So self-affirmation, through movements like Negritude, only "represents a potential source of empowerment for colonized populations suffering the effects of internalized racism" if it is able to "motivate praxis that is attentive to the structural as well as the subjective features of colonial rule" (144). Fanon and Sartre see such identity politics thus "as an important means to achieving anticolonial struggle, but not an end to the struggle itself" (144).[117] Coulthard's critique of this position is that, because Fanon saw the self-affirmation of Negritude as merely a *transitional phase* in the march towards freedom, "he was less willing to explore the role that critically revitalized traditions might play in the (re)construction of decolonized Indigenous nations" (148). In certain contexts, cultural revitalization/resurgence and structural change cannot be thought of quite so separately. As such, Coulthard posits "the substantive relationship forged between self-affirmative practices of cultural regeneration and decolonization by theorists and activists of Indigenous *resurgence* working in the settler-colonial context of Canada" (133).[118] Thus, for Coulthard, self-

[117] Of course, Fanon does makes a distinction between cultural self-affirmation occurring among colonized elites and as occurring organically among the population as a whole; when the latter occurs, self-affirmation is more likely to lead to structural change (Coulthard 2014: 147).

[118] Coulthard's position is similar to that of Mohawk scholar Taiaiake Alfred (who penned the preface to his book) in various publications over the course of 20 years. A succinct and recent account of his views on the importance of culture can be found in "Cultural Strength: Restoring the Place of Indigenous Knowledge in Practice and Policy" (2015).

recognition/affirmation *involves* direct action that accounts for structures of power—cultural resurgence does not occur in a vacuum, but rather always contains an account of material context. His call to Indigenous communities, then,

> demands that we begin to collectively redirect our struggles *away* from a politics that seek to attain a conciliatory form of settler-state recognition for Indigenous nations towards a *resurgent politics of recognition* premised on self-actualization, direct action, and the resurgence of cultural practices that are attentive to the subjective and structural composition of settler-colonial power. (2014: 24)

This call articulates with Audra Simpson's notion of a politics of refusal and the "possibilities that this [orientation] structures: subject formation, but also politics and resurgent histories," the possibility of "identification and identity within and against recognition" (2014: 106-107). While Mackey, Thielen-Wilson, and Asch analyze how settler legitimacy might be unsettled (and the obstacles to this), Coulthard, Simpson, and others take up the question, implicitly or explicitly, of what might be required of Indigenous communities to live meaningful non-colonial lives.

These scholars are attentive to the multitude of contextual factors that any move to decolonization would have to navigate—settler affective formations (Mackey), the racialization of law (Thielen-Wison), settler moves to innocence (Tuck and Yang), and hegemonic political formations like constitutionalism (Asch) or the recognition paradigm (Coulthard). Throughout the history of decolonial thought, numerous other thinkers have contended with similar contextual assemblages, and it is instructive to consider the historical lessons offered by their philosophical enquiries into world-making. To take one example, Gary Wilder, in *Freedom Time: Negritude, Decolonization, and the Future of the World* (2015), has challenged what he calls the 'methodological nationalism' of work on decolonization—the assumption that decolonisation, for those working towards it, always already meant national liberation. Really, he

says, we should be asking how historical power made one to seem the necessary counterpart of the other (4). As Susan Pedersen writes in her history of the Mandates:

> In April 1946…The wind of self-determination was at gale force, and [leaders of the former empires] bent before it. In the way of politicians everywhere, they rewrote the past to accommodate the present, suggesting that state-building had been the purpose of the mandates system all along…Thus was the League subsumed into a genealogy that would credit enlightened European internationalism with the extension to all men of that Hegelian destiny: the construction of the state as the achievement of national freedom. If this book has convinced you of nothing else, I hope it has shown how profoundly this causal narrative misreads history. (2015: 402)

Any account that takes national liberation in the form of the nation-state as the ultimate horizon of decolonial action is helping to sustain this 'Hegelian destiny'.[119] However, looking carefully at the intent of the Negritude theorists reframes assumptions about what they thought possible or necessary. After all, decolonization provided people with the opportunity to remake the world. What Wilder finds, in fact, is a tradition of thinking about self-determination *without* state sovereignty (2015: 1). *Practically*, for many of these thinkers, 'delinking' from the imperial power was not possible, and formal independence would not dissolve the thick connections and dependencies that remained between metropole and colony. And, *conceptually*, because imperialism and nationalism arose so much in tandem and to each other's benefit, decolonization *as* national liberation might be more of an inversion of colonial power than the dismantling of colonial power itself. A non-national orientation to politics would work towards undoing the knot between 'national identity' and 'nationalism-in-the-form-of-a-vindication-of-sovereignty'.

[119] Lisa Lowe usefully explains the connection between such a destiny and the delimiting of 'the political' it brings about: both Hegel and Marx "conceived politics in relation to a universal humanity that may be apprehended through a particular set of normative categories, unities, and teleologies, and posited the transparency and harmony of the realized state, whether bourgeois or communist…Thus, despite Marx's materialist critique of the abstraction of Hegelian idealism, both imply differently the necessity of universality overcoming particularity. Historically, this has often entailed the necessity of repressive, normative means to achieve common purposes and to maintain ethical resolution, forestalling the elaboration of processes marked by colonial difference and heterogeneity" (2015: 148). This is the broad intellectual context; Wilder adds the specifics, arguing that at the time of decolonization, "the converging pressures of anticolonial nationalism, European neocolonialism, American globalism, and UN internationalism made it appear to be a foregone conclusion that the postwar world would be organized around territorial national states" (2015: 1).

Europe will not be provincialized so long as the European form of the state is how the world is ordered.[120]

While history ultimately went in the direction of national independence movements, the point of revisiting these early accounts of world-making is that they teach us to resist a too-soon acceptance of whatever criteria might be on the table for evaluating decolonial success. In the nascent or chaotic moments of a struggle, it is simply too soon to tell what direction should or will be pursued. In *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (2014), Alexander Weheliye, writing about the pain of racial subjection, asks

> whether there exists freedom (not necessarily as a commonsensically positive category, but as a way to think what it makes possible) in this pain that most definitely cannot be reduced to mere recognition based on the alleviation of injury or redressed by the laws of the liberal state, and if said freedom might lead to other forms of emancipation, which can be imagined but not (yet) described. (14-15)

Similarly, in the context of slave politics in 19th century America, Saidiya Hartman turns away from "traditional political activity" like abolitionism, suffrage, and the like, and instead looks to "everyday practices," the pedestrian activities that "illuminate inchoate and utopian expressions of freedom that are not and perhaps cannot be actualized elsewhere" and that "exceed the frame of civil rights and political emancipation…primarily because they express an understanding or imagination of freedom quite at odds with bourgeois expectations" (1997: 13). What expectations are decolonial thinkers invited to have in different contexts, and how might we follow Tuck and Yang, Wilder, Weheliye, and Hartman in resisting the pull to define these?

[120] Wilder's book calls for both a provincializing and deprovincializing move: provincializing national liberation as the only necessary outcome of decolonization, and deprovincializing the theorizing about world-making engaged in by the Negritude thinkers as a legitimate and productive attempt to rethink the world. Audra Simpson and Andrea Smith articulate something similar to this second move with relation to Native communities and 'theory' in their introduction to *Theorizing Native Studies* (2014: 7).

The Decolonial Limit of 'Politicised' Human Rights

> "Indian sovereignty is real; it is not a moral language game or a matter to be debated in ahistorical terms. It is what they have; it is what…they have left; and thus it should be upheld and understood robustly"
>
> — Audra Simpson, "Settlement's Secret" (2011), 211

This section has tried to outline some characteristics of settler decolonization, without stating them as clear expectations. Yet, we can still offer a provisional account of what it might involve: settler (uncertainty) and Indigenous (self-affirmation), material change (land restitution), and aporia (a future form not to be known until it arrives); it has potential processes (denaturalizing settler certainty) and obstacles (law's racialised violence); it speaks to the everyday 'infrapolitics' of contextualized Indigenous cultural life and the conceptions and traditions of world-making they contain. Given this theoretically rich settler decolonial discourse, how useful does the hypothetically re-politicised human rights described above seem? I identify a number of limits, suggesting that repoliticized human rights: affirm a *global* (rather than local) 'Indigenous' identity without changing structural conditions; figure a form of political contestation that does not adequately take into account power imbalances inherent in that contest; and invest in settler certainty by employing a form of political dialogue recognizable within and no danger to the liberal (settler) state. These arguments amount to one primary limitation: even the politicized version of human rights *implicitly* presumes a specific political for(u)m—the liberal, democratic tradition—as the necessary condition for such repoliticising to occur, its political-discursive condition of possibility.

First, human rights discourse affirms a 'global Indigenous identity', but remains ill-suited to actualizing the ultimate goal of decolonization described by Coulthard: material change. Because the oppression of subjected groups—such as the Jew, or for Fanon the racialized

other—is *socially constituted*, authenticity becomes a way to challenge objectification on the individual level, but is less effective at undercutting the "*social relations* constitutive" of such anti-Semitism or racism (2014: 136). We might say that the international human rights regime has facilitated self-affirmation. Indeed, Niezen (2003) argues that self-recognition *as Indigenous* occurred at the international level through human rights mechanisms, which was where a global 'Indigenous' identity was largely forged (2003). However, following Coulthard, *this* self-recognition does not work towards decolonization for two reasons. First, forging a *new* global identity is a very different thing than the self-recognition of an existing identity that was degraded; dialectically producing newness (as Fanon advocates) is not the same as *resurgence* (as Coulthard advocates). Rather, Niezen's global Indigenous identity is fundamentally based on recognition by 'international organizations' (not self or community), in the international sphere, and in the context of seeking protection. To recognize oneself as 'Indigenous', generally, is something else than the self-affirmative self-recognition as Bororo or Inuit or Moken living in the grip of (settler) colonialism. Second, such self-affirmation at the global level has not substantially changed the material conditions that necessitated the formation of that identity.[121] For instance, the focus on the right to culture[122] articulates an important protection (of cultural life) without addressing the structures endangering cultural life in the first place (settler colonialism or neoliberalism, for instance).[123] Thus when Coulthard writes that Negritude

[121] For example, Moyn shows the limited ability of human rights to alter the global neoliberal economic order that wrecks so much devastation on Indigenous ways of life (2014c).

[122] Whole books are devoted to advocating for the use of the right to culture, UN Article 27, as a key tool for advancing the interests of Indigenous peoples in international human rights law; see Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (2007).

[123] Here it is important to acknowledge Coulthard's intervention that, "insofar as Indigenous cultural claims always involve demands for a more equitable distribution of land, political power, and economic resources, the left-materialist claim regarding the displacement of economic concerns by cultural ones is misplaced when applied to settler-colonial contexts" (Coulthard 2014a: 19). However, I suggest that the kind of claims to cultural resurgence that Coulthard is referencing here differ from the 'protection' of culture paradigm in UN human rights parlance that holds a rarefied, narrow idea of cultural practice that would not extend to the expansive claims Coulthard advocates for 'culture'.

downplayed "questions of colonial political economy by focusing too narrowly on revaluing the historical achievements of colonized cultures and societies" (2014: 143), this resonates remarkably with the focus on culture and its survival in international Indigenous (and human) rights discourse.

Would a radically repoliticized human rights be able to avoid this pitfall and instead help facilitate meaningful self-affirmation? I do not think it would, for two reasons. First, even politicized human rights would have difficulty *sustaining* a multitude of local identities in place of the umbrella idea of 'Indigeneity', which was developed to participate in human rights mechanisms. The 'contestation' required for settler decolonization is between relatively small peoples and relatively large, powerful settler states, meaning that this power imbalance will encourage these small groups to form a larger, more encompassing identity/voice so that they may participate in agonistic struggle at all—which is what happens in the story of Indigenous identity at the UN told by Niezen. Given the forums that exist for the new agonistic human rights to take root, the generalized identity would be difficult to abandon. Second, accounts of politicized human rights do not consider how easily the 'voice' it gives the local community can be co-opted by what Corntassel, as already noted, calls "a cadre of professionalized Indigenous delegates who demonstrate more allegiance to the UN system than to their own communities" (2007: 161). Watson and Venne make a similar point:

> The simplistic project of gaining political space without indigenous content is as meaningless as replacing the white mission managers with our own mob, while the policies continue. The interpretation of decolonization as an act of populating white political space with Aboriginal people as managers of that white political space is not an act of decolonization. It is rather a turn in the colonial project which enables at best Aboriginal self-management of the colonial project. (2012: 88)

The distance between Indigenous communities and those within them who already speak the language of 'International human rights' might mirror that between the colonial elites Fanon did

not have faith in and the grassroots population he knew needed self-affirmation to work towards decolonization.[124] As Saba Mahmood has warned us, "the very notions of agency and political action under consideration here often rely on the model of the liberal political subject as their telos" (quoted in Manfredi 2013: 23-24). We must consider the kinds of subjects implied by political processes without being forced to adopt either liberal or illiberal positionalities. Ultimately, the connection between self-affirming identity and structural change that Coulthard sees as crucial for decolonization would be a serious challenge to the identity politics that currently operate in the international system and to which the new politicized human rights do not seem to offer an alternative.

