

ENTRENCHING HIERARCHIES IN THE GLOBAL PERIPHERY: MIGRATION, DEVELOPMENT AND THE ‘NATIVE’ IN ILO LEGAL REFORM EFFORTS

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This article examines the historical imbrication of international law and institutions with both migration and development. Specifically, it examines legal initiatives of the interwar International Labour Organization (‘ILO’) that focused on migration in what is now known as the Global South — and their aftermath. The Treaty of Versailles created the ILO as an institution related to the League of Nations in part to ‘protect ... workers ... in countries other than their own’ and invested it with other, more implicit powers related to migration. In subsequent years, the ILO’s mandate to oversee migration and promote new migrant rights expanded.

Yet such expanding oversight intersected with another feature of the interwar ILO: respecting — and thereby entrenching in international law and governance — existing hierarchies forged by colonial relationships or mentalities in regions beyond Europe. The Organization’s efforts did shift some state behaviour towards respecting migrants’ rights. Nonetheless, in providing largely African ‘native’ migrants fewer or different protections than those available for European migrants and in encouraging domestic legal reform to accommodate the needs of European settlers migrating to Latin America over those of locals — each done in order to promote different forms of ‘development’ — the institution enshrined and in some ways redoubled hierarchical divisions between Europeans and natives. Its actions, moreover, demonstrate the deep roots of — and lessons for — today’s impoverished international migration law, forms of international development premised on international institutional control and the legal understanding of ‘indigenous peoples’. This analysis therefore not only produces further evidence of the colonial entanglements of international law and institutions but also demonstrates unexplored links between the genealogies of migration, development and international law, as well as implications for rethinking their contemporary forms and their relationship with the Global South today.

CONTENTS

I	Introduction.....	2
II	ILO Migrant Hierarchies in the Interwar Periphery.....	6
	A The Interwar ILO, Migration and the Rule of Difference	6
	1 ILO Powers and Migration.....	6
	2 A World of Difference in ILO Activity	8
	B The ‘Native Labour’ Conventions and Colonial African Migration	9
	1 The Dual Mandate Goes International: Balancing Trusteeship and Economic Development in the Context of African Migration.....	10
	2 Internationalising Colonial Assumptions: The Work of the Native Labour Committee	12
	3 From Committee to Conventions: Native Labour before the International Labour Conference	14
	4 Comparing the <i>Indigenous</i> and <i>General Migrant Worker</i> <i>Conventions</i>	16

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5	The Acceptance and Palatability of the Conventions among Colonial Powers	18
C	Strengthening Settler Colonial Hierarchies in Latin America	21
1	The ILO, European Emigration and Settler Colonialism	22
2	Latin American Interest in Settler Colonialism.....	22
3	The ILO's Ideology of Settler Development in Latin America	24
4	The ILO's Pro-Settler Legal Reform Efforts	26
D	Synthesising the ILO, Migration and Development in the Interwar South	28
III	Perspectives on Modern International Law and Global Governance.....	28
A	Implications for Contemporary International Migration Law and Governance.....	28
B	Implications for International Institutions and Development.....	31
C	Implications for the Idea of 'Indigeneity' in International Law	35
IV	Conclusion: ILO Hierarchies, the Historiography of International Law and Institutions, and Future Reform	38

I INTRODUCTION

Many contemporary migration and development issues have colonial and cultural-hierarchical origins, and continuities with those origins persist. These links are increasingly well documented. So, too, are the origins of international law and institutions in the context of European colonialism. Historically grounded critiques of these phenomena, however, often document them within individual silos — discussing individually the colonial or hierarchical roots of law and governance, development or migration.¹ While historical critiques of international law and development, taken together, are among the most common exceptions, migration has still rarely factored into these discussions.² This relative amnesia has resulted in such phenomena as an official International Organization for Migration ('IOM') publication announcing, that 'migration and development' is a concept that only emerged in recent decades, while proposals for the reinvention of the global governance or management of migration have failed to recognise that there was any background from before 1945 on which such a revision could draw.³ Yet international law and institutions, development and migration have long been interlinked — and particularly so during the period between the two world wars, when internationalism grew in ambition and influence. Understanding this history

¹ For examples of colonial and cultural-hierarchical origins of each of these concepts, respectively, see Adam M McKeown, *Melancholy Order: Asian Migration and the Globalization of Borders* (Columbia University Press, 2008) (on migration); HW Arndt, *Economic Development: The History of an Idea* (University of Chicago Press, 1987) 22–9 (on development); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) (on international law); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001) (also on international law).

² A number of histories of international law and institutions address their imbrication with 'development'. Among the most nuanced book-length studies concerned principally with this entanglement, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

³ Marianne Ducasse-Rogier, *The International Organization for Migration: 1951–2001* (IOM, 2001) 47, noting that this 'new concept' of migration as development was 'developed' in the 1960s. For proposals for a global governance of migration, see, eg, Bimal Ghosh (ed), *Managing Migration: Time for a New International Regime?* (Oxford University Press, 2000).

can help critically rethink and reformulate the sometimes fraught and troubled way that linkages between migration, development, and international law and institutions function hierarchically — or as a result of past hierarchies — in the present.

The interwar era witnessed the rise of not only the League of Nations but also related international organisations. Together, these helped construct a broader rule of difference in international law and global governance as applicable between the geographies and peoples of what have come to be called the Global North and South. This article examines legal initiatives of the International Labour Organization (‘ILO’) that focused on migrant populations, the initiatives’ impacts on the South and their implications. Specifically, it focuses on how the ILO legally constructed two hierarchically distinguished types of migrants in this part of the world during the interwar period: on the one hand, ‘native’ migrant labourers in colonial Africa, who did not enjoy the benefit of the Organization’s general migrant rights laws, and, on the other, European ‘colonists’, legally privileged over local natives, who were settling the frontiers of Latin American states.⁴

In each of these cases, the idea of a ‘native’ was hardly precisely defined, often intersecting or overlapping with other terms including ‘indigenous’ or ‘aboriginal’ or simply denoting residence in a colonial or peripheral territory — an ambiguity with consequences that this article will address. The hierarchies that the ILO constructed were also not always *overtly* racially or culturally grounded, though racial distinctions could often instead be inferred through comparison with the legal treatment of Europeans and through readings of contextual arguments around the ILO’s efforts at creating new migrant protections.

These hierarchies were intimately related to what, in more contemporary terms, would be called — and in some instances, period actors explicitly deemed — ‘philosophies of economic development’. The migrants that the ILO legal constructions addressed were comparable in so far as they each travelled long distances to seek economic opportunity. Each of their migrations also had economic effects. Yet the architects of the ILO legal reforms did not see these populations in the same way. Distinctive ‘native labour’ laws could appear to improve the humanitarian situation in African colonies, for example — by not quite meeting European standards and, in doing so, permitting intensified economic growth. Legal reform in favour of European settlers in Latin America would, many believed, attract migrants and accelerate the economic benefits that they brought. In both instances, ILO action bore resemblance to institutionally-directed development programs imposed by international financial and other institutions in the Global South more recently — attempting to shape legal climates to drive competitiveness or attract investment. Developmentalism — the drive to ‘improve’ economic performance, social circumstances or other measures — was not driven by international institutions only as a post-Second World War continuation of colonial practices.⁵ Those institutions’ involvement

⁴ This article will hereafter employ this period terminology without quotation marks for ease of reading, but the author does not wish to imply endorsement or naturalisation of categories such as ‘native’, which, as they were used, were constructed and historically contingent.

⁵ Sundhya Pahuja, for example, treats developmentalism in its modern sense — driven by international institutions — as emerging in the era of postwar decolonisation: Pahuja (n 2) ch 3.

began in both formal colonies and independent, peripheral states during the interwar period, and intimately involved migration.

The legal cleavage between European and native also took place not *merely* because of the now well demonstrated argument that international institutions during the period tended to reflect the attitudes of powerful colonial empires — although this factor was both present and important.⁶ The imbrication of ‘development’ and migration with international law and institutions was a more complicated terrain. It gave rise to debates about what kind of ‘progress’ the ILO and colonial administrators were attempting to achieve: it could mean a focus on building economic capacity or improvement of labour law or migrant rights — or an attempt to balance them. At times, individuals with agency from the South participated in this contestation, as did individuals from colonial powers. Still, as a result, the ILO not only enshrined distinct tiers of rights in international law for natives as compared to European migrants but also acted as a transnational legal consultant, designing domestic laws to *enhance* benefits for, and the status of, European immigrants.

Several scholars have previously interrogated aspects of the ‘rule of difference’ in ILO activity during this period.⁷ Yet the relationship between this and the Organization’s involvement in interwar *migrant* rights during the same era has been critically underexplored. This has left the Organization’s work on migration in Africa examined as a ‘labour’ issue alone and has missed much of its work on settler migration in Latin America, along with any comparisons and continuities between these two.⁸ Many existing examinations of past ILO practices have, additionally, been produced as institutional histories in partnership with the Organization itself.⁹ While still valuable, they can sometimes lack broader contextual analyses that scholarship less focused on the Organization alone can complete.

These disconnects argue for the examination of the ILO’s activities under a more wide-ranging lens that considers what role the colonial overtones present in international institutions played in interfacing with different types of migration processes. In doing so, this article will not survey every law or right with which the ILO constructed global hierarchies during this period, but it will focus on those

⁶ On the argument that interwar international institutions — particularly the League — reflected colonial powers’ interests, see especially Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009) ch 1.

⁷ See Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919–1989)* (Oxford University Press, 2005) chs 1–2; Susan Zimmerman, “‘Special Circumstances’ in Geneva: The ILO and the World of Non-Metropolitan Labour in the Interwar Years” in Jasmien Van Daele et al (eds), *ILO Histories: Essays on the International Labour Organization and Its Impact on the World during the Twentieth Century* (Peter Lang, 2010) 221. Native labour was also the subject of an introductory essay in one recent ILO-published study about the Organization’s history that nonetheless focused on the postwar period: see Daniel Maul, *Human Rights, Development and Decolonization: The International Labour Organization, 1940–70* (Palgrave Macmillan, 2012) prologue.

⁸ One author even writes that native labour was the only effort in which the ILO deviated from a commitment to universality: Maul (n 7) 23.

⁹ See, eg, Sandrine Kott and Joëlle Droux (eds), *Globalizing Social Rights: The International Labour Organization and Beyond* (Palgrave Macmillan, 2013); Gerry Rodgers et al, *The International Labour Organization and the Quest for Social Justice, 1919–2009* (International Labour Office, 2009).

permitting comparisons of categories of migrant — particularly the regulation of recruiting for labour migrants and the provision of property rights and forms of legal insurance to settlers. Such an analysis also requires a move beyond published sources and the ILO's archives. Official publications and officials' statements can be rich wells of information, but they hardly put forward the least flattering evidence or internal assessments of an organisation and often present information decontextualised from its interactions with members. Methodologically, therefore, this article will analyse documents from not only the ILO's archives but also archives of Britain and France, whose own colonial policies and politics influenced ILO practices and, in turn, were influenced by the Organization.¹⁰

The article will proceed in two additional Parts. Part II focuses on the ILO's interwar activities and is divided into four sections. The first is an introduction to the Organization's interest in and powers over the regulation of international migration, including provisions in its constitution that allowed it to shift the legal standards that it was creating, depending on characteristics of different regions: the blueprints for a rule of difference. The next two sections focus on regions where the Organization carried out distinctive legal reform projects concerned with migrants' rights in what is now the Global South. The first project involved the creation and implementation of conventions governing standards for the treatment and recruitment of native labour, which applied largely to migrations in Africa. These, this Section shows, contrasted with the protections that the ILO pursued for other (mostly European) labour migrants in ways that suggest an attempt to balance the need to accelerate African economic development with a paternalist drive to protect the indigenous. The second concerns ILO efforts to ensure that domestic laws promoted the success of European settler migrants in Latin America — in contrast to local native populations. Contemporaries viewed such settlers as drivers of development who were nonetheless in danger of falling to a putatively less productive native status without a proper legal foundation of property rights and financial support. In the efforts in both Africa and Latin America, international law or international institutional pressure to reform domestic law helped entrench existing inequalities produced by colonialism or colonially derived hierarchies in the name of economic growth, as the fourth section summarises.

Part III then suggests some potential implications of this research for thinking about contemporary features of international law and institutions, including international migration law, the ways international institutions pursue development and definitional questions about international law's use of 'indigeneity'. The article concludes by considering how this evidence may also help rethink aspects of the historiography of international law and the related question of responsibility for the creation of past hierarchies, their ongoing effects and the reforms necessary to address them.

¹⁰ Repositories consulted for this article include the ILO Archives, Britain's The National Archives ('TNA'), the French Archives nationales d'outre-mer ('ANOM') and the India Office Records ('IOR') at the British Library.

II ILO MIGRANT HIERARCHIES IN THE INTERWAR PERIPHERY

A *The Interwar ILO, Migration and the Rule of Difference*

Part XIII of the *Treaty of Peace with Germany* ('*Treaty of Versailles*'), which ended the First World War, created the ILO as an organisation related to the League of Nations, even to the point of defining the purposes of the ILO as those of the League as well.¹¹ The ILO was nonetheless mostly autonomous, although it relied on the League for its funding.¹² This Section demonstrates how the Treaty not only granted the ILO both express and implied powers to regulate migration but also permitted its activities to function distinctively in different cultural, climatic or other circumstances. Efforts to treat migrants equally worldwide were doubly complicated by philosophies of both social and economic development, which held that differential treatment of migrants was required to bring territories on the global periphery up to a more equal standard.

1 *ILO Powers and Migration*

An important function of the ILO, as set out by the *Treaty of Versailles*, was to help avoid 'unrest so great that the peace and harmony of the world are imperilled' — on the theory that doing so required pacifying labour agitation through 'social justice'.¹³ The authors of this clause sought to avoid upheavals like the violent protests and revolutions that convulsed Europe in the years immediately after the First World War or resource wars fought out of socioeconomic desperation — which many period scholars believed would produce a renewal of conflict on the War's scale.¹⁴ In subsequent years, ILO officials used what they viewed as a mandate to seek 'peace through social justice' as a justification to expand the Organization's activities radically.¹⁵ A broad interpretation of the Organization's powers under this mandate did not go unchallenged by states, yet the new Permanent Court of International Justice upheld the ILO's ability to extend its regulatory purview extensively on the mandate's basis.¹⁶

One significant area into which the ILO expanded its activities through the 'peace through social justice' formula was migration. Both the original reason for the Organization's concern with migration and its rationale for further action lie within the text of the *Treaty of Versailles*. In addition to extrapolating from its

¹¹ *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) pt XIII ('*The Constitution of the International Labour Organisation*') preamble ('*Constitution of the ILO*').

