COLONIALISM AND THE BIRTH OF INTERNATIONAL INSTITUTIONS: SOVEREIGNTY, ECONOMY, AND THE MANDATE SYSTEM OF THE LEAGUE OF NATIONS

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I. INTRODUCTION

All sovereign states are equal.[1] Colonies, by definition, lack sovereignty. But the transformation of colonial territories

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1. This proposition, which is fundamental to international law, has been formulated in different ways. Oppenheim's formulation in 1928 is as follows: "The equality before International Law of all member-states of the Family of Nations is an invariable quality derived from their International Personality." 1 OPPENHEIM, INTERNATIONAL LAW (Sir Arnold D. McNair ed., 4th ed. 1928). The suggestion that equality exists, not among all states, but rather, among those states that are members of the Family of Nations (that is, European and Western states) points already to one of the major themes explored in this article: the complex relationship between sovereign equality and colonialism, and the manner in which admission to the Family of

into sovereign, independent states enabled these territories, which previously had been excluded from the realm of international law, to enter the international system with all the powers and attributes of sovereignty and as equal members of the Family of Nations. This development in turn is the basis of the claim—fundamentally important to the contemporary discipline of international law and its legitimacy—that international law is truly universal, open, and cosmopolitan because it extends sovereignty to all states without making the invidious cultural distinctions between the civilized European and the uncivilized non-European that had served in the nineteenth century to exclude non-Europeans from the realm of sovereignty while subjecting them to colonialism. The liberality of international law is affirmed by the fact that it extends this formal equality despite wide disparities in the real power of supposedly equal sovereign states.

The first tentative formulation of this radical project of transforming colonial territories into sovereign states commenced immediately after the Great War. It occurred at the same time that another monumental change was taking place in international law, as the creation of international institutions like the League of Nations began to emerge. Up to the beginning of the twentieth century, sovereign states were the only actors recognized by international law. With the creation of the League, however, the international institution emerged as a new actor in the international system, providing international law with a new range of ambitions and techniques for the management of international relations.

This article seeks to explore the relationship between these two developments: the relationship between the project of transforming colonial territories into independent sovereign states and the international institution which was supposed to implement this project—the Mandate System of the League of Nations.[2] The Mandate System was an international

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Nations affected the character of the sovereignty acquired by the non-European states so admitted.

2. The Mandate System has generated an enormous body of literature. *See, e.g.*, QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS (1930); NORMAN BENTWICH, THE MANDATES SYSTEM (1930); R.N. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS (1955); H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIPS (1948); 3 HERSCH LAUTERPACHT, *The Mandate Under International Law in the Covenant of the League of*

regime created for the purpose of governing the territories—stretching from the Middle East and Africa to the Pacific—that had been annexed or colonized by Germany and the Ottoman Empire, two of the great powers defeated in the First World War. Rather than distribute these territories among the victorious powers as the spoils of war, the international community resolved to place them under a system of international tutelage. In this sense, the Mandate System represented a dramatically different approach to what broadly might be termed "colonial problems": the complex problems generated by Western governance of colonized peoples. Whereas the positivist international law of the nineteenth century endorsed the conquest and exploitation of non-European peoples, the Mandate System, by contrast, sought to ensure their protection. Whereas positivism sought to exclude non-European peoples from the Family of Nations, the Mandate System was created to achieve precisely the reverse: It attempted to do nothing less than to promote self-government and, in certain cases, to integrate previously colonized and dependent peoples into the international system as sovereign, independent nation-states.

At the most immediate level, then, I examine the legal structure of the system, the political context in which it was created, the goals it sought to advance, and the manner and effects of its operation. The task confronting the Mandate System was both unprecedented and formidable. It involved far more than simply bestowing a juridical status on dependent people; rather, it contemplated nothing less than the creation of the social, political, and economic conditions thought necessary to support a functioning nation-state. This project required international law and institutions to produce a new set of technologies, and my interest lies in examining the character of these technologies and their actual use in, and development through, the mandate territories. At a more general

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Nations, in INTERNATIONAL LAW 29, 29-84 (E. Lauterpacht ed., 1970). For a later assessment of the system, see James C. Hales, *The Reform and Extension of the Mandate System*, 26 TRANSACTIONS OF THE GROTIUS SOCIETY 153 (1940). For accounts of specific mandates, see CHRISTOPHER G. WEERAMANTRY, NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP 41-122 (1992); and see generally ISAAK I. DORE, THE INTERNATIONAL MANDATE SYSTEM AND NAMIBIA (1985). I have relied heavily on Wright's masterly work, *supra*. Although it is one of the earliest, it is in many ways the most comprehensive, penetrating, and prescient.

level, my claim is that an examination of the Mandate System reveals issues of enduring theoretical and practical significance about sovereignty, international institutions, and the management of relations between European and non-European peoples. This is because it is in the Mandate System that these three broad themes first come into relationship with each other. My argument is that colonialism profoundly shaped the character of international institutions at their formative stage and that, by examining the history of how this occurred, we might illuminate the operations and character of contemporary international institutions.

My larger concern is to study the League experiment in the broader context of the relationship between colonialism and international law. This article is part of an ongoing attempt to sketch a history of this relationship.[3] My broad argument is that the colonial confrontation was central to the formation of international law. Given the foundational significance of the proposition that international law is universal, it follows that any comprehensive theory of the discipline needs to address the question of how a single system of international law, with its explicitly European origins, became global and applicable to the societies of Africa, Asia, and the Pacific, with their very different cultures, belief systems, and political and economic institutions. It was principally through colonial expansion in the nineteenth century that international law became universal in this sense. In the interwar period, the pro-

3. Other articles that form a part of this project include Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993) [hereinafter Anghie, *Nauru*]; Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 231 (1996) [hereinafter Anghie, *Vitoria*]; Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999) [hereinafter Anghie, *Peripheries*]; and Antony Anghie, *Universality and the Concept of Governance in International Law*, *in* LEGITIMATE GOVERNANCE IN AFRICA 21 (Edward Kofi Quashigah & Obiora Chined Okafor eds., 1999). I have touched upon various aspects of the Mandate System in previous articles, and this article develops themes sketched in Anghie, *Nauru*, *supra*, and Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243 (2000) [hereinafter Anghie, *Time Present and Time Past*]. These works attempt to develop a methodology for examining the question of the relationship between colonialism and international law—a methodology that I have applied and elaborated here.

ject of universality began to acquire a different, liberal character as it tentatively commenced the process of incorporating non-European societies into the international system as equal and sovereign states. This project of decolonization, concluded in the U.N. period, was crucial to a different and more powerful argument regarding the universality of international law: It now could be claimed that international law was not merely applicable to all societies, but that all societies participated on equal terms in its formulation. Despite this, scholars of international law generally have relegated the colonial confrontation to the theoretical peripheries of the discipline by treating that confrontation as generating a series of issues that were of a pragmatic, rather than a theoretical, consequence. As such, decolonization, for example, is seen as an issue appropriately requiring pragmatic resolution rather than as an issue that reveals anything of enduring theoretical significance about the character and nature of international law.[4]

This neglect has been promoted by the view, adopted by mainstream and critical scholars alike, that the principal theoretical problem confronting the discipline is that of how order is maintained among sovereign states. This broad problem has been refined into a number of other inquiries of both a practical and a theoretical nature that broadly examine the binding quality of international law: Is international law really law? Is international law legitimate? What is the character and authority of customary law? How does international legal argument seek to overcome the problem of order by positing the existence of a law that provides clear answers? The resolution of the problem of creating order among autonomous sovereigns was crucially important for the purposes of resolving disputes between sovereign European states. But once the historical experience of European states was transformed into the dominant theoretical problem of the discipline, it conditioned and limited other forms of inquiry. Within this paradigm, therefore, no account can be given of the way in which non-

4. Scholars more sensitive to the histories of non-European peoples have been attempting to remedy this defect. *See generally* Georges Abi-Saab, *International Law and the International Community: The Long Road to Universality, in* ESSAYS IN HONOUR OF WANG TIEYA 31 (Ronald St. John ed., 1994); Onuma Yasuaki, *When Was the Law of International Society Born?: An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIS. INT'L L. 1 (2000).

European peoples were denied sovereignty or, indeed, the way in which international law subsequently sought to transform them into citizens of sovereign states, issues that are the subject of this article. Thus, within this framework, it is only when colonial states achieved independence and emerged as sovereign states that they acquired a significance that is capable of analysis. Furthermore, it was at this point that the issue of universality became especially prominent as Third-World countries attempting to assert their newly won sovereignty by seeking to change international law were seen to be threatening the universality of international law.

My attempt to sketch the history of the relationship between international law and colonialism is informed, then, by a concern to examine, through this history, a different problem, and to develop a different set of analytic tools that might be more adequate for the purposes of explaining and illuminating the colonial confrontation and its broader significance for international law.[5] My argument here is that the practices of cultural subordination and economic exploitation, which are essential aspects of colonialism, are not epiphenomenal aberrations in the international system that were remedied by the project of decolonization and self-determination. Rather, they continue to play a role in contemporary international relations and generate important analytic categories that have an enduring and crucial significance to our understanding of international law as a whole.

In developing such a methodology, I argue that international law must be viewed, not in terms of the problem of order among sovereign states, but rather, in terms of the problem of cultural difference—the difference that international jurists through the centuries understood to separate civilized, European states from uncivilized, non-European states. The problem of cultural difference gives rise to what crudely might

5. My approach has been based on the profoundly important work done by scholars problematically termed "postcolonial." *See generally* EDWARD W. SAID, ORIENTALISM (1978); EDWARD W. SAID, CULTURE AND IMPERIALISM (1993); GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON (1999); HOMI K. BHABHA, THE LOCATION OF CULTURE (1994); DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000). For another important recent work on the subject of imperialism that is more Marxist in orientation, see generally MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2001).

be called the dynamic of difference, which consists of a series of maneuvers: First, a fundamental difference is postulated between the European and non-European worlds; second, this difference leads international law to generate the doctrines, technologies, and institutions that purport to bridge this gap, efface difference, and achieve uniformity and universality; third, failure on the part of the natives, uncivilized and backward, to comply with these universalizing doctrines and technologies often leads to the application of sanctions. It is the continuous construction of difference that animates the civilizing mission and is a fundamental and enduring theme of international law, the imperial project by means of which international law seeks to achieve the necessarily endless task of becoming universal. My further reasons for emphasizing the concept of cultural difference are the inextricable links between culture and sovereignty, and international law's formulation of notions of sovereignty that affirm, reflect, and empower certain cultural practices while excluding and suppressing others. The dynamic of difference acquires very different forms in different phases of the discipline. In the nineteenth century, it operated to exclude non-European societies from the international realm and to facilitate their absorption into the system as colonies, as Europeanized entities. In the interwar period, by contrast, the dynamic operated to establish the terms on which non-European societies might enter international law as sovereign states.

This article sketches a history of how international law and institutions created sovereignty in non-European states. In examining this theme, I seek to depart from traditional approaches where the sovereignty doctrine, perfected in the West, is transferred to the non-European world. This is a powerful and enduring intellectual structure, for it is not merely sovereignty but rather, in more recent times, concepts of human rights, development, democracy, and good governance that are understood to have been perfected in the West and then exported into the Third World. Thus, further implicit in the traditional argument is the view that the history of the processes by which the non-European world acquired sovereignty is largely irrelevant, because the sovereignty so bestowed is no less powerful than the sovereignty enjoyed by European states. Within this narrative, if there is nothing distinctive about non-European sovereignty, it is indeed to the West,

where the nation-state emerged and international law was formulated, that we must look if we are to understand sovereignty doctrine.[6] The history of sovereignty, then, can be told entirely in terms of developments within the history and theory of the West,[7] and the extension of sovereignty to the non-European world generates practical, rather than theoretical, problems.

My argument, developed through an examination of the Mandate System, is that sovereignty did not extend without problem to the non-European world. Rather, sovereignty acquired a different form and character as it was transferred from the European to the non-European world. Non-European sovereignty is unique, and this article attempts to explore the character of this uniqueness and how it came into being. My further argument is that the history of non-European sovereignty cannot be separated from the larger history of sovereignty itself. Traditionally, international law asserts that there is one juridical version of sovereignty, implicitly European sovereignty, which applies to all states. This understanding is crucial to the maintenance of the fundamental premise of international law: that all states formally are sovereign and equal. My argument, by contrast, is that international law and institutions created two different models of sovereignty: European sovereignty and non-European sovereignty. My concern is to identify the characteristics of these two models, to attempt to explain how non-European sovereignty is distinctive and how it came into being, and to explore what the relationship is between these two models and what consequences might follow for non-European states and peoples. If my argument has any validity, if the distinctive character of non-European sovereignty can support a claim that all states are *not* equally sovereign and that this is *because* of international law and institutions rather than *despite* international law and institutions, then this might suggest the need to rethink some of the funda-

6. Importantly, eminent Third-World scholars make the same assumption even as they critique international law: Thus, Mohammed Bedjaoui argues that "[t]he New World was to be Europeanized and evangelized, which meant that the system of European international law did not change fundamentally as a result of its geographic extension to continents other than Europe." Mohammed Bedjaoui, *Introduction* to INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 7 (Mohammed Bedjaoui ed., 1991).

7. *See generally* JENS BARTELSON, A GENEOLOGY OF SOVEREIGNTY (1995).

mental premises of the discipline and, indeed, its very founding concept of sovereignty. Furthermore, this issue is of importance to Third-World states that have attempted to explore the phenomenon of neocolonialism—the enduring character of what in essence are colonial relations even after Third-World states acquired independence.[8] Third-World statesmen and international lawyers have long recognized this phenomenon.[9] My endeavor here is to examine the role that international law and institutions have played in furthering neocolonialism by studying the origins of the whole process of decolonization as they emerged in the Mandate System. Connected with this is a further interest in sketching the relationship between the emergence of what might be crudely termed a pragmatic "American" international law and the role it played in developing a new approach to colonial problems.

These are the broad themes and concerns I seek to explore in this article. The second part of this article outlines the basic structure of the Mandate System. In order to help

8. The Ghanaian leader Kwame Nkrumah provides a good definition of neocolonialism: "The essence of neocolonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus political policy is directed from outside," *cited in* ROBERT J.C. YOUNG, POSTCOLONIALISM: AN HISTORICAL INTRODUCTION 46 (2001). For a general discussion of the phenomenon of neocolonialism, see chapter 11 of MICHAEL BARRATT BROWN, THE ECONOMICS OF IMPERIALISM 256 (1974).

9. *See generally* MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979); B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER (1993). The insights of these scholars have been developed in important ways by scholars working within the interconnected traditions of Third-World approaches to international law, critical race theory, and lat-crit theory. For collections of these important works, see for example, Symposium, *International Law and the Developing World: A Millenial Analysis*, 41 HARV. INT'L L.J. 595 (2000); Symposium, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000); Colloquium, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997). The introductions to each of these volumes, by James Gathii, Ruth Gordon, and Elizabeth M. Iglesias, provide very useful overviews of these approaches and their significance for international law scholarship as a whole. *See* James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT'L L.J. 263 (2000); Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000); Elizabeth M. Iglesias, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997).

place the distinctive problems of sovereignty as they emerged in the Mandate System within the broader context of interwar discussions about sovereignty, international law, and international institutions, the third part sketches some of the debates relating to sovereignty that took place immediately after World War I. My interest here lies in the challenge that the new international law of pragmatism posed to formalism and to the now-discredited theory of positivist international law of the nineteenth century. The pragmatist challenge was based in important ways on the insights and proposals of American jurists, and I attempt to show how the Mandate System embodied many of the insights of pragmatism in its operations. The fourth part addresses the issue of how colonial problems were perceived at the end of the War: These perceptions inevitably affected both the formation and operation of the system. The fifth part examines some of the problems and puzzles that the Mandate System generated in relation to conventional understandings of sovereignty doctrine, and the specific, if not unique, technologies adopted by the League to address these problems. The sixth part focuses on the actual policies formulated by the League to promote self-government and sovereignty in the mandate territories. In particular, I examine the importance given to economic development in the formulation of these policies, and the ways in which the discourse of economics shaped policy choices and resolved various policy problems. The seventh part discusses what I claim are the unique characteristics of sovereignty doctrine as it manifested itself in the non-European world. It focuses on the novel techniques of power and discipline that are created by the Mandate System and used to manage relations between European and non-European peoples. In particular, I argue that the contemporary discipline of development originated with the Mandate System in important ways. The eighth and concluding part attempts to outline the legacy of the Mandate System and the enduring significance of this great experiment in international management both at the practical level and at the theoretical level for contemporary international law and institutions.

II. THE CREATION OF THE MANDATE SYSTEM

A. *Introduction*

The Mandate System was devised in order to provide internationally supervised protection for the peoples of the Middle East, Africa, and the Pacific who previously had been under the control of Germany or the Ottoman Empire. Initially, however, General Smuts of South Africa, who originally proposed the creation of the Mandate System, envisaged its application to European territories over people left behind by the collapse of the Russian, Ottoman, and Austro-Hungarian Empires, who were characterized as "incapable of or deficient in power of self-government," "destitute," and requiring "nursing towards political and economic independence."[10] The Mandate System was to play the role of the "reversionary" of the defeated Empires.[11]

President Woodrow Wilson of the United States supported the basic framework of Smuts's plan, but argued for its application not to the European territories—many of which were to become the subject of the minority treaty regimes—but to the Ottoman territories in the Middle East and to the German colonies in Africa and the Pacific. Wilson vehemently argued against annexation of these territories by the victorious powers, as such actions would have been contrary to the principles of freedom and democracy for which the war ostensibly had been fought.[12] Wilson instead proposed the application of the Mandate System to these non-European peoples and territories. The essential purpose of the system was to protect the interests of backward people, to promote their welfare and development, and to guide them toward self-government and, in certain cases, independence.[13] This was to be achieved by

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10. The outlines of Smuts's views can be found in his proposal. J.C. Smuts, *The League of Nations: A Practical Suggestion, reprinted in* 2 DAVID HUNTER MILLER, THE DRAFTING OF THE COVENANT 23, 26 (1928).

11. Smuts stated that "Europe is being liquidated, and the League of Nations must be heir to this great estate." *Id.*

12. Wilson declared at the Peace Conference, "We are done with the annexations of helpless peoples meant by some Powers to be used merely for exploitation . . . ." RUTH CRANSTON, THE STORY OF WOODROW WILSON 318 (1945).

13. The question of how law should administer territories for the purpose of developing them was the subject of much scholarly work at that time. *See, e.g.*, M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TER-

appointing certain states, officially designated as mandatories, as administrators of these territories on behalf of the League, and subjecting these mandatories to the League's supervision.[14]

B. *The Legal Structure of the Mandate System*

The Mandate System embodied two broad sets of obligations: first, the substantive obligations according to which the mandatory undertook to protect the natives and advance their welfare, and second, the procedural obligations relating to the system of supervision designed to ensure that the mandatory power was administering the mandate territory properly.

The primary and substantive obligation undertaken by the mandatory power is stated in Article 22 of the League Covenant, which enunciates the concept of a "sacred trust of civilization":

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.
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> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility and who are willing to accept it, and that this tutelage

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RITORY IN INTERNATIONAL LAW (1926); ALPHEUS H. SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS (1921); CHARLES G. FENWICK, WARDSHIP IN INTERNATIONAL LAW (1919).

14. The idea that certain territories should be internationally administered was not new. For example, such a system had been proposed at the Congress of Berlin for the administration of the Congo. *See* WRIGHT, *supra* note 2, at 18-20.

> should be exercised by them as Mandatories on behalf of the League.[15]

The fact that Article 22 embodied, in a somewhat modified form, several of the ideas that had been outlined in Smuts's plan and had been enunciated with respect to the European territories that became part of the minority treaty system suggests the radically plastic nature of sovereignty doctrine in the League period.

The broad, primary goal of the Mandate System was to prevent the exploitation of the native peoples; its secondary goal was to promote their well-being and development.[16] The term "not yet able to stand by themselves" suggested that the system was a temporary arrangement until such time as the peoples were capable of becoming independent. As a result, Article 22 was described as meaning "trusteeship with independence as the goal of the trust."[17] While it was provided explicitly that the Middle Eastern mandates were to become sovereign states, the status of the mandate peoples in Africa and the Pacific was more uncertain: This largely was because the Dominion powers—South Africa, Australia, and New Zealand, who were intent on annexing the former German territories and were placated only partially by being appointed mandatories over those territories—were unwilling to accept any provisions suggesting that such territories might become independent.[18] Article 22 was generally interpreted as requiring mandatories to promote "self-government"—a term capacious enough to suggest progress toward full sovereign statehood, while not explicitly making this the ultimate and inevitable goal. Thus, Hall asserts that "[s]elf-government is the central positive conception set out in Article 22 of the League Covenant."[19]

The Mandate Article provided for an essentially three-tiered system of administration, as mandate territories were classified according to their degree of advancement.[20] The

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15. LEAGUE OF NATIONS COVENANT art. 22, paras. 1-2.

16. For a detailed and illuminating analysis of these provisions, see LAUTERPACHT, *supra* note 2, at 40-51.

17. HALL, *supra* note 2, at 94.

18. *See* CHOWDHURI, *supra* note 2, at 43-44, 53.