Second, and relatedly, the contestation that occurs through this new political human rights will not result in norms fit to the task of decolonization because it does not account for (and rather under-theorizes) the power imbalances that will determine such a process. Whatever norms pertaining to or useful for the decolonization struggles of Indigenous peoples in settler contexts that develop will have a hard time achieving international support. Matthew Wildcat, citing Martha Finnemore and Kathryn Sikkink's influential work on international norm dynamics (1998), points out that their

> [r]esearch on human rights has shown that norms are more likely to be influential in world politics if the norm can be simply expressed. This presents a challenge in settler colonial situations where multiple forms of oppression are entangled with each other and the fabric of society. (Wildcat 2015: 408, note 21)[125]

[124] Coulthard, as already mentioned, critiques Sartre and Fanon by suggesting a closer, subtler "substantive relationship" between cultural self-determination and political action/life in the case of Indigenous communities in settler colonial contexts. Fanon's concern that (racial/cultural) self-affirmation will not translate into material action is based on the fact that such self-affirmation was often the purview of colonized elites rather than the wider population; Coulthard, however, sees this concern as less legitimate in the case of First Nations communities in Canada, where there do exist the conditions for such self-affirmation.

[125] This observation is related to the question of the extent to which international relations theory (the language of norm construction and contestation) can itself be decolonized. As Pearcey notes, "although a number of IR theories—postcolonial theory in particular—have tried to advance the process of decolonizing IR, the degree to which more orthodox traditions…can rectify the state- and Eurocentric foundations upon which they have been built remains an open question. How far can the English School go in rectifying its account of the expansion of international society before it becomes unrecognizable?" (2015: 452).

Thus human rights or social justice norm evolution will naturally lend itself, for instance, more to anti-racist (Black Lives Matter) or anti-capitalist (Occupy Wall Street) movements than to ideas of settler decolonization that might destabilize or call into question the objectives of such movements.[126] Tuck and Yang noted that decolonization is fraught in settler contexts because "empire, settlement, and internal colony have no spatial separation" and thus we find the simultaneous expression of "contradictory decolonial desires" (2012: 7). Contrary to the complexity of these emancipatory desires, the value of human rights "as a guide to complex arenas of meaning," say Conor Gearty and Costas Douzinas,

> depends in part on an overly simple approach to the subject…rights talk has become an easy and simple way of describing complex historical, social and political situations, a type of 'cognitive mapping' and the main tool of identity politics. (2014: 7)

If the human rights regime gives power and reach to those norms that are easily expressed because of the constitution of international society and international relations—and there is no reason to think a more openly political human rights existing in this same international society will operate any differently in this regard—it does not seem likely that genuine decolonial norms will advance very far. The new human rights merely broaden the populations contributing to norm construction without positing any change in the political-discursive structure or process by/in which this occurs.[127] This means that both global identities (a broad 'Indigeneity') and specific norms that were encouraged by the formations and structures of power governing the *old*

[126] Adam J. Barker, analyses the tensions between Occupy and Indigenous peoples, arguing that settler colonialism is a useful analytic for understanding these tensions. See, "Already Occupied: Indigenous Peoples, Settler Colonialism and the Occupy Movements in North America" (2012). On race, Jodi A. Byrd notes that in Native or Indigenous Studies, 'sovereignty', methodologically, "serves as the means to render indigenous peoples visible within and against the discourses of racial inclusion and the adjudication of liberal multiculturalism" (2014b: 133).

[127] Charles Beitz glosses Martti Koskenniemi's important observation that "when we combine an awareness of the openness of legal rules to contrasting interpretations with an understanding of the prevailing differences in political power among states, we come to see that engagement in controversy about international law's requirements can be a 'hegemonic technique'—a process of 'articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which the are made.' The idea is that actors seek to advance their interests by proposing advantageous interpretations of legal rules and principles for the resolution of conflicts" (2009: 211).

human rights will likely continue on into the new human rights.

This is where James Tully's philosophical project, most recently presented in *Public Philosophy in a New Key* (2008), becomes important. Tully offers a rich account of the deeply imperial character of the modern global system, but also a vision for how to democratize the norm creation that gave rise to it. If Mouffe, Hopgood, Moyn and Golder want human rights to develop through political contestation, Tully wants to ask *how* we develop forums for the communication of worldviews that account for present disparities of power and histories of oppression. While Tully is not writing specifically about human rights, his enquiry aligns closely with the work of human rights repoliticizers, especially in their mutual concern with the question: how do we develop norms for governing the world that are truly democratic, open-ended, and accountable? Previous attempts have been shortsighted, Tully suggests, because the very language describing the global order occludes a number of its imperial features (143). This is the language of a metanarrative going back to Kant, for whom imperialism is a "necessary stage in the development of the human species towards the end-state of a world system of European-style states bound together by global economic relations and international law" (146). This narrative continues today through the work of people like Francis Fukuyama, who merely tweak the story, so that progress is more dialectical, sovereignty more differential, and universalism more open to deliberation (151). These changes bring Kantian imperialism in line with contemporary informal imperialism. The metanarrative further leads us to overlook many non-imperial features of the present, such that we miss "the legal, political and economic pluralism that has *not* been reconstituted by Western imperialism but continues to exist in the day-to-day lives of millions of people" (164). Imperialism, he says, has not so fully made the world over (164). As such, we need to enter into a "difficult kind of dialogue" with these other

"languages and practices" to form "non-imperial relationships of…mutual understanding" (165).[128] But currently, the space for national democratic communicative action occurs through a constitutional democratic system that is itself imperial: some version of constitutional democracy is spread across the globe through the 'imperial right', whereby Indigenous peoples who resist and defend their constitutional forms violate the duty of hospitality, and can be coercively brought in line—through colonial occupation, indirect rule, or free trade imperialism—with the 'conditions' of trade and civilization (210). This was achieved primarily through the construction of modern international law in the nineteenth century (212), the centerpiece of which was the 'standard of civilization', and the endpoint of which was constitutional democracy (213). Spreading this political form through democratization projects is essentially "'legalized hegemony' over the nominally sovereign yet substantively subalternised former colonies" (216).[129] How can constitutional democracy be de-imperialised? We need to "work to bring the basic constitutional and constituent structures…under the participatory shared authority of those who are subject to them" (217). To do this we need to exploit and expand the existing field of "direct participatory freedom…within and against the constitutional forms to which the governed are now subject…at the very sites where these unjustly constrain their ability to exercise shared authority" (217). Imperialism, remember, has not completely destroyed non-Western legal and political orders (219). This existing political pluralism thus must be "brought into critical dialogues within and over different forms of organizing authority" (219-220). Examples, for Tully, include cooperatives rather than corporations, fair trade rather than free trade, local democracy, deep ecology, and mutual aid. Associated with these practices is what he calls

[128] Such opportunities "for democratic communicative action exist…wherever we communicate" (190), because the seeming deterministic technological processes "imposed on us from above and to which we must submit" actually are based on and extend from "everyday communicative activities" (191). One example he gives is NGOs.
[129] See, especially, Tully's chapter on "The imperial roles of modern constitutional democracy" (2008: 195-221) for a detailed account of the rise, diffusion and imperial nature of this political form.

'glocal citizenship', the ideal orientation for the individual in this world. Both globalization and citizenship are contested languages and activities, but are also "not everywhere circumscribed by rules" (245). It is possible to extend them in new directions. This 'pragmatic linguistic freedom' is related to the practical freedom and improvisation possible within the "inherited relations of power" that his project charts (245).

I produce this lengthy account of Tully's argument because his impressive project is the most nuanced and rigorous attempt to think a more expansive, politicized international relationship for colonized peoples.[130] Yet a number of questions remain. First, how do we think Tully's explicitly non-violent anti-imperialism alongside Fanon's explicitly violent anti-imperialism? Can empire be dismantled dialogically? Tully's anti-imperial normative development scheme might have constructive potential, but is less convincing as a means by which to decolonize current colonial relationships. Second, Tully's project seems to hinge on an analogy between the inherent linguistic freedom Wittgenstein describes in an analysis of the indeterminacy of rule-following, and the extra-linguistic freedom of improvisation within relations of power. But, and this is also a question for Golder and Hopgood, is the play of language and the play of power close enough for this to be convincing? Third, and most seriously, "how can we distinguish forms of contestation that *modify* an imperial relationship—leaving the underlying structures intact—from one that transforms it?" (Ivison 2011: 134-135). For Tully, transforming an imperial relationship involves bringing it under the democratic authority of those subject to those relations of power. However, given the pervasive and deeply embedded nature of imperialism he describes, how will such democratic inclusion avoid the

[130] For a full and wide-ranging discussion of Tully's project, see the "Feature Symposium: Reading James Tully, 'Public Philosophy in a New Key' (Vols. I & II)" in *Political Theory* 39, no. 1 (2011). The symposium features contributions from Anthony Simon Laden, Rainer Forst, David Armitage, Duncan Ivison, Bonnie Honig, and a response from Tully.

liberal techniques of inclusion in / recognition by an *existing* imperial power? In other words, what does success look like for Tully, and how do we know we are on the right track?

This digression through Tully helps us see how the 'repoliticization scholars' employ a sleight of hand: human rights have always been 'political', just in a context of massive power imbalances that allowed them to be claimed as universal.[131] As Bonnie Honig observes, "[t]hat Tully's reasonableness is part of and not an alternative to power politics is a point to which he is not adequately attuned given his agonism" (2011: 139). Will simply naming human rights as what they have always been (political) change the material conditions that have shaped them? The attempts cited above try to take *some* of the universalism out of human rights by, as Tully does, "vivif[ying] an agonistic humanism" (Honig 2010: 660)—but what does this leave us with that is unique? And, if the human rights regime has always been political (though it dare not admit it) why go this route if it has had little success? What is so special about the *language* or *idea* of human rights that it must be salvaged? Frederick Cooper reminds us that,

> [t]he notion of 'rights' is not the only way of doing politics, but it is an important one precisely because the articulation of a right is the making of a transcendent claim, going beyond the give-and-take of a particular political situation…It puts claims in terms both of law and of a vision of social order in which opposed parties might see a long-term interest…Struggles over rights imply a notion of politics that is not reduced to the play of interests or to expressions of identification of putative collectivities. (2012: 474)

In the standard account, the authority of human rights discourse lies in the fact that it links universal moral imperatives to international law, which buttresses the jurisdictional claims of national laws meant to implement these moral norms. If Human Rights (capitalized) is a decidedly liberal universalist creed, then to take the universalism out of it, to make it just one

[131] Consider here Anthony Pagden's observation about early traditions of (human) rights: "[d]espite the attempt by both the Thomists and the modern natural-law theorists to detach the basic elements of the natural law, and thus natural right, from purely local political and social arrangements—from, that is, politics—politics always crept back in. Only the claim that there existed an omnipotent deity who had decreed that his creation possessed certain transcultural and immutable rights could ensure that those rights remained unaltered by the histories of the creature who possessed them. Neither the Thomist nor the modern natural law theorists were prepared to take such an extremely voluntarist stance. [P]recisely the same predicament faces modern human rights theorists" (2015: 250).

more language game of politics, should make us curious (and concerned) about why we call this human rights at all. The burden of these repoliticized human rights that want to retain the name 'human rights' is to explain the benefit of this retention. This they have not done. Critiquing writing on human rights during the era of decolonization, Moyn describes how "[i]n a powerful body of historiography, tales are told of seizures from below of the formal universalisms of dominant peoples, classes, and nations, and presented simply as the realization of their original, truncated forms" (2012: 160-161). Repoliticized human rights facilitate the formation of a similar narrative, but simply by making the 'formal universalism' more informal and diffuse. It seems to me, then, that these calls to bring human rights down into the thicket of political contestation are as much about the *re-enchantment* of human rights (as the protector of the humanist international, in Hopgood's language), as about making them useful for real-world structural change. Redescribing them as a language game (the Wittgensteinian move at least overtly acknowledged by Tully but implicit for the others) remains unsatisfying given the robust critique of their complicity or ineffectualness thus far in changing anything about the world, and given that current Indigenous claims to sovereignty are not "a moral language game" (Simpson 2011: 211), but statements of material and lived realities.