¹² *Ibid* art 399.

¹³ *Ibid* Preamble paras 1–2. Scholars have noted that this has been and continues to be a goal of international law more generally: see, eg, Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

¹⁴ See, for example, the discussion of overpopulation and conflict among scholars outlined in Alison Bashford, *Global Population: History, Geopolitics, and Life on Earth* (Columbia University Press, 2014) ch 2.

¹⁵ Guy Fiti Sinclair takes the expansion of the ILO's activities on the basis of this formula as a model case of how international organisations can take on new powers: Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017) pt I.

¹⁶ See *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture (Advisory Opinion)* [1922] PCIJ (ser B) No 2, 43.

mandate to achieve social justice, the Organization was guided by two portions of the preamble's text. The first authorised it to take action to reduce unemployment and 'regulat[e] the labour supply',¹⁷ which it eventually interpreted as permitting it to regulate migration, including organising the movement and transfer of populations to sites of labour.¹⁸ The second required that the ILO '[protect] ... the interests of workers ... in countries other than their own', allowing it to ensure the respect of migrant rights.¹⁹ By the mid-1920s, the ILO had even taken over a considerable amount of refugee work from the League of Nations. The League's famous Nansen passports allowed refugees to move throughout Europe looking for work, but refugees needed both more material aid and active logistical assistance to emigrate beyond Europe when work was lacking there — which only the ILO's broader powers could help provide.²⁰

Yet the notion that the ILO would assist *all* migrants worldwide — or that it would assist them all on an equal basis — was hardly a foregone conclusion. International lawyers had endorsed proposals for at least a nominally universal migrants' rights convention both before and after the First World War. In 1897, the Institute of International Law had adopted a model migrant rights convention that did not limit its definition of 'migrant' geographically or in any way that might be taken as a geographical proxy — a possibility that members of the Institute debated but ultimately declined to endorse.²¹ Greater state (and imperial) influence in the drafting of the *Treaty of Versailles*, however, resulted in more carveouts for differently situated polities.²²

¹⁷ *Constitution of the ILO* (n 11) Preamble para 2.

¹⁸ For a demonstration of how the ILO began interpreting the Treaty to permit the regulation of migration on the basis of the need to tackle unemployment, see Note for the Emigration Experts of the International Labour Office, attached to Letter from Louis Varlez to JC Walton, 11 February 1926 (India Office Records, L/E/7/1394). To understand how this led to organising transfer, see Christopher John Szabla, 'Governing Global Migration: Internationalism, Colonialism, and Mass Mobility, 1850–1980' (PhD Dissertation, Cornell University, 2020) ch 3.

¹⁹ *Constitution of the ILO* (n 11) Preamble para 2.

²⁰ Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford University Press, 1995) 189–93.

²¹ On the 1897 proposed model treaty, see 'Emigration from the Point of View of International Law' in James Brown Scott (ed), *Resolutions of the Institute of International Law: Dealing with the Law of Nations* (Oxford University Press, 1916) 137. On the rejection of limitations for 'colonial' workers, see Louis Olivi, 'L'Émigration au point de vue juridique international et les délibérations de l'Institut de droit international' [Emigration from the Point of View of International Law and the Deliberations of the Institute of International Law] (1898) 30 *Revue de droit international et de législation comparée* 413, 433. On the rejection of a definition of 'emigrant', see 'Quatrième commission d'études: De l'émigration au point de vue juridique international' [Fourth Study Group: On Emigration from the Point of View of International Law] (1897) 16 *Annuaire de l'Institut de droit international* 242, 261–2. The ultimate decision to adopt a model treaty that treated all migrants worldwide on an equal basis ran against the emerging thought in the Institute of International Law that embraced colonial hierarchies: see Koskenniemi (n 1) ch 2. As such, it was not uncontroversial but ultimately passed a members' vote.

²² International labour advocates at the Paris Peace Conference had to contend with powers that were convinced that no ILO standards should apply to colonies, while weaker standards were also adopted for 'differently situated' countries such as Asian states: see Zimmerman (n 7) 223–5.

2 A World of Difference in ILO Activity

The *Treaty of Versailles* in fact permitted the ILO to discriminate in *all* of its activities on the basis of differing cultural or environmental factors. As pt XIII of the Treaty (also known as, and hereafter, the '*ILO Constitution*') acknowledged, 'differences of climate, habits and customs ... make strict uniformity in the conditions of labour difficult of immediate attainment', and 'special circumstances' could also modify general requirements.²³ In addition, while the Constitution's 'colonial clause' committed the ILO to an extension of its activities to colonies, member states of the Organization were required to apply the instrument's provisions to their territories only in so far as local conditions did not make them inapplicable.²⁴ Finally, the Constitution also acknowledged the 'imperfect development of industrial organisation' in *independent* states as a cause for the modification of its principles.²⁵

These deviations from universality in the *ILO Constitution* dovetailed with much of the League of Nations' thinking about the distinctiveness of the global periphery. The document enabled a paternalistic model that followed colonialism's interwar turn towards 'trusteeship', a concept in which foreign and usually European rule persisted for natives' own benefit.²⁶ At the international level, trusteeship was expressed in not only the League's conception of mandate territories being under the 'sacred trust of civilisation' and their classification into developmental categories, but also the *Covenant of the League of Nations*' injunction to secure 'just treatment of native inhabitants' under colonial empires' control.²⁷ Following these philosophies, the mandate system was at least theoretically meant to guide former German colonies and Ottoman territories — through the tutelage of Allied powers — towards 'civilizational uplift' and thereby self-government.²⁸ This latter goal dovetailed not only with mandatory and colonial trusteeship but also with the elevation of peripheral societies into the community of recognised, modern, 'civilised' states and societies that preoccupied the project of international law as a whole in the period.²⁹

Such differentiation did not go uncontested by figures within the ILO, some of whom continued to carry forward earlier attitudes about making international law a 'general project' that would immediately encompass humanity on a more equal

²³ *Constitution of the ILO* (n 11) art 427.

²⁴ *Ibid* art 421. On terming this provision a 'colonial clause', see Maul (n 7) 19.

²⁵ See *Constitution of the ILO* (n 11) art 405.

²⁶ This model was especially prevalent in the British Empire: see, eg, Kenneth Robinson, *The Dilemmas of Trusteeship: Aspects of British Colonial Policy between the Wars* (Oxford University Press, 1965); RD Pearce, *The Turning Point in Africa: British Colonial Policy 1938–48* (Frank Cass, 2005) ch 1. Note the enshrinement of trusteeship attitudes in the League Covenant: at 4, citing *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) pt I ('*Covenant of the League of Nations*') art 22.

²⁷ *Covenant of the League of Nations* (n 26) art 23(b).

²⁸ Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015) 4, noting the supposed goal of self-determination. See also at 147, noting 'the framework of civilizational uplift and tutelage that underpinned mandatory rule'.

²⁹ For many of the international lawyers of the late 19th and early 20th centuries, Martti Koskenniemi writes, sovereignty would be a 'gift of civilization' brought about through colonial rule: see Koskenniemi (n 1) ch 2. For more on 'civilisation' as a standard, see Ntina Tzouvala, 'Civilization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing, 2019).

basis. Albert Thomas, the Organization's first chairman, claimed that the ILO would have entirely upheld racial equality without the League's interference in its affairs.³⁰ Yet Thomas faced hostile receptions from officials while on tour of French Indochina and the Dutch East Indies in 1928 over the idea of *any* regulation of colonial labour at the international level.³¹ He had to argue for ILO intervention on the basis that, without tackling the issue, these territories might be ripe for 'race war' or communism:³² forms of instability similar to those that the Organization had used to extend its mandate for pacification through 'social justice' before.

Still, it was also because of the universalistic forms of thinking embraced by some in the ILO that they believed social conditions in the periphery had to be *made* to converge with those that the Organization sought to have 'industrial' states follow — in ways that ultimately resembled the project to 'uplift' the periphery to civilisation. This uplift required, they believed, more effort to reform those parts of the world where they believed social rights were not already as well developed. Consequently, even Thomas acknowledged that it was '[p]robably ... in the colonies' where the ILO could do the most work³³ — needing to treat them differently, in other words, in order to make them the same. As he put it, the Organization would help 'lift the chains that still bind the native so as to prepare him for the next educative step'.³⁴ In the words of French labour leader and prominent ILO delegate Léon Jouhaux, international social standards would facilitate the colonies' (and natives') 'development of civilization'.³⁵

Nevertheless, this social developmentalism had to contend with an equally assertive economic variant — often meaning that one developmentalism was compromised in favour of the other. Overall, as will become clear, the ILO's interwar developmentalism in the embryonic South involved the production of a less robust or distinctive tier of social protection for natives on the theory that it would best allow for greater productivism while still permitting some new degree of protection. This dynamic did not manifest in the same way all across the South, however, but varied depending on the characteristics of different regions. In Africa, the ILO balanced the need for competitiveness by debuting new migrant and labour protections that were nonetheless less robust or distinct from the standards it promoted as a global average. In Latin America, it deemed that higher than native or even general migrant rights were necessary to attract European migrants and to secure their presence as important agents of economic development.

B *The 'Native Labour' Conventions and Colonial African Migration*

Reflecting pressure to balance social and economic 'uplift', this Section will show how the ILO developed a number of conventions governing native labour in the interwar period, which largely concerned African migrants. These emerged from the assumptions of an expert committee composed of colonial administrators. They also reflected the ILO's deference to colonial interests. Their differential

³⁰ Zimmerman (n 7) 228.

³¹ See Maul (n 7) 17.

³² Ibid 24.

³³ Zimmerman (n 7) 228.

³⁴ Maul (n 7) 24.

³⁵ Ibid 19.

approach to labour and migration is especially clear in comparison to general migrant labour rights pushed by the ILO in the same period.

1 *The Dual Mandate Goes International: Balancing Trusteeship and Economic Development in the Context of African Migration*

The turn to trusteeship in interwar colonies involved a focus on the conditions of native populations to the exclusion of earlier emphases on settlement in Africa, in what has been dubbed a policy of ‘native paramountcy’. Interwar colonial officials considered such a focus less of an economic and security burden than settlement and more likely to involve collaborative allies.³⁶ At the same time, colonial business interests and officials placed their holdings under increased pressure to become more economically productive. French officials emphasised the need for the colonies’ *mise en valeur* — their development or more literally ‘placement into value’.³⁷

Many contemporaries viewed migration — whether within or between colonies or empires — as especially critical for African economic growth. ‘The African labourer is also a migrant’, wrote one ILO expert — in a reflection of the period’s sweeping categorisations — and Africa was a ‘continent of migrations ... Individual Africans may be found in employment at one extreme who have come from almost the other extreme of Black Africa’.³⁸ Over half the hundreds of thousands working in South Africa’s mines alone had crossed colonial borders to take up their position — including nearly a third from Portuguese East Africa. Southern Rhodesia and Tanganyika hosted tens of thousands of migrant labourers, many from Portuguese East Africa and Congo, respectively. Half the labour in The Gambia and over one quarter in Cameroon, both British-controlled territories, had migrated from French West Africa, while 200,000 migrated from there to the British Gold Coast annually.³⁹ The continent had ‘passed beyond the stage at which government can be limited to the maintenance of public order and the collection of taxes. Industrial and plantation undertakings in Africa require some guarantees as to their labour supply’, the expert concluded.⁴⁰ And an earlier British imperial survey of African labour found that the continent was at risk of severe labour shortages without the use of ‘employment at a distance’.⁴¹

Yet the governance of African migration needed to reflect the goals of trusteeship as well. The imperial survey expressed a notion that the ability to return to one’s tribe offered a form of social welfare to some African labourers that would need to be replicated by other means for future migrants.⁴² It quoted one Harvard

³⁶ See Pearce (n 26) 4; Caroline Elkins and Susan Pedersen, ‘Settler Colonialism: A Concept and Its Uses’ in Caroline Elkins and Susan Pedersen (eds), *Settler Colonialism in the Twentieth Century: Projects, Practices, Legacies* (Routledge, 2005) 1, 9, 14. Such paramountcy was relative to support for European settlement. The original use of the term is reflected in a 1923 British command paper proclaiming the interests of natives as ‘paramount’: Pearce (n 26) 4.

³⁷ Maul (n 7) 20.

³⁸ Wilfrid Benson, ‘Some International Features of African Labour Problems’ (1939) 39(1) *International Labour Review* 34, 34.

³⁹ *Ibid* 35–7.

⁴⁰ *Ibid* 40.

⁴¹ ‘A Survey of African Labour’ (1939) 40(1) *International Labour Review* 77, 80.

⁴² *Ibid* 81.

academic's opinion that 'in ... Africa the white man still has *carte blanche* to avoid the mistakes of the past' concerning 'the impact of primitive peoples with an industrial civilisation'.⁴³

These potentially contradictory aims resulted in what became known as the 'dual mandate' for colonial rule, as theorised by British colonial official Frederick Lugard: to represent the interests of natives in terms of treatment and to exploit colonial resources for the benefit of the wider world.⁴⁴ Both goals could be achieved, Lugard believed, through indirect rule: empowering local leaders through 'traditional' social and political structures and thus imposing seemingly minimal political change on colonies while avoiding resistance to extractive activities. In practice, indirect rule — implemented in the French as well as British Empires — did not mean an end to mass recruitment drives of colonial workers or even militarily coerced labour.⁴⁵ Local leaders often, instead, facilitated it better than under direct rule.⁴⁶ Moreover, so widespread was the mentality that forced work was necessary to ascend the developmental ladder that even a Senegalese advisor to the ILO's French delegation voiced support for it.⁴⁷

Harsh conditions could nonetheless appear to violate the trusteeship principle of colonial rule and therefore gave further impetus for international humanitarian efforts to aid African workers.⁴⁸ At the same time, administrators pushed for more coordination of cross-border labour movements on the continent, which was being hindered by a lack of cooperation between colonial powers; the 'differing colours with which the map of Africa had been painted obscured the interrelationship of African problems', the imperial labour survey found,⁴⁹ echoing the opinion of none other than South African leader Jan Smuts, whose vision for the League of Nations system had been as a sort of internationalised British Empire.⁵⁰

Conventions focusing on the treatment of native or indigenous labour were a project initially pursued by the League, yet that institution was forced to abandon its efforts because many members viewed them as too far an expansion of its anti-slavery activities. Still, civil society groups such as the Anti-Slavery and Aborigines Protection Societies and the League of Nations Union demanded that *some* international organisation tackle abuses.⁵¹ Because of the centrality of labour to the issue, the ILO became a vehicle to handle the problem.