19. HALL, *supra* note 2, at 94.

20. This scheme was the result of a confrontation between Wilson and several statesmen of the British Dominions—including Smuts of South Af-

non-European territories of the former Turkish Empire were classified as A mandates whose "existence as independent nations can be provisionally recognized."[21] German territories in Central Africa were placed within the B regime; South-West Africa and the Pacific territories, under the C regime. Mandatories over the most backward territories, the C mandates, were given especially extensive powers, as such territories were regarded as "best administered under the laws of the Mandatory as integral portions of its territory," subject to the safeguards provided by the Mandate System on behalf of the inhabitants.[22] Apart from the broad stipulation contained in Article 22 of the Covenant regarding the "sacred trust of civilization," the mandatory and the Council of the League of Nations entered into separate mandate agreements. These agreements outlined the obligations and powers of the mandatory in greater detail, and sought to strengthen further the protection of the natives. This was provided both by the general formula that the mandatory "shall undertake to promote to the utmost the material and moral well-being and the social progress of its inhabitants"[23] and by the more detailed provisions that suppressed the slave trade and compulsory labor (except in special circumstances), controlled the sale of alcohol,[24] and restricted the manner in which lands were to be disposed.[25] The mandatory was provided with broad powers for the purpose of performing its functions; few limits applied

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rica and Hughes of Australia—as to the fate of the German colonies. The Dominions, supported by Britain, which at all times acted with the diplomatic tact borne of much experience, demanded annexation of the territories in question. Wilson refused, and a compromise formula finally was adopted whereby the territories in question were divided into three categories: A, B, and C mandates. For an account of the confrontation between Hughes and Wilson, see WEERAMANTRY, *supra* note 2, at 41-54.

21. LEAGUE OF NATIONS COVENANT art. 22, para. 3.

22. *Id.* art. 22, para. 6.

23. *See, e.g.*, WRIGHT, *supra* note 2, app. at 613 (citing art. 3 of the Mandate for Tanganyika).

24. *Id.* (citing art. 6 of the Mandate for Tanganyika).

25. *Id.* (citing art. 6 the Mandate for Tanganyika). This article required in part that laws that were enacted by the mandatory and dealt with lands "take into consideration native laws and customs." *Id.* It also required public authorities to consent to the creation of rights over land. This could be seen as an attempt to prevent unscrupulous private entities from persuading the natives to enter into agreements giving the entities extensive rights over those lands. This had been a very common practice in the past.

to the range of issues that the mandatory could examine in order to promote the material and moral well-being of the inhabitants of the mandates. For example, the obligations outlined in Article 23 of the Covenant dealt with issues ranging from labor standards and traffic in women and children to trade in arms and ammunition.[26]

A proper mechanism for supervising the actions of the mandatory was essential for the efficient functioning of the system.[27] To achieve effective supervision, mandatories were obliged to submit an annual report to the League Council.[28] These were submitted in practice to the Permanent Mandates Commission (PMC), the monitoring organ established to "receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates."[29] The PMC was composed essentially of experts in colonial administration[30] who examined the annual reports presented by the mandatory powers and advised the League Council on developments within the territories.[31]

Finally, the supervisory mechanism was supported further by the stipulation, contained in all mandate agreements, that in the event of a conflict between the mandatory and any other member of the League of Nations as to the "interpretation or application of the provisions of the mandate," the dispute could be referred to the Permanent Court of International Justice (PCIJ).[32] In this manner, different organs of the League—the League Council (essentially a political organ that could be regarded as the executive branch of the League), the PMC (an organ that combined the functions of an administrative and expert body), and the PCIJ (a judicial organ)—all

26. LEAGUE OF NATIONS COVENANT art. 23.

27. The excesses of the sort that had taken place in the Belgian Congo at the turn of the century when the Congo was administered by the International Association of the Congo under King Leopold II of Belgium suggest the difficulties connected with making such supervision effective. *See* WRIGHT, *supra* note 2, at 18-20.

28. LEAGUE OF NATIONS COVENANT art. 22, para. 7.

29. *Id.* art. 22, para. 9. For analyses of the relationship between the Council and Commission, see WRIGHT, *supra* note 2, at 128-30, 146-55. These debates included issues as to the competence of the Commission and the extent of its powers to direct the administration of the territories.

30. WRIGHT, *supra* note 2, at 140-41.

31. *Id.* at 127.

32. *See id.* app. at 620 (citing art. 7 of the Mandate for Nauru).

brought their differing perspectives to bear on the activities of the mandate. As a further supervisory measure, the PMC instituted the practice of receiving petitions from the inhabitants of the territories as to the implementation of the mandate. This system, however, was far from successful.[33]

III. THE LEAGUE OF NATIONS AND THE NEW INTERNATIONAL LAW

A. *Introduction*

The Mandate System was created in the context of a broader set of developments in international law and relations that occurred immediately after the Great War.[34] Commencing a project that seems to follow each major war,[35] international lawyers of the League period set about the task of creating a new international order based on respect for the international rule of law.[36] Understandably, the maintenance of

33. *See* HALL, *supra* note 2, at 198.

34. For my overview of this period, I have relied principally on the classic work written by Oppenheim and edited by Arnold McNair. *See generally* OPPENHEIM, *supra* note 1. McNair later became Lord McNair, Judge of the International Court of Justice. Other important works generally dealing with the period include J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (2d. ed. 1936); C.G. FENWICK, INTERNATIONAL LAW (1924); C. EAGLETON, INTERNATIONAL GOVERNMENT (3d ed. 1957).

35. As Kennedy points out, it is as against the image of war that the major international institutions have established themselves: "These images of the relationship between war and peace were associated with an image of the institution as the opposite of the social breakdown of war." David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 846 (1987). I am indebted also to David Kennedy, Some Reflections on the Role of Sovereignty in the New International Order, Presentation to the Canadian Society of International Law (Oct. 17, 1992) (on file with author).

36. For important studies of this period, see generally Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy and the Limits of the Interwar Framework*, 33 HARV. INT'L L.J. 353 (1992) [hereinafter Berman, *Ambivalence*]; Nathaniel Berman, *"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993) [hereinafter Berman, *Alternative*]; Nathaniel Berman, *The Nationality Decrees Case, or, Of Intimacy and Consent*, 13 LEIDEN J. INT'L L. 265 (2000); Carl Landauer, *J.L. Brierly and the Modernization of International Law*, 25 VAND. J. TRANSNAT'L L. 881 (1993); David Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275 (1996). A superb, recent work dealing with this period is MARTTI KOS-

peace was a major preoccupation of the time. Accordingly, sustained efforts were made to further disarmament and to create regimes that would outlaw aggression. The great yet unfulfilled ambition to establish a system that would foster the judicial resolution of disputes commenced with the creation of the PCIJ.[37] Further, lawyers called for the codification of international law and emphasized the importance of holding large international conferences at regular intervals to address the major international problems of the time.[38]

The task of constructing a new international order inevitably was accompanied by the attempt to create a new jurisprudence, a new international law to replace the positivist law of the nineteenth century whose inadequacies were made tragically evident by the Great War. The formulation of such a new jurisprudence involved a fundamental rethinking both of the functions, methods, and goals of international law and of the concept of sovereignty, which was central to the discipline itself. My goal in this section is not to provide a detailed account of this period, but to sketch some of the principal controversies—methodological, theoretical, and political—that shaped the international law of the period and, therefore, the

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KENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960 (2002).

37. While many of these initiatives took on a particular importance immediately after the Great War, it should be noted that many of these projects, such as the judicial resolution of disputes, had an earlier history. In particular, the Hague Peace Conferences of 1899 and 1907 dealt with many of these questions. *See* FRANCIS ANTHONY BOYLE, FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS, 1898–1922, at 144-45 (1999). Boyle's important work focuses in particular on the contributions made by American jurists to international law in the period he studies.

38. For accounts of some of the major issues of the period, see generally Manley O. Hudson, *The Outlook for the Development of International Law*, 11 A.B.A. J. 102 (1925); Edwin D. Dickinson, *The New Law of Nations*, 32 W. VA. L.Q. 4 (1925); J.L. Brierly, *The Shortcomings of International Law*, 5 BRIT. Y.B. INT'L L. 4 (1924). For a more historical account, see OPPENHEIM, *supra* note 1, § 50. For an introduction to the Vienna School and the immensely important work of Hans Kelsen, see Josef L. Kunz, *On the Theoretical Basis of the Law of Nations*, 10 TRANSACTIONS OF THE GROTIUS SOCIETY 115 (1924). For a later assessment of the period, see generally Wolfgang Friedman, *The Disintegration of European Civilisation and the Future of International Law*, 2 MOD. L. REV. 194 (1938); Hans J. Morgenthau, *Positivism, Functionalism and International Law*, 34 AM. J. INT'L L. 260 (1940).

creation and operation of the Mandate System. Equally, however, I argue that the Mandate System presented a unique and unprecedented set of issues relating to the relationship between sovereignty and international law and that this may be appreciated better if set in the context of broader debates on the subject.

B. *Sovereignty and the Move to Institutions:*[39] *The Creation of the League of Nations*

As McNair asserted, "[T]he outstanding feature of the period is the creation of the League of Nations, which is a serious attempt to organize the international life of the Family of Nations."[40] It was through this novel apparatus, the international institution, that the international community as a whole attempted to address the classic problem of war and peace and the more novel questions of economic and social welfare. The existence of the League in itself challenged traditional positivist ideas in at least two different respects. First, it challenged the positivist idea that international law is the law governing states and that states are the only actors in international law.[41] Second, and more importantly, the existence of the League suggested new ways of approaching the problem of sovereignty, and led interwar lawyers to question conceptions of sovereignty that had been fundamental to the positivist international law of the nineteenth century. The nineteenth-century positivists had prided themselves on transforming international law into a science, thereby establishing their discipline on intellectually valid foundations. This international law, which claimed to be strictly positivist, basically equated law

39. I have borrowed this phrase from David Kennedy's study of the establishment of the League of Nations. Kennedy, *supra* note 35, at 884.

40. OPPENHEIM, *supra* note 1, § 50c, at 99.

41. This problem is addressed in P.E. Corbett, *What is the League of Nations?*, 5 BRIT. Y.B. INT'L L. 119, 119-23 (1924). The League, although not possessing the crucial attributes of statehood such as territory and population, nevertheless exercised several of the powers associated with sovereignty, such as the powers of legation. This conundrum led to McNair's argument that although the League possessed international personality, it was *sui generis* and incapable of being brought within existing categories of international law. *See* OPPENHEIM, *supra* note 1, § 167c, at 321.

with the practice of sovereign states,[42] and in this way liberated the discipline from the superstitions and imprecision that had afflicted the naturalist international lawyers of the seventeenth and eighteenth centuries who sought to find law in reason or in considerations of humanity. According to the positivists, by contrast, there was no authority superior to the sovereign state, which was bound only by rules to which it had consented—if that—and which enjoyed the unfettered and ultimate prerogative of waging war.[43] It was precisely this positivist international law, however, with its exaltation of state sovereignty and its insistence on separating law from morality and society, that appeared to have endorsed, if not facilitated, the tragedy of the Great War.[44] Although the defective amorality of positivism was apparent, it hardly was possible to return to naturalism as a basis for international law, since positivists had inflicted irreparable damage to that jurisprudence, and it was uncertain how, in this debilitated form, it could address the political realities confronting a world traumatized by war.[45] One of the

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42. For an interesting interwar account of nineteenth-century concepts of sovereignty, see OPPENHEIM, *supra* note 1, § 69. These concepts were more developed in the field of what might be termed political theory rather than international law. *Id.* In the field of international law, sovereignty appears to have given rise to a debate on the "divisibility of sovereignty," a proposition not readily accepted by nineteenth-century international lawyers. Interwar jurists themselves were doubtful as to whether entities that possessed some but not all of the attributes of sovereignty had any international legal personality. *Id.* §§ 65-66. Oppenheim's remarks on sovereignty have an enduring significance:

> [I]t will be seen that there exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.

Id. § 66.

43. These basic premises persisted despite the attempts made at the great Peace Conferences held at the Hague in 1899 and 1907 to address the problems of war. On the question of the sovereign prerogative to go to war, see generally ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW? (1986).

44. For a survey of this attitude among the interwar jurists, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 131-33 (1989).

45. As McNair puts it, "We know nowadays that a Law of Nature does not exist." OPPENHEIM, *supra* note 1, § 59, at 121. But it should be noted that many eminent international lawyers, such as Hersch Lauterpacht, attempted to formulate a more sophisticated naturalist international law. *See, e.g.*, Hersch Lauterpacht's claim that positivism had been replaced by a more

principal problems confronting the interwar jurists, therefore, was how to devise a system that somehow effectively limited sovereignty even while recognizing that the sovereign state was the major, if not the only, actor in international law. Of course, this is the classic problem of international law restated: How is a plausible legal order to be created among sovereign states? This classic theme, however, was given a new significance by the emergence of a number of new institutions, virtually all of them derived from the League, which promised in some way to replicate, even if very tenuously, the institutions found in domestic systems: a legislature, judiciary, and executive. Thus, international lawyers hoped that all disputes between states would be subjected to judicial resolution by the PCIJ, whose jurisdiction would be compulsory.

Understandably, then, the relationship between the League and its member states raised a number of issues.[46] Attempts to define the character of the League ranged from describing it as a confederation[47] to terming it a "mere alliance."[48] Even though it was clear that the League was nothing

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moderate natural law. *Id.* § 59 n.2. For an illuminating account of Lauterpacht's own attempts to formulate such an approach, see Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 2 EUR. J. INT'L L. 215 (1997). Several international lawyers who were sensitive to the history of their discipline, including Lauterpacht, turned to Grotius as a source of inspiration—for it was Grotius who, in the midst of a catastrophic war, established a plausible intellectual foundation for a peaceful world. In addition, Roscoe Pound's lecture delivered at Leiden also makes Grotius and his achievements a central figure in Pound's analysis of the problems confronting the international community in the aftermath of the War. Pound concludes his lecture by referring to Grotius and asserting, "Our chief need is a man with that combination of mastery of the existing legal materials, philosophical vision and juristic faith which enabled the founder of international law to set it up almost at one stroke." Roscoe Pound, *Philosophical Theory and International Law, in* 1 BIBLIOTECA VISSERIANA DISSERTATIONUM IUS INTERNATIONALE ILLUSTRANTIUM 73, 90 (1923). It is possible that Pound, the Carter Professor of Jurisprudence at Harvard at the time, saw himself—and his jurisprudence, which was developed principally in a domestic setting—in this larger role.

46. "From the very beginning of the movement in favour of the League of Nations there were many who objected to it on principle, whether because they thought the League inconsistent with the sovereignty of the several States, or because they considered it a utopian plan." OPPENHEIM, *supra* note 1, § 167r.

47. This was argued by P.E. Corbett. *See* Corbett, *supra* note 41, at 121.

48. *See* OPPENHEIM, *supra* note 1, § 167c, at 319-20.

like a superstate, as the League lacked the power to bind its members,[49] it was evident that the League in various ways did impinge on the sovereignty of its member states. Its very existence had an important impact on the way in which sovereignty was coordinated and conceptualized in the interwar era. The League was a means of organizing states into a community, and it therefore could claim to represent, if not embody, the opinion and interests of the international community. Consequently, the sovereign actions of a state that deviated from norms prescribed by the League were considered not simply in terms of their impact on another state, which might be most affected, but rather in terms of their impact on principles that were thought fundamental to the maintenance of the larger international community.[50] The system of collective security that the League attempted to inaugurate—the simple and yet profound notion that aggression against a particular state is aggression against all member states of the League—was the most significant expression of this idea. Article 10 of the League Covenant inaugurated the system of collective security,[51] which, although it failed, still endured within the United Nations system.[52] Thus, even though the League could not bind sovereignty, it could coordinate sovereign states in its attempts to curb aggression.

International well-being, it was hoped, would enter into the calculus of state action in this way,[53] as the regime perhaps

49. None of the League's organs had the power to make decisions that legally bound member states. *Id.*

50. Thus Dickinson's hope that "[t]he new law of nations . . . will place less emphasis relatively on the right of each separate nation to ignore its neighbor, exalt its own particular interest, or set the world aflame in seeking redress in its grievances. It will lay increasing stress as time goes on upon the social interests of the great society." Dickinson, *supra* note 38, at 32.

51. For a discussion of Article 10, which Wilson characterized as the "keystone of the Covenant," see OPPENHEIM, *supra* note 1, § 167m.

52. *See* U.N. CHARTER arts. 7, 39-42, 51; *see also* Bernard H. Oxman, *The Relevance of the International Order to the Internal Allocation of Powers to Use Force*, 50 U. MIAMI L. REV. 129, 135-38 (1995).

53. This perhaps is to give a constructivist reading of these initiatives of the League. On constructivism, see ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999). The basic idea is not that a sovereign does not have a fixed, immutable identity or a set of interests, but rather that compliance with international norms is also an interest that would enter the calculus of a sovereign as it contemplates action.

aspired to affect the psychology of sovereignty.[54] This approach was combined with a focus on cooperation. Apart from the difficult and enduring problems of war and aggression, the less ambitious but nonetheless important function of the League was to foster cooperation among states.[55] The need for such cooperation seemed inevitable because states, "whether they like it or not, are becoming every day more interdependent and more internationalized."[56] International law could be created, not through the coercion of states, but rather by persuading them of the advantages of pursuing common goals through cooperation, particularly in the economic field.

We see in Oppenheim the suggestion that the economic realm, rather than being merely incidental to the great questions of international law—the issues of war and peace, of statehood and jurisdiction—could be central to international law. So much so that "the more important international economic interests grow, the more International Law will grow."[57]

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54. The notion that states possessed a consciousness and that this consciousness continuously changed and could find expression through the League of Nations was articulated by various international lawyers at the time. For the powerful argument that the success of the League depended on an "international consciousness" that had not yet come into existence, see Alfred Zimmern, *International Law and Social Consciousness*, 20 TRANSACTIONS OF GROTIUS SOCIETY 25 (1935).

55. As McNair again puts it, "While the Family of Nations was unorganised it did not, and could not, exercise any function, nor devote itself to the fulfilment of any tasks." OPPENHEIM, *supra* note 1, § 167i.

56. *Id.* § 150, at 99.

57. *Id.* § 51, at 103. McNair proved to be prescient: The WTO system is arguably the most developed and comprehensive international regime in place—particularly since the creation and operation of the compulsory dispute resolution system. McNair went further: "[I]t may, therefore, fearlessly be maintained that an immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour." *Id.* Notably, however, McNair does not identify the field of international economic law as a distinct field of international law. Rather, it is subsumed within the broader field of the law of treaties. McNair devotes three pages to commercial treaties and asserts that "[t]he details of commercial treaties are, for the most part, purely technical, and are, therefore, outside the scope of a general treatise on International Law." *Id.* §§ 578-580. This approach continues to prevail in many major contemporary international law texts.

C. *Internal and External Sovereignty Connected*

Positivist notions of a sovereign with unrestrained power were questioned not only at the practical level by the creation of international institutions, but also at the theoretical level by prominent interwar jurists. These jurists, who were influenced by studies of the state undertaken by sociologists and political scientists, argued that international law was seriously flawed because it propounded a juridical concept of the state that was based implicitly on a notion of the state that had ceased to correspond with sociological and political reality in the domestic sphere.[58] In modern Western societies, sovereignty was vested not in a monarch, but in the people. Nevertheless, Roscoe Pound argued, "The need of revision [of international law] was not perceived since psychology had not as yet revealed the hollowness of the assumption that a moral order among sovereign kings could become a moral order among sovereign peoples . . . ."[59] Furthermore, the idea that sovereignty was supreme, absolute, and unfettered, which was still the premise in international law, was no longer true in many domestic systems in which constitutional developments had complicated the issue. Sovereignty in the domestic sphere, even in the cases of monarchies, could be restricted by a constitution and positive law.[60] It is not surprising, then, that many of the early interwar discussions on the sovereign state attempted to link constitutional law with international law[61] in order to argue that restrictions were not incompatible with

58. Thus, Brierly argued that "[t]he advent of constitutional government really demanded a new theory of the nature of states to take the place of the theory of sovereignty which, although approximately true in its time, had ceased to be a rational account of changed facts." BRIERLY, *supra* note 34, at 37. For an illuminating analysis of the work of Brierly, see generally Landauer, *supra* note 36.

59. Pound, *supra* note 45, at 79.

60. *See* OPPENHEIM, *supra* note 1, §§ 68-69. There was the further problem of trying to identify where in the domestic system of government sovereignty could be located. *See* ROBERT LANSING, NOTES ON SOVEREIGNTY: FROM THE STANDPOINT OF THE STATE AND OF THE WORLD (1921). This was a compilation of a number of articles written by Lansing, who was Secretary of State.