Politicization, as I have argued, implies both political subjectivities (global indigeneity) and political processes (asymmetrical norm construction) that continue the tradition of how human rights have always (politically) operated. This, then, leads to a third limitation: politicized human rights remains invested in settler (state) certainty, encouraging settler futurity, by couching its political language in a liberal idiom familiar and unthreatening to settler polities. This is not merely to point out that the settler community retains a seat at the table in the politicized human rights outlined above, but rather that it does so as an equally legitimate actor

with far more power acting on its own discursive soil (though, physically, on someone else's soil). The juxtaposition of these repoliticized human rights against their 'Liberal Echoes' at the beginning of this chapter should give some sense of how comfortable liberal political thinkers and institutions would be in the world of this 'new' human rights. The various settler moves to innocence described by Tuck and Yang are "about imagining an Indian past and a settler future" whereas "tribal sovereignty has provided for an Indigenous present and various Indigenous intellectuals theorize decolonization as Native futures without a settler state" (2012: 13). Human rights might become a language used to argue about justice, but as it stands the norms it invokes to do so are inscribed in documents such as the UNDRIP, the final article of which states, in part, that "[n]othing in this Declaration may be…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" (Article 26.1).[132] Indeed, Moyn notes human rights have been steadfast to this system their entire history: "[n]ever at any point were they primarily understood as breaking fundamentally with the world of states that the United Nations brought together" (2014a: 75), but rather the UDHR "emerged as an afterthought to the fundamentals of world government it did nothing to affect" (77). If Mackey insists that a first step towards decolonization is embracing settler uncertainty, the framework that the human rights regime has built does not seem a promising avenue. Especially because, contrary to producing uncertainty, human rights now are about bolstering a certain image of national identity, as I described in Chapter 1. The whole language of the human rights system—wherein states, as duty-bearers, are required to 'respect, protect, and fulfill' the rights of various rights-holders, such as Indigenous

[132] Further, as Edmund Fawcett notes, "Article 21 [of the UDHR] stipulated the kind of legal and political arrangements needed for people to be able to exercise the preceding ones: 'The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures"; and, "[t]aken together and at their word, articles 21 to 27 proclaimed a universal right to liberal democracy with a strong 'social' cast" (2014: 292).

peoples—rests on settler certainty. It is precisely when a state is *uncertain*—'rouge' or 'failed'—that international human rights norms/law permit the qualification of its sovereignty in the name of protecting human rights, whereas when a state is 'democratically legitimate' and advancing human rights norms, when its life as a state seems 'certain', that human rights are powerless to intrude upon it.

This is a critique of the human rights system as it stands today, but my claim is that the new human rights will be no more able to facilitate uncertainty. This new human rights, while interested in letting alternative visions speak and argue for their validity, does not appear to hold a deconstructive program—that is, while all the thinkers described above advocate for a newly political human rights practice, none argue for abandoning the normative or institutional framework advanced by the past/failed human rights regime (except, hesitantly, Moyn), which seems a necessary corollary to the utility of a new pluralized/politicized human rights. Hegemonic human rights discourse will not be provincialized so long as the current institutions and the legal framework through which it is ordered remain intact. Human rights—banking on the state, buttressing it, worrying over its soul—contributes to the perpetuation of this ordering, rather than the unsettling of it. However, without this order, what makes human rights unique? The utility of human rights is the way that it links the requirements of 'humanness' (minimum standards for its protection) to 'right' (something to be filled by some entity with the power and obligation to do so) in a state system where international law and strong civil societies can (attempt to) ensure this. Making this language more the tool of downtrodden peoples than the cosmopolitical international order does not remove the founding logic of a rights-holder using the language to claim the right form a duty-bearer.

* * *

> "[R]adical dissent today constantly faces the danger of getting organized into a standardized form. It begins to borrow from the dominant worldview to sustain itself, to reach out to the mainstream, to model itself on the previously successful and popular…to somehow attain respectability within the present global culture"
>
> — Ashis Nandy (1989: 264-265)

In his history of 'Indigenism' Ronald Niezen asserts that "[l]iberation from the various forms of oppression imposed upon indigenous peoples *could not become a political objective* until the idea of indigenous peoples had itself gained currency," and that "[t]his occurred through developments in international law" (2003: 217, emphasis added). The law to which Niezen refers is international human rights law; as such, he is claiming that without the human rights framework Indigenous liberation *could not become a political objective*. This is precisely the kind of claim that subsumes complex, historically and culturally-grounded political manoeuvres and grammars within a structuring optic that always-already sees counter-hegemonic claims as speaking in the language of human rights to an international community of states; it is the 'standardized form', in the words of Ashis Nandy, that always tries to conscript radical dissent and which such dissent must resist. What is clear from Niezen's statement, is that even if we take human rights to be an agonistic political struggle between divers actors, the objective is still to tussle over the norms of a language designed to speak to an international community configured in certain relations of power, to be audible within a political optic that determines respectability and legibility. What is missed when this is taken as the best version of international political contestation we can hope for? I take three examples from what is called Canada.

First, an account of political life as agonistic dialogue between communities appealing for international attention, would miss the complex political gestures and understandings of

Anishinaabe anticlearcutting activism in Kakipitatapitmok (or 'Slant Lake'), as explored by Anna J. Willow (2011). The first thing to note about this example is that 'human rights' are nowhere to be found as a political grammar. The second thing to note is that "as a kind of relationship between a group of people and an inhabited environment" (263) it speaks more to "political ecological" imperatives (262) than cosmopolitical universalisms. Here we see a landscape "politically constituted" through a complex relation of cultural life and settler impositions upon it. Willow thus "locate[s] Anishinaabe anticlearcutting activists' efforts to assert and enact their sovereignty within a political landscape they create at the confluence of land-based subsistence and environmental change, colonial history, and treaty-guaranteed rights" (263). To read it otherwise is to 'clearcut' a very rich thicket of political meaning and intention by homogenizing the Anishinaabe as a culture 'in contestation' or 'in dialogue' with a hegemonic actor in the name of accruing moral capital internationally. But as Willow writes: "sovereignty stands for the power to imagine the forms their landscape has taken in the past and will take in the future; it stands for the imperative ability to apply one's own cultural categories and frameworks to the daily decisions that shape how one looks and lives on the land" (271). The dialogue here is within a community and between that community and the land with which it has a relationship of care.

Second, Gordon Christie, writing about Inuit sovereignty, asks: "[h]ow is it that arguments and debates around the opening up of the Arctic all seem to function within a form of discourse that assumes the sovereign authority of Canada and the other Arctic nation-states?" (2011: 331). Christie cites the "prior 'cultural' activity (that is…the mechanisms of decision making at play at this time, in this place)" as crucial to the devastating effects of "second-stage colonization" (332). That is, for Christie, the language we use matters because of what it makes

understandable and also acceptable: "[i]t is within these mechanisms that certain symbolic preconditions of deliberation operate—these are the larger forms of understanding through which are made understandable the sorts of thinking processes that ultimately lead to certain forms of action" (332). Christie notes that "certain linguistic elements do not simply instrumentally assist in the formation of plans and strategies, rather, they serve to define a range of possible plans and strategies" (332). One of these is 'sovereignty':

> Quietly residing in the background, it provides a certain kind of conceptual structure to be applied to the very acts of investigation, assessment, and planning. Not only are certain parties simply assumed to be vested with the proper authority in making decisions that will affect all those who live in the Arctic, but how these parties think and act are assumed to be the only vehicles or mechanisms by which legitimate actions are first imagined and then instantiated. Here forms of language and action outcomes are linked together in a way that seems to preclude the sensibility of other ways of thinking and acting. (332)

'Sovereignty', as "a key element in a story being woven by nation-states," needs to be brought to a level "where story meets story and where the Inuit challenge the notion that this magical term can unreflectively act to channel all thinking about action in relation to the Arctic" (334). So while the UN might be one channel by which to "mitigate the impact" of resource exploitation and other ills (337), it is merely one of the many "cognizable challenges [to oppression] understandable only within the sovereignty model" (339).[133] Against this, Christie suggests that "entirely distinct strategies are available—strategies of resistance that do not work within the stories told by others" (337). These stories exist because of the Inuit's status "as separate meaning-generating communities, living within other larger narrative structures they create" (340):[134] meeting story with story is a key form of resistance, because it means

[133] "Imagination itself is constrained within this model—our plans and strategies can reach out only this far. Are there really no other sensible ways that the sovereign claims of a nation-state might be challenged?" (Christie 2011: 339).

[134] "In this universe, stories did not exist embedded in larger understandings of 'territorial integrity' and 'sovereign authority over land' but rather within accounts of land and people interrelations predicated on concepts of responsibility and respect" (Christie 2011: 341).

> the Inuit can tell stories about their relationships to the land, water, and animals as alternate stories about how decision-making processes should be understood, about how humans should go about deciding how to act in relation to land, water, and animals; and they can relate these stories back to the power they enjoy in relation to their stories, a power that encompasses not only authority over telling and retelling but also the power of critical reflection, modification, and world adjustment. (342)

Again, this is not a dialogue that a agonistic human rights would successfully encompass given its story about how political communities are meant to engage in contestation, and to what ends.

Finally, we should consider how such a political project operating under the strategies of a different story strikes far more terror in the heart of the settler colonial project that the human rights claims so easily co-opted or ignored. Andrew Crosby and Jeffrey Monaghan, for instance, analyse Canadian government responses the blockades of the Algonquin of Barriere Lake (ABL) to reveal "the place of (in)security governance techniques within the eliminatory project of settler governmentality" (423). Indigenous activism that does not speak the language of liberal dialog (that are not 'respectable') are "framed by policing and security agencies as matters of 'national security'" and responded to by "stigmatizing the ABL community as backwards and mired in criminality" to rationalize its interventions (423). In this case, the actions taken "progressed from financial manipulation and legal manoeuvring, to deposing the customary chief, to the eventual replacement of the traditional leadership-selection process by forcing a dubious band election process under the Indian Act" (428). Considered under the auspices of counter-terrorism, "the ABL were subject to a host of surveillance and policing strategies aimed at monitoring, isolating and neutralizing 'extremist' elements of resistance" (428). Part of the power of the ABL actions is the fact that they are part of continuing, centuries-long resistance to settler encroachment on their land, with "their efforts dating back to at least 1613 when they denied the French access to the Canadian interior via the Ottawa River" (428). Such resistance comes in the face of the Government's actions: delegitimizing traditional leadership, breaking

with the trilateral agreement and instead suggesting comprehensive land claims processes that would extinguish native title, placing finances under third-party management, actions which also have a long genealogy. As Crosby and Monaghan write: "As a function of the settler post-colonial imagination, the reactivation of colonial lawfar—such as Section 74 of the Indian Act—is less an anachronism than a reminder of the continuity of settler governmentality" (433). The conduct of the ABL is "viewed as hostile to the project of settlement and expansion" (433) in a way that, as this thesis has tried to show, human rights mechanisms *are not*. These are examples where dissent has not been 'organized into a standardized form' as Nandy warns.