The consequence was that the ILO addressed what it originally termed the 'native labour' issue (*travail indigène* was used in French and 'indigenous labour' increasingly in English during the interwar period) through its particularly technocratic approach. Thomas had been sceptical that states would accept the

⁴³ Ibid 78–9.

⁴⁴ Sir FJ Lugard, *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons, 1922).

⁴⁵ Maul (n 7) 21–2. On the dual mandate being implemented in France as well as the British Empire, see Pedersen (n 28) 109–11.

⁴⁶ Pedersen (n 28) 240–2, 257.

⁴⁷ Maul (n 7) 25.

⁴⁸ JP Daughton, 'ILO Expertise and Colonial Violence in the Interwar Years' in Sandrine Kott and Joëlle Droux (eds), *Globalizing Social Rights: The International Labour Organization and Beyond* (Palgrave Macmillan, 2013) 85, 85–6. See also 'Meeting of the Committee of Experts on Native Labour' (Record, July 1927) (ILO Archives, N 206/2/1/5) 2.

⁴⁹ 'A Survey of African Labour' (n 41) 78–9.

⁵⁰ On Smuts' vision, see Mazower (n 6) ch 1.

⁵¹ Zimmerman (n 7) 232–3.

ILO's supranational authority or settle on conventions in direct negotiations — particularly after the pushback that the Organization's earliest efforts had received. His preferred solution was to convene small groups of 'experts' whose conclusions could form the basis for international legal solutions proposed to states.⁵² Consistent with this *modus operandi*, therefore, the Organization set up a Committee of Experts on Native Labour ('Native Labour Committee') in 1926.⁵³

2 *Internationalising Colonial Assumptions: The Work of the Native Labour Committee*

The Native Labour Committee did not follow the 'tripartite' structure of the rest of the ILO or even its other 'expert' groups, in which the interests of both organised labour and employers were represented alongside those of states.⁵⁴ Instead, membership of the Committee tended to count former or current European colonial administrators alone⁵⁵ 'in order that questions relative to native labour be examined as thoroughly as possible from a technical point of view'.⁵⁶ This was done explicitly, according to the ILO, 'to give to colonial powers the most serious guarantees' that the proceedings would be handled in an 'expert' manner.⁵⁷

The Native Labour Committee included not only Lugard, 'one of the most important players in the British Empire in the age of new imperialism'⁵⁸ and former British Governor in both Hong Kong and Nigeria,⁵⁹ but also Freire d'Andrade, former Governor of Portuguese East Africa;⁶⁰ Albrecht Gohr, Director General in Belgian Ministry of Colonies and an official in the Belgian Congo;⁶¹ Martial Merlin, former Governor-General of Guadeloupe, French West Africa, French Equatorial Africa, French Madagascar and French Indochina;⁶² Freiherr von Rechenberg, former Governor of German East Africa;⁶³ Daniel Francois Willem van Rees, former Vice-President of the Council of the Netherlands East Indies and former Secretary-General of the Netherlands Colonial Institute;⁶⁴ and Pedro Saura del Pan, former Spanish Chief of the Section of Civil Colonial Affairs

⁵² On Thomas' preference for expert groups with regard to native labour, see Zimmerman (n 7) 235. For more on his pattern of thinking, see Szabla (n 18) ch 3.

⁵³ Zimmerman (n 7) 236.

⁵⁴ *Ibid.*

⁵⁵ See 'Experts on Questions of Native Labour' (List, 1927) (ILO Archives, N 206/2/1/0).

⁵⁶ *Rapport de la Commission d'experts en matière de travail indigène* [Report of the Commission of Experts on Indigenous Labour Matters] (Report, July 1927) (Archives nationales d'outre-mer, 1AFFPOL/2551). All translations are by the author, except where otherwise indicated.

⁵⁷ 'Note concernant la consultation d'experts sur les problèmes du travail indigène' [Note concerning the Consultation of Experts Consultation on the Problems of Indigenous Labour] (Note) (Archives nationales d'outre-mer, 1AFFPOL/2551) 3.

⁵⁸ Heather J Sharkey, 'African Colonial States' in John Parker and Richard Reid (eds), *The Oxford Handbook of Modern African History* (Oxford University Press, 2013) 151, 155.

⁵⁹ 'Experts on Questions of Native Labour' (n 55).

⁶⁰ *Ibid.*

⁶¹ Zimmerman (n 7) 237.

⁶² *Ibid.* For Merlin's colonial affiliations, see Thomas Adrian Schweitzer, 'The French Colonialist Lobby in the 1930's: The Economic Foundations of Imperialism' (PhD Thesis, University of Wisconsin, 1971) 60–1.

⁶³ Zimmerman (n 7) 237.

⁶⁴ 'Experts on Questions of Native Labour' (n 55).

in the Department for Morocco and the Colonies.⁶⁵ Exemplifying continuity with the patterns exhibited by the League, many of these figures were also members of the Organization's Permanent Mandates Commission ('PMC'), overseeing mandatory territories.⁶⁶ Some were even too engaged in developing 'expertise' on the global periphery to attend the forum's meetings; an Italian delegate was recorded as absent at one session because he was 'engaged in exploring the forests of Paraguay'.⁶⁷

Only certain outside voices were also able to gain influence within such a committee. Not only did civil society groups in Europe concerned with forced labour have more clout, but labour activists and advocates from among the colonised — which sometimes pressed for broader reforms — lacked representation.⁶⁸ Narayan Malhar Joshi, an Indian member of the ILO Workers' Group and one of the few colonised peoples represented within the Organization, had previously expressed scepticism that different conditions could require laxer labour standards. 'Is anyone prepared to say', he asked at one meeting of the International Labour Conference ('ILC'), the ILO's main representative body, in 1925, 'that, simply because the climate of some countries is hotter than the climate of Europe, the workers in these territories can work longer hours without detriment to their health?'⁶⁹ While his remonstrances led to deeper consideration of the question of native labour at the ILO in general, such perspectives were kept out of the expert debates that ultimately shaped its approach.

The Native Labour Committee's composition inevitably impacted the groups that it placed under protection — and that protection's extent. While Lugard long promoted the more protective aspects of the dual mandate, others including d'Andrade and Merlin argued on the PMC for a more growth-oriented approach.⁷⁰ In addition to forced labour, migrant labour was a focus, and not just because of its significance. The ILO's Governing Body had also limited the 'native labour' issue to a diplomatic one and limited the Committee's ability to impose too much authority vis-à-vis the sovereignty of colonial powers — which its members, effectively their representatives, also had an interest in guarding.⁷¹ The Committee was thus fairly limited to handling what was mainly (but not exclusively) the *cross-border* issue of migration rather than *internal* labour treatment.⁷²

⁶⁵ Jasmien Van Daele, 'Industrial States and Transnational Exchanges of Social Policies: Belgium and the ILO in the Interwar Period' in Sandrine Kott and Joëlle Droux (eds), *Globalizing Social Rights: The International Labour Organization and Beyond* (Palgrave Macmillan, 2013) 190, 208 n 33.

⁶⁶ These included d'Andrade, Merlin and van Rees, the last of whom was vice president of the body: see 'Experts on Questions of Native Labour' (n 55); Schweitzer (n 62). '[N]o one better articulated [the Commission's] principles or honed their practices than Lugard', who also sat on the body and whose Dual Mandate served as its 'bible': Pedersen (n 28) 107, 109.

⁶⁷ 'Meeting of the Committee of Experts on Native Labour' (n 48) 1. While such activity may not seem on its face colonial, the mapping of such terrain was often part and parcel of European migrant settlement schemes. The next section will elucidate further.

⁶⁸ Zimmerman (n 7) 236–9.

⁶⁹ 'The Seventh Session of the International Labour Conference' (1925) 12(2) *International Labour Review* 145, 173.

⁷⁰ See Pedersen (n 28) 131–2, 259.

⁷¹ See Zimmerman (n 7) 272.

⁷² See *ibid* 242.

3 From Committee to Conventions: Native Labour before the International Labour Conference

The Native Labour Committee's work ultimately led the ILC — where states, employers and workers were all represented — to adopt a number of native labour conventions. These included the 1930 *Convention concerning Forced or Compulsory Labour* ('*Forced Labour Convention*'), the 1936 *Convention concerning the Regulation of Certain Special Systems of Recruiting Workers* ('*Indigenous Recruitment Convention*'), the 1939 *Convention concerning the Regulation of Written Contracts of Employment of Indigenous Workers* ('*Indigenous Contracts Convention*') and the 1939 *Convention concerning Penal Sanctions for Breaches of Contracts of Employment by Indigenous Workers* ('*Indigenous Penal Sanctions Convention*').⁷³ All — but particularly the latter three — were salient for migrant labour, ensuring that those classified as indigenous did not agree to be recruited or sign contracts on the basis of misrepresentations concerning distant worksites, assume other risks in accepting far-off work or face punishment for failing to understand the terms of their employment.

The conventions were considerably shaped by the Native Labour Committee's recommendations and proposals.⁷⁴ The need to pass ILC scrutiny resulted in some modifications, yet these were relatively minor and tended to favour further dilutions of proposed protections, especially given the body's disproportionate number of European, settler-state and employer representatives.⁷⁵ ILC committees gave additional weight to the perspectives of (mostly European or settler-state) member governments to whom they had sent questionnaires about the proposals

⁷³ *Convention concerning Forced or Compulsory Labour*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932) ('*Forced Labour Convention*'); *Convention concerning the Regulation of Certain Special Systems of Recruiting Workers*, opened for signature 20 June 1936, 40 UNTS 109 (entered into force 8 September 1939) ('*Indigenous Recruitment Convention*'); *Convention concerning the Regulation of Written Contracts of Employment of Indigenous Workers*, opened for signature 27 June 1939, 40 UNTS 281 (entered into force 8 July 1948) ('*Indigenous Contracts Convention*'); *Convention concerning Penal Sanctions for Breaches of Contracts of Employment by Indigenous Workers*, opened for signature 27 June 1939, 640 UNTS 312 (entered into force 8 July 1948) ('*Indigenous Penal Sanctions Convention*').

⁷⁴ The Committee did not influence all these conventions to the same degree. The *Forced Labour Convention*, for example, was based on a report that had been compiled and later amended based on its recommendations. Yet its final form was subject to the additional work of the ILC, the ILO's representative body, and its own expert committees: see Jean Goudal, 'The Question of Forced Labour before the International Labour Conference' (1929) 19(5) *International Labour Review* 621, 623–4. A similar process was involved for the *Indigenous Contracts Convention*, although it is clear from the list of the Committee's recommendations that it shaped the content of the resulting convention considerably: 'The Twenty-Fourth Session of the International Labour Conference' (1938) 38(3) *International Labour Review* 301, 319–20. The *Indigenous Recruitment Convention* was based directly on the proposals of the Committee: see Benson (n 38) 44.

⁷⁵ The ILC committees were another bottleneck through which the conventions passed, and while the committees were balanced into state, employer and labour representatives like many ILO structures, they could be led entirely by Europeans, as in the case of the *Indigenous Recruitment Convention* and *Indigenous Contracts Convention*: see 'The Twentieth Session of the International Labour Conference' (1936) 34(3) *International Labour Review* 286, 294–5; 'The Twenty-Fifth Session of the International Labour Conference' (1939) 40(4) *International Labour Review* 448, 463–4.

in their preparation of draft texts for plenary votes.⁷⁶ The Dutch government, for example, was able to push through an alteration that permitted the recruitment of minors.⁷⁷ The Indian Workers' Group could remonstrate against

Western democracies for hesitating to abolish penal sanctions immediately [in the *Indigenous Penal Sanctions Convention*, which, for the most part, only required their gradual abolition] ... thus abandoning in their colonial administration the spirit of liberalism which they followed in their internal policy.⁷⁸

Yet it only attracted tepid support for this position. '[W]ith the exception of those representing India, China and Brazil, ... [governments] urged that, in present conditions, [penal consequences] were required for the adequate control of the labour of primitive peoples'.⁷⁹

European workers joined the representatives of their colonial counterparts at times but could be outvoted when states' and employers' interests were congruent.⁸⁰ Workers also split along questions such as whether the imposition of standards should be immediate or gradual, in order to increase chances of acceptance — essentially deferring to the anticipated behaviour of states.⁸¹ Some Workers' Group proposals were not only watered down in language but also downgraded from convention provisions to recommendations.⁸²

The content of these conventions thus reflected the continuity of colonialist attitudes that were prevalent in their formulation and negotiation. Daniel Maul has noted that in some instances the native labour agreements were demonstrably less protective than was their original humanitarian intent; for example, the *Forced Labour Convention* did not entirely prohibit unfree work.⁸³ The ILO openly

⁷⁶ For example, in the case of the *Indigenous Contracts Convention*, the ILC committee gave weight to comments of governments that they were in a better position to regulate length of service on a contract over the desire of the ILO secretariat to consider a universal rule: 'The Twenty-Fifth Session of the International Labour Conference' (n 75) 466.

⁷⁷ See 'The Twentieth Session of the International Labour Conference' (n 75) 296. Other examples include, with reference to the *Indigenous Contracts Convention*, how the ILC committee acceded to a British Indian government request to let voluntary termination of a labour contract stand in for termination as a result of ill-treatment by an employer, and, with reference to both the *Indigenous Recruitment Convention* and *Indigenous Contracts Convention*, the practice of South Africa with regard to compensation for repatriation, allowing this to be covered by 'sufficient wages' despite considerable Workers' Group resistance: at 297–8; 'The Twenty-Fifth Session of the International Labour Conference' (n 75) 467–8.

⁷⁸ 'The Twenty-Fifth Session of the International Labour Conference' (n 75) 471. Article 2(1) of the *Indigenous Penal Sanctions Convention* required only that penal sanctions for adults be abolished 'progressively and as soon as possible'.

⁷⁹ 'The Twenty-Fifth Session of the International Labour Conference (June 1939): Report of the Delegates of the Government of India' (1940) 68 *Bulletins of Indian Industry and Labour* 1 (India Office Records, L/E/8/964) 10.