61. *See, e.g.*, JOHANNES MATTERN, CONCEPTS OF STATE, SOVEREIGNTY AND INTERNATIONAL LAW (1928). Mattern provides a useful overview of some of the debates of the period, and discusses the work of scholars, such as Vinogradoff, Duguit, Laski, and Kelsen, several of whom were political scientists rather than international lawyers.

sovereignty.[62] John Austin, attacked by nineteenth-century international lawyers for his dismissal of international law as law properly so called, now was attacked in the interwar period for his characterization of sovereignty as being absolute by definition.[63]

Given this analysis, one way of plausibly suggesting the importance and desirability of imposing restraints on sovereignty was to transfer to the external sphere of international law developments that had taken place in theories of sovereignty regarding the internal sphere of the state.[64] This strategy is evident in the writing of scholars such as Sir Geoffrey Butler. Butler acknowledges the unusual character of his argument: Unlike most international lawyers, Butler was concerned with internal rather than external sovereignty.[65] To Butler, however, this is only logical, since his argument is that sovereignty should be associated, not with the exercise of supreme power, but rather with the protection of rights existing within the community governed by the sovereign. As Butler expressed, "[W]e should be prepared to find in the pre-existence of lawful rights reason for the existence of sovereignty."[66] Seen in this way, sovereignty is given an ethical dimension, and it is precisely through the League that the ethical concerns protected by sovereignty in the internal realm may be given expression in the external realm. Butler queries "whether, in other words, in so far as authoritative sovereignty is conceived to exist in order to minister to ethical rights, it may not in

62. Of course, by the 1930s the concept of internal sovereignty itself being ethically and constitutionally bound was destroyed, as the emergence of fascism in Europe resulted in the creation of a state that violated individual rights on a large scale. *See generally* Friedman, *supra* note 38.

63. *See generally* RICHARD A. COSGROVE, SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART 105 (1996) ("Dissatisfaction with his explanation of sovereignty led Austin to become a favorite straw man for the academic jurists of the 1880s . . . ."); Anghie, *Peripheries*, *supra* note 3.

64. This strategy was also plausible, since positivist jurists had been preoccupied with proving that international law possessed, albeit in a somewhat primitive form, all the characteristics of domestic law and hence qualified as "law properly so called."

65. As Butler notes, "We have been speaking of internal sovereignty, but the chief concern of international lawyers is external sovereignty." Sir Geoffrey Butler, *Sovereignty and the League of Nations*, 1 BRIT. Y.B. INT'L L. 35, 38 (1920).

66. *Id.* at 37.

external affairs find existence only through some such process and machinery as will arise out of the League of Nations."[67]

Any restrictions imposed by the League on sovereign states were desirable, then, because this was a means of furthering rights. Thus, Butler's basic argument is

> that insofar as the League of nations supplies a mechanism for the preservation of these rights and values, the conception of sovereignty, with its necessary implication of moral authority, can for the first time be applied in a more adequate sense than as a mere assertion of the unchecked power either of the states or of some central federation.[68]

The League's limitation on sovereignty could be justified in this way as a means of preserving rights and values and, indeed, perfecting an ethical sovereignty.

The internal character of the state was important, not only in theoretical terms as a means of reconceptualizing sovereignty at the international level, but also in more immediately practical ways, as a number of developments in the period suggested. As Kingsbury points out, it is important to have an "awareness of the importance in international relations of the links between sovereignty and domestic structures."[69] Interwar jurists were acutely aware that internal sovereignty and external sovereignty were intimately connected and that the specific form of government within a state had a decisive impact on its international behavior and hence was an important issue for international law. Thus, one of the morals McNair deduces from the history of the development of the Law of Nations is that "the progress of International Law is intimately connected with the victory everywhere of constitutional government over autocratic government, or what is the

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67. *Id.* at 38. Interestingly, Butler further sees himself as writing against the strict division, first articulated by Westlake, between internal and external sovereignty. He attempts to reconcile his position with the classic view. *See id.* at 38 n.2.

68. *Id.* at 41.

69. Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599, 608 (1998) (referring to judicial decisions and arbitral awards). For an account of the different ways in which the boundaries between internal and external sovereignty were being challenged in the interwar period, see *id.* at 608-09.

same thing, of democracy over autocracy."[70] McNair's view—which may be traced back to Kant's idea of the democratic peace—suggests that international jurists gradually were accepting the insights of political scientists and theorists. This trend was inevitable, if not necessary, since the prevention of aggression was a principal goal of the League, and the insights of political science could make important contributions to that project.

The fundamental difficulty confronting the interwar jurists, however, was that the internal political character, the interior of the state, now recognized to be of such importance for the larger goals of international law, was not a subject they could address. Nineteenth-century international law prescribed that a sovereign state, even in its dealings with other states, could be required to adhere to only those obligations to which it had consented. The internal realm of a state was entirely outside the scope of international law.[71] This classic principle, which endured in the interwar period, is stated by McNair, who noted, "In consequence of its internal independence and territorial supremacy, a State can adopt any constitution it likes, arrange its administration in a way it thinks fit, [and] enact such laws as it pleases."[72]

This presented a fundamental and insuperable dilemma to the jurists of the interwar period, who were now crucially aware, both at the theoretical level and at the practical level, of the intimate connection between internal and external sovereignty, but who could not proceed any further to manage this internal realm.

D. *From Formalism to Pragmatism*

Positivism was attacked not merely because of its inadequate views of sovereignty but also because of its formalism. This critique of positivism raised the familiar and yet novel debate of the relationship between law and politics.[73] Positivism

70. OPPENHEIM, *supra* note 1, § 51.

71. There were, of course, notable exceptions to this powerful principle. For example, a state had to comply with certain international rules in its treatment of foreign diplomats and foreign nationals within its territory.

72. OPPENHEIM, supra note 1, § 124.

73. Perhaps it would be more accurate to speak of debates, since the law/politics distinction emerged in a number of different settings.

was viewed as a formalist system because it was based broadly on the principles that sovereign states were the only actors in the international system; that international law was a creation of sovereign states; that the major task confronting international lawyers was to identify the relevant rules of international law; and, most importantly for our purposes, that international jurists should focus, in their identification and application of rules, on the strictly legal realm, as law existed independent of ethics or sociology.[74] It was by asserting the autonomy of law that positivists sought to give the discipline its scientific character. This resulted in formalism, since the positivist preoccupation with rules led to the conclusion that the life of the law was logic rather than experience. Within the context of colonial issues, the formalism of nineteenth-century law was regarded later as being responsible for its endorsement of colonial conquest and dispossession.[75]

Positivism was attacked by interwar jurists from a number of perspectives. In vehemently asserting the autonomy of international law properly so called, positivists had created a law that appeared to be entirely removed from questions of social purpose. To many interwar jurists, the positivist preoccupation with legal materials to the exclusion of all other materials dealing with the political life of nations was intellectually flawed and morally dangerous. It was a common theme among eminent jurists on both sides of the Atlantic that the deficiencies and dangers of this approach had been revealed by the war.[76]

Thus, the new international law, by contrast, had to devote itself to furthering social goals. This did not mean, however, an international law that returned to the ethical system prescribed by naturalism, but rather an international law based on the social sciences—political science, sociology, and

74. For a biting summary and critique of positivism, see Morgenthau, *supra* note 38, at 261-62. At this stage, Morgenthau still attributed an importance to international law, arguing that it should be more closely linked to politics. For a detailed critique of Morgenthau's work from a Third-World perspective, see CHIMNI, *supra* note 9, at 22-72.

75. For an exploration of the connection between formalism and colonialism, see generally Anghie, *Peripheries*, *supra* note 3.

76. *See, e.g.*, Manley O. Hudson, *The Prospect for International Law in the Twentieth Century*, 10 CORNELL L.Q. 419, 428-36 (1925) (discussing international law's failure to consider questions of social purpose).

international relations. Only by furthering social goals and developing a law that, far from being autonomous, was informed and shaped by social developments and that reflected the realities revealed by sociology and political science was international law able to operate effectively and ethically.

In these different ways, what was required was a sociological jurisprudence.[77] American scholars were forceful in making these claims and in developing this alternative jurisprudence, which might be termed "pragmatism."[78] The foremost American thinker on this subject in the domestic sphere was Roscoe Pound, who argued that the same approach was required in the international realm.[79] Indeed, according to Pound, Grotius himself understood the need to synthesize law with politics, and his achievement lay in doing this effectively, for Grotius's jurisprudence "grew out of and grew up with the political facts of the time and its fundamental conception was an accurate reflection of an existing political system which was

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77. I have relied on Samuel Astorino's important discussion of the relationship between American sociological jurisprudence and international law in this period. *See* Samuel J. Astorino, *The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: The American Experience*, 34 DUQ. L. REV. 277 (1996). For a collection of works that embodies this tradition, see AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993). For an account of the French jurists addressing the relationship between international law and sociology, see KOSKENNIEMI, *supra* note 36, at 266-353.

78. For David Kennedy's account of this tradition and its significance for the international law tradition in the United States, see generally David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9 (1999). Kennedy describes this tradition as involving a number of ideas that

> would include rule skepticism—a well-developed and ubiquitous practice of criticizing rules in the name of anti-formalism—and a blurring of the boundary between law and what United States lawyers call 'policy', a mix of expert arguments about how disputes should be resolved and institutions developed that opens legal analysis in the United States to all sorts of interdisciplinary input and social considerations which might elsewhere seem more like 'politics.'

Id. at 26.

79. As Astorino notes, "Roscoe Pound wrote sparingly about international law; Cardozo did not write on this subject. Yet their philosophies of law, so closely intertwined otherwise, helped to provoke a profound debate about the nature of international law, the role of law in international relations and how Americans should respond to the twenty year crisis bracketed by the two World Wars." Astorino, *supra* note 77, at 279 (citations omitted).

developing as the law was doing and at the same time."[80] For Pound, the "basis of a new philosophical theory of international law" could be achieved only by "thinking of a great task of social engineering."[81] This required a "legal philosophy that shall take account of the social psychology, the economics, the sociology as well as the law and politics of today,"[82] for only such a philosophy could give a "functional critique of international law in terms of social ends."[83] The theory of international law was to focus, then, not on whether it conformed to a formalist idea of "science," but whether it was embedded within society and furthered social objectives.[84]

These ideas were elaborated in the international sphere by a number of jurists, including Manley Hudson, Pound's colleague at Harvard, who argued that "the future law of nations must seek contributions from history, from political science, from economics, from sociology, and from social psychology if it would keep pace with the society it serves."[85] In relation to the specific subject of sovereignty, Robert Lansing's earlier writings were based on the same foundations, in that he argued that real sovereignty was based on the exercise of power. Thus, "[a]n equality among sovereigns to be *real* must be an equality of might, otherwise it is artificial, an intellectual creation."[86] Lansing's concern to analyze law and sovereignty in terms of underlying sociological and political factors is to Kunz the hallmark of American pragmatism: "[Lansing] gives us

80. Pound, *supra* note 45, at 76.

81. *Id.* at 89.

82. *Id.*

83. *Id.* Morgenthau's famous 1940 article might be seen as such an attempt—as its title suggests. *See* Morgenthau, *supra* note 38.

84. Like positivism, then, realist jurisprudence made claims to be scientific—but in the superior sense that it allied itself with the insights and discipline of the social sciences. *See generally* ROBERT M.A. CRAWFORD, IDEALISM AND REALISM IN INTERNATIONAL RELATIONS: BEYOND THE DISCIPLINE (2000); PATRICK JAMES, INTERNATIONAL RELATIONS AND SCIENTIFIC PROGRESS: STRUCTURAL REALISM RECONSIDERED (2002).

85. Hudson, *supra* note 76, at 434-35. As Astorino notes, Hudson's critique of positivist jurisprudence followed very closely Pound's critique of Langdell's legal science. Astorino, *supra* note 77, at 286. Hudson, of course, had a brilliant career in international law, was one of the major international jurists of his time, and served as a member of the PCIJ.

86. LANSING, *supra* note 60, at 65 (emphasis in original).

considerations on sovereignty, not as a theoretical jurisprudent, but rather as a sociologist."[87]

The same themes were sounded by a number of other scholars, including Alejandro Alvarez, the brilliant Chilean jurist who later became an outstanding judge of the International Court of Justice, who asserted, "Up to the present day, International Law has been considered an exclusively juridical science."[88] Alvarez, framing his argument as belonging to the school of "American International Law,"[89] found that it was necessary to change this perspective and to adapt "principles and rules and standards more directly to the service of the live, current needs of our present-day society."[90] The strict application of rigid rules[91] was not conducive to this new jurisprudence of furthering social ends. Rather, it was by combining the legal and the political that important international problems could be resolved. For Alvarez, the disciplines of law and politics, instead of being in tension, strengthened and refined one another.[92] The fusion of law with politics, the "harmony between politics and legal rules,"[93] would assist in establishing a system that could address concrete problems. Alvarez further argued that such a fusion would result in "the elimination from politics of all arbitrary notions."[94] But this also required a law that did not consist simply of rigid rules, but

87. Kunz, *supra* note 38, at 138.

88. Alejandro Alvarez, *The New International Law*, 15 TRANSACTIONS OF GROTIUS SOCIETY 35 (1930).

89. Alvarez announced the school as having emerged at the end of the nineteenth century: "It consists of doctrines relating to both American and to universal interests that are professed by all nations of the New World, and that differ from those of the two preceding schools [Anglo-Saxon and Continental]. It is American International Law." *Id.* at 44. Alvarez had written a lengthy article on this subject some years prior. *See* Alejandro Alvarez, *Latin America and International Law*, 3 AM. J. INT'L L. 269 (1909).

90. Hudson, *supra* note 76, at 435.

91. Thus, Alvarez noted that "juridical rules are exact, definite and rigid." Alvarez, *supra* note 88, at 47.

92. *Id.*

93. *Id.*

94. *Id.* at 46. Scholars in the Anglo-Saxon tradition, such as Brierly, McNair, and Lauterpacht, while recognizing the important links between law and politics, were more cautious in welcoming such a fusion, in part because this could result in the erosion of the idea of law itself. Thus, for example, Lauterpacht was emphatic in asserting that law prevailed, that law governed all disputes—whether they were characterized as political or legal in nature.

rather of "principles of morality and equity [that] are more pliable and elastic than legal rules and consequently, more adaptable to the solution of political problems."[95]

E. *The Uniqueness of the Mandate System*

In all these different ways, the conclusion of the Great War and the creation of the League questioned positivist international law both in terms of its views on sovereignty and in terms of its formalism and rigidity. Nevertheless, in the final analysis, basic positivist principles were maintained;[96] states remained the major actors of international law despite the existence of the League of Nations. Furthermore, even as the interwar jurists problematized sovereignty in seeking to dislodge its foundational significance for international law, these efforts

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See H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 434-47 (1933).

95. Alvarez, *supra* note 88, at 47. According to Alvarez, this division between law and politics was furthered in the academic sphere, where law *stricto sensu* was studied in law schools and international politics was studied in departments of political science. For Alvarez, it was only by combining the study of law and politics that it was possible to create an effective international law, a practical international law. Thus, Alvarez called for the creation of "the science of international relations," as this would enable the study of international law itself, "not only in the realm of theory but especially to assure its practical realisation." *Id.* at 38. Given the subsequently fraught character of the relationship between international law and international relations, it is interesting that, at this stage, Alvarez should see the complementarities between the fields and, indeed, call for the creation of the field of international relations. American political scientists were equally keen to contribute their insights to the international realm and to examine international law for these purposes. *See generally* Pitman B. Potter, *Political Science in the International Field*, 17 AM. POL. SCI. REV. 381 (1923). Potter gives a fascinating account of the emergence of the subject "International Politics" in American universities. For a recent revival of the project of combining international law and relations, see generally Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993). For a critique of this approach, see Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 17 (Michael Byers ed., 2000).

96. Thus, Morgenthau, writing in 1940 at the end of the great experiments of the interwar period, argued that none of the alternatives developed in the period had affected "the predominance of positivist thought over the science of international law." Morgenthau, *supra* note 38, at 264. In his article, Morgenthau appeared intent on amending this idea, although he had not quite sawn off the branch at this stage.

also provoked increasingly sophisticated responses on the part of positivists who, with more or less credibility, attempted to account for the developments of the interwar period by producing more thoughtful and nuanced versions of sovereignty doctrine and positivism. Thus, for more traditional and positivist scholars such as Corbett, the concept of sovereignty continued to possess a vital analytic value: All the major developments of the period, including the establishment of the League itself, could be seen as creations of sovereignty, as increasingly sophisticated exercises of the powers of sovereignty, and, in effect, as an elaboration of positivism rather than as a departure from it.[97]

Further, while the League represented a better and more efficient way by which states could express their consent and arrive at agreement, it did not obviate in any way the need for such consent.[98] State sovereignty was preserved. Indeed, somewhat ironically, it was upheld and celebrated by institutions that had been created in the hope that they somehow would curtail sovereignty. Thus, the PCIJ famously proclaimed, "Restrictions upon the independence of States cannot therefore be presumed."[99] Further, even in those circumstances where states had appeared to bind themselves, this, too, was characterized as an exercise of sovereignty.[100]

In the Mandate System, however, the problem of sovereignty took a very different character. In the final analysis, the League was subordinate to the will of sovereign states. In the mandates, this relationship was reversed entirely. Here, inter-

97. Thus, Corbett argued that the League, far from being *sui generis* as McNair maintained, was explicable in positivist terms as a creation of states. *See* PERCY CORBETT, THE GROWTH OF WORLD LAW 37-38 (1971) (discussing the importance of and emphasis on sovereignty of states in the creation of the League of Nations).

98. OPPENHEIM, *supra* note 1, § 167t.

99. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

100. In the first contentious case heard by the PCIJ, the PCIJ stated, "The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction on the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty." S.S. Wimbledon (U.K., Fr., Italy & Japan v. Germ.), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17).

national institutions, rather than being the product of sovereign states, were given the task of creating sovereignty out of the backward peoples and territories brought under the mandate regime.[101] The emergence of international human rights law is characterized axiomatically, in virtually all the literature on the subject, as a revolutionary and unprecedented moment in the history of international law because it undermined the fundamental principle of territorial sovereignty, which had been in existence since the emergence of the modern European nation-state and the writings of Vattel.[102] As a result of the emergence of international human rights law, international law and institutions now could intervene in relations between a sovereign and its citizens.[103] In this context, the truly extraordinary character of the Mandate System project, when put at its highest, becomes more apparent: It did not seek merely to qualify the rights of the sovereign,[104] but rather to create the sovereign.

Perhaps another way of understanding the unique character of the mandate project is to revert to the metaphor of "consciousness" that is used repeatedly by the international lawyers

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101. It must be noted that the League exercised, in effect, a form of sovereignty over certain territories that it administered, like the Saar for example. But it was not given the task of creating sovereignty, of transforming backwardness into modernity. *See* Corbett, *supra* note 41, at 126-36.

102. *See, e.g.*, HIDEAKI SHINODA, REEXAMINING SOVEREIGNTY: FROM CLASSICAL THEORY TO THE GLOBAL AGE (2000) (discussing the impact of international human rights law on theories of sovereignty); Jianming Shen, *National Sovereignty in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 420-22 (2000).

103. There are, of course, many other important reasons why international human rights is extraordinary, not least among them the real impact it has had on the conduct of states. To many international lawyers, however, the erosion of sovereignty is in itself revolutionary.

104. The Mandate System was not the only great experiment in nation building conducted by the League. At the same time, the League was seeking to manage the problem of nationalism in European states through the creation of minority treaty regimes. The great experiment of the minority treaty system—one of the important precursors of international human rights law—was animated by the idea of qualifying sovereign rights. For a superb account of this experiment, see generally Berman, *Alternative*, *supra* note 36, at 1821-73 (analyzing the difficulties surrounding the nationalities problem and comparing the minority treaties with other alternatives by examining how they were applied to different nations in Europe). *See also* Berman, *Ambivalence*, *supra* note 36, at 369-77 (comparing two decisions by the PCIJ that "[go] to the heart of the Versailles system for resolution of the nationalities question").

of the period. Freud's work had a powerful impact on the interwar lawyers.[105] Thus, it is unsurprising that Brierly, for example, discusses the importance of the "social consciousness" of states for international law.[106] And Butler, explicitly drawing the term from the emerging field of psychology,[107] uses the metaphor to describe the way in which a state's consciousness may evolve continuously. Interests within the subconscious sphere will demand admittance into the conscious sphere in ways that finally will find expression in international affairs, thus justifying international organization.[108] Given Butler's own aim to erode the division between internal and external sovereignty, it may not be extending his metaphor too far to suggest that we could view the interior life of the state, its government, its social, economic, and political organizations, as the subconscious. As McNair notes, it decisively affects state behavior in the external realm and is therefore crucial to international law and institutions; yet it remains outside the scope of control or even scrutiny of international law, which can address the relevant phenomenon only when it emerges into the conscious sphere, as it were, when it manifests itself in the external behavior of the state and thereby becomes a properly international issue.[109] The frustration for international jurists was that, while they could con-

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105. For an important study along these lines, see generally Anthony Carty, *Law and the Postmodern Mind: Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt*, 16 CARDOZO L. REV. 1235 (1995).

106. *See* BRIERLY, *supra* note 34, at 35 (discussing the belief that elements of social consciousness are present in international life).

107. Butler noted:

> We have heard much in recent times from the psychologists as to the existence of a subconscious sphere, whence flow into the consciousness of the individual motives and promptings, which, in certain circumstances dominate his action. In the light of this image and for the purpose of illustration only, we may visualise the nation state.

Butler, *supra* note 65, at 42. Freud's *The Interpretation of Dreams* had been published in German in 1900 and in an English translation by A.A. Brill in 1913. *See* SIGMUND FREUD, THE INTERPRETATION OF DREAMS xi (James Strachey ed. & trans., 1965).