* * *

The argument of this chapter is that the three limitations described above, together, reveal the repoliticized human rights attempting to 'save' the discourse's emancipatory potential fail to meet the criteria for settler decolonization because it, implicitly, presumes a specific political for(u)m—a liberal, democratic (settler) state—as the condition for its possible existence in reality. The liberal language employed in Section I about difference and dialogue, culture and contestation, the arduous conversations rooted in emotional attachments to place and tradition, has a powerful rhetorical pull; but we must remember that these concepts of pluralism, multiculturalism, and validation of difference are always already thought of as existing in the liberal state (the 'Hegelian destiny')—where difference and differing political perspectives are accounted for so as to be managed in the name of protecting the legitimacy and reality of that political formation.[135] As Duncan Bell writes,

> The history of liberalism…is a history of constant reinvention. The most sweeping of these occurred in the middle of the twentieth century, when…it came to denote virtually

[135] As a practical example of this, consider again the Canadian Human Rights Museum's response to *A Tribe Called Red*'s decision to pull out of the opening ceremony concert, already cited above: "We know that building dialogue and earning trust is a long-term process, and we hope this will again be an opportunity for respectful conversation on issues that historically haven't been easy to talk about" (MacNeil 2014).

> all non-totalitarian forms of politics as well as a partisan political perspective within societies. (2014: 705)

Even a reworked human rights, one that becomes the language through which plural societies engage in cultural jousts, is already understood to exist in a liberal setting. The card-carrying Liberal, Michael Ignatieff, after all, whose vision of a minimal, political human rights is hard to distinguish from Chantal Mouffe's 'agonistic' human rights, is described by Jeanne Morefield as using "the confrontation with illiberalism…as an opportunity to stage precisely the qualities he believes are so essential to liberal society" (2014: 196) such as robust internal debates. These debates and the 'tragic choices' they necessitate are a key way in which the liberal 'character' of states allows them to claim an expansive acceptance of difference while acting 'illiberally' against difference's imposition. And, as argued in Chapter 2 and as Aziz Rana's *The Two Faces of American Freedom* demonstrates, when these liberal states are settler colonial states, this makes the colonial status quo seem legitimate because it contains the normative-communicative-linguistic tools (through human rights discourse and democratic institutions) for future change—even if this change always comes in the form of *inclusion* within a state's understanding of citizenship, not a contestation of the set-up of global governance that defines the terms of nation, citizenship, and sovereignty in ways that have historically brought about the attempted (though never entirely successful) elimination of Indigenous peoples. If the settler empire/state can claim to be able to encompass difference because of its internal constitution, so too can liberal political theory claim to encompass the agonistic contestations demanded by the human rights repoliticizers. The folding-within manoeuvre of both settler states and liberal political theory are mutually-supporting and co-constituting: settler colonial states are liberal democratic states.

This is the constructive aspect of a liberal settler state project. But settler states also, as we know, have an eliminatory project—part of this, I argue, is eliminating from view certain

visions of political life and counter-hegemonic action. Human rights is a tool such a state uses to do this. As Charles R. Beitz argues, "one function of [human rights] norms is to organize disagreement," such that "agents accept a certain normative discipline by availing themselves of the resources of the practice of human rights" (2009: 210-212). In the politicized human rights, this function of organizing disagreement contains precepts echoing a liberal international order. As such, "we must," says Wendy Brown,

> take account of that which rights discourse does not avow about itself. It is a politics and it organizes political space, often with the aim of monopolizing it. It also stands as a critique of dissonant political projects, converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well. (2004: 461)

To organize disagreement, to organize political space, means to cordon off some versions of disagreement and political space in favour of other versions.[136] Anthony Pagden provides a valuable intellectual history of how this happened, and how this dynamic continues to this day with regards to (human) rights. He argues that natural law (in which we see elements of human rights) and civil law (which was opposed to natural law) essentially dissolve into one concept with the "inclusion of the right to property" (251) in the *Déclaration des droits de l'homme et du citoyen* (1789), making the social contract a necessary backdrop to all rights thinking. This "elision" of natural law and what came to be civil and political law "becomes more emphatic" in the French tradition over time, such that the "Rights of Man" "were those which could only be held in society and, furthermore, only in a society of a particular kind: republican, democratic, and representative" (252). At this stage, such rights were understood by the slave population of Saint Dominque to offer "the possibility of freedom from colonial rule," but by 1848 "they had

[136] This is not merely a theoretical assertion or warning. Remember, for instance, Corntassel's notions of blunting—when "an Indigenous political agenda is shifted and altered to fit the dominant norms of existing institutional structures"—and channelling—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" (2007: 140).

been transformed into a specific set of political entitlements, rights which could only be held by citizens of a particular state" (252). So without "truly trans- or international agencies" these rights "became increasingly useless as a notion of international or intercultural relations" (252). Indeed, for liberals, "one could only speak of rights within what had come to be called a civilization" (252): "The distinction between nature and society, between the rights a person might hold as an individual, and those he or she might hold as member of a given community…had now collapsed altogether" (252). This singular vision of civilization in the form of a specific political community came to be questioned at the close of WWII because of "the atrocities which had been committed in its name" and the disintegration of the formal European empires. It became apparent, argues Pagden, that "[w]hat was needed was a new consensus. The Universal Declaration of Human Rights of 1948 was clearly intended to provide this" (253). We thus see a dynamic emerge by which the idea of human rights, when it comes under fire for being complicit or incomplete, works towards a new consensus. This is because, Pagden notes, human rights, "implicitly in the case of most modern human rights claims," (and explicitly in the prior Kantian cosmopolitical variant), "can only be properly realized in a specific political order" (255):

> Amy Gutman may be right in insisting that 'human rights should not be conceived as guarantors of social justice, or for comprehensive conceptions of a good life', but it is hard to see how they could be formulated, *or be given any real imaginative force*, in the absence of any such conception, however minimally expressed. (255, emphasis added)

Pagden's contribution here is to show that the very power of human rights stems, in part, from the vision of political life that they help sustain, and in which they make sense, because it was a conception to hold up against others. Human rights as a mere process of discussion, unconsolidated, as *the forum in which* conceptions of the good life are agonistically engaged, is unattractive as an emancipatory idiom because human rights represent (or used to) one such

conception. In short: human rights require a consensus about the political world in which they make sense; history suggests the 'agonistic' (anti-consensus) vision of human rights advocated by the repoliticizers might be theoretically incoherent and historically unlikely.

The deeper limitation of this reworked political human rights, then, is that it purports to democratize political contestation while simultaneously playing into a neo-Kantian narrative of perpetual peace: contestation will be messy, but it will be hashed out on a shared discursive ground where cultures speak to one another on a necessary progression to a shared understanding of at least the *forum* in which this is possible—a liberal-democratic one. This is the reason why these attempts to remake human rights cannot be squared with settler decolonization: they focus on human rights as a discursive construct, a language-game for declaring outrage to those who might do something about it, neglecting the ways in which that construct *only makes sense within* certain governance systems and understandings of political life—systems that have wrecked havoc for certain peoples, Indigenous peoples, over the course of five centuries and continue to do so today. These theories trying to rework human rights to make it 'political' amount to making it democratically legitimate, and so *universally legible*, on a global scale within a broad frame of liberal pluralist thinking. This does little to make human rights anything other than 'business as usual'. What has come to be accepted as 'politics' in liberal settler states, I have shown, is eliminatory, and so 're-politicizing' human rights will not do much good if the form of politics it takes is one consonant with the liberal tradition described above. Take Golder's provocative assertions, describing Foucault, as an example:

> He expresses his political interventions via the liberal idiom of rights, but perverts and 'performative[ly] undermine[es]' them in the process. Here we must observe that Foucault's critique of liberalism is neither a simple opposition to nor a rejection of liberalism, *but rather a contrary inhabiting of it*, a destabilizing 'counterinvestment' which works within and against it. (2015: 21, emphasis added)

As Chapter 1 demonstrated, the self-exceptionalism of international Indigenous rights discourse (and its unique claims to the self-determination norm) presents itself precisely as such a 'contrary inhabiting' of both human rights and the liberal settler state. We saw multiple commentators suggest that working within a rights tradition can alter that system, destabilize, or 'counterinvest' it—but the fact remains that this started in the 1970s, and by now, when human rights power is said to be waning, it still has not proffered the material results called for by Coulthard as necessary for decolonization. What good is a 'counterinvestment' in international human rights that settler states happily endorse because it in no way threatens their sovereign legitimacy?

While human rights is attentive to and makes apparent difference, as against the "state's project of homogenizing heterogeneity" (Simpson 2014: 18), it nonetheless does so in a way that structures the visibility of that difference in a frame that only makes sense within the liberal political order. As scholars like Hartman and Wilder show, the contestations that need to happen at historically key moments are those over the *meaning* of organizing terms like freedom, emancipation, sovereignty; these are true 'contestations', not liberal ones about inviting groups to a table already set with the meal ordered. When Golder's Foucault "views the attainment and enforcement of these rights not as normative ends in themselves, but rather as part of an ongoing and often diffuse struggle conducted on a number of different fronts" (2015: 24) we should be suspicious. Is this possible for human rights, which have a normative end always in sight even if obscured by a purported pluralist outlook? The way we have conversations implies a set of normative conditions which themselves imply ends. The conceit that this conversation can happen without normative content is a dangerous one, for it invokes the idea of making human rights political over that of invoking prior/anterior political visions against this framework. Without such anterior visions of political process and life, practitioners of the new human rights

will risk becoming, as Reinhold Niebuhr once said of past advocates of liberalism, "bland fanatics of Western civilisation…who regard the highly contingent achievements of our culture as the final form and norm of human existence" (quoted in Mishra 2015).

The limitations discussed in this section, then, lead to a tentative conclusion: decolonization requires an extension of the political imagination beyond the parameters set in the world organization as it exists, something which even a newly politicized human rights is constitutively unable to do given its investment in a kind of political contestation that has been imagined out of and only makes sense in relation to liberal democratic contexts. Rather than thinking *outside* the confines of contemporary political thought, what the 'repoliticization' thesis amounts to is a folding of human rights *within* the confines of the most banal and commonplace contemporary political thought: Western liberal democracy. Contrary to this, the most interesting thinkers grappling with Indigenous governance and settler decolonization agree on one point: change necessitates thinking beyond (even if *from* within) the political possibilities of the liberal state. Refusing false choices, says Kevin Brunyeel in *The Third Space of Sovereignty* (2007), "requires a decolonization of our spatial imaginations to reveal forms of political space that cannot simply be mapped onto the boundary lines of the international state system" (222). Even Asch, who we saw might make a settler move to innocence in his commitment to settler futurity, ultimately asserts that to move forward "we need first to conceptualize how to form a relationship that falls outside the range of possibilities offered to us in contemporary political thought" (2014: 7). Audra Simpson's work, likewise, commits to being "deeply mindful of the range of possibilities available for political life" (2014: 106-107). When we think about life and the conditions for life (rather than social, physical, cultural, or political death) do we think of a world that is made and done, or do we, in the style of the Negritude thinkers, see challenge,

irony, bitterness, and struggle as a comment on and example of a world not fully made, one always in development? This might sound wistful, but it does not have to be fanciful: Brunyeel suggests that

> the third space may…prove of worth as a conceptualization of antistatist autonomy that can be an alternative to the polar imaginaries that either see state sovereignty as the unavoidably exclusive font of legitimate political space or postulate a political world in which we have somehow moved beyond state sovereignty altogether. (2007: 222)

In the vein of Wilder, Brunyeel does not settle for an either/or scenario, but develops a situated concept that explodes the terms that had previously set the limits of political imagination.[137] The work advocating for the repoliticisation of human rights, differently, does not constitute examples of what Drucilla Cornell, in a discussion of the work of Gayatri Spivak, calls "refusing the confines of political realism" (2010: 113)—precisely because their prescription that everything *be* political actually amounts merely to a description that everything *is* political, a singularly banal claim. Decolonisation, unlike human rights, aims to be circumstance-altering, and so imbibes freely of *the aspirational*—"bearing the strictly groundless character of a hoping and wishing that is either at odds with its ambient circumstance or that seeks to be circumstance-altering" (Gandhi 2014: 165). Except, as Brunyeel and Coulthard and Simpson show, in the case of Indigenous communities such an orientation is essentially grounded and responsive to its ambient circumstances even as it works to be circumstance-altering. The idea explored in the next section is that refusing human rights is one way to also refuse the 'confines of political realism' as it is presented in the normative political languages and optics of the settler state.

[137] From the field of IR theory, we could look to the creative thinking of David Chandler, who develops a critique of 'neoliberal constraints on governance' through the idea of *resilience* (2014a, 2014b), which argues (by way of philosophical pragmatism) for a commitment to using the tools or material conditions of local cultures as they exist and working from there to find contingent solutions rather than looking to external neo-Kantian provisions or frameworks.