⁸⁰ Workers were unsuccessful in prohibiting forced labour 'for revenue': 'The Twelfth Session of the International Labour Conference: I' (1929) 20(3) *International Labour Review* 321, 337.

⁸¹ Such splits were the case when it came to penal sanctions: see 'The Twenty-Fifth Session of the International Labour Conference' (n 75) 469–70.

⁸² See, for example, the attempt to introduce language calling for the 'progressive elimination of recruiting': 'The Twentieth Session of the International Labour Conference' (n 75) 299.

⁸³ Maul (n 7) 23–5, noting that the *Forced Labour Convention* defined the object it sought to restrain in a way that effectively allowed forms of it to continue — for example, providing exceptions to prohibitions when they could be construed as 'civic obligations', a term that could carry different meaning in colonies.

acknowledged the limits of the Convention. One of its pamphlets made clear that requiring ‘unfree’ labour to bring colonies up to a higher standard of civilisation was a ‘tragic contradiction’ but could be leavened through ‘a series of human guarantees’.⁸⁴ The conventions more explicitly aimed at migration, too, had carveouts. All contained explicit clauses allowing colonial powers to modify them to suit the circumstances of their rule in dependencies, referencing the general right to do so provided in the *ILO Constitution*.⁸⁵ They also reflected the balance between social and economic developmentalisms: as noted previously, for example, the *Indigenous Penal Sanctions Convention* only required abolition of such sanctions to take root as circumstances allowed.⁸⁶

Who, specifically, could be defined as ‘native’ or ‘indigenous’ was another issue: the conventions left the definition relatively open. In a post-Second World War report, the ILO retrospectively claimed that the definition was meant to be interpreted more narrowly. It asserted that the ‘indigenous’ category included peoples with a pre-existing special legal status in dependent and ‘non-metropolitan’ colonial territories or territories similar in character.⁸⁷ Both formally and informally, however, the broad definition threw to colonial suzerains the decision about to whom the conventions applied, as a subsequent section will show.⁸⁸

4 Comparing the Indigenous and General Migrant Worker Conventions

It is, however, in comparison to the general migrant labour convention that the ILO promoted during the same period that the hierarchical position of the native labour conventions emerges most clearly. Many of the difficulties that native migrant labourers faced and native conventions attempted to address — the misrepresentations of recruiters, for example, or harsh conditions in unfamiliar contexts — were similar to problems facing migrants, including Europeans, worldwide. For these other migrant workers, the ILO produced a separate *Convention concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment* (‘*Convention on Migration for Employment*’) in 1939.⁸⁹ Although it did not enter into force before the outbreak of the Second World War

⁸⁴ Zimmerman (n 7) 248–9, quoting ‘The ILO and Native Labour’ (Pamphlet, 1934) (ILO Archives, N 206/0/6/2).

⁸⁵ *Forced Labour Convention* (n 73) art 26(2); *Indigenous Recruitment Convention* (n 73) art 25(1)(b); *Indigenous Contracts Convention* (n 73) art 22(1)(b); *Indigenous Penal Sanctions Convention* (n 73) art 4(1)(b).

⁸⁶ See *Indigenous Penal Sanctions Convention* (n 73) art 2(1).

⁸⁷ International Labour Office, *Report of the Governing Body of the International Labour Office on the Working of the Convention (No 50) concerning the Regulation of Certain Special Systems of Recruiting Workers, 1936* (Report, 1951) (The National Archives, CO 859/200/4) 4–5.

⁸⁸ For an example of this breadth and the potential recursiveness of the Convention’s definitions, see *Indigenous Recruitment Convention* (n 73) art 2(b), defining ‘indigenous’ as someone ‘belonging or assimilated to the indigenous populations’ of both the home and dependent territories of members. For more on how states interpreted these definitions, see below Part II(B)(5).

⁸⁹ *Convention concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment*, opened for signature 28 June 1939, ILO Conventions No C066 (not entered into force) (‘*Convention on Migration for Employment*’).

(and was superseded thereafter),⁹⁰ this Convention nonetheless demonstrates how the Organization — and representatives within it — was thinking about migrant workers' rights for non-indigenous peoples at the time.

The *Convention on Migration for Employment* required states to employ standards for migrants equal to those enjoyed by their domestic workers, alongside specific protections, and these standards were not as flexible.⁹¹ A movement for similar equal treatment and non-discrimination clauses in the *Indigenous Recruitment Convention* by the Indian Workers' Group in the ILC had been rejected as being of a 'political character' and ruled 'out of order' by the body — partly on the basis that similar treatment should be considered alongside 'migration' rather than 'recruit[ment]'.⁹² Yet the *Convention on Migration for Employment* exempted 'indigenous' peoples, 'as defined by' the *Indigenous Recruitment Convention*, specifically,⁹³ indicating that the Organization believed that indigenous migration issues should be handled under the *Indigenous Recruitment Convention*.

Yet not only did indigenous migrants lack similar protections under their own conventions, but they also faced other deviations limiting their rights. Compared to the blanket provisions regulating recruiting in the *Convention on Migration for Employment*, for example, the *Indigenous Recruitment Convention* spared from regulation non-'professional' recruiters who were not recruiting many workers or who were doing so for the purpose of domestic servitude or non-manual labour.⁹⁴ A 'competent authority' could cap wage advances and their conditions for indigenous workers, a provision not included in the general convention.⁹⁵ General migrant contracts needed to be 'drawn up',⁹⁶ while indigenous contracts only needed to be in writing when they 'differ[ed] materially from those customary in the district of employment for similar work'.⁹⁷

Because of their focus on territories and peoples that were also subject to the ILO's colonial clause, the indigenous conventions' provisions were also far more often subject to special conditions. This was clear not only in terms of provisions, mentioned above, that permitted derogations in different cultural or climatic zones. The language of flexibility in unspecified circumstances was incorporated into a number of specific provisions of the indigenous conventions as well (including potentially allowing the exemption of certain recruiters from regulation or the need to provide information about prospective labour).⁹⁸

⁹⁰ Its replacement was the *Convention concerning Migration for Employment (Revised 1949)*, opened for signature 1 July 1949, 120 UNTS 71 (entered into force 22 January 1952).

⁹¹ *Ibid* art 6.

⁹² These attempts to broaden the rights of indigenous migrants were actually rejected by the ILC on multiple occasions: see 'The Nineteenth Session of the International Labour Conference' (1935) 32(3) *International Labour Review* 289, 312; 'The Twentieth Session of the International Labour Conference' (n 75) 299.

⁹³ See *Convention on Migration for Employment* (n 89) art 8(d).

⁹⁴ *Indigenous Recruitment Convention* (n 73) art 3.

⁹⁵ *Ibid* art 22.

⁹⁶ See, eg, *Convention on Migration for Employment* (n 89) art 4(2).

⁹⁷ *Indigenous Contracts Convention* (n 73) art 3(1)(b).

⁹⁸ *Indigenous Recruitment Convention* (n 73) arts 15, 17.

The separate indigenous conventions sometimes did grant certain rights, or more specific rights to indigenous labour than these general migrant rights conventions did. Yet these often reflected a differentiated and paternalistic understanding of the indigenous rather than any attempt to elevate their treatment beyond the status of general migrant workers. In particular, the conventions stressed a need to maintain the ‘political and social organisation of the populations’ and expressed special concern about the withdrawal of the adult male population from communities — none of which was reflected in the *Convention on Migration for Employment*, despite European communities also experiencing social consequences of emigration.⁹⁹ The basis for this apprehension was the desire to balance development against the desire to ‘protect’ and thus retain tribal structures that were the bedrock of indirect rule. More specific requirements to demonstrate a worker’s determination to enter into a contract likely reflected a presumption that the indigenous were less sophisticated parties in need of more oversight than European emigrants — who were, in fact, not actually demonstrably more savvy vis-à-vis the promises of recruiters or migration agents.¹⁰⁰ Even in situations in which distinctions between the conventions did not necessarily point to lesser *protections* for native or indigenous workers, therefore, the existence of a general migrant worker convention with different terms helped define the ways that a separate and inferior understanding of native was inscribed in international law.

5 *The Acceptance and Palatability of the Conventions among Colonial Powers*

The conventions’ congruency with colonial policy is evident in their acceptance and application by colonial powers. This acceptance did not necessarily mean that the conventions achieved widespread ratification — a fact that was at least partially attributable to the intervention of the Second World War not long after

⁹⁹ Ibid arts 4–5. On the social consequences of emigration from Europe that were well known to governments, see, eg, Tara Zahra, *The Great Departure: Mass Migration from Eastern Europe and the Making of the Free World* (WW Norton and Company, 2016) 26.

¹⁰⁰ Compare the *Indigenous Contracts Convention* (n 73) arts 5–6 and the *Convention on Migration for Employment* (n 89) art 4. See, eg, Zahra (n 99) ch 1, documenting a number of trials over agents’ misrepresentation in prewar Austria-Hungary.

the ILO adopted most of them.¹⁰¹ Yet even just awareness of the ILO's work on native labour impacted, for example, the specifics reached in the negotiation of a bilateral recruitment agreement for the use of workers from Portuguese East Africa in South African mines.¹⁰² Even without the likely South African ratification, the draft *Indigenous Recruitment Convention* began to govern agreements to import mine labour from British colonies such as Nyasaland.¹⁰³ This recognition came in part because private actors agreed to apply the Convention's terms, presumably so as not to lose access to labour to places that accepted it more formally.¹⁰⁴ Both Britain and France claimed that the conventions' requirements were being met already in many of their colonies prior to ratification, yet each nonetheless

¹⁰¹ The earlier *Forced Labour Convention* attracted ratifications from a number of colonial powers prior to the war, including the United Kingdom, France, Japan and the Netherlands: see 'Ratifications of C029: Forced Labour Convention, 1930 (No 29)', *International Labour Organization* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174:NO>, archived at <<https://perma.cc/4V4G-NEXK>>. The *Indigenous Recruitment Convention* was ratified by the UK and Japan before the war as well: 'Ratifications of C050: Recruiting of Indigenous Workers Convention, 1936 (No 50)', *International Labour Organization* <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312195:NO>, archived at <<https://perma.cc/5NRL-JMV8>>. The remaining conventions attracted ratifications from the UK during and from other states only after the war: 'Ratifications of C064: Contracts of Employment (Indigenous Workers) Convention, 1939 (No 64)', *International Labour Organization* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312209:NO>, archived at <<https://perma.cc/HV4E-36QY>>; 'Ratifications of C065: Penal Sanctions (Indigenous Workers) Convention, 1939 (No 65)', *International Labour Organization* <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312210>, archived at <<https://perma.cc/8722-BNPW>>. Some additional governments were taking steps towards ratification of the other conventions prior to the war, such as France and the Netherlands: see 'Visit of the Governing Body Delegation to the Union of South Africa' (1939) 39(6) *International Labour Review* 773, 791. Although they did not or were not able to ratify the conventions at the time of their adoption, numerous governments stated that they intended to vote for them during the ILC sittings at which they were successfully adopted. For example, several Latin American governments and the United States expressed their intention to vote for the *Indigenous Contracts Convention*, and France said that it intended to vote for the *Indigenous Penal Sanctions Convention*: 'The Twenty-Fifth Session of the International Labour Conference' (n 75) 472. The Belgian, Portuguese and Peruvian governments also spoke highly of the *Indigenous Recruitment Convention* before the vote was taken on it: 'The Twentieth Session of the International Labour Conference' (n 75) 300. Furthermore, governments, including colonial powers such as Belgium, France and the Netherlands, made indications to the ILO that they were preparing to ratify the remaining conventions as soon as the war was over: see 'The Twenty-Ninth Session of the International Labour Conference' (1947) 55(1) *International Labour Review* 1, 27.

¹⁰² Letter from the Office of the Minister of Railways and Harbours to the Prime Minister (South Africa), May 1928 (The National Archives, DO 119/110) 7 ('Letter from the South African Office'), referring to the ILO as the 'Labour Bureau' of the League.

¹⁰³ United Kingdom, *Parliamentary Debates*, House of Commons, 6 April 1938, vol 334, col 334 ('*Parliamentary Debates 6 April 1938*').

¹⁰⁴ Malcolm MacDonald, Secretary of State for the Colonies, and Ernest Brown, Minister of Labour, 'Proposed Action on the Draft Convention concerning the Regulation of Certain Special Systems of Recruiting Workers the Recommendation concerning the Progressive Elimination of Recruiting' (Memorandum, 11 November 1938) (The National Archives, CAB 24/280/10) 2-3 ('Memo from the Secretary of State for the Colonies to the Minister of Labour').

undertook careful reviews of colonial law and policy to ensure compliance.¹⁰⁵ Debates in Westminster over labour conditions also referenced the conventions — indicating that Parliament undertook review on their basis in addition to the colonial bureaucracy.¹⁰⁶

Colonial powers mostly found it expedient to stick to the conventions even when there was temptation to escape their terms. In some cases, for example, the British government claimed that it was legally incapable of forcing dependencies to enact implementing legislation.¹⁰⁷ In doing so, it made reference to the *ILO Constitution's* overarching colonial clause. Nonetheless, the fact that the conventions had already been drafted to reflect that very provision made this exception difficult, ministers acknowledged, to invoke.¹⁰⁸ Concerns had also existed that the convention terms could make labour migration so attractive that it led natives to assimilate into urban society. Doing so would undermine their ‘protect[ion]’ as tribal communities.¹⁰⁹ Yet the British Cabinet determined that it could only reject the application of *additional* ILO recruitment recommendations owing to their potential to encourage ‘an excess of voluntary movement of labour’, which had caused ‘serious social problems’ in Africa.¹¹⁰ In other words, the conventions struck the right balance. Only when protections went so far that they could be construed as undermining the trusteeship logic of colonial rule did Britain feel that it could argue that derogations were permissible.