108. Butler, *supra* note 65, at 44.

109. *See supra* text accompanying note 70.

ceptualize vaguely the interior in various ways, they were unable to act upon it.[110]

The discovery of interiority is central to the phenomenon of modernity as a whole.[111] The great literature of modernity—the works of Henry James, Joseph Conrad, James Joyce, Virginia Woolf, and T.S. Eliot—are preoccupied with mapping the interior, with tracing and examining the workings of an inner consciousness.[112] International jurists sensed that access to the interior of the state would revolutionize their discipline in much the same way that Joyce revolutionized the novel and Freud revolutionized our understanding of human nature. And yet, this inquiry was precluded by the sovereignty doctrine. We might understand the monumental significance of international human rights law in these terms: It enabled international law and institutions to enter the interior, to address the unconscious, and thereby to administer civilizing therapy to the body politic of the sovereign state.

Whereas previously the internal character of the sovereign European state was immune from scrutiny, in the interwar period it was precisely through the Mandate System that international law and institutions had complete access to the interior of a society. It was in the operations of the Mandate System that it became possible for international law not merely to enter the interior realm, but also to create the social and political infrastructure necessary to support a functioning sovereign state.[113] Here, then, sovereignty was to be studied, not in the context of the problem of war and of collective security, but in a very different constellation of relationships that are central to the understanding of sovereignty in the non-Eu-

110. Freud's work, of course, had a far more direct relevance to international law and the whole question of war and aggression, as it sought to identify the origins of aggression and the death drive. *See* SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (James Strachey ed. & trans., 1961) (1930).

111. *See generally* H. STUART HUGHES, CONSCIOUSNESS AND SOCIETY (1958).

112. *See generally, e.g.*, HENRY JAMES, THE PORTRAIT OF A LADY (1881); JOSEPH CONRAD, HEART OF DARKNESS (1902); JAMES JOYCE, ULYSSES (1922); VIRGINIA WOOLF, MRS. DALLOWAY (1925); T.S. ELIOT, THE WASTE LAND (1922).

113. Another relationship is suggested in seeing the mandate society as the unconscious. Most often, the encounter with the unconscious is characterized as a journey into the past, an encounter with the primitive: in this case, the backward mandate people. This is one interpretation of Marlow's journey upriver in *The Heart of Darkness*. *See* CONRAD, *supra* note 112.

ropean world. Within the Mandate System, sovereignty is shaped by, and connected with, issues of economic relations between the colonizer and the colonized on the one hand, and comprehensively developed notions of the cultural difference between advanced Western states and backward mandate peoples on the other. It was in the Mandate System, furthermore, that many of the interests of jurists such as Pound, Alvarez, and Hudson could find expression. This was because the task confronting the Mandate System involved far more than the granting of a simple juridical status. Rather, international law and institutions were required to create the economic, political, and social conditions under which a sovereign state could come into being. In this sense, law had to be combined with sociology, political science, and economics in order to achieve the goals of the Mandate System. It was through international institutions that such a task of synthesis could be addressed. The establishment of institutions gave international law a reach and range of technologies that previously had never been available to it in its attempts to organize the international community. Precisely because of this, the aspirations of pragmatic jurists to make law more socially oriented could be given effect; international institutions made pragmatic jurisprudence a possibility in the field of international relations. Further, it was in the Mandate System that international law and institutions could conduct experiments and develop technologies that were hardly possible in the sovereign Western world. It is, then, by studying how this occurred that we may gain an understanding both of the unique character of non-European sovereignty and, conversely, of the identities that international institutions developed in the course of bringing such sovereignty into being.

Third-World scholars examining nineteenth-century international law consistently have argued that the formalist and positivist character of that law was ideally suited to support the imperial project.[114] In short, formalism has been linked inextricably to imperialism. The further suggestion is that an antiformalist jurisprudence such as pragmatism would enable the negation of colonialism. My argument, however, is that pragmatism, itself a response against formalism and colonialism,

114. This view is explored in Anghie, *Peripheries*, *supra* note 3.

gave rise to a new type of colonialism whose character may be identified by a study of the Mandate System.

IV. THE MANDATE SYSTEM AND COLONIAL PROBLEMS

A. *Introduction*

Although the Mandate System, in strictly legal terms, only applied to the territories formerly annexed to Germany and the Ottoman Empire, interwar lawyers and scholars understood that it had a far broader significance. It represented the international community's aspiration, through the League, to address colonial problems in general in a systematic, coordinated, and ethical manner. At the highest level, it embodied "the ideal policy of European civilization towards the cultures of Asia, Africa, and the Pacific."[115]

The last major conference to be held on colonial problems was the Berlin Conference of 1885, which basically sought to ensure that Africa would be divided up among European powers on a systematic basis to minimize the potential for conflicts among rival European imperial powers.[116] The character of the relationship between the European and non-European world had changed profoundly since that time as a consequence of numerous developments, including the Great War, the emergence of anticolonial movements, and the condemnation of colonialism within the West itself. It was in these complex circumstances that the System had to legitimize its existence and make good on the promise that the creation of international institutions would result in a better way of addressing international problems. More broadly, the Mandate System generated a debate among international lawyers on the role of their discipline in legitimizing colonial conquest. The

115. WRIGHT, *supra* note 2, at vii.

116. Although the largest conferences were held in 1885, Western powers held numerous other conferences relating to colonial problems between 1885 and 1912. Africa had the doubtful distinction of being the object of concern of many of these conferences. G.L. Beer, the American expert on Africa, stated that "no other region had called forth more international cooperation or had been subjected to more comprehensive international control." *See* HALL, *supra* note 2, at 103 (quoting G.L. BEER, AFRICAN QUESTIONS AT THE PARIS PEACE CONFERENCE; WITH PAPERS ON EGYPT, MESOPOTAMIA, AND THE COLONIAL SETTLEMENT 193 (1923)). Beer was among several American experts on colonial affairs; others included Colonel House, who accompanied Wilson to the peace talks.

creation and operation of the Mandate System, then, can be understood best in terms of these debates regarding colonialism and its significance for international law and relations.[117]

B. *Legitimizing the Mandate System: Colonial Problems in the Interwar Period*

By the end of the Great War, if not earlier, it was clear that many non-Western states would become sovereign states.[118] This point was illustrated most dramatically by Japan, which was accepted into the Family of Nations in 1905. This occurred after the Japanese defeat of Russia, which marked not only Japan's military ascendancy, but also its assumption of the role of a colonial power, as the war was fought essentially over control of Korea.[119] Japan participated in the Peace Conference as one of the major powers,[120] for with the conclusion of the Great War, it was not only the United States but also Japan that emerged with greater strength.[121] Equally important, Siam and China[122] were signatories at the Treaty of Peace,[123] although significantly, Islamic countries were initially

117. This follows Morgenthau's injunction that the rules and institutions of international law "need also to be seen within the sociological context of economic interests, social tensions and aspirations for power, which are the motivating forces in the international field, and which give rise to the factual situations forming the raw material for regulation by international law." Morgenthau, *supra* note 38, at 269.

118. For an account of the non-European states that had been accepted, even if only partially, into the Family of Nations, see Kingsbury, *supra* note 69, at 607-08.

119. *See* THE CAMBRIDGE HISTORY OF EGYPT 250 (M.W. Daly ed., 1998).

120. The five great powers at the Peace Conference, as listed by Oppenheim, were the British Empire, America, France, Italy, and Japan. OPPENHEIM, *supra* note 1, § 167a.

121. "Far from being weakened by participation in the War, the United States and Japan emerged from it economically and militarily strengthened." Indeed, the United States and Japan emerged as imperial powers at approximately the same time, and sought to accommodate each other's imperial aspirations in the years preceding the Great War. DAVID B. ABERNETHY, THE DYNAMICS OF GLOBAL DOMINANCE: EUROPEAN OVERSEAS EMPIRES 1415–1980, at 118 (2000). Thus, "the Roosevelt administration formally acquiesced in the Japanese takeover of Korea in return for a free hand in the Philippines and an agreement to bar Japanese immigration to the United States." BOYLE, *supra* note 37, at 95.

122. OPPENHEIM, *supra* note 1, § 167b.

123. *Id.* Siam had declared war on Germany and had sent troops to fight in France. Nevertheless, the Allied Powers, with the exception of the United

excluded from the League.[124] Egypt won independence from the British in 1922.[125] All these events illustrated that non-European societies could become sovereign states despite the view powerfully promulgated prior to the War that Europeans alone had the capacity to govern.

In addition, colonized peoples were seeking more control over their own government, and it became clear that the relationship between colonies and the imperial center was evolving continuously. Settler colonies such as Australia and New Zealand had been granted "dominion status,"[126] while other colonies such as India also sought to achieve this status, if not outright independence.[127] Corresponding with this, by the interwar period, experts on colonial affairs recognized the immense problems involved in continuing to control "geographically separated areas, well populated by people of a culture different from that in the imperial state."[128] Thus, Sir Cecil

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States, were slow to dispense with the system of extraterritoriality to which Siam had been subjected. For an interesting account of the diplomacy surrounding these issues, see FRANCIS B. SAYRE, GLAD ADVENTURE 104-27 (1957). Sayre was the son-in-law of Woodrow Wilson, and his career included appointments as professor at Harvard Law School, High Commissioner of the Philippines, and member of the U.N. Trusteeship Council.

124. For an eloquent argument about this, see Syed Ameer Ali, *Islam in the League of Nations*, 5 TRANSACTIONS OF THE GROTIUS SOCIETY 126 (1919).

125. *See* THE CAMBRIDGE HISTORY OF EGYPT, *supra* note 119, at 250.

126. For a discussion of the international law problems raised by dominions, see OPPENHEIM, *supra* note 1, §§ 94a-94b.

127. The Indian National Congress (INC) had campaigned for dominion status; the British refused to accommodate these claims, and by 1929 the INC declared its goal to be complete freedom. ABERNETHY, *supra* note 121, at 110.

128. Imperial historians of the nineteenth century were far more sanguine about Britain's ability to maintain its colonial possessions. John Seeley, for example, argued that such a question only arose if British expansion was viewed as creating an Empire. Seeley argued instead that British overseas possessions should be regarded as a part of the British state. Seeley recognized that distance made control problematic. Nevertheless, he argued that these difficulties could be overcome by the influence of common nationality and religion. In essence, the colonial possessions were to be populated by people from the United Kingdom. Implicit in Seeley's framework is the notion that authority is coextensive with culture. Once this link is severed, Empire, or to use Seeley's terminology, the English state, ceases to exist. Interestingly, therefore, Wright, in repudiating the plausibility of this thesis, cites authors who argue that different environments produce changes in physical characteristics, as a consequence of which it becomes doubtful that even settlers from the mother country would preserve the biological characteristics

Hurst, who later became president of the PCIJ, stated, "The dominions of today were but crown colonies in the past. The crown colonies of today will be dominions in days to come. There is nothing static about the British Empire."[129] It thus was contemplated that some colonies could become self-governing or even entirely independent.

The War, of course, had a profound effect on the issue of colonial relations at a number of different levels. It had not merely devastated Europe, but also severely weakened its claims to moral superiority and, indeed, to being civilized.[130] In addition, the Allies had sought to justify themselves by arguing that the War was one of principle, fought for the preservation of freedom. Many colonies had sent soldiers to the war. At least 1.4 million Indians were mobilized to serve in France, the Middle East, and Africa;[131] in return, the Indian Secretary of State had promised to allow the gradual development of self-governing institutions for India within the overall framework of the Empire.[132]

Most significantly, nationalist movements were developing in colonial societies throughout the globe. Imperial powers, intent on maintaining their empires despite the War and its toll on their credibility and strength, now had to confront these movements, whose ambitions were expanding rapidly from requests for more participation in government to demands for outright independence—the result of broken promises and authoritarian rule by the imperial powers. The deliberations at Versailles occurred in the shadows of the mas-

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of their nationality (equated here with race). All these matters are discussed in WRIGHT, *supra* note 2, at 4-5.

129. SIR CECIL HURST, GREAT BRITAIN AND THE DOMINIONS 13 (1928). It also must be noted, however, that British control over overseas territories reached its most expansive point during the interwar period once Britain was appointed mandatory over various African, Middle Eastern, and Pacific territories.

130. For detailed studies of this period, see V.G. KIERNAN, FROM CONQUEST TO COLLAPSE 191-207 (1982). *See generally* A.S. Kanya-Forstner, *The War, Imperialism, and Decolonization, in* THE GREAT WAR AND THE TWENTIETH CENTURY 231 (Jay Winter et al. eds., 2000); ABERNETHY, *supra* note 121. For an important study on which I have relied and which focuses specifically on the Mandate System, see SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS 111-42 (1996).

131. ABERNETHY, *supra* note 121, at 109.

132. *Id.*

sacre at Amritsar and Mahatma Gandhi's first Satyagraha campaigns. Protest, if not rebellion against colonial rule, took place in Sierra Leone, Saigon, the Congo, Egypt, Iraq, Kenya, and South Africa.[133] Marcus Garvey's demand—"Africa for the Africans"—caused great concern to colonial powers.[134] It was understandable then, that even at Versailles, the A mandatories were characterized explicitly as well advanced in their progress toward independence.[135] Furthermore, as Grovogui argues, the Bolshevik Revolution in Russia gave inspiration to anticolonial struggles on the one hand, and made Western statesmen aware of the importance of offering greater voice to colonized peoples on the other.[136] Anticolonial resistance, then, played a crucial role in shaping the League's policies toward the mandate territories.

Matters were complicated further by President Wilson's forceful promotion of the concept of self-determination, which he claimed was one of the major principles over which the war was fought. Wilson's ideas had to be treated with respect.. Consequently, the victorious European powers, intent on preserving, if not extending, their empires, presented their claims in a manner that appeared to conform with Wilson's views.[137] Further, Algerian, Vietnamese, and Tunisian nationalist movements seized on the concept of self-determination to advance their claims for self-government.[138] Wilson's proclamations on self-determination and his assertion that each distinctive culture was entitled to become an independent state was as relevant to the great colonial territories such as India as it was to the people of Europe to whom they primarily were addressed.[139] Indeed, Grovogui argues, the recognition of the

133. *Id.* at 129. For a good overview of anticolonial resistance during this period, see YOUNG, *supra* note 8, at 161-81.

134. ABERNETHY, *supra* note 121, at 129.

135. This is suggested by the phrasing of Article 22, which asserts that these communities "have reached a stage of development where their existence as independent nations can be provisionally recognized." WRIGHT, *supra* note 2, app. at 591 (citing art. 22 of The Mandate Articles of the League of Nations Covenant). For a larger discussion, see generally *id.*

136. GROVOGUI, *supra* note 130, at 113.

137. Kanya-Forstner, *supra* note 130, at 239.

138. *Id.* at 242.

139. As Wright argued, while the principle was seldom applied in practice, it was nevertheless assertible that "every considerable people of distinct culture is potentially an independent state and that imperial powers can prop-

newly emergent Balkan states by the Western powers further gave impetus to nationalist demands for self-determination by the non-Europeans. In these ways, Wilson's condemnation of colonialism and his promotion of self-determination had far reaching consequences that he hardly could have anticipated.[140]

Various criticisms of past colonialism made it vital for the League to establish that the Mandate System was not a form of veiled colonialism and that it effectively could protect native peoples, promote their interests, and guide them toward self-government. Self-government hardly had been prominent in the colonial policies adopted by the traditional imperial powers. Thus, although Britain, for example, claimed that its administration of its colonies was directed toward developing self-government in the colonies, scholars remained skeptical.[141]

The one example of a colonial power that professed itself intent on developing self-government and as acting in the interests of the native peoples was provided by one of the newest colonial powers, the United States, in its administration of the Philippines. The United States took control over the Philippines after defeating the Spanish in 1898[142] and Filipino na-

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erly exercise only tutelage over them pending their maturity." WRIGHT, *supra* note 2, at 15.

140. The obscure young Vietnamese nationalist leader, Nguyen Ai Quoc (later to emerge as Ho Chi Minh), hopeful that Wilson would understand the aspirations of his people for liberation from France, attempted to meet Wilson, but was shown the door. Kanya-Forstner, *supra* note 130, at 242; *see also* MARK PHILIP BRADLEY, IMAGINING VIETNAM & AMERICA: THE MAKING OF POST-COLONIAL VIETNAM, 1919–1950, at 10-11 (2000).

141. Hobson, at least, asserted, "Upon the vast majority of the populations throughout our Empire we have bestowed no real powers of self-government, nor have we any serious belief that it is possible for us to do so." J.A. HOBSON, IMPERIALISM: A STUDY 114 (George Allen & Unwin Ltd. eds., 4th ed. 1948) (1902). For a contrasting view, see HALL, *supra* note 2, at 94-95.

142. For the argument that the U.S. interest in international law was powerfully shaped by its emergence as a colonial power, see BOYLE, *supra* note 37, at 18. Boyle argues:

> The birth of the American Society of International Law and its journal can be attributed to the experience of the United States during its war in Spain in 1898. The exhilarating feeling of the sudden and decisive victory stimulated within all sectors of the country an increased awareness of international affairs and generated a felt need within the U.S. international law community for an organiza-

tionalists afterwards in a war that resulted in roughly two hundred thousand deaths, the enormous majority of them Filipino civilians.[143] The architect of U.S. colonial policy toward the Philippines and, in some respect, the founding architect of U.S. colonial policy,[144] Elihu Root,[145] had studied exhaustively English colonial policy. Studying in particular British rule in India,[146] Root saw the U.S. approach to the Philippines, which he had authored, as distinctive: "It has differed from all other colonial experiments that I know anything about in following consistently as one of its fundamental rules of conduct the purpose to fit the Filipinos themselves for self-government."[147]

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tion and a publication in which to express the legal aspects of America's new and far flung international relations.

Id. (citations omitted).

143. The history of the war and the paradox of how the United States, having fought Spanish imperialists only to commence a war against Filipino nationalists who initially had seen the United States as an ally, is told in STANLEY KARNOW, IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES (1989).

144. Root's policies took the form of a set of instructions, authored by Root, which were issued by President McKinley to the head of a commission he appointed to inquire into American governance of the Philippines. The commissioner was William Howard Taft. The instructions are reproduced in 2 W. CAMERON FORBES, THE PHILIPPINE ISLANDS app. at 439 (1928). Taft, heavily influenced by his reading of Tocqueville's *Democracy in America*, regarded the New England town as central to the democratic project and sought to create a similar system in the Philippines. *See* KARNOW, *supra* note 143, at 228.

145. Root's remarkable life is the subject of a two-volume biography by Philip Jessup. *See generally* PHILIP C. JESSUP, ELIHU ROOT (1938). Root had been Secretary of War at the time of the war against the Filipino nationalists. He pursued the war with ruthless efficiency, despite growing concern within the United States about the atrocities committed by U.S. forces. *See* KARNOW, *supra* note 143, at 140. Root subsequently became the first President of the American Society of International Law and worked tirelessly for the establishment of a court to settle international disputes. His contribution to the creation of the PCIJ was immense, and he was awarded the Nobel Prize for Peace in 1913—thus perhaps initiating or furthering the curious tradition whereby Nobel Peace prizewinners have proved themselves extremely adept at the waging of war. Root himself was skeptical about the significance of the prize. *See* JESSUP, *supra*, at 504.

146. *See* JESSUP, *supra* note 145, at 345.

147. *Id.* at 371. Given the history of the United States, with its own anticolonial struggles against the British, it was inevitable that the U.S. approach to colonialism would differ markedly from that of the European colonial states. The United States was unenthusiastic about formal political control of colonial territories. Rather, as its position at the Berlin Conference of 1884–85 made clear, the United States was intent on trading with

Root's policies reflected this broad goal in many ways. Having defeated the Filipino nationalists, the United States then set about the task of reconstructing the Philippines along the lines suggested by the history of the United States itself. Thus, although the U.S. Constitution was not applicable explicitly to U.S. rule over the Philippines—Root studied this question in considerable detail—he proceeded to provide most of the rights included in the Bill of Rights to the people of the Philippines on the basis that the Constitution outlined the limits to what any government could do.[148] In addition, Root actively promoted self-government by stipulating that locals were to manage their own affairs "to the fullest extent of which they are capable."[149] Municipal authorities were to be selected by the people; government was to take place with proper regard for Filipino customs, habits, and prejudices "to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government."[150] The administration was to be directed, not toward the well-being or profit of the United States, but toward "the happiness, peace and prosperity of the Philippine Islands."[151] It was clear, however, that there were limits to American munifi-

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colonial territories and furthering its economic power. For the U.S. position at Berlin, see Anghie, *Peripheries*, *supra* note 3, at 60-61.

148. The question was whether "the Constitution followed the flag," and whether, therefore, by exercising sovereignty over the territories it had acquired after the Spanish War, the United States was required to provide the inhabitants of those territories with rights guaranteed by the Constitution. This was the subject of a Supreme Court decision that Root summarized as follows: "[A]s near as I can make out the Constitution follows the flag—but doesn't quite catch up with it." JESSUP, *supra* note 145, at 348. Root himself argued on the one hand that rights enjoyed within the United States could not be extended to the colonial territories because "the provision of the Constitution prescribing uniformity of duties throughout the United States was not made for them, but was a provision of expediency solely adapted to the conditions existing in the United States upon the continent of North America." *Id.* at 347. Nevertheless, the rights embodied in the Constitution were applicable to colonized peoples, according to Root, "because our nation has declared these to be rights belonging to all men." *Id.* Root's views took important and concrete form in his letter of instructions to Taft, whereby he basically extended to the Filipino people all the rights contained in the Bill of Rights with the exceptions of the rights to trial by jury in criminal cases and the prerogative to bear arms. KARNOW, *supra* note 143, at 170.