III. (Ref)Using Human Rights: A Decolonial Enquiry

> "It doesn't matter if this human rights infrastructure is largely ineffective; it is now the only show in town. Indigenism both challenges and uses this paradigm."
>
> — Dian Million, *Therapeutic Nations*, 73

> "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, and it will behoove us to inspect, evaluate, and judge it as such."
>
> — Wendy Brown, "The Most We Can Hope For…", 453

Using Human Rights

Dian Million accepts that Indigenous cultures "have been harnessed by the biopolitical state in the service of managing [their] health and well-being at the community level"—but, she adds, "that could never be the whole story" (2013: 166). The interesting question of what Indigenous peoples can turn to when they want to oppose the states occupying their lands often invites two options: the international community (for instance, human rights mechanisms), or the local 'culture' (for instance, through acts of refusal). What scholars like Million show, however, is that there is a third way that understands those spaces as complexly intertwined. So the question of what it means to have faith in human rights is a complicated one that involves puzzling through questions such as how internationalism relates to political possibilities *within* and *against* states. For instance, the 'healing' discourse propagated by human rights that seems so at odds with 'real change' (whatever that might look like) reflected, Million shows, a reasoned response to a set of needs:

> *Healing as a concept* gave [Indigenous] individuals and their families not only a language but an actual set of practices that could effect positive change. Thus, *trauma* and *healing* should be acknowledged as part of a language adopted, articulated, and practiced among peoples determined to act on their historical situation. (96)

This is the context in which we should understand why Indigenous peoples "initially saw the [UN] and its human rights agenda as a real alternative to working with the nation-states that continuously harmed them" (126). To the extent that they became the 'subjects' of trauma (or human rights) discourse, they also became 'empowered' by it as they acted on their historical situation (94) in the face of "multiple and conflicting discourses and a huge chronicle of local and international practices" (81).

Million's careful parsing of where, when, and why turning to human rights-motivated discourses of healing made sense should be instructive for any investigation of the complicity of human rights with settler colonialism, because it insists that there is more to the story, and that those who use human rights do so in wily and skeptical and also transformative ways. This requires making vital distinctions, for instance between investments in human rights discourses that distract from material change and those that reflect a considered decision to act on a 'historical situation' because the conditions at hand require it. On a very practical level, we need to acknowledge that groups use such human rights discourse *alongside* other, perhaps grander or more holistic strategies of resistance. As Million puts it:

> Often informed reflexively within UN campaigns for justice, community healing movements, Indigenous spirituality, and Indigenous polity, present self-determination movements are rich with alternative visions and performances that, like life itself, might exceed any neoliberalism that seeks to appropriate it. I gloss this as an Indigenous intense dreaming, because it helps me imagine the conditions under which we might produce our own truths in a so-called postmodern, postcolonial milieu. (2013: 32)

Thus we need to distinguish instances when 'human rights' are used instrumentally to attain discreet ends in a larger project intended to radically recast the state-system (Million), from those that index how Indigenous peoples have to an extent been interpolated into the liberal/dialogic idea of recognition (Coulthard). We will have to distinguish between the UN Indigenous rights

apparatus as a site for what Million calls 'intense dreaming' and the way its mechanisms and assumptions propagate the system against which this intense dreaming is struggling, what it is trying to dream from, out of and beyond. What seems crucial here is that Million is engaging with "the heart and meaning of nation"—"not necessarily the nations called into being by a human-rights will to self-determination, but as the indigenous nations they already understood themselves to be" (124). This is an important observation: human rights cannot call self-determined nations into being, but it might do something to help that which is called into being sustain itself.

For instance, in the face of all these critiques, it is important to note that much in UN human rights discourse is about how to protect the resources of Indigenous peoples so that self-government is more sustainable (so that material conditions are such that state 'support' is not required). This will not 'solve' the problem of the settler state's eliminatory drive, but it might loosen its grip or complicate its tactics. To take one example, the current UN Special Rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, recently produced a significant report "on the impact of international investment and free trade on the human rights of indigenous peoples" (August 2015). The report focuses on a very specific topic, the investor-state dispute settlement mechanisms that are a standard feature of most bi-lateral investment and free trade agreements. Such mechanisms "seek to provide substantive rights to investors that protect against expropriatory, unfair, and discriminatory conduct by States hosting investment projects" (¶13) by allowing "investors to challenge States for perceived violations of their rights" through "binding arbitration mechanisms" (¶15). Free trade and investment agreements, unsurprisingly, usually take the form of 'Global North' investments in large projects in 'Global South' countries, leading to human rights issues including but not limited to land dispossession, environmental

degradation, and poverty (¶20).[138] And disputes, for instance, between communities claiming land rights and companies seeking use of these lands under these dispute settlement mechanisms "are likely to become increasingly common" (¶30) as extractive industries search for new resources. However, Indigenous communities, who often own these lands, have almost no ability to "contribute to the drafting of [these] powerful [international] legal agreements" (¶37). As such, the US, because of its "legal and financial resources" has never lost an investor-State dispute settlement case, and so has never "been required to award compensation" (¶17). Using language one does not always find in UN reports, Tauli-Corpuz thus finds that

> international investment agreements are contributing to the perpetuation of colonial and post-colonial power structures that have caused the systematic racism and discrimination towards, and the marginalization and exploitation of, indigenous peoples. (¶39)

The report, further, is extremely critical of neoliberal development models, especially in their approach to inequality reduction and environmental protection (¶62-64). Interestingly, Tauli-Corpuz also advances a critique of the 'lack of coherence within international law', showing how the dispute settlement system operates via unequal standards, affording binding 'treaty' law protections and enforcement mechanisms for foreign investors, while the rules and responsibilities for private actors (such as Indigenous communities) only exist in 'soft' law, undermining their judiciability and enforcement (¶45).[139] If Indigenous groups were given more than soft law protections, the fear is that it would produce a 'chilling effect' whereby international investors would not want to risk doing business with states with large Indigenous

[138] When Global South states are required to pay huge sums when they (almost inevitably) lose these investor settlement dispute cases, it means they will have even fewer resources to fulfill their international legal obligations to Indigenous communities that exist within their stated territory, or to pay such groups what they are awarded when they are victorious in various actions against the state in national court (¶42).

[139] The largely bi-lateral international investment and free trade law regimes and the largely customary human and Indigenous rights standards have "developed as…separate strand[s] of international law." Because of the already existing lack of transparency in the former, policymakers and legislators have a difficult time gaining "a systemic picture of international investment and free trade regimes and their effect on human and indigenous peoples' rights" (¶65).

populations. The report, then, demonstrates convincingly the need for greater "transparency, social dialogue and legislative oversight during the negotiation and drafting process of international investment agreements" (¶53) that includes all the communities affected. As the field of 'Business and Human Rights' becomes more prominent, states will have increasing motivation to work the protection of Indigenous interests into the fabric of these agreements from the beginning to avoid the messy dispute settlement cases and the bad PR they bring.[140] While the report is clear to stress that the road ahead will not be an easy one, it has the great merit of advancing a thoroughly holistic critique of large, structural global issues (neocolonial power formations, international legal incoherence, and neoliberalism), while focusing on one very specific aspect of this picture to think about how it might be made susceptible to critique by (so as to incorporate the concerns of) Indigenous peoples.[141]

The question for this report could be: why include this advocacy as part of the human rights framework? If bringing attention to the unfairness of the issue is the main way the report makes specific advocacy and political claims, what is the merit of subsuming it under an international label like the UN's human rights mechanisms? Here we see the wisdom in the observations of Million and Moyn that human rights are what we have to work with now to address pressing problems. At the moment, human rights has the most robust legal, institutional,

[140] In an early article that helpfully presents the history and key aspects of the movement, "The Spotlight and the Bottom Line: How Multinationals Export Human Rights," Debora Spar suggests that, "in a world marked by international media and transnational activism, U.S. multinationals could be—indeed, may already be—a powerful instrument in the pursuit of human rights" (1998: 12). The history of the movement is more comprehensively presented in *Just Business: Multinational Corporations and Human Rights* (2013), by John Gerard Ruggie, who drafted the 'Ruggie Principles'—the main UN business and human rights guidelines used today. For a key, and relatively effective, advocacy tool, see the *Business & Human Rights Resource Centre* website, http://business-humanrights.org/, which tracks business-related human rights cases, compiles reporting on issues, and highlights company practices.

[141] As Gordon Christie observes: "The sovereign authority of nation-states is the assumed backdrop to these sorts of [UN] instruments…This does not imply that resistance of such form is futile or that it cannot improve the lives of [for instance] the Inuit, even in the face of such looming threats. Resource exploitation, increased shipping and travel, and general economic development will continue to push up from the south, and resisting on multiple fronts…will likely mitigate the impact of the changes this will bring about" (2011: 337).

and financial resources for taking on big business and extractive industries—which must be done if territories are to be spared from such exploitation. Moyn might think human rights are a 'powerless companion' to neoliberalism (2014c), but the focused work of Tauli-Corpuz shows it is at least something worth using when there is nothing else better suited to the job.[142] Thus, following Coulthard (2014), we might be able to use human rights to help with the *conditions* for cultural resurgence, but it cannot be the ultimate terms in which the claims (material, political, cultural) are made.

Refusing Human Rights

> "I would suggest, however, that entirely distinct strategies are available—strategies of resistance that do not work within the stories told by others."
> — Gordon Christie, "Indigeneity and Sovereignty in Canada's Far North", 337

At the same time I raise this example of manoeuvre *within* the international system through human rights, I am also making a case for the strategic outright refusal of human rights. As much as human rights may be used strategically, they may also be refused to strategic ends. When Audra Simpson writes of moving Indigenous polities away from "seductive inducements to perform for the state" (2014: 158-159), I think it is also important to think about the seductive inducements of the human rights regime to perform for an international community—whether this is the performance of an identity (global Indigeneity) or the traumatic harms that necessitate claims to justice in human rights frameworks. As Cornellier and Griffiths ask, "[h]ow are we to think indigenous/fourth world decolonization today, in light of this politics of recognition, ostensibly international and yet so reliant on the mediation of settler nation states?" (2015: 3).

[142] Without being overly optimistic, the Indigenous presence at the recent Paris climate talks, and efforts to including language pertaining to Indigenous rights in the draft outcome document, was driven largely by Indigenous groups expressing political views related to the environment, as aided by international human rights organizations. This seems a more fruitful relationship than speaking *through* UN channels.

For instance, Million provides the example of the recognition implied in the trauma paradigm: "to ask for justice for past wrongs the First Nations Peoples would have to fully assume this *victimhood* at the same time they sought political power and autonomy, spheres that speak the very opposite languages" (2013: 81). This is one way in which claims to decolonization (or in this case political autonomy) and human rights-based claims are, for Tuck and Yang, incommensurable, and also a way in which, as Wendy Brown insists, human rights activism "displaces" and "competes with" "other political projects" (453). These other (Indigenous) political projects are 'other' precisely because they are not *invoking* a 'universal' norm so much as critiquing their meanings or legitimacy. Because human rights are always making a claim to something which is deserved (a right), they, in the manner of other political-philosophical organizing schemes such as contract theory, *translate* Indigenous activism "into claims *to*" things such as sovereignty and property, rather than into claims "about the very nature *of*" sovereignty or property (Nichols 2013: 174). Claims *about* self-determination must not be understood as claims *to* self-determination because of the evolution of that norm as explained in Chapter 2. Nichols' observation aligns with Andrea Smith's insistence that we move from a situation where "Native peoples are seen as the containers of truth that must be unveiled" to one where they are "the ones who analyze or determine truths" (2014: 214). Refusing human rights is not merely an oppositional stance for the sake of opposition; rather, it is tied to the articulation of situated understandings of political life.