Colonial governments could also take advantage of the conventions’ open definition of ‘indigenous’. The diversity of pre-existing colonial status designations ensured, for example, that certain parts of the British Empire were able to exempt themselves from the conventions’ coverage, despite British ratification. This is most clear in discussions of native peoples within India. Indian colonial officials believed that the ILO native labour conventions were likely *meant* to apply to aboriginal migrants within India working in, for example, the ‘Assam tea-gardens’ (the conventions did not specify that they *only* applied to cross-border migrants).¹¹¹ Yet the British Indian government ‘took exception’ to the notion that the category ‘appeared to place Indian labour in India on the same footing as coloured labour in Africa’.¹¹²

¹⁰⁵ For examples of colonial powers determining that the law in force already met the basic terms that would be included, see ‘Note pour le 1er Bureau: AS réglementation du travail obligatoire’ [Note for the First Bureau: AS on Regulation of Compulsory Labour] (Memorandum, 17 February 1925) (Archives nationales d’outre-mer, 1AFFPOL/2551), with reference to the *Forced Labour Convention* being negotiated under the League Temporary Slavery Commission, which the ILO effort replaced. See also House of Commons, ‘Draft Oral Reply’ (Memorandum, 23 July 1938) (The National Archives, CAB 323/1541/10) (‘House of Commons Draft Oral Reply’), with reference to the *Indigenous Recruitment Convention*. For reviews of colonial laws, see *ibid.* See also the French Ministry of Colonies’ review of measures under its ‘*code de l’indigénat*’, its set of laws for ‘infractions not expected under French law’ that essentially set those considered ‘indigenous’ apart: ‘Note pour le ministre: Régime de l’indigénat’ [Note for the Minister: Indigenous Sanctions Regime] (Memorandum, 8 September 1924) (Archives nationales d’outre-mer, 1AFFPOL/2551).

¹⁰⁶ ‘House of Commons Draft Oral Reply’ (n 105); *Parliamentary Debates 6 April 1938* (n 103).

¹⁰⁷ ‘Memo from the Secretary of State for the Colonies to the Minister of Labour’ (n 104) 4.

¹⁰⁸ *Ibid* 1–2.

¹⁰⁹ Maul (n 7) 21.

¹¹⁰ ‘Memo from the Secretary of State for the Colonies to the Minister of Labour’ (n 104) 5.

¹¹¹ ‘Brief for Indian Government Delegation on Item II: Regulation of Contracts of Employment of Indigenous Workers’ (Memorandum, 13 May 1938) (Indian Office Records, L/E/8/964).

¹¹² *Ibid.*

The Indian government therefore found means within the Convention to escape its application. It noted that India was classified not as a dependent territory in international terms after the First World War but as a full member of the League of Nations — despite its obvious colonial status.¹¹³ This status allowed it to escape any need for implementation as a consequence of British ratification. There was also no clear pre-existing legal distinction for ‘tribal’ peoples within India, an element of the ILO’s interpretation of the definition, as noted above.¹¹⁴ Both factors allowed Indian colonial officials to believe that none of the special protections of the native labour conventions were applicable to them.¹¹⁵ South Africa’s similar status also allowed it to escape implementation.¹¹⁶ Of course, not all colonial governments could so easily avoid regulation, and India still took an active interest in the conventions given that it admitted that Indian emigrants to other dependencies could be encompassed by its terms.¹¹⁷

Yet it was unlikely that Indian migrants to non-dependent territories — like South Africa — were meant to fall under the *Convention on Migration for Employment*. Given the potentially confusing nature as to whom the general migrant worker convention or the native labour conventions should apply or whether no convention ought to apply, a binary between two convention regimes could be too crude to account for the complex distinctions of the colonial world. There were thus ILO proposals that called for *multiple* tiers of convention according to different levels of development. Multiple tiers, some ILO officials believed, would be a means to gain more adhesion to conventions among states and colonial governments that were still wary of signing onto (migrant) labour commitments that did not appear to accommodate their own understanding of the circumstances they faced.¹¹⁸ While more variegated tiers between the native labour and migrant worker conventions never arose, the ILO nonetheless sought to create, through transnational legal reform, another hierarchically *higher* level of migrant: the European settler in Latin America — whose greater rights could be guaranteed through domestic law.

C *Strengthening Settler-Colonial Hierarchies in Latin America*

The colonial preoccupation with native paramountcy was of little concern in independent Latin American states in the interwar period. There, the ILO acted on the basis of a transatlantic consensus in favour of mass European settlement in the region — improving settlers’ situation relative to that of local natives — instead. In contrast to the Organization’s efforts in Africa, in Latin America the ILO did not act directly by means of international law but by advocating for the reform of domestic law to meet international standards.

¹¹³ See ‘Miscellaneous Notes Relative to International Status of India’ (Memorandum, December 1927) (Indian Office Records, File No L/E/9/417) 4.

¹¹⁴ See above nn 87–8 and accompanying text.

¹¹⁵ ILO, ‘Situation of India in Respect of International Labour Conventions Which It Has Not Yet Ratified’ (Memorandum, 1 December 1937) (Indian Office Records, L/E/8/982) 33.

¹¹⁶ ‘Visit of the Governing Body Delegation to the Union of South Africa’ (n 101) 790.

¹¹⁷ ‘Instructions for Indian Government Delegation on Item II: Regulation of Contracts of Employment of Indigenous Workers’ (Memorandum, 7 June 1939) (Indian Office Records, L/E/8/964) 2.

¹¹⁸ See generally Letter from De Michelis, Italian Government Representative, to the Chairman of the Governing Body, 19 April 1934 (ILO Archives, D 600/2000/22).

1 *The ILO, European Emigration and Settler Colonialism*

The origins of the ILO's focus on settler colonialism related back to its mandate to pursue 'peace through social justice' and to do so by addressing unemployment. In post-First World War Europe, the number of unemployed — including those demobilised from militaries, workers transitioning to a peacetime economy and refugees — soared.¹¹⁹ The issue gave rise to fears of social turmoil that could help re-spark conflict or revolution of the sort that had convulsed Russia.¹²⁰ This became a serious focus for the ILO, charged as it was with preventing unrest. One widespread proposal was to export Europe's 'surplus population' of unemployed — especially from countries that did not already possess colonial 'outlets' — to the global periphery. This periphery included not just colonies but also 'underdeveloped' independent states, where, the theory was, European migrants could find productive work, particularly as agriculturalists putting to work new lands in a way that would benefit the economies of host societies.

Yet the territories open to a mass population transfer were few. The British and French governments had implemented native paramountcy because of the expense of settlement and partly because settlement had produced unrest in their colonies. Canada and Australia worried about the dilution of their ethnic composition by new European nationalities.¹²¹ The United States had closed itself off — even to most European immigration — after a series of legislative changes from 1917 to 1924.¹²² Consequently, Latin American states welcomed an increasing percentage of European immigrants.

2 *Latin American Interest in Settler Colonialism*

The Latin American states' enthusiasm was part of a long tradition of seeking to encourage European population growth in their territories, particularly on frontiers of settlement. European settlement helped them, first, to grow economically and to fortify their societies against the threat of raids by the natives whom new populations were displacing. European settlement also acted to counterbalance or dilute the presence of non-European peoples —

¹¹⁹ A panoramic scholarly study of post-First World War unemployment across Europe has yet to be published. Yet contemporaries took note — such as the political economist Karl Pribram, who observed that in 'the European industrial countries ... a comparatively high percentage of permanent unemployment is the unhappy legacy of the war': Karl Pribram, 'World-Unemployment and Its Problems' in Quincy Wright (ed), *Unemployment as a World-Problem: Lectures on the Harris Foundation 1931* (University of Chicago Press, 1932) 45, 45.

¹²⁰ See, eg, *ibid* 145–6. On fears of social unrest during this period caused by demobilisation, see Adam R Seipp, *The Ordeal of Peace: Demobilization and the Urban Experience in Britain and Germany, 1917–1921* (Ashgate, 2009) 3–4.

¹²¹ On Canada and Australia's preferences mostly for British immigrants, see Skran (n 20) 22, 24. On the fear of 'new' European immigrants in this period, see Sean Brawley, *The White Peril: Foreign Relations and Immigration to Australasia and North America 1919–78* (UNSW Press, 1995) 66–8.

¹²² Maddalena Marinari, Madeline Y Hsu and María Cristina García, 'Introduction' in Maddalena Marinari, Madeline Y Hsu and María Cristina García (eds), *A Nation of Immigrants Reconsidered: US Society in an Age of Restriction, 1924–1965* (University of Illinois Press, 2019) 1, 5–6.

whether indigenous, mestizo or black.¹²³ As a growing literature suggests, this region-wide emphasis — which occurred well beyond traditional recipients of European mass immigration such as Argentina and southern Brazil — indicated a tendency of the entire region towards settler colonialism.¹²⁴ Indeed, Latin American settlement projects well into the 20th century continued to be called, explicitly, ‘colonisation’ schemes.¹²⁵

In facilitating settlerism, governments in the region also sought to legitimise their claims to full membership in the international community and fully sovereign statehood in the eyes of international law. Following European intellectual trends, the region’s elite viewed European immigrants as potential contributors to racial and civilisational uplift.¹²⁶ Settler colonisation, in this understanding, would help render their countries as close as possible to European states, which exemplified a developed status in the eyes of the international legal profession and international institutions where Europeans held significant clout. (A territory or polity’s level of ‘civilization’, as Ntina Tzouvala has pointed out, could also rise by emulating metropolitan ‘primitive accumulation’ through settler processes of land appropriation from indigenous peoples.¹²⁷)

Despite conforming to a project grounded in European norms, interwar international facilitation of Latin American settlerism was therefore an undertaking in which the region’s governments often enthusiastically participated of their own volition. As scholarship by Arnulf Becker Lorca and others has demonstrated, the region’s bloc of at least formally independent states — as well as its international legal and other experts — had more agency in the international system than previous critiques of that system’s Eurocentricity had assumed.¹²⁸ In the case of promoting European settlement, the region had even more sway because of the high level of compatibility between Latin American and European aims.

As a consequence, Latin American states often *led* movements advocating the importation of European settler migrants to their shores in the interwar era even as movements in Europe sought to export that continent’s surplus. Countries in the Latin American region proved enthusiastic about receiving refugees in communications with both the League and the ILO just after the First World

¹²³ See, eg, Tanya Katerí Hernández, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response* (Cambridge University Press, 2013) 24–34.

¹²⁴ See, eg, Richard Gott, ‘Latin America as a White Settler Society’ (2007) 26(2) *Bulletin of Latin American Research* 269; M Bianet Castellanos, ‘Introduction: Settler Colonialism in Latin America’ (2017) 69(4) *American Quarterly* 777.

¹²⁵ Brazil, for example, created a ‘Directorate of Colonization’ to assist incoming European immigrants as late as 1931: see CR Cameron, ‘Colonization of Immigrants in Brazil’ (1931) 33(4) *Monthly Labor Review* 36, 39.

¹²⁶ See, eg, May E Bletz, *Immigration and Acculturation in Brazil and Argentina: 1890–1929* (Palgrave Macmillan, 2010) 4–5.

¹²⁷ Tzouvala (n 29) 100–1.

¹²⁸ See Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History, 1842–1933* (Cambridge University Press, 2014); José Antonio Sánchez Román, ‘From the Tigris to the Amazon: Peripheral Expertise, Impossible Cooperation and Economic Multilateralism at the League of Nations, 1920–1946’ in Simon Jackson and Alanna O’Malley (eds), *The Institution of International Order: From the League of Nations to the United Nations* (Routledge, 2018) 43.

War.¹²⁹ Brazil's calls for facilitating general European immigration into the region, for example, directly led to the creation of the ILO's Permanent Migration Committee, a forum to discuss the needs of migrants and to use answers reached to help facilitate the movement of Europeans across the period's tightening border controls.¹³⁰

Latin American states increasingly focused specifically on drawing from the ILO's legal expertise to address those settler needs. In 1936, an Argentine-led resolution at a region-wide conference called for the ILO to carry out a study on problems faced by European colonists in the region and to help resolve them in order to promote immigration from Europe.¹³¹ ILO officials produced exposés, based on such requests, focused on the legal difficulties faced by settlers in countries such as Brazil.¹³² In addition to issuing calls for action, Latin American states used the threat of withdrawing their membership from international institutions to compel action; ILO officials believed that Venezuela would leave the ILO if the Organization did not assist it with legal reforms to help promote colonisation.¹³³

3 *The ILO's Ideology of Settler Development in Latin America*

The ILO's powers to assist the unemployed and its responses to European and Latin American needs led to its efforts to organise selection and transportation of prospective settlers.¹³⁴ Yet the ILO's 'studies on ... "colonists" in the region'¹³⁵ also revealed significant difficulties pertaining to the security of their property, as well as a lack of means to address migration agents or property speculators' misrepresentations as to, among other issues, the quality of land.¹³⁶ Solid property rights were a mark of a civilised country, international lawyer James Lorimer had written in the 19th century, and the mantra continued to stand.¹³⁷ Difficulties securing property rights or making land productive could also, settlement advocates feared, lead European migrants to fall into the kind of economic precariousness that would lower them to the level of native labour. European

¹²⁹ See, for example, the report on one ILO mission to South America to engage governments as to the possibility of refugee resettlement there: 'Annex 4: Report on the Work for the Refugees' (1925) 38 *League of Nations Official Journal, Special Supplement* 113, 122. See also Letter from Albert Thomas, Director of the International Labour Office, to the Secretary-General of the League of Nations, 5 September 1927, reproduced in 'Annex 3a: Measures in Favour of Russian and Armenian Refugees' (1927) 59 *League of Nations Official Journal, Special Supplement* 59, 79, noting offers from the governments of Argentina, Bolivia, Brazil, Paraguay and Peru, as well as private enterprises, to settle Russian and Armenian refugees.

¹³⁰ See 'Appointment of a Committee of Experts to Assist the Permanent Emigration Committee of the International Labour Office' (Memorandum, 20 May 1925) (Indian Office Records, L/E/7/1394) 3.

¹³¹ Roger Böhning, *A Brief Account of the ILO and Policies on International Migration* (Draft Paper, 2008) 13.

¹³² See, eg, P Paula Lopes, 'Land Settlement in Brazil' (1936) 33(2) *International Labour Review* 152.

¹³³ Letter from Enrique Siewers to the Director of the ILO, 23 July 1938 (ILO Archives, E 22/63/0) ('23 July 1938 Letter').

¹³⁴ These processes go beyond the scope of this article. For much more detail on ILO efforts to export these populations in the interwar era, see Szabla (n 18) ch 4.

¹³⁵ *Ibid* 247.

¹³⁶ *Ibid* ch 4.