149. FORBES, *supra* note 144, at 440.

150. *Id.* at 442.

151. *Id.*

cence: While locals were to be incorporated into the administration, they had to demonstrate "an absolute and unconditional loyalty to the United States"—a condition that rendered the whole idea of self-government extremely problematic.[152]

It perhaps is not a coincidence that Jessup terms Root's instructions "the most important single document in American colonial history."[153] They captured the ambivalences involved in a posture that simultaneously repudiates colonialism, but is convinced firmly that a particular model of government, of social and political organization, is valid universally and therefore should be promoted among, and adopted by, all peoples—even when that model conflicts with the customs and forms of government found among those less enlightened peoples.[154] Thus, Root argued that American principles of government represented the "immutable laws of justice and humanity"[155] and that these "great principles of government . . . must be maintained in their islands for the sake of their

152. *Id.*

153. JESSUP, *supra* note 145, at 354. I cannot pursue this theme in detail here, but we might see in Root's views some of the enduring themes of the foreign policy of the United States and, in particular, the beginnings of the various projects of good governance and democracy promotion that are such an important aspect of contemporary international relations and that are forcefully undertaken both by international institutions and by many Western states, such as the United States. For an important historical overview of U.S. projects promoting democracy that appear, at least in part, to be based on the assumptions found in this document, see William P. Alford, *Exporting the "Pursuit of Happiness,"* 113 HARV. L. REV. 1677 (2000) (reviewing THOMAS CAROTHER, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999)). As Alford notes, "The United States has a long history of endeavouring to enlighten, if not save, our foreign brethren by exporting ideas and institutions that we believe we have realized more fully." *Id.* at 1678. It must be noted that Root's own views were more complex than his official positions might suggest. On the one hand, he was doubtful as to whether the Filipinos ever would be capable of self-government as he defined it. JESSUP, *supra* note 145, at 343-44. On the other, he had no faith in Congress to construct a government for the Samoan Islands, sarcastically declaring, "I should think that an exchange of professors of governmental science between Tutuila [Western Samoa] and Boston would be particularly advantageous to the people of the last mentioned city." *Id.* at 349. Root was a graduate of New York University School of Law.

154. For another, quite different American response to the problem of colonialism, see Nathaniel Berman, *Shadows: Du Bois and the Colonial Prospect, 1925*, 45 VILL. L. REV. 959 (2000).

155. Cited in JESSUP, *supra* note 145, at 332.

[the Filipinos'] liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar."[156]

Seen in this way, the governance of backward peoples was a type of trusteeship, and was therefore a burden.[157] The U.S. commitment to self-government was such that Congress had declared that the Philippines would receive independence "as soon as stable government can be established."[158] The Philippines became an independent nation—perhaps appropriately—on July 4, 1946, which marked the first instance of a peaceful transition from colonialism.[159] The links between the U.S. administration of the Philippines and the Mandate System consist of more than their concern to promote self-government. After all, it was Wilson himself who had declared that the United States was a "trustee of the Filipino people,"[160] and who had authored the Mandate System as well.

The notion of trusteeship, central to the Mandate System, could be used to justify the continuing control of foreign peoples by presenting the control as being motivated by concern for native interests and a desire to promote their self-government rather than by the selfish desires of the colonial power.

C. *The Economics of Colonial Relations in the Interwar Period*

Even as the colonies were demanding self-government and increased political freedoms, imperial powers were becoming acutely aware of the economic importance of their colonial territories. Until the latter half of the nineteenth century, large trading companies, such as the British East India

156. *See* FORBES, *supra* note 144, at 443.

157. Moreover, it was through the concept of trusteeship that the United States could seek to resolve a fundamental contradiction: How could the United States, born out of a war of independence against colonialism, become itself a colonial power? For a classic examination of this broad theme, see generally ERNEST R. MAY, IMPERIAL DEMOCRACY (1961). The American occupation of the Philippines generated enormous controversy precisely for this reason. *See* KARNOW, *supra* note 143, at 78-138. In addition, of course, the notion of trusteeship was an important part of U.S. law, as it was said to constitute the basis of the relationship between the United States and the Native Americans.

158. WRIGHT, *supra* note 2, at 14 n.24.

159. KARNOW, *supra* note 143, at 323.

160. WRIGHT, *supra* note 2, at 14 n.24.

Company and the Dutch East India Company, had driven the colonial enterprise. These companies, which exercised what amounted to sovereign powers over the territories they controlled,[161] simply sought to make profits; the imperial states that granted these companies' charters increasingly found that they were becoming embroiled in costly colonial conflicts as a result of the actions of these companies. As a consequence, colonial powers began to formulate imperial policy and assume more direct control over colonial relationships.[162] Thus, by the end of the nineteenth century, it was the imperial state that established economic links with its colonies on a sustained and organized basis; this was justified in terms of the grand mission of bringing civilization to the natives.[163]

Imperialism always had been motivated by economic gain. But whereas "in 1880 a conscious policy of economic imperialism hardly existed,"[164] by the end of the century this situation had changed dramatically, and imperialism acquired a new and singular form. It was in this period that the formidable powers of the European state, with its massive military and economic resources, were committed systematically to the task of making profit out of the colonies.[165] This prosaic view of im-

161. For a detailed examination of the role played by these companies in the colonial enterprise, see KOSKENNIEMI, *supra* note 36, at 98ff. *See also* Anghie, *Peripheries*, *supra* note 3, at 3-37.

162. Thus, imperial powers met in Berlin in 1885 to sort out the complications that could have been created by their trading companies. Furthermore, in the case of Britain, this is reflected by the dissolution of the East India Company in 1856 and the consequent assumption by the Crown of direct responsibility for the governance of its Indian territories. *See* WRIGHT, *supra* note 2, at 11 n.18. It was far from the case, however, that the adventurers had no role to play in the formulation of British imperial policy. The lucidly pursued megalomania of Cecil Rhodes embroiled the British in the Boer War, which in turn led to the creation of that peculiarly modern institution, the concentration camp.

163. *See* Anghie, *Peripheries*, *supra* note 3, at 63-64.

164. *See* LEONARD WOOLF, EMPIRE AND COMMERCE IN AFRICA 37 (1920).

165. *See id.* at 44-45. Woolf gives a pointed account of the singular nature of this form of imperialism. *Id.* at ch. 3. Woolf spoke with particular authority. He was a civil servant in Ceylon for seven years, during which time he developed a particularly intense dislike for the imperial system that he had very conscientiously administered and whose assumptions he did not entirely escape. Abruptly transported to the jungles of Ceylon from his beloved Trinity College and the company of his mentors and friends—who included G.E. Moore, Lytton Strachey, and John Maynard Keynes—Woolf eventually resolved to live in Ceylon, looking after his district, but not as a Government

perialism tarnished the noble visions of Empire so evocatively produced by authors such as Kipling.[166] The commercial well-being of the European state and its national economy were perceived as being connected intimately with its overseas possessions and its ability to protect and expand its overseas markets. Indeed, the character and function of the European state itself was altered profoundly by this shift in emphasis. Joseph Chamberlain, as Secretary of State for the Colonies, made these points clear in a speech in 1895, where he asserted that the principal purpose of his government in effect was "the development and maintenance of that vast agricultural, manufacturing and commercial enterprise upon which the welfare and even the existence of our great population exists."[167] This involved "finding new markets and . . . defending old ones,"[168] and the Foreign Office, the Colonial Office, the War Office, and the Admiralty all were involved, in their different capacities, in this great endeavor. Chamberlain went further in claiming that the promotion of such commerce was the principal function of government itself.[169]

By the beginning of the War, then, the central importance of colonial possessions for the economic well-being of the metropolitan power was proclaimed widely and acted upon. The economic dimensions of this new system of imperi-

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Agent. His marriage to Virginia Stephen changed his plans. Woolf wrote one remarkable novel, set in Ceylon. *See generally* LEONARD WOOLF, THE VILLAGE IN THE JUNGLE (1913).

166. Orwell, who saw this dimension of imperialism only too clearly, explains Kipling's loss of popularity partly in these terms:

> He could not understand what was happening, because he had never any grasp of the economic forces underlying imperial expansion. It is notable that Kipling does not seem to realise, any more than the average soldier or colonial administrator, that an empire is primarily a money-making concern. Imperialism as he sees it is a sort of forcible evangelising. You turn a Gatling gun on a mob of unarmed "natives" and then you establish "the Law," which includes roads, railways, and a court house.

GEORGE ORWELL, *Rudyard Kipling*, *in* DICKENS, DALI & OTHERS 140, 143-44 (1945).

167. WOOLF, *supra* note 164, at 7.

168. *Id.*

169. "Therefore it is not too much to say that commerce is the greatest of all political interests, and that the Government deserves most the popular approval which does most to increase our trade and to settle it on a firm foundation." *Id.*

alism had been analyzed by scholars such as Hobson years before the War,[170] and many scholars such as Woolf elaborated and refined these analyses immediately after the War.[171] The War itself further demonstrated how important colonies were for the home state. Not only did the colonies provide soldiers to fight on the western front, but they also provided raw materials for the war effort, including cotton, rubber, tin, leather, and jute.[172] All this suggested that "[c]olonies could be even more valuable in the future, so the thinking went, if their economic potential were realized."[173] The importance of this economic development was emphasized by the most eminent colonial administrators, Albert Sarraut and Frederick Lugard, who further distinguished between economic "development" and what could be termed economic "exploitation."[174] The latter policy would exhaust the colony, whereas development would produce ongoing benefits to the metropolis.

It hardly was surprising, then, that the economic resources of the mandate territories were an important part of the debates regarding the structure of the Mandate System. The principal controversy focused on the "open door policy."

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170. *See generally* HOBSON, *supra* note 141. Hobson believed that "[i]mperialism is the endeavour of the great controllers of industry to broaden the channel for the flow of their surplus wealth by seeking foreign markets and foreign investments to take off the goods and capital which they cannot use at home." *Id.* at 85. Hobson's view of imperialism focused more on the theme of colonies as markets than on the importance of colonies as a source of raw materials. His views of imperialism were powerfully shaped by the class struggle in England, and he argued that England would be better off if it invested in developing its own markets rather than in seeking them abroad.

171. Lenin went a stage further in his analysis, which pointed to the centrality of colonialism to the entire capitalist system. *See generally* V.I. LENIN, IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM (International Publishers 1939) (1917).

172. ABERNETHY, *supra* note 121, at 112; Kanya-Forstner, *supra* note 130, at 247.

173. ABERNETHY, *supra* note 121, at 112.

174. Lugard's views are discussed below. *See infra* notes 249-50 and accompanying text. Sarraut argued, "It is not by wearing out its colonies that a nation acquires power, wealth and influence; the past has already shown that development, prosperity, consistent growth and vitality in the colonies are the prime conditions for the economic power and external influence of a colonial metropolis." ABERNETHY, *supra* note 121, at 112.

The United States was opposed to becoming a mandate power;[175] nevertheless, it was implacable in asserting its economic interests by insisting that the open door policy be implemented in all mandate territories. This would ensure that all states could trade and invest on an equal footing, and without fear of discrimination, in mandate territories. This was a manifestation of Point Three of Wilson's Fourteen Points.[176] Thus, the Mandate Agreements of B mandates contained provisions explicitly guaranteeing this.[177] Nevertheless, this hardly satisfied the United States, which had wanted the open door policy to apply to the A mandates of the Middle East and which engaged in a long series of contentious negotiations with the British in order to gain access to the oil fields of Mesopotamia.[178] France and Great Britain were intent on gaining control over the oil resources in their Middle Eastern mandates and went so far as to redraw the boundaries of the mandate territories of Palestine, Mesopotamia, and Syria in order to enable a more efficient exploitation of their oil reserves.[179] Protracted negotiations about access to these economic re-

175. The United States requested a reservation to the Mandate Article: "Acceptance of a mandate is optional—no Power need accept a mandate unless it so chooses." CRANSTON, *supra* note 12, at 337. Other delegates protested, arguing that the United States should share the responsibility of managing backward territories. Colonel House, one of Wilson's advisers at the Conference on Colonial Affairs, responded by pointing out that Americans disliked acquiring "imperial appendages." *Id.*

176. Point Three called for "[t]he removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all nations consenting to the peace and associating themselves for its maintenance." President Woodrow Wilson, The Fourteen Points (Jan 8, 1918) *reprinted in* CRANSTON, *supra* note 12, app. at 461-63.

177. Thus, the Mandate Agreement for Tanganyika, for example, included a provision stating, "Further, the Mandatory shall ensure to all nationals of States Members of the League of Nations, on the same footing as to his own nationals, freedom of transit and navigation, and complete economic, commercial and industrial equality . . . ." WRIGHT, *supra* note 2, app. at 614 (citing art. 7 of the Mandate for Tanganyika). Generally, the open door policy did not apply to A and C mandates, and this was a source of dispute for the United States. *Id.* at 236. *See generally id.* at 476-80.

178. For an account of this dispute, see *id.* at 48-63. Britain responded by pointing to U.S. control over oil fields in the United States, Haiti; and Costa Rica. *Id.* at 50-51.

179. *Id.* at 51. For a detailed study of the settlement of the Middle East by the Allied Powers following the Great War, see DAVID FROMKIN, A PEACE TO END ALL PEACE (1989).

sources delayed confirmation of some of the mandates for several years.[180] Similarly, Australia and New Zealand did little to conceal their desire to annex the mandate territory of Nauru because of its valuable phosphate deposits.[181]

The paradox, then, was that colonial peoples were striving toward the ever more real goal of independence at precisely the time when their economic value and their significance for the metropolis were becoming increasingly evident. This was one of the fundamental tensions confronting the Mandate System, which simultaneously had to promote the self-government of the mandate territory on the one hand and economic integration of the mandate territory into the global economy on the other.

D. *Reinterpreting the Relationship Between Colonialism and International Law*

The liberal-humanist sentiment that animated Wilson's condemnation of colonialism was shared by a number of important international lawyers.[182] Further, jurists of the League period, including Wright and Lindley,[183] pointed out that many of their distinguished nineteenth- and early twentieth-century predecessors, such as Lawrence, Westlake, and Oppenheim, had endorsed, if not authored, a system of international law that sanctioned conquest and exploitation.[184] The interwar lawyers, then, sought not only to challenge the formalist law of their predecessors, but also to reform the international

180. *See* WRIGHT, *supra* note 2, at 48-56 (discussing negotiations over oil interests).

181. *See* WEERAMANTRY, *supra* note 2, at chs. 5-6.

182. Lauterpacht noted:

> The history of the colonial conquests of the European Powers has in fact been a history of the most ruthless economic exploitation of native peoples, maintained by the despotic rule of military administrations. From time to time during the last twenty years the so-called colonial revelations have shocked the public opinion of Europe.

LAUTERPACHT, *supra* note 2, at 39. Lauterpacht's work on the Mandate System was devoted in part to showing that the System embodied binding legal principles and was not simply a facade for the reproduction of power and colonial might. *See generally* Koskenniemi, *supra* note 45.

183. *See* WRIGHT, *supra* note 2, at 6.

184. *Id.* at 7.

law that had legitimized the dispossession of non-European peoples.[185]

In looking within their own discipline for jurists who could act as a foundation for such a humanist project, the League lawyers returned to the work of Francisco de Vitoria, a Spanish jurist in the sixteenth century who had produced a notable work on American Indians.[186] In attempting to formulate a legal basis for the Spanish rule over the Indians of the New World, Vitoria pointed out that although the Indians had a form of government themselves, this was inadequate as the Indians had "no proper laws nor magistrates, and [were] not even capable of controlling their family affairs."[187] As such, it was in their own interests that the sovereigns of Spain undertook the administration of their country to provide them with prefects and governors for their towns, and perhaps even give them new lords, so long as this was clearly for their benefit.[188]

Vitoria characterized the natives as "infants,"[189] further reinforcing the notion that they required guardianship. Consequently, the Mandate System now was presented as an elaboration of the important ideas that first had been enunciated by Vitoria, but that had been neglected and dismissed, together with so much else of value in international jurisprudence, as a result of the dominance of positivism, which now was itself discredited. The circle was complete: In seeking to end colonialism, international law returned to the origins of the colonial

185. In practical terms, several jurists attempted to systematize the international law relating to non-European peoples. Thus, Snow wrote his work in response to a State Department request made in 1918 for a systematic presentation of "Aborigines in the Law and Practice of Nations." *See* SNOW, *supra* note 13, at 3, 24-30.

186. FRANCISCI DE VICTORIA, DE INDIS ET IVRE BELLI RELECTIONES (Ernest Nys ed. and John Pawley Bate trans. 1917) (1696). For the significance of Vitoria for the discipline, see generally ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1954); JAMES B. SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW (1934); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986).

187. VICTORIA, *supra* note 186, at 161.

188. *Id.* It is notable that Vitoria was tentative in presenting this argument: "There is another title which can indeed not be asserted, but brought up for discussion, and some think of it a lawful one." *Id.* at 160.

189. They were also characterized as having "defective intelligence" and being hardly better than wild beasts. *Id.* at 161.

encounter. It hardly is surprising, then, that virtually every book written on the mandates makes some reference to Vitoria's work. To the League scholars, Vitoria was not so much the jurist legitimizing the Spanish war waged on the Indians[190] as the committed advocate of Indian rights whose work suggested that international law, from its very beginnings, had been concerned with protecting the welfare of dependent peoples. Root and Wilson, in arguing for trusteeship over backward peoples, were giving effect to ideas that Vitoria had elaborated centuries earlier.

The League's adoption of Vitoria's extraordinarily potent metaphor of wardship had a number of effects.[191] Most significantly, it reinforced the idea that a single process of development—that which was followed by the European states—was to be imitated and reproduced in non-European societies, which had to strive to conform to this model. This in turn justified and lent even further reinforcement to the continuing presence of the colonial powers—now mandatory powers—in these territories, as the task of these powers was not to exploit, but rather to civilize, the natives. This revival of Vitoria's rhetoric was combined through the Mandate System with a formidable array of legal and administrative techniques directed toward transforming the native and her society.

Since its inception, international law has been engaged in an ongoing struggle to manage colonial problems at both the practical and the theoretical level. In the nineteenth century, the problem of accounting for relations between European and non-European societies threatened to negate positivist claims to establishing a coherent and comprehensive science of international law based on the behavior of sovereign, European states.[192] Similarly, the attempts of interwar jurists to rid themselves of the colonial international law of the past was fraught with ambivalence, principally because it was this colonial international law that had universalized a basically European international law. The positivist international law of con-

190. For this interpretation of Vitoria, see generally Anghie, *Vitoria*, *supra* note 3.

191. For the importance of ideas articulated by various thinkers to this whole enterprise, see generally DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS (2001).

192. *See generally* Anghie, *Peripheries*, *supra* note 3.

quest, which the League jurists sought to displace, had been directed toward extinguishing and invalidating the legal systems of non-European peoples and endorsing their replacement with the systems of law established by the colonizers. This basic feature of nineteenth-century international law remained unchallenged by the new international law of the mandates that now presumed the triumph of European international law and the unequal international relations that had arisen as a result. The new international law, therefore, could embark on the next stage of the civilizing process of preparing non-European states for independence and emergence into the universal system of international law. The new universalizing mission of international law now acquired an even more powerful character: Through the intervention of international tribunals, it took on the task of transforming the interior of non-European societies and peoples, ostensibly to liberate them. In this way, through the adoption of the idea of trusteeship, the universalizing mission of international law now could adapt itself to changed circumstances and anticolonial political sentiments and still continue its task of ensuring that the Western model of law and behavior would be seen as natural, inevitable, and inescapable. In this sense, the Mandate System continued, rather than departed from, the grand nineteenth-century project of universalizing international law.

In addition, the very definition of international law retained the concept of civilization that had been used in the nineteenth century to exclude non-European states. Thus, McNair begins his edition of *International Law* by asserting, "Law of Nations or International Law . . . is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other."[193] Significantly, although McNair uses the civilized/uncivilized distinction that is crucial to nineteenth-century jurisprudence, he is careful to present the term in a more neutral manner, suggesting that it "does not particularly postulate Christian civilisation, but merely such kind of civilisation as will enable the State concerned and its subjects to under-

193. OPPENHEIM, *supra* note 1, § 1. For a detailed and comprehensive study of the deployment of the term "civilization" in nineteenth-century international law, see GERRIT W. GONG, THE STANDARD OF 'CIVILISATION' IN INTERNATIONAL SOCIETY (1984).

stand, and to act in conformity with, the principles of the Law of Nations."[194] In this sense, civilization ostensibly is separated from a particular cultural tradition and instead is given a more functional character[195] connected with the efficient operation of international law itself.[196] This emphasis on function rather than on a more blatantly racial category, such as civilization, did not alter the fact that the rules of international law were inherently European in orientation: They reflected European concepts of society, political organization, and economic interaction. Furthermore, they represented a set of rules that would enable European economic expansion into non-European societies.[197] In any event, as McNair acknowledges, political and diplomatic realities did not always conform with juridical constructs; thus, several states, such as Persia, Siam, and China, had become accepted as members of the Family of Nations largely because of the interactions between these nations

194. OPPENHEIM, *supra* note 1, § 27. Kingsbury points out that even in the 1905 edition, Oppenheim makes it clear that it is not necessary to be a Christian state in order to belong to the Family of Nations. *See* Kingsbury, *supra* note 69, at 605. There was, perhaps, another reason for this qualified use of the term "civilized." After the slaughter of the First World War it was doubtful to observers familiar with both civilized and uncivilized societies whether the West was any more civilized than the headhunting inhabitants of Papua New Guinea or the Solomon Islands. This is the powerful concept explored in Pat Barker's superb novel set during the First World War. *See generally* PAT BARKER, THE GHOST ROAD (1995).