There is a more theoretical-epistemological reason, as well, for such refusal: to *read a political action as* a human rights claim—as politically oriented towards asking for ones human rights—is to make a claim to knowledge about that individual or community. The human rights system does offer a language that transcends the state, in order to reign down judgments upon

it—seeming, therefore, attractive for those whose primary injury is perpetuated by the state. But, at the same time, as we have seen, to make oneself audible within the human rights framework is to be legible to, interpolated by, a language spoken fluently by the settler state. The knowledge-production apparatus of the UN and human rights reporting is not, then, just about global biopolitical governmentality, but more specifically, in settler colonial settings, about "colonial intelligibility" (Smith 2014: 214). Refusing human rights is thus aligned, to an extent, with Simpson's notion of 'ethnographic refusal', which insists on the right of the Indigenous subject to determine what does and does not need to be known (or for human rights, *advocated for*) in a given situation. Simpson asks: "[d]oes sovereignty matter at the level of method and representation?" and concludes that yes, "[s]overeignty matters…because it speaks from jurisdictional authority: the right to speak and, in this case, to not speak" (2014: 104-105). As we have already seen, there is great importance to unsettling jurisdiction for settler decolonization. I therefore follow Simpson's lead "to think about the juridic and the textual at once and link the notion of jurisdiction over texts to writing" (105). Like the "ethnographic calculus" of choosing what to include in her account of Mohawk political life, what is or is not interpreted as a human rights claim needs to be subject to the 'political-discursive sovereignty' of those making the claim. This is so "not because of the centrality of esoteric and sacred knowledge," but instead because of "the deep context of dispossession, of containment, of a skewed authoritative axis and the ongoing structure of both settler colonialism and its disavowal make writing and analysis a careful, complex instantiation of jurisdiction and authority" (105). My argument, then, is about political optics and the ideological content structured through this, as well as the hermeneutic of suspicion to such an optical regime adopted by those subject to it.

What we see in the rhetoric of the human rights politicizers is an ethics of *engagement*

that takes the fact of engagement as a praiseworthy commitment to pluralist norm-construction. Projects like Tully's contribute to this by suggesting how this can happen on grounds least structured by existing power disparities. And while scholars like Coulthard do acknowledge that engagement of a kind will be necessary, he does not, unlike Dale Turner in *This Is Not a Peace Pipe* (2006), take the question of *how* to engage to be the primary objective of communities. Rather, Coulthard, contra 'engagement' and like Simpson, sees the utility of refusing engagement at tactically strategic points in order to focus instead on self-affirmation. Self-affirmation is a pre-condition for any engagement that will be valuable. For the human rights regime to always-already have interpolated Indigenous peoples into its notion of contestation is to challenge the ability for this self-affirmation to speak as itself rather than in the language of another. Therefore, useful refusals can occur at a number of strategic points. Robert Nichols writes that abandoning "a general definition of 'indigeneity' as provided by contract theory" may be necessary as a first step (2013: 181). While Nichols' suggestion might be controversial, given the effort that has gone into forging an agreed-upon global Indigenous identity, refusing to adopt an identity that was forged in order to speak to international institutions arising out of Western political theory could 'shifts the gaze', as he puts it, from an (international) arena constructed through a normative/ideal theory of political contestation derived from a European intellectual tradition, to one more attuned to the material conditions in need of alteration in the present in specific cultural and territorial locations. Or we might refuse to assimilate Brunyeel's 'third space of soveriengty' "to the institutions and discourse of the modern liberal democratic settler-state and nation" (2007: xvii) or to the human rights regime. Remaking human rights to be 'political' in as capacious and undefined sense as the thinkers described above do, might allow such a human rights to more easily assimilate other claims that come from different traditions; if

the repoliticized human rights is so similar to liberal agonistic democratic discourse, this will make Brunyeel's third space more easily assimilable to the 'institutions and discourse of the modern liberal democratic settler-state and nation'. Thus refusing even the more politicized human rights is strategically crucial for certain ends.

On (In)divisibility and Disaggregation

> "But if there are still other historical possibilities, if progressives have not yet arrived at this degree of fatalism, then we would do well to take the measure of whether and how the centrality of human rights discourse might render those other political possibilities more faint."
>
> — Wendy Brown, "The Most We Can Hope For…", 462

As I have said, I am not interested in 'throwing out' human rights. Instead, I propose a mass act of *disaggregating* what claims—to self-determination or to water or to holding extractive industries accountable—are made in the language of human rights to/through human rights instruments, and which are reserved for the culturally situated political language of resurgent communities. The question becomes: can such disaggregation occur if a cornerstone principle of human rights is that they are understood to be indivisible, interdependent, and interrelated?[143] That is, human rights are mutually reinforcing and form a cohesive, interlocking system of rights and duties. As just one example, Article 6(2) of the 1986 *Declaration on the*

[143] See Daniel J. Whelan's introduction, "Indivisible, Interdependent, and Interrelated Human Rights" (1-10) to *Indivisible Human Rights: A History* (2010). Whelan sets out the history of how this tripartite arrangement came to be, emphasizing how it arose in the 1950s during the drafting of the two Covenants as a way to link their projects and create a whole cloth out of disparate threads. Interestingly, he finds that the rhetoric of indivisibility was used primarily by postcolonial nations in the 1950s, 1960s and 1970s to assert their claims to economic, social, and cultural rights alongside the more 'hardline' civil and political rights in a developing world. For an account of the indivisibility of human rights as this pertains to Indigenous peoples, see Helen Quane, "A Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous Peoples" (2012). Quane looks at how indivisibility both in terms of *implementation* and *content* of rights means a significant overlap between rights afforded to 'peoples' and those afforded to 'minorities', showing that this once important distinction in international law is becoming less and less stable. See also Ernst-Ulrich Petersmann's review of recent literature showing the increased indivisibility of the human rights system in an era of globalization, "On 'Indivisibility' of Human Rights" (2003).

Right to Development states:

> All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights. ("Declaration on the Right to Development")

Given this principle, can human rights be a non-totalizing ideology? Can some rights be claimed by communities that reject other rights? Theoretically, no, because of the liberal individualism at the heart of the project (which will always protect the individual over the community). However, in terms of the activity of human rights organizations, which already pick and choose which issues will earn their attention and resources, this might be possible. These organizations need to ask this question on the institutional level, and the thought-leaders of communities contemplating turning to the human rights system need to ask this on the strategic-political level.

Part of asking this question is to think about whether or not the choice to define something as a human rights issue can rest with the 'subjects' who purportedly hold those rights and whose exercise or enjoyment of those rights are in need of protecting. Can we make the definition of what is or is not to be framed as a human rights issue a matter of sovereign action? This would be to suggest that part of respecting self-determination is an element of respecting 'political language-determination'—as the international community seems to do for IPVI (as discussed in Chapter 2), whose 'isolation' is taken to be enough for human rights organizations not to intervene in their affairs. The idea of 'human rights determination' (the right to determine what is and is not framed as a human rights issue) is one that the field must contend with in order to move forward, allowing groups to enact human rights on terms of their own engagement and decide how human rights are to be utilized or understood. Here the distinction that Tully makes between struggles *of* freedom within a system, and struggles *for* freedom from a system might be

instructive,[144] in that human rights seem to provide a tool for struggles of manoeuvre within liberal political systems but not an escape from them (in the form of settler decolonization). Similarly, this follows the distinction between *making human rights political*—"attempts to modify the techniques of government to gain degrees of self-government and control over some of their territories," (Tully 2000: 38)—and *invoking a prior political visions* against this framework—"direct confrontation with the background structures of domination" (38).[145] Picking which rights work for either of these options is made possible through disaggregating rights and their attendant means of protection/advocacy and linking them to specific political claims. Disaggregation, I argue, should be thought of as a precondition or assistant to refusal. Refusal should not have to be wholesale; but that is the choice that is on offer. Either you sign on to human rights, or you do not; human rights are a sign of modernity, so you are either modern or you are not; in the contemporary global order, being modern means being a cosmopolitan progressive liberal, meaning you are either liberal or you are not. This rests in a centuries-long tradition, as I have already quoted Barbara Arneil as saying: "[f]or the three centuries since the publication of Locke's *Two Treatises*, the choice for non-European peoples has been defined by [the] dichotomy between the state of nature and civil society" (1996: 210). Of course, in the

[144] "First, indigenous peoples' struggle *for* freedom as peoples in resisting the colonial systems as a whole…Second, they exercise their freedom *of* manoeuvre within the system" (2000: 42).

[145] It is also crucial, however, to think critically about what such struggles 'of freedom' within a system will do to a wider political project. For instance, Michael Murphy acknowledges that Indigenous electoral representation will "rarely if ever…deliver an indigenous veto over government policy" (2008: 215), but thinks it might still contribute to self-determination struggles *of* freedom (to use Tully's distinction), even if not *for* freedom. This is because such peoples "continue to be subject to the authority of settler societies and their situations, and it is therefore essential to find ways to shape and mediate the impact of that authority" (216). This follows from the arguments of Manfredi and others that we concede too much of the struggles *of* freedom within remaining structures when we work towards the struggles *for* freedom from those structures. Thus for Murphy, Indigenous communities must "seek to exercise influence simultaneously inside and outside of state institutions" (216). Murphy says that "it is essential that the historic stigma that attaches itself to the notion of electoral representation be removed" (216). But what this risks doing in the field of political optics is dividing representation of Indigenous peoples as those willing to engage the state and those unreasonable, 'dangerous' peoples for whom elections are 'stigmatized'. 'Stigma' is something uncalled for, something unthinking, yet the distrust of electoral representation comes from centuries of understanding settler colonial tactics, as well as long debates within communities. To urge elections as manoeuvre within the system, then, might contribute to that system's understanding of other 'others' as unreasonably adverse to its machinations even though this represents a considered political response.

words of Simpson, "[c]hoices are not choices if they are bestowed rather than self-generated" (2014: 193). Disaggregating the human rights apparatus such that elements may be refused, rather than the whole being thrown out or assented to, would be breaking with this Manichean colonial dichotomy.

The intellectual history I have sketched tries to make this decision more informed, and so agrees with what David Scott that,

> first, the aim is to disclose the contingent conditions of the languages and practices of prevailing regimes of norm and power so as to grasp the varied ways in which problems and their solutions present, and have historically presented, themselves to determinate actors. In the second, the aim is to re-describe these norms and powers in such a way as to enable and encourage those subjected to their rule to envisage possibilities for governing themselves differently. (2014: 102)

My claim in this chapter has been that disclosing the contingent conditions of the prevailing human rights languages and practices, and their attendant visions of decolonization and political order, involves a move also to show how alternatives always have and still do exist to this order. This is why the work of scholars such as Siba N'Zatioula Grovogui (2006), Leela Gandhi (2014), and Gary Wilder (2015), and are so important, because they search the archive for alternative traditions of political thinking to temper the ideological hubris of the liberal democratic Western order, showing that paths were not taken for contingent rather than teleological reasons. This seems to me a necessary first step before being able to use human rights tools instrumentally, to remind the system that such *use* is not *ideological assent*.[146] As Lisa Lowe writes towards the

[146] In *Beyond Eurocentrism and Anarchy: Memories of International Order and Institutions* (2006), Grovogui "proposes formulations of power, interest, ethics, and subjectivity by a group of African intellectuals as plausible alternatives to official French and American postwar proposals for world order." This is a way of provincializing international relations theory, showing that alternatives did (and do) exist to the course that history took. Leela Gandhi, in *The Common Cause: Postcolonial Ethics and the Practice of Democracy, 1900 – 1955* (2014), works towards a similar end, but focuses specifically on democratic thinking. Her project, methodologically, asks about the space we give to imagination and everyday actions in large histories of anticoloniality. Recovering 'occulted strands' of political thinking reframes political history. In particular, she contrasts the moral perfectionism of imperialism, fascism and liberalism with the 'moral imperfectionism' of a set of anticolonial and antifascist thinkers who developed ideas of self-ruination and inconsequence, to develop 'a transnational art of the possible' that

end of *The Intimacies of Four Continents* (2015), her provocative 'world history of liberal thought' that analyses the tangled histories of settler colonialism, slavery, and imperial trade alongside the colonial state:

> The contemporary moment is so replete with assumptions that freedom is made universal through liberal political enfranchisement and the globalization of capitalism that it has become difficult to write or imagine alternative knoweldges, or to act on behalf of alternative projects or ways of being. Within this context, it is necessary to live within but to think beyond this received liberal humanist tradition, and all the while, to imagine a much more complicated set of stories about the emergence of the now, in which what is foreclosed as unknowable is forever saturating the 'what-can-be-known.' We are left with the project of imagining, mourning, and reckoning 'other humanities' within the received genealogy of 'the human'. (175)

However, the comments of Scott on redescribing norms 'to envision possibilities for governing differently' and those of Lowe on 'imagining alternative knoweldges', I want to stress, should be directed at the human rights regime, not Indigenous communities. It is precisely this regime that needs a more complicated set of stories through which to make sense of political action and subjectivity. The whole point of 'resurgent' histories and of acts of refusal are that there already exist knowledges and forms of government here; it is the human rights regime that has trouble seeing them, or taking them seriously. When this regime cannot see them, and so chooses to read their political claims as always-already invocations of human rights, this limits, as I have tried to show, the deeper, decolonizing contestation that is actually occurring. When self-determination, differently, is grounded in histories and self-affirmative cultural practices outside of the purview of normative settler politics, it constitutes a decolonial political claim and action.