¹³⁷ Tzouvala (n 29) 89–90.

settlers, they believed, required special guarantees to productive property to keep them on a higher, more productive plane than the often property-less natives — or ‘*peones*’ — whose lack of other income left them as mere hired help.¹³⁸

ILO officials agreed. An Argentine named Enrique Siewers, one of the ILO’s lead experts in the region, united the perspectives of an Organization functionary and the Latin American elite in espousing a belief in settler colonialism’s benefits for the region’s development, relative to the development achieved by empowering local natives.¹³⁹ In a discussion of Venezuela, Siewers wrote that ‘the rural population is a wage-earning one relying for its primitive standard of living on ... a precarious holding’.¹⁴⁰ This situation could not be aided by guaranteeing natives property rights, he continued, since locals’ shiftlessness, and hence precarity, was *inherent*. While *some* of these ‘peasants’ did have ‘a sense of property’, which Siewers characterised as ‘the first condition of progress in individual farming ... the same cannot be said of those in other districts’.¹⁴¹ Worse, it was ‘[t]he inertia and fatalism of the rural population’, he wrote, that would ‘be among the obstacles which will hold up technical improvements and the development of production’.¹⁴² Even a ‘campaign to improve health and education would have little chance of success among [this] population’, Siewers continued, since ‘the effort would fail if dispersed among rural populations which are unstable and do not take kindly to the individual and collective discipline essential to success in such an undertaking’.¹⁴³

Yet rural development could benefit the existing population if it was ‘part of a scheme of land settlement’.¹⁴⁴ A better population would make scientific agriculture possible: ‘the raising of crops suitable to the nature of the soil and climatic conditions could be organised and improved only by ... settlers who have at least the minimum aptitude for the necessary discipline being selected for the purpose’.¹⁴⁵ Development was useless without the right types of people carrying it out; Siewers concluded that

amounts appropriated ... for the improvement of the population’s state of health and the prevention of illiteracy would be spent more usefully on social groups forming a part of a scheme of land settlement and duly selected ... by the competent authority.¹⁴⁶

¹³⁸ For an example of this mentality, see the writing of CO Miachinski, Director of the Buenos Aires Harbour Mission: CO Miachinski, *The Problem of Migration* (1932) 4, reproduced in Letter from CO Miachinski to Harold Butler, 2 August 1932 (ILO Archives, E 2/4/2/1).

¹³⁹ The Venezuelan government requested that the ‘experts’ of the Organization put in charge of an ILO reform effort in the country be Latin American themselves, but this hardly changed the fact that the mission involved the implementation of suggestions coordinated with the largely European ILO for the benefit of European settlers: see ILO, ‘Mission technique au Vénézuéla pour la colonisation et l’immigration’ [Technical Mission to Venezuela for Colonisation and Immigration] (Memorandum, 30 March 1938) (ILO Archives, E 22/63/0) 3.

¹⁴⁰ Enrique Siewers, ‘The Organisation of Immigration and Land Settlement in Venezuela: I’, 39(6) *International Labour Review* 764, 770.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid* 770–1.

¹⁴⁴ *Ibid* 771.

¹⁴⁵ *Ibid* 770.

¹⁴⁶ *Ibid* 771.

Left unsaid in Siewers' account was that these 'social groups' — since they would not be the local rural population — would necessarily need to be selected from a different source. In a classical Lockean formula that has long justified settler colonial expansion, there was, in Andrew Fitzmaurice's words, a 'link between the idea of [right to] occupation and economic progress'.¹⁴⁷ Only the population that could best *use* the land had a right to it.¹⁴⁸ In elite Latin American thinking, this population consisted, of course, of Europeans.

4 *The ILO's Pro-Settler Legal Reform Efforts*

Legal reform would be designed to lure such settlers and guarantee their success. Given that preventing unemployment required transplantation of 'workers' to frontier regions, the *Treaty of Versailles* could be read as authorising ILO oversight of settlers' rights to be free of the consequences of misrepresentation and agricultural failure. Reducing risk became a means to mobilise settler populations as well: one view of ILO activity — held by Europeans as well as Latin Americans — was that a better guarantee of such rights could help *entice* the voluntary movement of settler migrants, who might otherwise be apprehensive, out of overpopulated European countries.¹⁴⁹

In the special circumstances of Latin America, however, where existing law was hardly seen as sufficient to guarantee the property and economic security of natives, equality with domestic workers guaranteed by the *Convention on Migration for Employment* would be insufficient for settlers' needs. Nor did that convention guarantee a right to property. A movement in favour of international efforts to assist *settlers* had in fact begun within the ILO but would not gather enough force to result in proposals for international conventions on settlers' rights until after the Second World War.¹⁵⁰ The ILO therefore encouraged domestic reforms that would ensure the legal security of new transplants on the best land.

Siewers and other ILO officials consequently sought to uplift Venezuelan law to international standards through 'social guarantees'.¹⁵¹ Yet they targeted these reforms to attract and benefit settlers in an effort to prioritise bringing the Venezuelan economy up even faster. Siewers also worked on general projects in Venezuela, including a labour code.¹⁵² Yet his most successful was the creation of a Venezuelan 'Technical Institute of Immigration and Colonisation' ('Institute') (pushed through by executive decree when the country's Congress proved too slow to act on it) with powers to promote and support settlers.¹⁵³

¹⁴⁷ Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge University Press, 2014) 2.

¹⁴⁸ *Ibid* 2–4.

¹⁴⁹ See Colonial Office, 'Report for Obsons — by 15th May — Prior to the Conference in June 1939' (Memorandum, 12 April 1938) (The National Archives, CO 859/9/7).

¹⁵⁰ See 'The ILO Manpower Programme' (1949) 59(4) *International Labour Review* 367, 385–7.

¹⁵¹ See Letter from Enrique Siewers to Waelbroeck et al, 8 November 1938 (ILO Archives, E 22/63/0) 1–2 ('8 November 1938 Letter'); 23 July 1938 Letter (n 133); Letter from Harold Butler to the Director, 8 March 1938 (ILO Archives, E 22/63/0).

¹⁵² 23 July 1938 Letter (n 133).

¹⁵³ 8 November 1938 Letter (n 151) 1–2; Government of Venezuela, 'Decreto reglamentario del Instituto Técnico de Inmigración y Colonización' [Regulatory Decree of the Technical Institute of Immigration and Colonisation] (Gazette, 17 October 1938) (ILO Archives, E 22/63/0) ('Decreto reglamentario del Instituto Técnico').

The Institute was essentially an administrative solution to concerns over misrepresentation and property rights, meant to regulate the entire migrant recruitment and settlement process as part of a single program. Its constitutive instrument defined its aims as ‘the most efficient exploitation ... of the land possible’, the ‘improvement of the ethnic majority of the population’ through selective immigration and the increase of landownership, as well as the facilitation of ‘technical and administrative support for colonists including providing them with capital and schools’.¹⁵⁴ It was also tasked with proposing legislation aimed at achieving the most rapid development (*‘desarrollo’*) of the country by identifying especially promising regions.¹⁵⁵ The Institute would also allow colonists to acquire from the state, or it would purchase and transfer to colonists sufficient land that would permit them to use their full ‘powers of labour’ and that would produce more than enough to pay their debts.¹⁵⁶ It would also indemnify colonists against risks to their ability to produce and grant them extensions on payments and loans and advancements if necessary.¹⁵⁷ Any plan for immigrants to work on plantations would be subject to the oversight of the Institute, so that they would not be ‘victims of usury deals’ or ‘unjust handling’.¹⁵⁸ Although it was formally subject to the Ministry of Agriculture, the decree also ordered other organs of government to work with the Institute.¹⁵⁹

Natives had a bit part to play in the work of the Institute until they were uplifted by developmental settlement. ‘Wasteland’ that the Institute received that did not ‘lend itself to colonisation’ could be worked by contract labour and/or divided into ‘small plots’ instead.¹⁶⁰ Eventually, thanks to a development plan (*‘plan de fomento’*) that was focused on ensuring that colonists did not become as deprived as natives, the ‘emancipation of the rural worker’ could be achieved as well.¹⁶¹ It is little wonder that, in the midst of this effort, the ILO hardly recognised a growing Latin American indigenous movement — a process deferred by a ‘study’ that would take until the 1950s¹⁶² — even under the indigenous conventions that it largely undertook to apply to Africa and other regions. The Organization instead considered its native-marginalising settlement plan a ‘model’ for ‘the organisation of immigration and colonisation’ operations across Latin America.¹⁶³ It sought to use the Venezuelan precedent to influence Brazilian legislation, as well as the legislation of other countries,¹⁶⁴ before these efforts were interrupted by the Second World War.

¹⁵⁴ ‘Decreto reglamentario del Instituto Técnico’ (n 153) 1 (arts 1(b)–(d)).

¹⁵⁵ Ibid 3 (art 1(h)).

¹⁵⁶ Ibid 12 (arts 23(a)–(b)).

¹⁵⁷ Ibid 19–20 (arts 36–8, 44).

¹⁵⁸ Ibid 36 (art 89).

¹⁵⁹ Ibid 53 (arts 110–13).

¹⁶⁰ Ibid 13 (art 26).

¹⁶¹ See ibid 3 (art 1(e)).

¹⁶² On this movement, see Rodríguez-Piñero (n 7) ch 2.

¹⁶³ 8 November 1938 Letter (n 151) 4.

¹⁶⁴ See Letter from Pierre Waelbroeck to JC Muniz, 7 November 1939 (ILO Archives, E 22/9/1).

D *Synthesising the ILO, Migration and Development in the Interwar South*

Both the ILO initiatives in Africa and Latin America demonstrate the extent to which interwar internationalism, as it related to migration both to and within the South, represented continuity with and legitimised existing colonial practices, and the extent to which it both reflected and deepened racial and cultural hierarchies in independent ‘peripheral’ states. In both Africa and Latin America, authorities colluded with the Organization. Each effort constructed a separate, lesser category of native in different ways. Together, these formed parts of a larger native/non-native hierarchy endorsed by the Organization, which could be extended beyond these case studies.

What these approaches also had in common was that they reinforced hierarchies through new instruments that sought to facilitate *development* through different configurations of social rights, deepening these cleavages throughout what would become the Global South. To bring Africa to a higher standard of civilisation, the expansion of migrant labour rights — however much it was a part of that same act of uplift — could not go too far. Economic development in Latin America appeared to require that settler migrants be protected in a way that effectively marginalised local populations, whom the Organization viewed as unworthy of such benefits.

The ILO effectively apportioned migrant rights differently in different contexts according to *how* it viewed different populations as being able to ‘improve’ colonies and societies. Both intra-African labour migrants and European settlers in Latin America required ‘protection’, but to varying degrees depending to the extent to which this facilitated growth. This overarching focus on growth continues to colour numerous international legal and institutional arrangements — although several have lost touch with the contribution of migration — as the next Part makes clear.

III PERSPECTIVES ON MODERN INTERNATIONAL LAW AND GLOBAL GOVERNANCE

The history recounted above provides critical background for understanding and questioning some of the ways that international law regulates migration, development and identity — particularly as they concern and entrench hierarchies within the present Global South. This article will briefly touch on all three, as well as the possibilities for the reform of international law and institutions that this discussion raises.

A *Implications for Contemporary International Migration Law and Governance*

The majority of international migrants today emerge from, or circulate within, the Global South. Such migrants continue to feel the effects (or the lack thereof) of a weak regime of international legal protections, characterised by a confusing patchwork of fragmented subject areas — between refugee, labour, human rights and other forms of law.¹⁶⁵ They also suffer from poorly ratified or observed

¹⁶⁵ On the weakness of international migration law, see, eg, Vincent Chetail, ‘The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction’ (2017) 111 *AJIL Unbound* 18.

instruments, including newer, less discriminatory ILO conventions such as its 1975 *Migrant Workers Convention*.¹⁶⁶ The 2018 *Global Compact on Migration*, meant to address some of these deficiencies, has embodied many of their contradictions and weaknesses rather than fundamentally altering them.¹⁶⁷ Similar problems persist amid international institutions concerned with migration, which are equally disaggregated — the ILO constituting now only one of numerous agencies concerned with migration at the international level.¹⁶⁸ The most logical institution to oversee migration as a whole — the International Organization of Migration — is, in fact, not fundamentally devoted to migrant rights.¹⁶⁹

The former position of settler migrants from Europe could be compared, in contrast, to the privileged standing of skilled expatriate service industry migrants who enjoy more accommodations at international law. An example lies in the movement guarantees of the *General Agreement on Trade in Services* ('GATS').¹⁷⁰ Its negotiation resulted in protection for 'temporary' service providers rather than permanent 'immigration ... on a broader scale'.¹⁷¹ This limitation leaves unprotected the migrants who need to seek a permanent improvement in their circumstances rather than a briefer opportunity. While many underprivileged migrants also move on a 'temporary' basis, scholarship has shown that GATS implementation also privileges 'highly skilled' migrants in a way similar to the privileged perspective with which European settlers were once viewed in the interwar period, although such 'skilled' migrants are much fewer in number today.¹⁷²

¹⁶⁶ Among its provisions, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) — a centrepiece treaty on migrant rights — is among the least well-ratified human rights treaties in existence: Martin Ruhs, 'Rethinking International Legal Standards for the Protection of Migrant Workers: The Case for a "Core Rights" Approach' (2017) 111 *AJIL Unbound* 172, 173. See also *Convention (No 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, opened for signature 24 June 1975, 1120 UNTS 323 (entered into force 9 December 1978); 'Ratifications of C143: Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143)', *International Labour Organization* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288>, archived at <<https://perma.cc/JLA3-JGPQ>>.

¹⁶⁷ Antoine Pécoud, 'Narrating an Ideal Migration World? An Analysis of the Global Compact for Safe, Orderly and Regular Migration' (2021) 42(1) *Third World Quarterly* 16.

¹⁶⁸ See Alexander Betts, 'Introduction: Global Migration Governance' in Alexander Betts (ed), *Global Migration Governance* (Oxford University Press, 2011) 1.

¹⁶⁹ See Jan Klabbers, 'Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-Making, and the Market for Migration' (2019) 32(3) *Leiden Journal of International Law* 383.

¹⁷⁰ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*') art I(2)(d) ('GATS'), liberalizing the supply of a service by a 'service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member'. See also at annex ('*Annex on the Movement of Natural Persons Supplying Services under the Agreement*').

¹⁷¹ For the quotations on the formation of this provision, see Marion Panizzon, 'Temporary Movement of Workers and Human Rights Protection: Interfacing the "Mode 4" of GATS with Non-Trade Bilateral Migration Agreements' (2010) 104 *American Society of International Law Proceedings* 131, 132–3.

¹⁷² *Ibid* 132.