195. OPPENHEIM, *supra* note 1, § 28. For a further detailed discussion of this functional approach to the issue of civilization, see EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW 223-29 (1920). The problem of civilization took on a different and tragic form by the end of the interwar period when, with the emergence of fascism, European states themselves proved uncivilized once again. The anguished question is posed by Wolfgang Friedman: "The question is nothing less than this: European civilisation has shaped modern International Law. But is European civilisation still what it was, and, if not, how do the changes affect International Law?" Friedman, *supra* note 38, at 195.

196. It is clear that the term "civilization" still means the West in a number of important respects; however, as McNair points out, international law itself, after all, is a product of Europe; and admittance to the Family of Nations requires the consent of those states, overwhelmingly European/Western, that constitute that group.

197. Kingsbury, *supra* note 69, at 606 (discussing the self-serving character of these norms); Anghie, *Peripheries*, *supra* note 3, at 52-54; Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 43 VILL. L. REV. 887, 902 (2000).

and the West, although it remained doubtful to McNair as to whether their governments and peoples understood and intended to carry out the rules of international law.[198] It also is telling that the attempts by Baron Makino, the Japanese representative to the Peace Conference, to include a provision relating to racial equality in the Covenant of the League were opposed emphatically.[199]

The ambiguities of the interwar period in relation to the colonial past—a past that was repudiated vehemently, even as the relationships of subordination that it established were to remain undisturbed—suggested a more specific ambiguity about the Mandate System itself: Was it designed to negate colonialism or recreate it in a different form?

V. THE MANDATE SYSTEM AND THE CONSTRUCTION OF THE NON-EUROPEAN STATE

A. *The Mandates and the Problem of Sovereignty*

The primary novelty of the Mandate System for many jurists of the interwar period was its puzzling relationship to traditional sovereignty doctrine. Colonial territories always had posed a problem to conventional concepts of sovereignty.[200] For interwar scholars, the central dilemma was that of determining who had sovereignty over mandate territories. The Axis powers lost their titles to their colonial possessions as a result of the peace settlement.[201] While this much was agreed, the issue of where sovereignty over the mandates was vested was never resolved, although it was the subject of exhaustive debate and analysis among various jurists, such as Mc-

198. *See* OPPENHEIM, *supra* note 1, § 28, at 40-41.

199. *See* FRANK FUREDI, THE NEW IDEOLOGY OF IMPERIALISM: RENEWING THE MORAL IMPERATIVE 5 (1994). The French and the Italians voted in favor of the inclusion of such a provision, but it was defeated by opposition from the United Kingdom and the United States. *See* CRANSTON, *supra* note 12, at 309-10. The Dominion powers, mindful of the impact of such a clause on their native populations, were especially opposed to such a provision.

200. *See* W.W. WILLOUGHBY & C.G. FENWICK, TYPES OF RESTRICTED SOVEREIGNTY AND OF COLONIAL AUTONOMY 5-13 (1919).

201. For discussion of this issue, see generally Corbett, *supra* note 41. This form of analysis was very much part of the positivist tradition, which treated sovereignty as a strictly legal category and attempted to trace the chain of title that eventually would reveal the holder of sovereignty.

Nair,[202] Corbett,[203] and Wright.[204] Possible candidates that were considered included the League, the mandatory power, and the mandated territory—postulated here as possessing "latent sovereignty" that would emerge in its actualized form upon the termination of the mandate. McNair also articulated this last position, argued in the 1930s, in his capacity as a Judge of the International Court of Justice. McNair asserted, "The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State . . . sovereignty will revive and vest in the new State."[205]

The inability of the jurists to resolve this question—despite which the Mandate System itself continued to function—justifies McNair's claim that the Mandate System was unique, as a result of which "very little practical help [was] obtainable by attempting to apply existing concepts of sovereignty to such a novel state of affairs as the Mandate System present[ed]."[206] But this was not the only reason why the Mandate System raised a unique set of problems regarding the character of sovereignty. Under the classic positivist international law, states came into being when they possessed certain attributes, such as territory, people, government, and independence, and were recognized as independent states by other states.[207] Within this framework, international law played only a relatively passive role, merely outlining the characteristics of a state and leaving the matter to be decided by the states that proffered or withheld recognition.[208] By contrast, in the Mandate System, international law and institutions actively engaged in the pro-

202. OPPENHEIM, *supra* note 1, § 94f (discussing views in textual note).

203. *See generally* Corbett, *supra* note 41.

204. WRIGHT, *supra* note 2, at 319-38, provides a customarily thorough analysis that reviews all the relevant literature of the period.

205. International Status of South-West Africa, 1950 I.C.J. No. 10, at 150 (July 11) (separate opinion of Judge McNair).

206. OPPENHEIM, *supra* note 1, § 94f.

207. In the case of the non-European states, of course, a further and more complex requirement, that of possessing "civilization," was required.

208. Indeed, international law could do very little when states extended recognition to entities that lacked the characteristics of a state—as when some Asian states such as Siam were recognized as members of the Family of Nations despite their supposed inability to fulfill their obligations as members of that group. *See* OPPENHEIM, *supra* note 1, § 28.

cess of creating sovereignty—as conceptualized by pragmatist jurisprudence—by establishing the social foundation, the underlying sociological structure, and the political, social, and economic substance of the juridical state. This project supported the idea that sovereignty could be graded, as implied by the classification of mandates into A, B, and C mandates, based on their state of political and economic advancement.[209] This in turn assumed that sovereignty existed in something like a linear continuum, and every society could be placed at some point along this continuum based on its approximation to the ideal of the European nation-state. This model implicitly repudiated the idea that different societies had devised different forms of political organization that should command some degree of respect and validity in international law.[210] Further, as a consequence of this postulation of one model of sovereignty, the Mandate System acquired the form of a fantastic universalizing apparatus that, when applied to any mandate territory—whatever its peculiarities and complexities—could ensure that such territories, whether the Cameroons in Africa, Papua New Guinea in the Pacific, or Iraq in the Middle East, would be directed to the same ideal of self-government and, in some cases, transformed sufficiently to ensure the emergence of a sovereign state.

The issue of where sovereignty resided with respect to the mandate territories was of great importance to mandatory powers. Those administering C mandates were especially prone to annex the mandate territory they controlled.[211] Significantly, however, it arguably was precisely because sover-

209. The acceptance of these divisions as somehow true rather than merely contingent on the peculiar battles waged by the statesmen at Versailles is suggested by the manner in which the PMC, for example, accepted these categories and proceeded to deal with the territories they were surveying accordingly. The superior sovereign status enjoyed by more advanced territories, the A mandates, was manifested in the form of greater autonomy given to these mandates.

210. Of course, under the traditional doctrine of sovereignty, it was precisely the purpose of sovereignty to protect the cultural distinctiveness, the unique political and social institutions of a state; however, in the case of the non-European world, the acquisition of sovereignty had the reverse effect, as it required profound transformations in the internal operations of a state.

211. This strategy was repudiated by the argument that, whatever the uncertainties are as to where sovereignty vested, it did not vest in the mandatory powers. *See* Legal Consequences for States of the Continued

eignty over the mandate territory could not be located decisively in any one entity that the Mandate System could have complete access to the interior of that territory. It was for this reason that the League, rather than being restricted by assertions of sovereignty, could develop a unique series of technologies and techniques for entering and transforming the very recesses of the interior of the mandate territory in order to realize this pragmatist, sociological vision of the sovereign state.

The actual powers of the League to implement its vision of the sovereign nation-state were extremely limited and problematic. The fact remained, however, that the League, simply by virtue of creating the system with its unique purposes and its reporting and monitoring systems, could begin to conceive of deploying international law in completely new and ambitious ways. The nation-state was not so much created by the mandatories administering their particular territories as imagined, in elaborate and vivid detail, by the bureaucrats of the League.

B. *The Sociology of the Non-European State and the New International Law*

The Mandate System has generated an extremely rich jurisprudence.[212] For the purpose of my argument, however, this analysis focuses on the administrative facet of the system. My argument is that the unique character of the Mandate System and the principles the League formulated to guide its operations[213] were developed largely through the work of the PMC, which had principal responsibility for supervising the operation of the system.[214] Once the basic framework of the

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Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21).

212. Issues relating to the Mandate System have been litigated extensively before the International Court of Justice. *See, e.g.*, International Status of South-West Africa, 1950 I.C.J. 128 (July 11); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319 (Dec. 21) (preliminary objections, judgment); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.) 1966 I.C.J. 6 (July 18) (second-phase judgment); Certain Phosphate Lands in Nauru (Nauru v. Austl.) 1992 I.C.J. 240 (June 26) (preliminary objections, judgment).

213. The extent to which the mandatory powers actually complied with these principles is, of course, an entirely distinct question.

214. This was far from easy, as considerable controversy existed as to how the PMC itself should proceed with its duties—whether, for example, it should adopt a cooperative or critical approach to the mandatory's policies,

Mandate System had been established it was the PMC that had the task of ensuring the progress of the mandate territories and monitoring the everyday workings of the system.

While the legal principles embodied in the mandate articles and mandate agreements purported to guide both mandatory powers and the League, these principles failed to provide any clear sense of the final end of the Mandate System. According to Article 22 of the Covenant, the primary purpose of the Mandate System was to secure the "well-being and development" of the peoples of the mandate territories.[215] While this much could be agreed, it was far from clear what this involved in terms of the specific goals to be achieved.[216] Nevertheless, a system had to be developed to monitor and assess the economic and social progress, however broadly defined, of a mandate territory. For such a project, as Wright points out, it was essential to formulate effective and workable standards:

> The ultimate object of the League's action in regard to mandated territories is to improve conditions in those areas. To do this, the League organs must know the facts and have in mind some standards by which they may be criticized, using criticism in the broad sense of suggesting improvements as well as pointing out mistakes. Complete knowledge of the

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and whether it was to make recommendations for prospective action or simply to confine itself to commenting on what had already occurred. Wright covers these issues in chapter seven. WRIGHT, *supra* note 2, at 190-218. He provides a characteristically thorough analysis of whether the League could be understood as acting in a "legalistic" or "administrative" fashion when performing a particular duty. *Id.* He also attempts to divide these functions among the different League organs: the Council, the Commission, and the Court. *Id.* The reliance on concepts and techniques of public administration is itself an interesting development in the area. Furthermore, the League faced a number of serious difficulties because it was almost completely reliant on reports made by mandatories about the territories they administered. Consequently, it hardly could arrive at independent judgments as to what was occurring in those places. These matters are discussed *infra.*

215. LEAGUE OF NATIONS COVENANT art. 22, para. 1.

216. The problem of establishing a common goal toward which these standards were directed was addressed by assessing all societies from an economic perspective and by using economic criteria to establish a universal standard, both to represent and to understand a society, and to test its progress. Each of these issues is explored *infra.*

> circumstances leading up to an incident or the conditions in the territory cannot yield any constructive suggestions unless they are compared with some principle or standard of conduct or culture.[217]

While the broad rhetoric of "standards of civilization" may be traced back at least to Vitoria,[218] the diversity of the mandate territories and, even more importantly, their administration by the one centralized body, the League, raised the profound problem of developing and particularizing a set of standards that could be applicable universally. Civilization and progress could no longer be discussed in terms of vague standards haphazardly applied by different colonial powers. Rather, the Mandate System required the elaboration of a consolidated and detailed set of standards that could be applied to the massive range of social, economic, and political phenomena examined by the League—whether this had to do with labor policy, systems of land holding, or trade relations—in determining the effectiveness of the mandatory's promotion of welfare, self-government, and, ultimately in some cases, sovereignty.

This task raised a number of complications. Members of the PMC doubted whether it was possible to devise sensible universal standards applicable to all colonial and mandate territories. This problem was raised starkly by the government of Portugal, which questioned whether the PCIJ was capable of determining whether the universal standards prescribed by the League had been satisfied. The Portuguese queried:

> The Court knows nothing of the colonies, their manners and customs, their traditions, the difficulties encountered by the colonising country, and many other factors which are essential to the consideration of the question. Can it settle that question? Obviously not, unless a special section is organised in the Court to investigate the problems of colonial administration. Even if such a section were formed, who is to say which system of colonial organisation is most closely in harmony with the provisions of the Protocol, seeing that there are, and always will be, differences of

217. WRIGHT, *supra* note 2, at 190.

218. *See, e.g.*, SCOTT, *supra* note 186, at 286-87.

> opinion among authorities on colonial questions, even though these differences may not relate to administrative measures themselves but only to their execution?[219]

How were universal standards to be applied to such disparate societies? Whatever the skepticism voiced by the Portuguese, the broader view prevailed that no progress was possible in the mandate territories without "some principle or standard of conduct or culture."[220] The issue of standards was crucial according to M. Van Rees, a member of the PMC, who believed that "[t]he study of such questions by the Mandates Commission, with the object of gradually and methodically establishing for its own use what, in my opinion, would constitute its jurisprudence, seems to me to be not only of great value but really indispensable for its work in general . . . ."[221]

The use of the term "jurisprudence" suggests that the development and application of standards essentially was a legal enterprise. And yet, once it was decided that standards were necessary, the PMC was confronted with the question of whether these standards should take the form of strict legal norms or more flexible administrative guidelines. This division between the legal and the administrative was evident not only in the question of the character of the standards to be established but also in the function of the PMC itself.

The PMC, on one hand, saw its function in legalistic terms. It derived its authority from the Covenant, and its task was to give effect to Article 22. Thus, the interpretation of Article 22 and the relevant Mandate Agreements was a central preoccupation of the PMC.[222] The PMC, in this sense, adopted a strictly legal approach: It confined itself to studying the obligations undertaken by the mandatories and ensuring

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219. *Draft Convention on Slavery Recommended by the Sixth Assembly*, 11 LEAGUE OF NATIONS O.J. 1539, at 1544 (1926) [hereinafter *Draft Convention on Slavery*].

220. WRIGHT, *supra* note 2, at 190.

221. *Id.* at 221 (quoting M. Van Rees).

222. *See, e.g.*, M. Freire d'Andrade, Note, "The Interpretation of that Part of Article 22 of the Covenant Which Relates to the Well-Being and Development of the Peoples of Mandated Territories." *Permanent Mandates Commission, Minutes of the Seventh Session*, League of Nations Doc. C.648 M.237 1925 VI, at 197 (1925) [hereinafter *PMC, Seventh Session*]. Lugard responded to the note. *See id.* at 206.

that these were discharged, as opposed to making its own suggestions, independent of these obligations, as to what the mandatory should be doing.[223] But the PMC also exercised an administrative function and control over the mandatory; this consisted of its role of receiving reports, providing and giving information based on these reports, questioning the representative of the mandatory power in the PMC, and attempting to formulate a broader and overarching mandate policy in light of all this information.

As Wright argues, however, this apparent tension was resolved by the fusion of these two functions—a development he analyzes in terms of the emerging discipline of public administration that required such a fusion. Some sense of how this took place is offered by an examination of the very different approaches adopted by two members of the PMC when outlining how the PMC should perform its duty of ensuring that welfare was being promoted. One member of the Commission, Van Rees, believed this could be achieved by addressing a series of essentially legal questions:

> Is it allowable to give the territory a political organization which would make it practically independent of the mandatory state? . . .
> Do the clauses of the covenant and mandate oblige the mandatory powers to devote themselves to the development of the territory and its population exclusively in the interest of the native? . . .
> What are the obligations which result from the principle that the mandatory powers, having been made trustees by the League of Nations, shall derive no profit from this trusteeship?[224]

M. Yanaghita, however, raised an entirely different set of questions that focused more on developments taking place in the mandates themselves than on the administrative, fact-finding function of the PMC. He sought information on matters such as the "[e]numeration of population according to tribal divisions, or to the stage of development attained by the various tribes . . . , [and the p]rogress of the development of the land, shown in reference to localities or native groups."[225]

223. WRIGHT, *supra* note 2, at 226.
224. *Id.* at 227 (quoting M. Van Rees).
225. *Id.* at 228 (listing suggestions of M. Yanaghita).

C. *Program of General Native Education*

The PMC responded by combining these two approaches, thus creating a law incorporating both elements: first, the collection and systematization of information called for by Yanaghita, and second, the use of this information for the purpose of creating a set of standards that in turn is linked notionally to a broader legal framework. It was important for law and administration to become fused in this way because, as Wright points out, "It is true the general principles of the Covenant and mandate may furnish guides, but clearly the main source for such formulations is not the documents, but the data, not deduction, but induction."[226]

Legal principles were vital, but they had to be combined into a broader system that enabled the PMC to become cognizant of the "facts."[227] In effect, then, it is precisely because of the alliance between law and administration that the PMC was in a unique position to engage in an ongoing and evolving process of receiving, assimilating, and synthesizing information from the mandate territories and then using this information to develop more appropriate and effective standards, a task that fulfilled the legal dimensions of its operations even while giving the PMC enormous flexibility in its operations. This concern to retain flexibility, to be sensitive to empirical reality, was what led many PMC members to be opposed to the codification of standards.[228]

This synthesis of law and administration is illustrated by the list of questions the PMC presented to the Mandatory Powers.[229] Part N focuses on questions regarding labor.[230] On the one hand, mandatories were required to provide detailed in-

226. *Id.* at 227.

227. *Id.* at 220 n.3 (quoting M. Merlin). Thus, when discussing how labor legislation should be framed, the Portuguese representative argued that "an effort should be made to compile the fullest possible statistics, in order to ascertain what contribution the people may, without risk, be expected to make to the work of the community. These statistics should show not merely the number of natives, but also particulars of their physical powers, customs and psychology." *Draft Convention on Slavery*, 11 LEAGUE OF NATIONS O. J. 1542 (1926).

228. WRIGHT, *supra* note 2, at 220.

229. *List of Questions Which the Permanent Mandates Commission Desires Should Be Dealt With in the Annual Report of the Mandatory Powers*, 10 LEAGUE OF NATIONS O.J. 1322 (1926).

formation as to the laws and regulations governing labor issues.[231] On the other hand, the PMC sought an immense amount of information in response to a series of questions, regarding, among other topics, the adequacy of available labor for economic development; processes of recruitment; the nature of the work for which recruiting had occurred; whether private organizations were allowed to recruit; and whether local demand for labor was sufficient.[232] The list of questions embodies the synthesis of the approaches suggested by Van Rees and Yanaghita. This is, moreover, exactly the sort of exercise called for by political scientists and pragmatic jurists intent on adjusting the law in light of realities disclosed by empirical study.[233] Further, the new jurisprudence that developed through the Mandate System was extraordinarily self-generating precisely because it was based on acquiring increasing volumes of information on an expanding range of issues, a process that in turn led to demands for more information on further issues and the formulation of further standards.

None of this, however, undermined the legal character of the system. The entire structure of administration and supervision still was based on legal norms and gave rise to justiciable legal obligations on the part of the mandatory. This is the point made by Jessup in comparing the broad phrases used in the mandate—"material and moral well-being and the social

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230. Other topics include: Status of the Territory, Status of the Native Inhabitants, International Relations, Public Finance, General Administration, and Trade Statistics. *Id.*

231. Questions of this sort focused on laws regarding labor contracts and penalties; rates of wages and methods of payment; hours of work; disciplinary powers possessed by employers; housing and sanitary conditions for workers; inspection procedures for workshops; issues of compensation and insurance; and compulsory labor for essential public works. *Id.* at 1325-26.

232. *Id.* The crucial link between labor and development is again emphasized in the list of questions: "Does the local supply of labour, in quantity, physical powers of resistance and aptitude for industrial and agricultural work conducted on modern lines appear to indicate that it is adequate, as far as can be foreseen, for the economic development of the territory?" *Id.*

233. This is the sort of science called for by Potter, who rejects a science of government based on abstract reasoning concerning the nature of man and of liberty, and instead calls for "efforts to collect as much data as possible concerning actual forms of state organization and governmental methods, and efforts to analyze that data and discover therein the main lines of causation and the fundamental principles of politics." Potter, *supra* note 95, at 381-91.

progress of the inhabitants" of the mandate territory—to provisions in the U.S. Constitution.[234] The full realization of the pragmatic, sociological international law comes into being, then, through international institutions that expand profoundly the technologies of international law that are applied uniquely to the mandate territories.