This element of reaching for futures past is the positive strain of a deconstructive move, for it destabilizes the given by unveiling its non-teleological, non-hegemonic construction. There

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provincializes the hegemonic forms mentioned above, and deprovincializes these alternative visions as tenable insights for how to order the world. Indeed, as Wilder says, "we now need to be less concerned with unmasking universalisms as covert European particularisms than with challenging the assumption that the universal is European property" (2015: 9-10).

is a second, more direct deconstructive strain, which takes what is given and destabilizes it on its own terms, revealing it to be incoherent, and so only tenuously, precariously hegemonic. The work of Christopher Bracken offers a particularly creative and challenging version of this latter move. In "Reconciliation Romance: A Study in Juridical Theology" (2015), Bracken deconstructs Canadian constitutional case law regarding Aboriginal rights by reading the personification of Canadian sovereignty in that law—the 'Crown' who wields sovereign power *at her pleasure* or *as a duty*—as/through the literary tropes of a romance.[147] Influenced by Jacques Derrida's deconstruction and Hayden White's work anatomizing the genres of historical writing, Bracken's work destabilizes the Canadian state's sovereign assertion(s) by revealing them to be mere language games drawing on the tropes of recognizable genres, making it a mere "name without a think: a signifier with a zero signified" (4). Specifically, 'reconciliation'—of Aboriginal priority and Crown sovereign assertion—"refers not to a legal doctrine but to a place in jurisprudence where a doctrine is needed but none is currently available" (4). Deconstructing the normative-textual apparatus by which the current came to be so (as Bracken does for the settler colonial legal imaginary) seems crucial as a first move, to see what might surge through the space that is opened when human rights no longer occlude whatever else vies for visibility. Along similar lines, Wilder invokes Immanuel Wallerstein's distinction between *re*thinking a situation and *un*thinking "the very categories by which we apprehend such evidence" (2015: 6). The argument of this section is that unthinking present categories through a deconstructive move to help us rethink futures past through a reconstructive move, together, help unsettle the ground of hegemonic, normative political legibility that has been sedimented over centuries of settler

[147] See also Bracken's *The Potlatch Papers: A Colonial Case History* (1997), where he shows how the colonial imaginary needed to invent precisely that which it was determined to destroy—the 'potlatch' tradition and ceremony. Bracken follows the trail of papers used to construct the fiction of the practice so as to use it against First Nations; as such, we again find a series of signifiers with no actual signified.

colonial and liberal internationalist thought.

POST-SCRIPT

Idle No More in the Era of Trudeau 2.0

On October 19, 2015, Justin Trudeau was elected Prime Minister of Canada, leading a majority Liberal government. To say that Trudeau galvanized Canadian progressives with a new sense of hope would be an understatement. After nearly a decade of Stephen Harper's Conservative government, Trudeau was considered a harbinger of 'change', a word used liberally both before and after his election. For a First Nations population under the grip of Harper's increasingly transparent and authoritarian regime, this change in government leadership renewed talk about a genuine, meaningful 'nation-to-nation' relationship. Consequently, the 2015 election "saw the largest turnout of First Nation, Métis and Inuit voters [ever], so high that some communities ran out of ballots" (King 2015). Trudeau has provided plenty of fuel to stoke this fire. His campaign platform offered a remarkable change in direction and rhetoric from the previous decade, promising to forge a new fiscal relationship with First Nations; ensure that every First Nations child receives a quality education; improve the quality of life for Métis individuals and communities; immediately launch a national public inquiry into the crisis of missing and murdered Indigenous women and girls; and enact the recommendations of the Truth and Reconciliation Commission, starting with the implementation of the UNRIP ("Real Change"). These measures, together, are part of what the new Liberal government envisions as a renewed nation-to-nation process "based on recognition, rights, respect, co-operation, and partnership" ("A New Nation-To-Nation Process").

If this thesis as demonstrated anything, it is that such language should give us pause. The flurry of hope among Canada's mainstream Left upon Trudeau's election and diverse cabinet

appointments was preceded, a number of years earlier, by a swell in First Nations activism under the title *Idle No More*. This movement articulated a sustained critique of the Canadian government and issued, and it is against its political claims that we might judge Trudeau's hope-infused rhetoric of 'real change'. Founded in December 2012, *Idle No More* is a grassroots movement comprised of First Nations activists and allies in response to continued inequalities and the failure to achieve change through legislative and judicial avenues. Specifically, it responds to the Harper Government's 2011 omnibus Bill C-45 (the 'Jobs and Growth Act'), which removed protections for forests and waterways, though the grievances and frustration go back centuries. The movement's three tenants are that it will continue to:

1. help build sovereignty & resurgence of nationhood;
2. pressure government and industry to protect the environment; and
3. build allies in order to reframe the nation to nation relationship... ("The Vision")

To achieve these goals, *Idle No More* has employed a number of tactics: staging Indigenous dances in public spaces, poetry slams, flash mobs, rallies, teach-ins, and social media pressure, alongside lobbying against bills passing through the legislative process that most effect First Nations sovereignty. While ostensibly a non-violent movement, some participants have also turned to tactics such as blockading rail lines and highways. This activism reflects what James Anaya has identified as the "high levels of distrust among indigenous peoples toward government at both the federal and provincial levels" in Canada (2014). This is the story sketched out in brief. However, the collection of documents, interviews, newspapers articles, podcasts, art, poetry, e-mails and more brought together in *The Winter We Danced: Voices from the Past, the Future, and the Idle No More Movement* (2014) tell a much broader and richer story.[148] This anthology, true to its title, allows a multitude of voices to speak, and what emerge

[148] The other full-length book account of *Idle No More* is Ken Coates, *#IdleNoMore: And the Remaking of Canada* (2015), a somewhat triumphant but also useful treatment of the movement's history and future.

are the disagreements, dialogues, and debates of the movement as it worked to articulate a shared vision.

Despite the inconsistencies that inevitably arise, what is evident across the contributions to *The Winter We Danced* and in the small critical literature on *Idle No More* is the importance of situating the movement in a very long history of Indigenous activism and struggle—and specifically, activism and struggle against colonialism. The movement, these documents make clear, is well aware that the present inequalities it is protesting are part of a long history, identifying "a clear assimilation agenda…within the Conservative government" (Palmater 2013) and rejecting the *Indian Act* as the legislation for Government/First Nations relations. For instance, *The Winter We Danced* cites a "very long chain of resistance," including the Red Power Movement (late 1960s); resistance to the White Paper in 1969-1970; Lubicon Cree boycott of the 1988 Calgary Olympics because of oil and gas projects; Temagami blockades in 1988 and 1989 to prevent development in their territories; the blockades of the Algonquin of Barriere Lake to stop clear-cut logging in their lands in 1989; the 'Indian summer' of 1990 in response to the Meech lake Accord and the 78-day Oka standoff; the Innu occupation at Goose Bay of a Canadian Air Force base; the Gustafsen's Lake standoff in 1995; the occupation of Ipperwash Provincial Park in Ontario by Stoney Point Ojibway in 1995; the Mi'kmaq of the Burnt Church First Nation's struggle in Eastern Canada between 1999-2002 over fisheries rights; and Kanostaton (The Kino-nda-niimi Collective 2014: 21; Coulthard 2014b: 32). Alongside these specific events were waves of solidarity actions across Canada and the United States involving leafleting, peace encampments, blockades, and more (Coulthard 2014b: 33).[149] The above list is echoed repeatedly throughout the collection, and I present it here at length to giving detail to the

[149] In particular, First Nations resistance in Canada has been intense after the 1969 White Paper, the 1973 Supreme Court of Canada decision of the Calder case, the 1977 release of the Mackenzie Valley Pipelines inquiry report, and the 1982 recognition of treaty rights in the Constitution (Peach 2011: 3).

first line of Tara Williamson's song 'Come My Way', which reminds the listener: "I've always been fighting" (2014: 31). Or Ryan McMahon's piece, "Everything You Do Is Political, You're Anishinaabe; Or, What Idle No More Is To Me" (2014). McMahon speaks lovingly of his grandmother, whose day-to-day action of living pressed up against settler colonial impositions meant that she was constantly political, even if she did not name her actions as such. In McMahon's terms, she was "[a]ccindentally political. But still, political nonetheless. Stubborn. But politically so" (139). That these communities and individuals have always been fighting—that they have been stubborn, but politically so—should be expected: "Indigenous peoples have been on the geographic frontier of capital accumulation for over 500 years of permanent resistance" (Pasternak 2014: 42). Others note that these acts and stances of resistance, including *Idle No More*, are often "lead by Indigenous women" (Palmater 2014: 39; Kino-nda-niimi 2014: 21), and that they are calculated "Indigenous practices of disruptive counter-sovereignty" (Coulthard 2014b: 35), challenging the heart of the settler state.

The build up of resentment and anger apparent in these actions are the result of centuries of dispossession and occupation that manifest in multiple crises: of housing in Attawapiskat, of water in Kashechewan, of suicide in Pikaangikum (Palmater 2014: 39). In the collection, these crises are always cited alongside and as inextricable from "the devastating cultural, spiritual, economic, linguistic, and political impacts of colonialism on Indigenous people in Canada" (Walia 2014: 44).[150] This colonial legacy could not be ignored by the settler government forever, and so in 1991 the Government of Canada launched the Royal Commission on Aboriginal Peoples (RCAP) "to investigate the abusive relationship that had clearly developed between Aboriginal peoples and the Canadian state," published in 1996 in 5 volumes and costing $58

[150] Adam Barker says that "the terms 'settler' and 'colonial' have been increasingly employed by activists and community members, especially in conjunction with Idle No More, a trend that I assert speaks to the resonance these analyses have with peoples' lived experiences in Canada" (2014: 2).

million (Coulthard 2014b: 35). The RCAP report, in Coulthard's words, called for 'recognition' and 'reconciliation' to pacify "the righteous anger and resentment of the colonized" that "threated to *un-settle* settler-colonialism's sovereign claim over Indigenous people and our lands" (36). Indeed, as Ian Peach notes, the Indigenous activism cited above "increased the level of anxiety for the future of the country among all Canadians" (2011: 11). But this anxiety, and the move to 'recognition' and 'reconciliation' that came from and sought to settle it, was not sufficient in addressing the core of what these protest actions were about, given their thorough critique of settler colonial structures and dispossession.

Continuing in this long tradition, the claims issuing from *Idle No More* connect neoliberal, biopolitical, and settler governmentalities to critical definitions and engagement with ideas of nationalism, sovereignty, environmentalism, race and more (Kino-nda-niimi 2014: 21). As Harsha Walia notes, "Indigenous self-determination is increasingly understood as intertwined with struggles against racism, poverty, police violence, war and occupation, violence against women and environmental justice" (2014: 45)—but, and here she invokes the argument of Tuck and Yang, Indigenous self-determination is intertwined with *but not synonymous or reducible to* these other struggles. What *Idle No More* articulates, and which the Government of Canada's 1990's and 2000's response to past Indigenous resistance does not address, is the crucial need for *decolonization*. The task of "supplanting the colonial logic of the state itself" (50) will involve "a profound recentering on Indigenous worldviews" (44), without "subordinat[ing] and compartmentaliz[ing] Indigenous struggle within the machinery of existing leftist narratives" (45). In Adam Barker's summation:

> Idle No More has been conscious of the need to contend for place through relationship building and other affective process, with the explicit intent of decolonisation: People within the Idle No More movement who are talking about indigenous nationhood are talking about a massive transformation, a massive decolonization. (2014: 10)

As thorough as the RCAP report is—and as much as it represents a more respectful approach than, for instance, the 1969 White Paper—it does not speak to this repeated call for decolonization.