Regional treaties can also be conceptualised as promoting this divide. Another preference for migrants of *value* is discernible in, just to take one example, the *North American Free Trade Agreement*, recently renegotiated as the *US–Mexico–Canada Agreement*, which facilitates easier visa access for ‘business persons’ and professionals.¹⁷³ While on their face these treaties concern rights of entry and do not discriminate in terms of the *treatment* they offer to legal migrants, their relative bias against migrants that are not ‘value-adding’ has tended to promote illegal migration of others and has led to a consequent relative lack of rights for migrants who must stay underground. Even regulations conceptualised as being in Southern migrants’ interest — such as anti-trafficking laws — can have the perverse consequence of rendering pathways even more clandestine and less safe for migrants lacking means of regular entry.¹⁷⁴

As such, international migration law’s biases bear resemblances to interwar patterns and structures. Such patterns beg questions about the supposed purpose of this law in a more contemporary context. Superior treatment of skilled migrants, that is intended to have positive economic effects, is a somewhat clear correspondence between practices of the interwar period and today. Yet if lesser protections offered to colonial labour migrants were intended to have developmental effects in the interwar era, what, if any, corresponding *economic* justification exists for weaker protections as applied to migration towards the ‘developed’ Global North? Answers to this question remain murky. Is the less protected migrant labour that international migration law produces actually more beneficial for Northern economies or the global economy in the aggregate? An answer would depend on better information about the complex relationship between labour protections, labour costs and economic effects — whether savings are invested, whether reduced wages reduce demand and what the broader social effects of a lack of documented status are.¹⁷⁵

Could a lack of migrant protections be a means to fuel Southern economic development? Contemporary scholars and policymakers have typically characterised migration’s relationship to development in terms of the impact of remittances or skills transfers from immigrant societies to emigrant countries — with a particular focus on transfers of funds or skill from immigrant societies in the Global North to communities of origin in the South.¹⁷⁶ Yet it is hard to see

¹⁷³ See *Agreement between the United States of America, the United Mexican States and Canada*, signed 30 November 2018 (entered in force 1 July 2020) ch 16 (‘*US–Mexico–Canada Agreement*’). The agreement provides for long-term stays up to and not including permanent residence: at art 16.1.

¹⁷⁴ See, for example, the criminal approach described in Prabha Kotiswaran, ‘Trafficking: A Development Approach’ (2019) 72(1) *Current Legal Problems* 375, 377.

¹⁷⁵ Current statistical practices and methodological difficulties also make the economic contributions of migration, let alone its relationship to protections, difficult to determine: see International Labour Organisation, Organisation for Economic Co-Operation and Development and World Bank Group, ‘The Contribution of Labour Mobility to Economic Growth’ (Joint Paper, G20 Labour and Employment Ministers’ Meeting, 4 September 2015) 13, 28–31. Research that has been attempted with recent data on specific aspects of social protection, such as the relationship between migration, access to welfare systems and economic benefit, has also proven ambiguous: see Igor Jakubiak, ‘Migration and Welfare Systems — State of the Art and Research Challenges’ (2017) 1(48) *Central European Economic Journal* 51.

¹⁷⁶ See Hein de Haas, ‘Migration and Development: A Theoretical Perspective’ (2010) 44(1) *International Migration Review* 227, 230.

how or whether the current weak regime of protections contributes to this dynamic. An argument could be made that a weaker regime disincentivises states in the Global North from closing their borders to migrants because migrants could then provide lower cost labour or have lower access to services — allowing for more contributors to remittance flows. Yet fewer protections can also mean lower migrant wages. Governments also often reduce migrant protections such as access to services to placate anti-immigrant opinion that assumes that such action will *reduce* migration.¹⁷⁷ And migrants themselves may not prioritise the best treatment in making choices over where to immigrate, particularly when access to services means increased surveillance or control.¹⁷⁸ All of these factors point to an unclear relationship between lowered protections in the North and increased remittance flows.

Less attention is paid to the place of *South–South* migration for the development of migrant *destination* states in the Global South today than in the interwar era, moreover. Certainly, migrants have made momentous contributions to the economies of the Gulf region and parts of East and Southeast Asia, to the extent of arguably excepting some states in these locations from the category of ‘developing country’ or ‘Global South’ altogether. Often, however, these states’ treatment of migrant labour is seen as being in defiance of international law or merely a consequence of this law’s lack of enforcement rather than a symptom that a weak or bifurcated international legal regime effectively *encourages*.¹⁷⁹ Has the fragmentation and weakness of international migration law inadvertently contributed to a balance, akin to that of the interwar era, that favours migrants to Southern states contributing to developmental growth over migrants’ rights?

B *Implications for International Institutions and Development*

Beyond prompting questions about how contemporary migration law contributes to growth and development, the histories above also open new perspectives on the role of international institutions in development and the Global South more broadly. ILO reform efforts can be read as constituting a prehistory of the way that many international economic, financial and even labour institutions have operated in more recent times. ILO programs during this era were not

¹⁷⁷ Recent research has indicated that policymaking concerned with welfare access for migrants in national contexts, for example, is more inclined toward this latter concern: see Mike Slaven, Sara Casella Colombeau and Elisabeth Badenhoop, ‘What Drives the Immigration–Welfare Policy Link? Comparing Germany, France and the United Kingdom’ (2021) 54(5) *Comparative Political Studies* 855.

¹⁷⁸ On migrant preferences in general, see, eg, Rémi Bazillier and Yasser Moullan, ‘Does Employment Protection Influence Migration Flows toward OECD Countries?’ (2012) 63(3) *Revue économique* 491; Daniel Degen, Theresa Kuhn and Wouter van der Brug, ‘Granting Immigrants Access to Social Benefits? How Self-Interest Influences Support for Welfare State Restrictiveness’ (2019) 29(2) *Journal of European Social Policy* 148. For an example of how improved treatment can correlate with increased control over status, see Sieglinde Rosenberger and Sabine Koppes, ‘Claiming Control: Cooperation with Return as a Condition for Social Benefits in Austria and the Netherlands’ (2018) 6 *Comparative Migration Studies* 26:1–18.

¹⁷⁹ These responses are frequently raised by human rights groups but also exist in the scholarly sphere: see, eg, David Kean and Nicholas McGeehan, ‘Enforcing Migrant Workers’ Rights in the United Arab Emirates’ (2008) 15(1) *International Journal on Minority and Group Rights* 81; Jaclyn L Neo, ‘Riots and Rights: Law and Exclusion in Singapore’s Migrant Worker Regime’ (2015) 2(1) *Asian Journal of Law and Society* 137, 155–6.

coercive towards independent states in the way that ‘structural adjustment programs’ pursued by international economic institutions more recently have been, such as by threatening to withhold bailouts, fiscal constraints and the potential to return to the good graces of global financial markets in order to ensure compliance.¹⁸⁰ Yet not all contemporary international economic laws and institutions are overtly coercive; often, they make similar claims to natural leadership through expertise.

Some scholars have suggested ways in which contemporary institutions’ approaches to the Global South can represent continuity with their interwar histories of engagement with colonial as well as peripheral states, as they not only balance economic growth and rights but potentially even account for cultural or geographic difference.¹⁸¹ Other scholarship, however, has continued to portray international economic law and institutions operating on independent postcolonial states as a fairly recent phenomenon of the postwar era.¹⁸² It is clear that engagement with the interwar history of these subjects must be deepened. In particular, scholarship has not taken account of the place of migration in these histories and the perspectives it can offer on the differences between interwar and contemporary approaches to development.

The ILO’s work in interwar Latin America, for one — helping or seeking to draft new domestic law in the name of attracting more value-adding settlers — bears resemblance to similar, and more recent, institutionally led and technocratically driven developmental reform programs. Groups within the World Bank, for example, have advocated legal reforms that they claim will improve the ‘investor climate’ of a country to attract foreign spending — ignoring the interest of other parties in the design of legal systems.¹⁸³ And even the contemporary ILO has pursued recent investor-friendly labour law reform initiatives in Africa.¹⁸⁴

Like these programs, the ILO’s interwar efforts in Latin America sought to provide aid in restructuring municipal law in order to bring an economic return. Settlement was, in effect, viewed as a form of investment, facilitated by the human capital of ‘superior’ or ‘skilful’ European migrants rather than by the more liquid capital of the present. In doing so, they likewise excluded the perspectives of other parties — namely the ‘natives’ whom these policies marginalised. Even the complicity of interwar governing elites in Latin America has been echoed more

¹⁸⁰ See, eg, Juan Pablo Bohoslavsky and Franz Christian Ebert, ‘Debt Crises, Economic Adjustment, and Labour Standards’ in Ilias Bantekas and Cephias Lumina (eds), *Sovereign Debt and Human Rights* (Oxford University Press, 2019) 284, 286, on the requirement of deregulation of the labour market by reducing minimum wage, dismissal and overtime protections in Argentina and Côte d’Ivoire; Sarah Babb, ‘The Social Consequences of Structural Adjustment: Recent Evidence and Current Debates’ (2005) 31 *Annual Review of Sociology* 199, 204–5, on the privatisation of social security systems in Latin America.

¹⁸¹ Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing, 2013) 38–9.

¹⁸² Pahuja, for example, discusses a split between international political law and international economic law in which the latter is much more coercive, yet her study begins in the postwar era of decolonisation: Pahuja (n 2) 7.

¹⁸³ See Amanda Perry-Kessaris, ‘Enriching the World Bank’s Vision of National Legal Systems and Foreign Direct Investment’ in Per Bergling, Jenny Ederlöf and Veronica L Taylor (eds), *Rule of Law Promotion: Global Perspectives, Local Applications* (Iustus Förlag, 2009) 271.

¹⁸⁴ See, eg, Adelle Blackett, ‘Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa’ (2011) 32(2) *Comparative Labor Law and Policy Journal* 443.

recently in the willingness of governments in the Global South to comply with international economic institutions — often because they share their economic ideology to the same extent that Latin American elites once shared the hierarchical assumptions of European ILO officials.¹⁸⁵

Taking the interwar ILO programs together, it is clear that they each offered societies elevation from a lower standard on the world stage at which a state and its people are virtually unrecognised, through the mediation of expertise emanating from a higher position. Postwar international economic law and institutions, Sundhya Pahuja has written, similarly ‘exercise ... control through the implementation of ongoing “reforms”’ to move underperforming states in the Global South towards an ‘ideal[ised]’ standard of ‘universality’ that is actually ‘provincial’ for having been conceived in the Global North, not unlike the earlier ‘standard of civilisation’.¹⁸⁶ Such law and institutions do so through similar claims of unique expertise with which developing states continue to be judged. The World Bank, for example, ‘measur[es], rank[s] and diagnos[es] countries on the basis of an epistemically constructed ideal-type of the modern state’.¹⁸⁷ These efforts may be ‘performative’ rather than directly disciplinary.¹⁸⁸ Yet they do not go unheeded by modern states — in fact, internal research found that the Bank’s ‘analytical and advisory products’ could be *more* influential than coercive methods such as lending conditions.¹⁸⁹ As in the interwar periphery, the logic of expert-led growth can be persuasive enough to lead to a reshaping of other protections — such as labour law — to defer to this logic of growth or to enhance growth.¹⁹⁰

As such, contemporary international institutions’ recommendations or allowances for states to reduce or slow the implementation of protections — often in the name of development — also echo aspects of the ILO’s native labour conventions, balancing the development of social rights with development in the form of economic growth. These include the idea of the ‘[progressive] ... realization’ of rights emerging only as resources allow (reflecting the interwar debate over penal sanctions), ‘flexibility’ on rights being necessary to entice states to a *relative* conformity with universalistic approaches (an approach often favoured by the contemporary ILO, and one bearing resemblance to its interwar fixture on circumstances) or weaker labour law protections being necessary to

¹⁸⁵ Contemporary Latin American elites have been complicit with international debt restructuring programs: see, eg, James L Dietz, ‘The Debt Cycle and Restructuring in Latin America’ (1989) 16(1) *Latin American Perspectives* 13.

¹⁸⁶ Pahuja (n 2) 3.

¹⁸⁷ Dimitri Van Den Meerssche, ‘International Organizations and the Performativity of Measuring States: Discipline through Diagnosis’ (2018) 15(1) *International Organisations Law Review* 168, 172.

¹⁸⁸ *Ibid.*

¹⁸⁹ See Stephen Knack et al, ‘How Does the World Bank Influence the Development Policy Priorities of Low-Income and Lower-Middle Income Countries?’ (Working Paper No 9225, World Bank Group, April 2020).

¹⁹⁰ For an example of how developmental ‘expertise’ overpowered objections in the direction of a more rigid labour law, see Liam McHugh-Russell, ‘International Labor Law and Its Others: Governance by Norm versus Governance by Knowledge’ (2019) 113 *AJIL Unbound* 402.

render poorer countries or countries in recession more competitive.¹⁹¹ In some cases, the issues addressed by these programs — whether minors should be permitted to work, for example, because this would at least theoretically allow regulatory oversight of an inevitable phenomenon — remain the same.¹⁹² Even today, the philosophy of flexibility can encompass not only the way specific clauses of conventions are drafted but also their division into different parts that are only optionally applicable or applicable to different polities or geographies.¹⁹³

As much as the histories above demonstrate such continuities, however, they also point to *discontinuities* in the way this expertise has functioned — particularly in its approaches to migration — which can potentially open up new approaches to development. These histories beg the questions, for example, of whether and when migration still functions as ‘investment’ or ‘labour’ and whether, when and which rights hinder or facilitate migration’s contributions to growth. Would *improved* rights that not only attract migrants but also make them more successful contributors to economies — as the ILO pushed for in interwar Latin America — facilitate growth in contexts where such an avenue is not considered today?

New approaches appear warranted especially because thinking through the deep roots of contemporary development tools also calls their effectiveness into question, given that many of the places subject to them have not become economic successes in all the time that similar approaches have been applied. The rationales through which colonial authorities in Africa accepted and implemented migrant rights, maintaining a paternalistic understanding of ‘traditional life’, demonstrates how understandings that seek to conform law to particular cultures or geographies — or to provide flexibility to do so — can potentially produce negative feedback loops that can *inhibit* economic participation.¹⁹⁴ Deference to state or international expert positions may inadvertently reproduce a similarly presumptive approach to rights in the present.