We may see this system, then, as an embodiment of the new international law called for by Alvarez and Hudson. This is the system that addresses Alvarez's concern to develop a link between social reality and international law, between "what is" and "what must be."[235] It is a project that fuses law with the social sciences by engaging in an empirical study of the phenomenon to be regulated.[236] Instead of abstract juridical rules that are exact, definite, and rigid, the shift to standards creates the flexibility that enables this fusion between law and politics. This is the law that is governed, then, by "new conceptions of economic, social and general utility."[237] And it was because of the formidable adaptability of this new jurisprudence, its ability to adjust continuously to social realities as they became better disclosed through empirical study, that Hudson's vision of international law, which was in turn based on Pound's view of international law as a mechanism of social engineering, could move toward realization. It was an international law based on "a conscious process of adapting our rules and principles and

234. "Certainly, courts can determine and have determined whether particular laws or actions comply with general broad criteria such as 'due process,' 'equal protection' and 'religious freedom.'" South-West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, at 428 (Dec. 21) (dissenting opinion of Judge Jessup). This point is basically affirmed by the court in its Namibia Advisory Opinion. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21).

235. Alvarez, *supra* note 88, at 42.

236. Alvarez thus claims that "[t]he establishment of this harmony between politics and legal rules is the greatest step which can be accomplished in International Law." *Id.* at 47.

237. *Id.* at 48. Alvarez makes his argument in the context of his larger project, which is "above all, to 'Americanise' these sciences [of international relations and international law], that is to say, take into account the doctrines, the practices and problems of the New World." *Id.* at 38. It is clearly the American jurists who are most forceful in presenting a pragmatic international law. *See* Astorino, *supra* note 77, for an important survey of this period and the significance of American pragmatism to the jurisprudence of the time.

standards more directly to the service of the live needs of our present day society."[238]

It is perhaps only appropriate, then, that thirty years after his appearance before the Grotius Society, Alvarez, now a senior judge of the International Court of Justice, again articulated the character of the new international law by describing the Mandate System and the trusteeship system of the United Nations that succeeded it in the following manner:

> But it is from the angle of international law that the creation of those institutions [the mandate and trusteeship systems] presents the greatest interest. The spirit and certain characteristics of what may be called the new international law have thereby been introduced in international law.[239]

It is difficult to assess how the ideas of jurists like Alvarez and Hudson affected the formation of international law and institutions. The simple fact was, however, that in creating international institutions, international law became capable, through the formidable linkage between law and institutions[240] in the special context of the mandate project, to develop a formidable set of technologies to address particular problems. In the final analysis, the fusion between law and administration discussed by Wright is made possible only by the linking of international law with institutions. As a consequence of this, the Mandate System consisted of not only a set of rules, but also an entire system that, among other things, would collect information, analyze that information, and formulate a policy. A whole complex set of problem-solving processes was devised and applied to colonial issues through the League, and I argue that these correspond closely with the ideas of advocates of the new international law. It is in the unique circumstances of the Mandate System—unique because of the connection between sociology and sovereignty, and unique because it gave institutions access to the interior of the state—that international law could develop a new set of technologies and methods of control to address colonial

238. Hudson, *supra* note 76, at 435.

239. International Status of South-West Africa, 1950 I.C.J. 128, at 174 (July 11) (dissenting opinion of Judge Alvarez).

240. This is to accept the positivist argument that institutions are simply creations of international law.

problems like the gap between the civilized and the uncivilized, a gap that is transformed in the Mandate System into a difference between the advanced and the backward. The dynamic of difference now is created, not through the crude, inexact jurisprudence of nineteenth-century positivism, but rather through the sophisticated techniques and technologies of pragmatism. These technologies have an extraordinary power, range, and penetration when exercised through standards, because these standards can create difference with respect to the most intimate and minute aspects of social life in mandate territories—native "customs, traditions, manner of living, psychology, and even resistance to disease."[241] Each rendition of difference in turn creates a project for the Mandate System, as the native's deficiency must in some way be remedied. In the colonial setting, then, the grand themes of law and politics played themselves out, not in the attempts of international law to outlaw aggression or to establish collective security and to control the nationalist passions of Eastern Europe, but rather in the less spectacular but relentlessly effective project of acquiring more data on backward native peoples and their societies in order to further the extraordinary project of creating government and sovereignty in these territories. This project progressed even while the system was ensuring that these territories continued to serve their traditional purpose in the larger global economic system.

VI. GOVERNMENT, SOVEREIGNTY, AND ECONOMY

A. *Introduction*

The New International Law was concerned, not only with the development of a new set of legal technologies, but also with their application to the furtherance of specific social goals that were seen as the "live needs of our present day society."[242] In the context of the Mandate System, this required the PMC to develop a vision of the economic, political, and social structure of the mandate territories in order to formulate a set of policies that would advance the "well-being and development" of mandate peoples, protect the natives, and

241. *Draft Convention on Slavery*, 11 LEAGUE OF NATIONS O.J. 1541 (1926).
242. Hudson, *supra* note 76, at 435.

promote self-government."[243] This section examines the character of the economic and social policies formulated by the PMC through the actual operation of the system. My argument is that the broad phrase "well-being and development" was interpreted principally in economic terms, and that a form of economic development that was disadvantageous to the mandate territories was instituted by the system as a result. This preoccupation with economic development dominated all other aspects of social policy in the mandate territories including, most significantly, the character of the government created in mandate societies. Moreover, the discipline of economics itself became all-pervasive and represented a new and powerful way of conceptualizing and managing the mandate territories and their peoples. Given that the ultimate goal of the Mandate System was to promote self-government and even to create sovereign states out of the mandate territories, the domination of economics resulted in what may be termed provisionally the "economization of government" or the "economization of sovereignty."

B. *The Mandate System and Colonial Administration*

The administration of mandate territories raised extremely complex issues: questions involving, for example, economic development, health policy, labor policy, relations among different tribes in the territory, relations between settlers and natives, and the status to be given to native political institutions. In attempting to resolve these problems, the PMC almost inevitably attempted to prescribe and follow what was regarded as "enlightened" colonial policy,[244] as no other precedent existed.[245] Thus, scholars such as Hall argued that a properly administered mandate territory was virtually the same

243. We recall here Hall's assertion that "[s]elf-government is the central positive conception of the Mandate System set out in Article 22 of the League Covenant." HALL, *supra* note 2, at 94.

244. J.S. Furnivall, in a monumental and prescient study of colonial policy, traced the way in which British policy had begun as purely laissez faire and had then changed over time. *See* J.S. FURNIVALL, COLONIAL POLICY AND PRACTICE (1948).

245. While many commentators argued that the purpose of the Mandate System was to devise the ideal colonial policy that all colonial powers should follow, others pointed out that the Mandate System itself could benefit from a study of the colonial policies pursued by the most progressive colonial pow-

as a properly administered colony[246] because in both territories there would be found the rule of law, personal liberty, security of property, trusteeship, indirect rule, and the open door policy.[247] In this way, the mandate was not a departure from colonialism as such; rather, it was a system of a progressive, enlightened colonialism, as opposed to the bad, exploitative colonialism of the nineteenth century.[248] This distinction between good and bad colonialism was important, for it helped to justify the continuing existence of progressive colonialism by the French and British in Africa and Asia.

In its attempts to resolve the many problems of promoting welfare and development, the PMC focused on certain broad themes of colonial administration and organizing principles. Lugard had outlined these magisterially in his classic work on colonial administration, *The Dual Mandate in British Tropical Africa*, which first appeared in 1921 at precisely the time when the PMC was grappling with these concerns. The dual mandate basically involved protecting the welfare of the natives by transmitting to them the benefits of civilization while expanding trade and international commerce in the colonized territories.[249] Equally significant, the basic function of the col-

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ers. Wright points out that mandate policies were basically those policies followed in West Africa. WRIGHT, *supra* note 2, at 544.

246. Hall argued that "an experienced observer, crossing over from an ordinary dependency in Africa into an adjoining mandated area administered by the same power, would be hard put to it to find any real distinctions between the one and the other." HALL, *supra* note 2, at 93.

247. *See id.*

248. Understandably, these developments led many scholars to represent the record of enlightened colonial powers as always having been guided by the principles embodied in the mandate. Thus, Hall, for example, argued that it was always the intention of enlightened colonial policy, such as that of Britain, to promote self-government, and it was only the backwardness of the natives that prevented this from being achieved. *See* HALL, *supra* note 2, at 94-95.

249. This basic idea is captured by the epigraph to Lugard's book, which quotes Joseph Chamberlain: "We develop new territory as Trustees for Civilisation, for the Commerce of the World." In language that powerfully evokes the themes and opening scenes of Conrad's *Heart of Darkness* by referring to Britain's Roman past, but lacking Conrad's irony, Lugard asserts:

> As Roman imperialism laid the foundations of modern civilisation, and led the wild barbarians of these islands along the path of progress, so in Africa to-day we are repaying the debt, and bringing to the dark places of the earth, the abode of barbarism and cruelty,

ony was seen in economic terms, and as necessary for the well-being of the West. Lugard argued that "[t]he democracies of to-day claim the right to work, and the satisfaction of that claim is impossible without the raw materials of the tropics on the one hand and their markets on the other."[250]

The economic policies pursued under the Mandate System were governed by the same vision of the mandates as a source of raw materials on the one hand and markets on the other. In examining the operation of the mandate, then, I have followed the PMC in drawing upon the literature relating to colonial administration as a whole.

C. *Economic Development and Native Welfare*

While the two aspects of the dual mandate could be regarded as complementary, it was evident that economic pro-

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> the torch of culture and progress, while ministering to the material needs of our own civilisation.

LORD LUGARD, THE DUAL MANDATE IN BRITISH TROPICAL AFRICA 618 (Archon Books 1965) (1922). The term "dark places of the earth" was used by Kipling, Conrad, and Lugard to describe the barbaric, non-European world. The dual mandate also marked a different approach to colonialism from the colonialism practiced up to the latter half of the nineteenth century. It succeeded the colonialism promoted by chartered companies and adventurers, who were unredeemable in their exploitation. As Furnivall puts it:

> The failure, economic and political, of the chartered companies in Africa, implied that the State, on taking over charge of the colonies, should intervene actively to promote economic development and to enhance native welfare. This new constructive policy with its double aspect came to be known as the "dual mandate."

FURNIVALL, *supra* note 244, at 288. For a broad study, see D.K. FIELDHOUSE, THE COLONIAL EMPIRES: A COMPARATIVE SURVEY FROM THE EIGHTEENTH CENTURY (1966). Lugard himself had been such an adventurer, conquering many territories in Africa as a representative of the East Africa Company before acquiring fame and respectability first as a colonial administrator in Nigeria and then as the senior figure of the PMC. For an account of Lugard's earlier career with the East Africa Company, see WOOLF, *supra* note 164, at 273-93. Woolf, who was not among Lugard's admirers, notes, "Captain Lugard was one of those fortunate persons whose early life was chiefly occupied in killing things." *Id.* Lugard had failed in a suicide attempt before arriving in Africa and making his fortune. *See* FELIPE FERNÁNDEZ-ARMESTO, MILLENNIUM 426-27 (1995). For a laudatory account of Lugard, see HALL, *supra* note 2, at 96-97. For some of Lugard's interventions in nineteenth-century debates about the legal status of African societies, see Anghie, *Peripheries*, *supra* note 3, at 42-43.

250. LUGARD, *supra* note 249, at 61.

gress and native welfare often were in tension with one another. The basic problem was identified by M. Orts:

> The development of the mandated territories constituted for the mandatory Powers a duty, alongside their other duty of securing the welfare of the natives. These two duties must be reconciled, and the two tasks must progress side by side. For this purpose it was necessary to find a just criterion.[251]

The fundamental tension between development and welfare, and the further questions it generated, had become a central issue for colonial policy and appeared in one form or another in virtually all the major debates regarding the administration of the mandates. Labor policy posed the tension in its most basic form. Large infrastructure and development projects had become a central aspect of economic development as it had been formulated after the war. Technology such as the railroad had made it possible to enter the interior of the colonies in search of raw materials, and European mining, trading, and agricultural companies significantly expanded their presence in the colonies in the interwar period.[252] These projects, however, had a massively detrimental impact on the natives who were required to supply the labor,[253] and the PMC kept confronting the question of whether

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251. *Permanent Mandate Commission, Minutes of the Sixth Session*, League of Nations Doc. C.386M.132 1925 VI, at 47 (1925) [hereinafter *PMC, Sixth Session*]. This fundamental issue was a central preoccupation of PMC deliberations. Thus, Lugard begins his report on "Economic Development of Mandated Territories in Its Relation to the Well-Being of the Natives" with the following assertion:

> That the economic development of African territories is no less a duty than that of securing the welfare of the natives is not questioned. The problem is how these two duties should be reconciled without, on the one hand, subordinating policy to a purely utilitarian outlook or, on the other hand, adopting a standpoint too exclusively philanthropic.

PMC, Seventh Session, *supra* note 222, at 197.

252. ABERNETHY, *supra* note 121, at 113. This approach to the development of colonies gave rise in the case of Britain to the Colonial Development Act of 1929 and the Colonial Development and Welfare Act of 1940. FURNIVALL, *supra* note 244, at 433.

253. As M. Freire d'Andrade asserts, "Yet everywhere roads will have to be made, railways constructed, hospitals and schools built, and everything done that is indispensable to the well-being and development of the peoples. And where these large demands arise, it almost always happens that native labor

these projects were taking place at the expense of the native populations. The "mortality of the natives engaged in certain work was very considerable."[254] A number of members of the PMC stressed the importance of bringing about gradual reform in mandate societies and ensuring that native well-being was not sacrificed for immediate economic gains.[255] Cautious statements were made about the need to balance the capabilities of labor with the tasks that had to be addressed.[256] Nevertheless, having made all these qualifying statements, the PMC concluded that the development of the resources of the territories was crucial. Thus, even M. Orts, who had drawn the attention of the PMC to the suffering endured by the native populations, finally concluded, "The present question was to ensure in the general interest, not the preservation of this natural wealth—which happily was not at issue—but the development of the incomparable resources represented by the population of the countries with which the Commission was concerned."[257]

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is scarce and its output not very great." *PMC, Seventh Session, supra* note 222, at 202.

254. *PMC, Sixth Session, supra* note 251, at 48. It was noted that administrations were continuously required to provide more labour. *PMC, Seventh Session, supra* note 222, at 194-95. Noting with concern the significant mortality rates of the native populations, PMC members raised further questions as to whether this was due to liquor, to "special diseases arising from the impact of civilisation or . . . to an intensive effort to develop the country for purely economic reasons." *Id.* at 195 (M. Rappard). Lugard, reporting on this matter, raised the possibility that "'sudden introduction of an industrial civilisation' and the consequent demand for native labour has not in some cases entailed too heavy a burden on a population not yet accustomed to the new conditions and to European methods." *Id.* at 195.

255. *See PMC, Seventh Session, supra* note 222, at 195. "In a word, the Administration, while assisting private enterprise in every reasonable way, must not allow itself to be dominated by the utilitarian spirit, for its special function is to frame its policy for the future and not exclusively to immediate economic success." *Id.* at 196.

256. The economic development of the country requires native labour, which must be adapted to its purpose; and this development in turn must be gradual and proportionate to the capacity of the labour. A balance must be maintained between the potentialities of native labour and the ever increasing demands upon it; otherwise nothing but harm can result.

Id. at 200.

257. *PMC,* Sixth Session, *supra* note 251, at 49.

Thus, the development of the incomparable resources of the mandate territories was the governing and unquestionable principle of the Mandate System. Most significantly, the resources of non-European territories invariably and conveniently were characterized by European statesmen and colonial administrators as belonging, not only to the peoples of those territories, but also to the larger "international community," as suggested by Chamberlain's very formulation of the dual mandate as developing new territories "for the Commerce of the World."[258] Despite the happy suggestion that both the natives and the world in general would benefit from the exploitation of these resources,[259] the fact that the terms of the exploitation were set by the colonial powers or the mandatory powers inevitably led to the sacrifice of native interests.[260] Thus, while the sort of outright exploitation of native peoples by chartered companies that took place in the nineteenth century was condemned, the new regime of unequal exchange, officially sanctioned by the colonial state and embodied in legal regulations, was completely acceptable.

Several other reasons were advanced for giving primacy to economic development. PMC members argued that the suffering experienced by native populations was more than justified by the benefits they would derive.[261] Another alternative—that of viewing the whole issue from a native point of view—was considered explicitly and rejected by jurists. Van

258. *See id.* These sorts of statements give some idea as to why the campaign for Permanent Sovereignty over Natural Resources became so centrally important to newly independent Third-World states. The propensity of colonial powers to characterize the resources of mandate territories as something akin to the "common heritage of mankind" is powerful and commonplace. Thus, the Portuguese representative argued that "[s]ome people, having nothing at heart but the interests of mankind as a whole, consider that it is the duty of colonising countries to exploit the economic wealth of their colonies and that, unless they do so, they have no right to retain those possessions." *Draft Convention on Slavery*, 11 LEAGUE OF NATIONS O.J. 1541 (1926).

259. Thus, Lugard himself claimed of the natives that "their raw materials and foodstuffs—without which civilisation cannot exist—must be developed alike in the interests of the natives and of the world at large." LUGARD, *supra* note 249, at 60.

260. For a detailed contemporaneous study of this issue in relation to Africa, see generally WOOLF, *supra* note 164. For a more recent study, see WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 147-203 (1972).

261. See d'Andrade's note in *PMC, Seventh Session*, *supra* note 222, at 200.

Rees, for example, asserted, "It was clear that, in general, European civilisation was based on principles diametrically opposed to those of the natives, and it resulted from this that a European administration had not and could not have the welfare of the natives, as conceived by the natives themselves, for its sole object."[262]

The prevalence of the policy of economic progress was desirable for a number of additional reasons connected with the administration of the mandates. The PMC had been confronted with a number of complex questions about native cultures: Should special protection be given to native cultures in mandates with mixed populations? What aspects of native culture should be modified? The policy of promoting economic progress, it was opined, would resolve many of these issues. Economic progress appeared a neutral test that would decide objectively and effectively what traits of native cultures would survive and, according to some PMC members, whether they should survive at all. This was because economic progress, the determining standard, was not to be associated with a particular race or culture: Transcending these specificities, it existed as a universal category. Thus d'Andrade—whose expertise was based on the Portuguese colonial model—argued, "If there were races unable to work, then without any doubt the very impact of civilisation would show them that they were not equipped for the struggle of life and they would end by disappearing."[263]

Economic progress, then, would bring about important social changes both directly and indirectly. For example, it would promote the emergence in mandate populations of modern, efficient communities[264] as well as the emergence of individualism—this as opposed to the tribalism that was such a prominent feature of mandate societies and was understood to pose a serious obstacle to the advancement of mandate territories.[265] A particular structure of relationships emerges within

262. *PMC, Sixth Session, supra* note 251 at 49.

263. *Id.* at 50.

264. The promotion of "efficient communities" was a major preoccupation of the Mandate System. WRIGHT, *supra* note 2, at 231.

265. These themes are made most explicit in the comments of d'Andrade in the PMC. D'Andrade was opposed to any protection being given to native cultures, even in mandate territories that had mixed populations of natives and European settlers. For d'Andrade, the "ideal is the slow, unforced as-

the system of analysis adopted by the PMC. Within this system, the market is associated with modernity, progress, individualism, and the universal. Culture, on the other hand, is connected with backwardness, tribal community, and the particular. The introduction and development of the market had a profoundly undermining impact on native cultures.[266]

D. *Economy, Labor, and the Transformation of the Native*

The economic development of the mandate territories, once established as the guiding principle of mandate administration, possessed both international and local dimensions that were closely interrelated. At the broader, international level, the primacy of the economy was made explicit by a set of debates—regarding free trade and the mandates—that focused on the status of colonialism within the international economic system itself. Simply, colonialism was seen as both inefficient economically and destabilizing politically on account of its inhibition of free trade. Colonial powers established monopolies over the trade of their colonies, imposing severe restrictions on the ability of other nations to deal with these colonies, either in terms of procuring raw materials or opening markets. It was well recognized that these monopolies exacerbated international tensions and increased militarism.

Consequently, Wilson at Versailles was vehement in stipulating that an open door policy had to be provided for and secured within the terms of the mandates.[267] For the United States, the open door policy was extremely important to en-

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similation of weak or inferior communities by strong or more developed communities." *Id.* at 233 (quoting d'Andrade). Furthermore, d'Andrade argued, the focus of the Mandate System was to be on the development of individuals, rather than communities; the market enabled individuals to emerge and escape the confines of their communities. *See id.*

266. D'Andrade proved to be right; the absorption of native labor into the modern economy led to the phenomenon of detribalization observed by the PMC in relation, for example, to Papua New Guinea. *See Permanent Mandates Commission, Minutes of the Twenty-Seventh Session,* League of Nations Doc. C.251.M.123 1935 VI, at 26-29 (1935).

267. Wilson's Third Point called for "[t]he removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all nations consenting to the peace and associating themselves for its maintenance." President Woodrow Wilson, The Fourteen Points (Jan 8, 1918), *reprinted in* CRANSTON, *supra* note 12, app. at 461. *See also* WRIGHT, *supra* note 2, at 29; GROVOGUI, *supra* note 130, at 129-30.

sure access to the oil deposits of the Middle East, which were to be subjected to French and British mandates. The League's failure to reach agreement on this matter was decisive in the final refusal of the United States to be party to the League.[268] Consequently, the mandate territories, like colonies before them, essentially were integrated into the economic structures of the mandatory itself.