Yet, the story is more complex than a mere consensus that decolonization is necessary and that there is an evident path towards achieving it. *Idle No More* earned 'official' support from the Assembly of First Nations, which used its formal capacity to call for, among other things, the adoption of the UNDRIP. As this thesis has demonstrated, adopting the UNDRIP—or going the route of international human rights—might be incommensurable with decolonization. And yet, the *Idle No More* campaign draws 'liberally' on the language of human rights, a December 10, 2014 event bearing the title: "Human rights Today, Human Rights Tomorrow: International Day of Human Rights". Can such language rest alongside calls for decolonization?[151] Demand for the full implementation of UNDRIP was also included in the 'Declaration of Commitment' negotiated to end the hunger strikes of Chief Theresa Spence and Raymond Robinson (actions separate from *Idle No More*) (Coulthard 2014a: 164). If some writing from *Idle No More* assert the importance that "[t]he inherent right to traditional lands and to self-determination [be] expressed collectively and should not be subsumed within the discourse of individual or human rights"—which would only "replicate the Canadian state's assimilationist model of liberal pluralism" (Walia 2014: 45)—how are we to understand the invocation of human rights by others writing from the same movement?

Likewise, we can interrogate the complex state actions that simultaneously agree to protect human rights (an international framework), embark on a renewed nation-to-nation

[151] And what about other invocations of settler futurity? For instance, assertions that *Idle No More* is for the protection of Canada's "lands, waters, plants, and animals" often note how this will be a benefit not just for Indigenous children, "but [for] the children of all Canadians" (Palmater 2014: 40).

relationship (a national framework), all the while securing settler futurity. For instance, while the sections in Trudeau's platform devoted to First Nations tout the language of 'respect' and a commitment to addressing "the issues most important to First nations, the Métis Nation, and Inuit communities," it simultaneously insists on making it easier for Indigenous peoples to vote, on embracing the spirit of reconciliation, and that, crucially, these actions constitute "a sure path to economic growth" ("A New Nation-To-Nation Process"). The document makes clear that things like First Nations education are "vital to Canadians' shared success" because it will lead to "better economic outcomes" ("First Nations Education"). Despite the significant attention given to Indigenous issues, the Liberal platform ultimately remains steadfastly committed to ensuring settler futurity. Tellingly, the platform item 'A Renewed Relationship with Indigenous Peoples' rests as a subheading under the section 'A Strong Canada'—the place for addressing 'the Indian problem' is filed under the plan for maintaining the state's *strength*. More economic ties, increased motivation to vote in federal elections, reconciliation: Justin Trudeau's "real change" platform sounds a lot less like change than *certainty* for Canada's settler status quo.[152]

Idle No More's use of human rights might be a demand for adherence to international moral standards, threat of international legal action, an ethical admonishment or shaming of Canada's behaviour (and so international reputation), a reminder that in the 21st century state sovereignty is (theoretically) checked by higher powers, a citation of solidarity with other struggles of the oppressed throughout the world, or something else entirely. Correspondingly, when Trudeau's platform promises to fulfill the recommendations of the TRC, starting with the implementation of UNDRIP, it should be seen as a discursive act identifying this as something

[152] While this platform could not in good faith be identified with the over assimilationist agenda of what Dale Turner calls the 'White Paper Liberalism' (2006: 12-37) of the era of Trudeau's father, Pierre Elliot Trudeau, the insights of settler colonial studies insist that we think of settler solutions to 'the Indian problem' as expansive and as including a diverse array of tactics to account for and erase Indigenous difference.

desired by Indigenous peoples (as a recognized political demand), or the broader Canadian population (as a left-liberal desired good), or as useful for the state itself (as buttressing a certain image internationally).[153] Whatever tactical use this invocation of a human rights instrument is being put to by First Nations, it can be read, misread, or parried by a state which already understands itself to operate within a world of human rights and sovereign states; the political optic of the state is already structured so as to situate the implementation of UNDRIP in terms that it understands. This also means that whatever counter-hegemonic thrust those initial citations of human rights might have had, they can be slotted into a pre-written script and then checked off as addressable or works in progress. For example, Ian Peach explains that the

> racism and violence that epitomized the events at Kanesatake shocked not only Canadians but also the international community; criticism of Canada over the mishandling of the situation and international embarrassment suddenly tarnished Canada's reputation as a protector of human rights. (2011: 13)

Here, human rights allowed the Mohawk at Kenesatke to earn moral capital against the state in the eyes of the international community. But this comes at a cost. Canada's reputation as a protector of human rights was tarnished, but not, it seems, its status as a legitimate authority with jurisdiction over those whose rights they did not protect, those whose actions it 'mishandled'. Presumably, when shamed enough, Canada will 'handle' situations of Indigenous protest in a more civilized, humane, liberal way. What Peach's observation further reveals, implicitly, is that the Indigenous actions at Kanesatake were read by the international community as a defense of human rights rather than an assertion of Mohawk sovereignty. Political acts with complex historical roots becomes human rights-washed through a narrative whereby Canada does not fulfill its duty to protect the human rights that its Indigenous peoples are owed and which they

[153] The implementation of UNDRIP must also then be analyzed through the critical international relations frame of Sheryl Lightfoot and Jeff Corntassel described in Chapter 1 to asses whether cooptation or selective endorsement are at play.

want. Similarly, to read *Idle No More* as only about seeking the protection of human rights would not do.

There is a lot going on here. Idle No More both asserts that the goal is decolonization, while also making use of human rights language and calling for recognition of these rights through respect for UNDRIP. Trudeau's Liberal Government shows commitment to fulfilling First Nations demands (such as for a national inquiry on MMIW), promoting Indigenous languages and culture (perhaps useful for facilitating Coulthard's cultural resurgence), and implementing international Indigenous rights standards such as UNDRIP, while also sedimenting settler futurity. If the history of Indigenous activism outlined above, including *Idle No More*, 'unsettles' settler populations, this population is also the one that overwhelmingly voted in a Prime Minister whose platform involves prioritizing the nation-to-nation relationship with First Nations communities; this prioritization involves meeting some of the demands of Indigenous activism (such as the inquiry, TRC recommendations, UNDRIP), while keeping meaningful decolonization off the table. Finally, we must not even assume that whatever use 'human rights' are being put to by Indigenous activists will be readily apparent: for "Idle No More…defied orthodox politics" (Kino-nda-niimi 2014: 23). The ideas of self-determination that emerges in the writings and activities of *Idle No More* are complex, historically informed, deeply contextualized, and sensitive to the workings of power in its multiple forms. This is not self-determination in an international human rights legal sense; this is the action of peoples who already know themselves to be sovereign. And yet, as I have also shown, the counter-hegemonic nature of these assertions might be lost through that very use of human rights—even if it represents the 'repoliticized human rights' imagined by those trying to reinvent the discourse—because it is a language always-already too familiar to the liberal state.

Listening / Hearing

> "As part of this renewed relationship, we will do more to make sure that the voices of Indigenous Peoples are heard in Ottawa."
>
> — Justin Trudeau's Liberal Platform

> "[W]e do not escape…the irony that many of the struggles we would wish to engage are not only carried out in the languages of liberty, equality, reason, progress, and human rights—almost without exception, they must be translated into the political and juridical spaces of this tradition. We must reckon that present contests over the life and death of the 'human' are often only legible in terms of those spaces still authorized by liberal political humanism."
>
> — Lisa Lowe, *The Intimacies of Four Continents*, 41

Looking at where *Idle No More*, Trudeau 2.0, and human rights discourse overlap and diverge is a form of the reckoning described by Lisa Lowe in the above passage. The repressed histories of ideas—the histories of repressive ideas—that this thesis has sought to assemble will, it is hoped, make this reckoning more possible and more productive.[154] I have tried to make an argument about political optics and the ideological content structured through this. Part of the story here is the way in which populations finally became recognized as 'peoples', only to be peoples 'self-determined' by different norms than other peoples. Thus when we start reading about a 'nation-to-nation' relationship, we need to ask who are the actors constructing this vision of 'nation', and to what ends. These terms of engagement exist in contexts overdetermined by power—in the case of settler states, this power has distinct objectives. Settler colonial studies has emphasized that this variant of colonialism is not an event, it is a structure, and it operates under a logic, a logic of elimination. Anything, then, that buttresses this structure, or is made to act on its behalf, is complicit in the violence it perpetrates against Indigenous peoples. We need to take

[154] Like Wilder, I see myself working in the vein of Walter Benjamin and Theodor Adorno's notion of 'constellations': "[f]or them, thinking entailed arranging concrete objects of inquiry into particular constellations through which the elements, the whole, and the hidden relations among them may be illuminated…It is only *after* they have been created by a critical imagination that the creator can discover and recognize as real the relations he or she crafted by thinking together seemingly disparate ideas, places, peoples" (13)

this seriously. Too often such terms (self-determination, peoples, rights, duties) are used uncritically by human rights organisations, whose actions cannot be abstracted from the power dynamics in which they operate. We should attend to the settler colonial context, and the political optics it structures, when navigating social justice (including human rights) projects. In the calculus about whether or not 'human rights' are any longer worth investing in, we must factor these facts against whatever decolonial potential the regime still contains. Human rights might be considered a category that implicitly positions Indigenous subjects in recognition paradigms with states while making alternative political strategies—those interpreted as 'illiberal' and irresponsible—less visible and legitimate in both national and international spheres. As such, can we distinguish the optical framing and focusing of human rights from the "relentless crises of recognition" (Simpson 2014: 155) in which are manifest settler colonialism's eliminatory task?

Outlining in as much detail as possible this complex language game of rights and peoples and self-determination and sovereignty in the context of settler colonialism tries to lay bare the entailments of these discourses—the material and ideological structures on which they depend. Human rights are structuring devices, and they currently require the state precisely because their goal is to check that state. To be relevant, human rights must sustain that which they check,[155] and this investment does not/might not align with the political visions of those in whose name the state is limited. The language-game of human rights discourse and law is intended to unmoor some of the state's power, some of the certainty, while retaining the premise on which it exists in the first place. Thus when we look at the Canadian context and see a paradigmatic settler state as

[155] This is an implicit argument in Andrew Vincent's *The Politics of Human Rights* (2010), which identifies the 'paradox' of human rights as the fact that they 'are upheld…by the civil state' (we comprehend human rights through relations with people in civil communities) even while their main function 'is to protect against another dimension of this same tradition', the nation-state. As such: "Human rights are…intimately part of [a] struggle at the core of the civil state tradition" (2).

well as a paradigmatic human rights endorsing and (supposedly) fulfilling state, we need to assess what the implementation of TRC recommendations or the forging of a 'nation-to-nation' relationship will *mean* given the definitional terms on the table that are interpolated into a broad liberal political humanism—one which forms both the historical core of Indigenous dispossession and the intellectual genealogy of contemporary human rights law, institutions, and discourse.

Lisa Stevenson, drawing on Audra Simpson, suggests that "[t]he history of colonization of indigenous peoples could be written as a process of becoming intelligible through inhabiting the 'subject position' of a 'problem'" (2014: 160). Thus we must be wary of even (or perhaps especially) a well-meaning Trudeau who, as quoted above, wants to ensure that Indigenous voices will be *heard* in Ottawa. As Stevenson writes,

> Crucially…listening can also be a form of interpellation. That is, there are modes of listening, just like modes of speech, that can fix someone, an individual, in a particular subject position. That is, there is a certain mode of listening reserved for listening to children, to criminals, to drunks, to kings. What can the child say that is not childish, the criminal say that is not itself criminal, the drunk say that is not drunken, the king say that is not kingly?" (2014: 161)

What can a political actor in a 21st century governed by a single, hegemonic, political optics-structuring Liberalism say that is not already a request for the respect of their universal rights? How might listening to claims and then hearing them as pleas for human rights interpolate Indigenous peoples into a world state system which is, to borrow from Stevenson, always already itself criminal? Stevenson describes a kind of auditory presumption on behalf of states and their agents, even if well meaning. This thesis addresses a similar dynamic, and might alternatively be titled 'The Presumptions of Liberalism'. States presume what is contested, as if the normative political language in which diverse peoples speak is a foregone conclusion. Part of my point is to

refuse the idea that seemingly foregone conclusions are actually forgone; to refuse this, stubbornly—politically so.

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