¹⁹¹ The idea of ‘progressive realisation’ is encapsulated in, for example, art 2(1) of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), which recognises the need for states to ‘take steps ... to the maximum of ... available resources’ to ‘progressively ... realiz[e]’ rights. For a discussion of progressive realisation as a form of ‘flexibility’, see George P Politakis, ‘Deconstructing Flexibility in International Labour Conventions’ in Jean-Claude Javillier, Bernard Gernigon and Georges P Politakis (eds), *Les normes internationales du travail: un patrimoine pour l’avenir* [The International Norms of Labour: A Patrimony for the Future] (Bureau International du Travail, 2004) 463, 484, referring to progressive realisation as ‘progressive implementation’. On ‘flexibility’ as a means to entice states to conformity, see Maupain (n 181) 38–47. On ‘flexibility’ as a means to increase competitiveness in developing countries, see, eg, Alvaro Santos, ‘Labor Flexibility, Legal Reform, and Economic Development’ (2009) 50(1) *Virginia Journal of International Law* 43.

¹⁹² For a contemporary example, see Karin Calitz, ‘The Failure of the Minimum Age Convention to Eradicate Child Labour in Developing Countries, with Particular Reference to the Southern African Development Community’ (2013) 29(1) *International Journal of Comparative Labour Law and Industrial Relations* 83.

¹⁹³ Politakis (n 191) 474–5.

¹⁹⁴ As such, the way that rights were implemented actually helped constitute ‘underdevelopment’. As Walter Rodney wrote in his classic work on the subject, ‘[w]hen [tribal organisation] ceased to be transient and became institutionalized in Africa, that was because colonialism interrupted African development’: Walter Rodney, *How Europe Underdeveloped Africa* (Howard University Press, rev ed, 1981) 229.

C Implications for the Idea of 'Indigeneity' in International Law

The historical application of international law to 'natives' informs a third category of international law: its construction of indigeneity. Today the term is often invoked to call for special protections or restitution in recognition of deprivation. Yet the use of loose native and indigenous categories in the interwar era to the end of establishing law that could be both paternalistic and insufficiently protective ought to yield cautions about how these terms have descended to and are deployed in law and governance today.

Concerns about the indeterminacy of the category of indigenous and its purposes in international law are hardly new.¹⁹⁵ Yet discussion of the historical definition of indigeneity in international law has left gaps. Scholarly treatment of the subject often begins only with the UN and ILO's efforts after the Second World War or skips forward to that era from much earlier periods of colonisation.¹⁹⁶ One leading scholar has written that prior to the 1970s, the category of 'indigenous people' was 'a prosaic description without much significance in international law and politics'.¹⁹⁷ Other scholars suggest that a lack of calcification of the concept of 'indigenous people' in international law by indigenous movements, or the lack of attention to indigenous issues outside the ILO (and a relative lack of focus within it), may have helped downplay many earlier periods of history.¹⁹⁸ Histories of international law that focus on published materials may also miss the contestation over terminology present in the archival records of states. As a consequence, few have mentioned struggles over definition in the ILO's interwar treatment of natives.¹⁹⁹

¹⁹⁵ See, eg, Benedict Kingsbury, "'Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92(3) *American Journal of International Law* 414.

¹⁹⁶ For examples of histories beginning in the postwar era, see Russel Lawrence Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80(2) *American Journal of International Law* 369, 370; Lee Swepston, 'Indigenous and Tribal Populations: A Return to Centre Stage' (1987) 126(4) *International Labour Review* 447. For an example moving from early modernity to the mid-20th century, see S James Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8(2) *Arizona Journal of International and Comparative Law* 1. S James Anaya's longer history of indigenous peoples in the eyes of international law includes more context between the early modern era and the 1950s but nonetheless omits interwar ILO work: see S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004).

¹⁹⁷ Kingsbury (n 195) 414. Benedict Kingsbury does consider the colonial roots of the definition of indigenous peoples in individual states but does not elaborate on how they informed international law prior to the late 20th century beyond a brief mention of the League: at 426–7. Russel Lawrence Barsh calls the lack of a definition of 'indigenous' an 'accident of history' and makes a similar passing reference to the League: see Barsh (n 196) 373.

¹⁹⁸ See Emma Nyhan, 'International Law in Transit: The Concept of "Indigenous Peoples" and Its Transitions in International, National and Local Realms' in August Reinisch, Mary E Footer and Christina Binder (eds), *International Law and...: Select Proceedings of the European Society of International Law* (Hart Publishing, 2016) 289, 292, discussing how terminology was inconsistent and did not impact international legal spaces until the 1970s; Swepston (n 196), focusing on the use of the concept within the ILO.

¹⁹⁹ For exceptions, see Rodríguez-Piñero (n 7) 49; Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observations' (2008) 30(1) *Michigan Journal of International Law* 177, 189–90. These brief discussions, however, do not account for how interwar definitions were applied.

Those arguments over to whom and the extent to which the category of native or indigenous applied left its definition open to manipulation by governments or other actors. They particularly left the term subject to interlocking legal definitions — the way, for example, Indian, South African or South American natives could be exempted from international legal protections because they were not classified as being located in ‘dependencies’, or the way that indigenous groups in India were additionally exempted from indigenous status because they lacked any pre-existing special legal designation. Nonetheless, relatively broadly interpretable definitions of indigenous peoples continued to apply in ILO convention revisions after the Second World War, which were hereditarily linked to the Organization’s interwar efforts. Scholarship has suggested that these conventions ‘shifted dramatically’ away from the colonial goals of the classification, moving away from paternalistic protection to philosophies of integration and ultimately autonomy.²⁰⁰ Yet the ongoing vagueness of the term itself has continued to make it likely to be subject to a wide variety of interpretations that may cut against these new goals.

The most recent revision of the ILO convention concerned with indigenous rights, for example — the *Convention concerning Indigenous and Tribal People in Independent Countries* (‘*Indigenous and Tribal Peoples Convention*’) — grants some deference to indigenous peoples’ self-identification but also applies other, far more arguable historical and organisational criteria for belonging in the category. These include, in an echo of interwar assumptions, being ‘tribal’, being ‘distinguish[ed]’ from the ‘other sections of the national community’, as well as ‘inhabit[ing]’ a country ‘at the time ... of colonisation’ and retaining institutions from that time — all of which can be used to argue for the application or denial of the Convention’s terms based on their particular interpretations.²⁰¹ As with the earlier ILO native labour conventions, these have the potential to reflect a deference to pre-existing statuses, including historical and state categorisations and notions of autonomy that may ultimately disempower these groups as much as they present them with opportunities.²⁰² Scholarship has already demonstrated how in one contemporary case, with respect to the classification of indigenous peoples, the

interplay between the international and the national not only produces inconsistencies, uncertainties and indeterminacy at the theoretical level but also generates tensions, hybridities, frictions and new subjectivities ... at the national and international level.²⁰³

At the same time, the histories in this article demonstrate commonalities among indigenous communities impacted by a colonially influenced international law. These demonstrate a breadth that militates against contemporary arguments for a more restrictive understanding of indigeneity, without sacrificing a specificity of historical experience. In contrast to arguments that the term should *only* apply to settler states, a considerable portion of the ILO’s interwar efforts focused on the

²⁰⁰ For the ‘dramatic shift’ argument, see Macklem (n 199) 190–2.

²⁰¹ See *Convention concerning Indigenous and Tribal People in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) arts 1(1)–(2) (‘*Indigenous and Tribal Peoples Convention*’).

²⁰² For just some of the definitional strategies that have been used, see Kingsbury (n 195) 434–5.

²⁰³ Nyhan (n 198) 290.

indigenous in specifically non-settler colonies in Africa.²⁰⁴ In contrast to arguments that ‘indigenous’ populations needed to have been set apart from society at large,²⁰⁵ the ILO’s efforts concentrated on migrant populations that European actors viewed as integral to their empires’ colonial economies. They also did not, in contrast to some definitional arguments, need to suffer ‘disruption, dislocation’ or even always ‘exploitation’, but they did suffer from a lesser *relative* status in the apportioning of protections and in the name of development.²⁰⁶ The same was true for the more settler-focused efforts in Latin America, where native status emerged as lesser by implication. Finally, these experiences account for socioeconomic understandings of indigeneity that go beyond a restrictive embrace of cultural rights alone.²⁰⁷

There is a case to be made that the broadest possible definition may be historically just in permitting the broadest array of historically or self-identified indigenous peoples’ rights.²⁰⁸ In contrast to the *Indigenous and Tribal Peoples Convention* of the ILO, the more recent *United Nations Declaration on the Rights of Indigenous Peoples* has no clear definition of the term, arguably allowing just such a broad array of claims.²⁰⁹ While this breadth presents fewer risks of entangling a more specific definition with a pre-existing status, it also provides fewer means to argue against the loss or nonapplication of indigenous status.²¹⁰ The definition of indigeneity in international law, this article suggests, could be more informed by historical definitions that had been previously present in international law and their own effects on indigenous experiences. These point both to the risks of a broad definition that does not account for unintended consequences and the need to account for situations in which international law itself contributed to the construction of categories of indigeneity.

²⁰⁴ Arguments for application of the term only to settler societies have been advanced largely by Asian states: see Kingsbury (n 195) 418.

²⁰⁵ As in the definition embraced in the *Indigenous and Tribal Peoples Convention* (n 201) art 1.

²⁰⁶ Kingsbury makes an argument for such a criterion: Kingsbury (n 195) 453.

²⁰⁷ For a critique of the embrace of cultural rights over an understanding of ‘indigeneity’ that touches on the socioeconomic, see Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010).

²⁰⁸ See the arguments cited in Kingsbury (n 195) 446–50.

²⁰⁹ Macklem (n 199) 203. Arguably, however, the *United Nations Declaration on the Rights of Indigenous Peoples* does embrace a definition concerned with colonial dispossession and a lack of a ‘right to development in accordance with their own needs and interests’ by making reference to it: *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex (‘*United Nations Declaration on the Rights of Indigenous Peoples*’) Preamble para 6.

²¹⁰ Even ‘self-identification’ of indigenous status presents the risk of the dilution of the label through overuse: see Gregory Benjamin, ‘Who Gets to Be Called Indigenous, and Why?’ (Keynote Address, International Conference on Access to Justice for Indigenous Peoples, 10 April 2015) 4.

IV CONCLUSION: ILO HIERARCHIES, THE HISTORIOGRAPHY OF INTERNATIONAL LAW AND INSTITUTIONS, AND FUTURE REFORM

The histories of international legal and institutional hierarchies recounted above demonstrate the colonial influences that have shaped interwar international law and institutions that have been documented by historians such as Mark Mazower.²¹¹ They also illustrate forms of the more thematic continuities between colonial practices and international law typically attributed to postwar, postcolonial international law by theorists of the Third World Approaches to International Law school.²¹² Both concrete inputs from colonial actors and the influence of colonial mentalities overlapped in and overdetermined the ILO's approach to migration during the interwar period: more formal types of colonial international law upholding the mandates system and the paternalistic governance of natives existed alongside more informal European guidance in peripheral states and the persistent belief in European superiority influencing the reform of domestic Latin American laws in favour of European settlers.

As such, the interwar period could be characterised as a *transitional* one, between an era of colonial international (and transnational) law in which European empires and hegemonic ideas more overtly dictated effects, and a post-Second World War era in which less overt forms of colonial ideology persisted and in which international institutions continued to exercise a kind of informal imperial influence on the Global South. In earlier eras, to be sure, transnational and international law mapped onto independent states in colonial ways — such as by enforcing Europeans' extraterritorial legal rights — and also complemented the exercise of formal colonial rule.²¹³ During the interwar period, however, both of these forms of law were formalised and codified at the international level in ways that would be more familiar today, including as a denser web of multilateral treaties and institutionally led global governance initiatives. Colonial understandings such as those concerning the regulation of African labour were rebaptised as initiatives of international organisations such as the League of Nations and ILO — which then became means to legitimise ongoing local practices of colonial governance. At the same time, institutions such as the ILO took up forms of informal influence over independent sovereign states in Latin America, providing a new channel for European influence over the region.

With the waning of formal colonial rule after 1945, the imbrication of colonialism and internationalism that shaped instruments like the native labour conventions became less clear, while their form — as well as the practice of informal influence that arose with and alongside them — persisted. What this juxtaposition demonstrates is that contemporary hierarchies in international law did not just possess colonial roots nor merely resemble colonial practices. Hierarchical relationships between independent states in forms very similar to today's emerged alongside colonial ones — to the point that they could be encompassed by the same organisation.

²¹¹ Mazower (n 6) ch 1.

²¹² See, eg, Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly* 739.

²¹³ See, eg, Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press, 2002) ch 6, on the implementation of extraterritoriality in 19th century Uruguay.

These histories also raise new questions about responsibility for the inequalities created in the past and their ongoing effects. The circle of who were involved in creating and most enjoyed the fruit of the hierarchies created includes not only the administrators of colonial powers or metropolitan populations who potentially benefitted from colonial or mandatory rule, but also the officials of international organisations from the elite of settler states and migrants and settlers from across Europe. The ILO's work in Latin America helped facilitate a form of internationalised settler colonialism for the benefit of nationalities such as Poles and Romanians whose countries lacked their own colonial outlets as much as Western Europeans who had more traditionally and more often been involved in the demographic 'expansion of Europe'.²¹⁴ A wide sphere of European societies therefore benefitted from the reduction and marginalisation of native categories of people in the interwar South. Today, once again, countries like Poland and Romania — to say nothing of wealthier states — enjoy the privilege of membership in a European sphere that has been historically difficult for those who are not members of that community to enter.

Tendayi Achiume — UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance — has written that imperial powers owe a debt of responsibility to the former colonised in the form of migratory pathways.²¹⁵ Histories that demonstrate how international institutions and international law were involved in the construction of settler colonial migration, the oversight of peripheral states and the marginalisation of colonised peoples show that an even wider sphere of 'imperial powers' — European states that never possessed formal empires, the elite classes of peripheral states and the world of international lawyers and institutions — may be similarly indebted. Addressing this responsibility need not necessarily come (only) in the form of facilitating compensatory migratory opportunities. It could begin by further interrogating the present structures of migration, development and indigenous rights in international law and global governance — as this article has only begun suggesting how to do.

²¹⁴ Szabla (n 18) ch 4. For the salience of the term 'expansion of Europe' in the field of imperial history, see Jerry H Bentley, 'Revisiting the Expansion of Europe: A Review Article' (1997) 28(2) *Sixteenth Century Journal* 503.

²¹⁵ E Tendayi Achiume, 'Migration as Decolonization' (2019) 71(6) *Stanford Law Review* 1509.