At the local level, the duty, as Lugard characterized it, to develop mandate territories required the construction of large infrastructure projects. These projects, of "arterial railways, with harbours and telegraphs, the public buildings and houses for staff,"[269] in Lugard's words, "justified any sacrifice."[270] These public works further assisted in eliminating the slave trade and intertribal warfare; at the same time, they also expanded markets.[271]

This focus on economic development and efficiency had a radical effect on colonial policies in general; more particularly, it led colonial powers to view natives in terms of the labor and economic wealth they represented. Simply put, the native was no longer merely to be conquered and dispossessed; rather, he was to be made more productive. The link between the mandate provisions and this larger goal is made clear by Wright in his clear-sighted discussion of the link between humanitarianism and new perceptions of economic efficiency. Wright noted:

> [I]t began to be seen that the native was an important economic asset. Without his labor the territory could not produce. Thus the ablest administrators like Sir Frederick Lugard in Nigeria began to study the native and cater not only to his material but to his psychological welfare with highly gratifying economic results. Everywhere the devastating and uneconomic

268. *See* WRIGHT, *supra* note 2, at 48-56. The United States sought to deal with this problem simply by negotiating bilateral treaties enabling access to the mandatory territories.

269. *PMC, Seventh Session, supra* note 222, at 195.

270. *Id.*

271. Lugard also mentions the importance of private enterprise and capital. "The plantation owner and the settler introduce new forms of culture of great value, such as coffee, cocoa, sisal and improved varieties of tobacco, cotton, sugar-cane etc." Lugard points out as well that these enterprises are furthered by government infrastructure projects. *Id.*

> effects of trade spirits and firearms among the natives came to be recognized and their importation controlled. In some parts of Africa, especially the west coast, the more fundamental problems of an equitable land system and a liberal and humane labor policy were studied and in a measure solved.[272]

No longer were the formalist rules of positivism or the simple expedient of massacring the natives seen as adequate responses to colonial problems. Rather, a new regime of production came into being and proceeded on the basis of a new set of moral principles—liberalism and humanity—that established a new set of goals and objects as essential for its realization. This preoccupation with labor gave rise to a whole series of related issues that the League explored in detail. For example, complicated questions emerged as to whether natives in fact were capable of work and whether the reduction in native populations was due to disease or work.[273] Other issues included the question of the sacrifices required of natives in order to promote essential economic growth for the private sector.[274]

It was precisely these studies, however, that gave the pragmatist project, which called for empirical and interdisciplinary studies, a special significance here. Once the broad goal of native productivity had been identified, these technologies could be employed to achieve the desired results. The PMC projects of monitoring the progress of labor policies in different mandate territories were used to develop and adjust appropriate standards that would be all the more effective precisely because they were empirical[275] and because they could take

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272. WRIGHT, *supra* note 2, at 10.

273. Labor questions were the central concern of the International Labour Office (ILO), which was also established by the Peace Conference of 1919. *See generally* 1 THE ORIGINS OF THE INTERNATIONAL LABOUR ORGANIZATION (James T. Shotwell ed., 1934). Some coordination existed between the ILO and the Mandate System. *See* WRIGHT, *supra* note 2, at 127, 140-41, 583. On how the ILO characterized the "primitive," see generally Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993*, 16 HUM. RTS. Q. 1 (1994).

274. *PMC, Sixth Session*, *supra* note 251, at 47.

275. The PMC therefore sought more and better knowledge about how labor productivity could be assessed and properly utilized. Hence it was important, as the Portuguese government representative states,

into account so many different aspects of the problem, such as the physical capacity of the natives, their moral well-being, their psychology, and their vulnerability to disease. All of this helped devise legislation directed at making the natives more productive.[276]

"From the material side the natives' main assets are labor and land,"[277] asserted Wright, and it followed that it was through all these projects aimed at making labor more productive that the native was linked to the larger international economic system that now was coming into existence and that connected the native with economy, progress, and capitalism.

The emergence of labor as a conceptual category also was important because of its broader implications for policy formulation. First, the analysis of labor could proceed on the assumption of universality:

> The law of labor is a law of nature, which no one should be allowed to evade. And if this is true of organized and highly developed societies, the same must be admitted for peoples on the road to civilization and for countries which are on the threshold of development.[278]

> that an effort should be made to compile the fullest possible statistics, in order to ascertain what contribution the people may, without risk, be expected to make to the work of the community. These statistics should show not merely the number of natives but also particulars of their physical powers, customs and psychology.

Draft Convention on Slavery, 11 LEAGUE OF NATIONS O.J. 1542 (1926). The Portuguese government stressed that the relevant information was unavailable, and that the ILO should be given the task of compiling all of it. *Id.*

276. These ideas are all to be found, for example, in the reply of the Portuguese government relating to the drafting of a convention on slavery. *Id.* at 1539-45.

277. WRIGHT, *supra* note 2, at 249.

278. *PMC, Seventh Session*, *supra* note 222, at 201. The experiences of a number of PMC members cast doubt on such generalizations. Thus, M. Van Rees remarked:

> It was impossible to generalise on the question of the work of the natives. Their conception was quite different from the western conception. They worked only so far as was indispensable for their own immediate needs, and sometimes less than was necessary for the satisfaction of those needs. To apply western ideas in an eastern country and to base administrative activity on such a point of view, would involve very serious chances of exposing the whole of the administration of the country to complete failure.

Labor thus served the same purpose within the mandate scheme as the "universal human being" postulated by Vitoria.[279] It suggested that the discipline of economics being applied to the mandates in turn was universally valid, embodying a set of processes by which natives could be civilized.[280] In this way, the latent capacity of the natives to enter the universal realm of progress and modernity could be developed precisely through their participation in the processes of economic development through their labor. Further, labor was connected so intimately with the physical existence of the native that it provided the means of entry into the very being of the native, the method by which the native could be disciplined and civilized. The native and his surroundings were rendered in economic terms: Economics and its related complex of concepts provided the vocabulary by which the essential features common to all mandates could be both identified and then integrated into a program of reform.

While labor was central to economic development, the problem remained of reconciling development policy with the promotion of native well-being: a central goal, after all, of the Mandate System. Thus, for example, the PMC carefully charted the health policies adopted by mandatory powers in their respective territories and the amount spent on making improvements to health.[281] Crucially, however, health issues were discussed principally in terms of labor issues: Certain types of labor suffered from heavy mortality rates, for example.[282] The preoccupation with productivity and labor, then, was the prism through which questions of welfare were approached. Thus, "colonial labour legislation [was] framed with a view to ensuring not merely the well-being of the native, but also his physical and moral development, and at the same

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PMC, Sixth Session, *supra* note 251, at 49. But the two positions are not necessarily irreconcilable; the native variation could be regarded as a violation of the universal norm, which could be remedied by successfully transforming the natives into laborers.

279. *See* Anghie, *Vitoria*, *supra* note 3, at 327-28. It also followed, therefore, that the outcome of labor policies in one colonial territory could offer guidance to other such territories. *See* WRIGHT, *supra* note 2, at 228 (citing statement of M. Unden).

280. WRIGHT, *supra* note 2, at 252-54.

281. For an overview of health issues discussed by the PMC, see *id.* at 552-54.

282. *See, e.g.*, *id.* at 553.

time furthering the economic progress of the country, which is an essential condition of general prosperity."[283]

This suggested a happy unity between welfare on the one hand, and productivity and economic efficiency on the other. The notion of welfare became subsumed by the concern for productivity. The point was made explicit by Lugard:

> It must, however, be admitted that these precautions for the welfare and increase of the native population are dictated by a utilitarian motive. The natives are regarded as the greatest "asset" of the country because of their potential value as labourers. The same argument applies to the good treatment and good feeding of a horse or a plough-ox or to the increase of stock.[284]

Thus, "welfare" meant, for example, requiring that work took place in hygienic conditions and that the PMC and the ILO[285] collaborated in ensuring this. In this way, the new form of colonialism, based on preserving and developing the native and her territories as productive assets rather than exploiting and exhausting these assets, presented itself as an exemplification of humanist and liberal principles.

These reform projects, however, were accompanied by a number of ironies. European states had been especially proud of the abolition of slavery and presented this as being among the major achievements stemming from their occupation of Africa. The mandate reaffirmed the importance of eliminating the slave trade; yet, ironically, the construction of infrastructure projects was of such central importance that the League Council permitted compulsory or forced labor for remuneration for "essential public works and services."[286] These

283. *Draft Convention on Slavery*, 11 LEAGUE OF NATIONS O.J. 1541 (1926).

284. *PMC, Seventh Session, supra* note 222, at 196.

285. *See, e.g., id.* at 146-47 (discussing the report presented by the South West African Employer's Union to both the ILO and the PMC on "Mortality in the Diamond Fields of South West Africa"). A representative of the ILO often attended PMC sessions (Mr. Grimshaw in the Sixth Session), and the PMC often requested that the ILO supply certain information.

286. This provision was included explicitly in a number of Mandate Agreements. Thus, in the Agreement for Tanganyika, for example, Article 5 reads in part:

took an enormous toll on native populations,[287] to the point where it became unclear as to which of these two practices—the primitive practice of slavery or the modern practice of development—had consequences more devastating to native populations.

The abolition of slavery liberated the native and enabled him to become a wage-earner. Despite the construction of the natives as economic assets, the broad ambition of the mandates to create an individualist and liberated economic man—"economic man" as postulated by various political theorists—seemed conspicuously absent from many of the colonies. Much to the frustration of administrators such as Lugard, the natives often were indifferent to the prospect of amassing large amounts of wealth and engaging in the sort of consumer behavior that would create large markets for goods from the colonial center.[288] The simple fact nevertheless was that an extraordinarily powerful set of forces—the forces of international capitalist development—was transforming these societies. Not only labor, but also education and land reform, became a means by which native societies were transformed in

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ART. 5. The Mandatory:

> (1) shall provide for the eventual emancipation of all slaves and for as speedy an elimination of domestic and other slavery as social conditions will allow;
>
> (2) shall suppress all forms of slave trade;
>
> (3) shall prohibit all forms of forced or compulsory labor, except essential public works and services, and then only in return for adequate remuneration . . . .

The Tanganyika Mandate Agreement appears in full in WRIGHT, *supra* note 2, at app. 611-16. Similar provisions are found, for example, in the Ruanda-Urundi Mandate. *See* HALL, *supra* note 2, at app. 353-58.

287. *See* discussion above and sources *supra* note 254.

288. Thus, M. Van Rees noted that "[t]hey worked only so far as was indispensable for their own immediate needs, and sometimes less than was necessary for the satisfaction of those needs." *PMC, Sixth Session*, *supra* note 251, at 49. Similarly, Lugard noted, in relation to the absence of consumer behavior in the tropics:

> In England the peasant must buy his daily food. Men and women may not go about quite nude. They are not physically inured to extremes of heat and cold, and need fires and fuel. We have, in fact, all acquired the habit of using many things which by long custom have become necessities of life.

LUGARD, *supra* note 249, at 391.

such a manner as to integrate themselves into the overarching system of the market economy.[289]

Importantly, however, it was understood that change could not be imposed on the native. Rather, it was by educating the native and shaping her will that these transformations could take place most effectively and economically. Thus, "[i]n Africa and the Pacific the problem [was] to delay the economic development of the country until the native has wants which make him willing to aid voluntarily in that development."[290] The idea, then, was to ensure that all these policies were desired and implemented by the natives themselves. New systems of disciplining the natives accompanied these new forms and ways of conceptualizing and managing native peoples.

E. *Modernity, Political Institutions, and Native Cultures*

The League's ambition to promote self-government inevitably raised complex issues of mandate policy toward native cultures and political institutions, which had to be reformed if this project was to be made a reality. But this project was shaped powerfully by the fact that policies furthering economic development, as the previous section discusses, were the principal preoccupation of mandatory powers and the League itself. In two respects, then, the mandate project reproduced some of the central themes evident even in Vitoria's vision regarding the governance of non-European societies: First, barbaric customs had to be eliminated, and second, governance was to be directed at integrating the colony into the larger economic structure of the metropolitan power.

Thus, the Mandate System sought to extinguish certain customs. It had been decided "in principle that certain native customs which conflict with humanitarian ideals should be abolished;"[291] the natives had to be saved from the "capricious

289. Thus, in the case of education, the policy recommended by the PMC was education such that "the native himself will be led to wish for an economic development of the region." WRIGHT, *supra* note 2, at 560.

290. *Id.* at 558.

291. M. Yanaghita, Note, "The Welfare and Development of the Natives in Mandated Territories," *Permanent Mandates Commission, Annexes to the Minutes of the Third Session,* League of Nations Doc. A.19 (Annexes) 1923 VI, at 282 (1923).

jurisdiction of tyrannical chiefs."[292] Those native laws that were not incompatible with civilization were to be allowed to remain in force at least for the moment.[293] Thus, while the mandate sought to replace native governance with modern political institutions in the long term, it was understood that a "certain number of ancient customs, on which native life is founded, must be preserved in the interests of peace in the territory."[294] The difficulty was that such a program could not achieve its desired goal "until the natives [were] capable of distinguishing good from evil, and of comprehending the attitude of the administrators."[295] The problem was that the offending customs appeared to be accepted by the mandate peoples as an integral part of their culture; the natives were incapable of appreciating their own best interests, which were understood only by the administrator.

More particularly, native institutions and customs hindered the project of economic development. But because the PMC recognized that it was hardly possible to restructure radically and immediately these institutions, they sought instead to advance the market precisely through the partial adoption of existing native customs. Once again, the PMC drew upon colonial experience in formulating an approach. The concept of "indirect rule,"[296] which essentially called for the retention of native political systems—provided that such systems served the overall purpose of the colonial power—had been elaborated by Lugard.[297] And within the PMC itself in the end, Lugard's

292. *Id.* at 283.

293. *See id.* at 282-83.

294. *Id.* at 283.

295. *Id.*

296. Lugard is generally regarded as the authority on this subject. For his discussion of "Methods of Ruling Native Races," see LUGARD, *supra* note 249, at 193-229. Lugard was highly skeptical of the ability of native societies ever to acquire effective self-government based on their own political traditions. *Id.* at 197-98. Lugard also asserted that the best policy would be to "[d]evelop resources through the agency of the natives under European guidance, and not by direct European ownership of those tropical lands which are unsuited for European settlement." *Id.* at 506. I am indebted to Dr. Philip Darby of Melbourne University, who pointed out to me that Lugard's ideas on self-rule emerged from his experiences in India, where Lugard was born.

297. For Lugard it is clear that the native and colonial systems are not two separate, parallel systems. Lugard remarks that

view of a gradual transition of native societies prevailed.[298] This policy decided debates as to whether native governments should be promoted and reformed, or simply and dramatically replaced. Yanaghita, a member of the PMC, suggested a solution whereby the native chieftains would be allowed to perform certain lesser functions in ways that furthered economic development: "Scarcely aware of the fact that their little sovereignty has been transferred to a higher group, they will assist in the work of the mandatory government and will be content with the empty title and the modest stipend."[299]

Both native quiescence and the progress of the mandatory policy were achieved by this strategy. The basic tactic involved here, then, was the familiar one of shifting the framework in which native society operated, as a consequence of which native procedures and practices became either purely ceremonial and ritualistic or a means by which they undermined the natives' own interests.[300] The detailed mechanisms by which native authority was transformed and integrated into

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> the native chiefs are constituted as an integral part of the machinery of the administration. There are not two sets of rulers—British and native—working either separately or in co-operation, but a single Government in which the native chiefs have well-defined duties and an acknowledged status equally with British officials.

Id. at 203.

298. This is a recurring theme in the discussions of the PMC. Thus, M. Freire d'Andrade argued:

> While keeping the native organisation as far as may be, it is also possible by degrees for the action of the native chiefs to be superseded by that of the administration of the Mandatory, which governs the community with the help of advisory or executive councils which include the principal natives, chosen either by the Administration or by the natives themselves.

PMC, Seventh Session, supra note 222, at 201.

299. *Permanent Mandates Commission, Minutes of the Third Session,* League of Nations Doc. A.19 1923 VI, at 283 (1923). This echoes Lugard: "Develop resources through the agency of the natives under European guidance, and not by direct European ownership of those tropical lands which are unsuited for European settlement." LUGARD, *supra* note 249, at 506.

300. The relationship between the market and native political institutions was dialectic. On the one hand, these institutions could assist in furthering the market; on the other, this process in itself would bring about desirable changes in native societies and customs. We may recall here d'Andrade's view that the furtherance of economic relations would result in the emergence of the individual and that weaker societies would be assimilated or even disappear. *See* discussion *supra* note 265.

the larger political structures that were created through the Mandate System are revealed in the prosaic reports to the PMC by the mandatory for Tanganyika.

The Commission noted with satisfaction that the mandatory power, with the agreement of the chiefs as well as of their tribesmen, abolished the tribute and the compulsory labor formerly exacted by the chiefs, replacing them with a poll tax, part of whose proceeds were paid into the Native Treasuries from which the chiefs received a salary. The Commission also viewed approvingly the Administration's proposal to make it a legal offense for a chief to exact or attempt to exact taxes other than those legally authorized.[301]

Crucially, it was through the instruments furthering economic progress that this goal, too, was achieved. New regimes of taxation served the dual purpose of raising revenues and undermining native political institutions even while using those native institutions for collections.[302] The chiefs now became part of the administrative structure of the system, a system created to further economic progress. Rather than relying exclusively on traditional authority, they now became something akin to salaried officials.[303] In addition, the under-

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301. *See Work of the Permanent Mandates Commission*, 10 LEAGUE OF NATIONS O.J. 1306, 1310 (1926). The massive changes that were made to native ways of life are somewhat obscured by the polite and calmly matter-of-fact language of international administrators:

> The Commission would be glad to have full information as to the further changes in the system of native administration which are foreshadowed in the report.
>
> The Commission will learn with interest of such arrangements as may be made by [the] Government of Tanganyika to assimilate the laws applicable to the Masai tribe in the reserves in Kenya and Tanganyika, in order to bring about greater co-ordination in the administrative policy applicable to the tribe as a whole.

Id.

302. Often, traditional authority structures could be undermined and, indeed, deployed far more effectively through these indirect methods than through direct abolition or suppression of the structures. For a penetrating study of this phenomenon, see generally Nicholas B. Dirks, *From Little King to Landlord: Colonial Discourse and Colonial Rule, in* COLONIALISM AND CULTURE 175 (Nicholas B. Dirks ed., 1992).

303. This strategy of transforming traditional chiefs into tax collectors is also evident in discussions as to various other government structures, for example, in the PMC's examination of the Annual Report on Ruanda-Urundi for 1934. *See Permanent Mandates Commission, Minutes of the 28th Session,*

mining of these traditional structures made "free labor" available, as natives previously had seen their occupations as intimately connected with the traditional structures. This in turn was crucial because it helped meet the needs of the large infrastructure projects being undertaken at the time.

It must be noted, however, that the indirect approach was not always adopted. Thus, Belgium, the mandatory for Ruanda-Urundi, was far more explicit in its interventions in traditional structures: Members of the PMC noted that "a considerable number of sub-chiefs had again had to be removed from office or dismissed—twenty-four in Ruanda and thirteen in Urundi."[304] The PMC also wondered how the Belgians could recruit "Bahutu" chiefs while claiming that they were following traditional practices of appointing successors from the family of the previous chiefs, who generally belonged to the "Asatuzi" people.[305]

F. *The Consequences of the Mandate System for Mandate Societies*

While the concept of backwardness had a number of connotations, by the interwar period it was understood primarily in economic terms.[306] An examination of PMC debates gives some idea of the logic and implications of the system of political economy that emerged in mandate territories as a result of the policies sketched in the previous section. The infrastructure projects begun in the colonies and mandate territories during this period basically were financed by the colonies/mandates themselves. For example, the people and territory of Ruanda-Urundi paid for the large projects that were essen-

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League of Nations Doc. C.439 M.228 1935 VI, at 15-21 (1935) [hereinafter *PMC, 28th Session*].

304. *Id.* at 16.

305. *Id.* The broader consequences of the colonial legacy for Rwanda are explored in GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 27-29 (1995). Rwanda, of course, continues to be the object of the international community's attempts to demonstrate its concern by establishing new institutions, in the form of an international criminal court, to deal with Rwanda's problems. For an important critical study of this theme, which places these initiatives in an historical perspective, see José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda,* 24 YALE J. INT'L L. 365 (1999).

306. According to Wright, at the time it connoted a lack of Europeanization, a lack of self-determination, and a lack of industrialization. Of these, the economic dimension was prevalent. WRIGHT, *supra* note 2, at 584.

tially designed to extract the country's resources for the principal benefit of Belgium itself.[307]

It was a commonplace colonial practice to make the colonies pay for their own exploitation and conquest. As Jawaharlal Nehru points out:

> Thus, India had to bear the cost of her own conquest, and then of her transfer (or sale) from the East India Company to the British Crown, and for the extension of the British Empire to Burma and elsewhere, and expeditions to Africa, Persia, etc., and for her defense against Indians themselves.[308]

This was a commonplace colonial practice and, in and of itself, would not have been objectionable to the PMC. Consequently, the Belgian practice in Ruanda-Urundi, in itself, also would not have been objectionable to the PMC. Nevertheless, some members of the PMC were perceptive enough to raise questions about the extent of the debt allocated to the territory. The Belgian representative was adamant, however, that "the loans made by the territory [Ruanda-Urundi] were not beyond its means and could not be called excessive, because the country's resources, and chiefly its mineral wealth, would make it possible later on to provide for the service and redemption of the public debt."[309] This meant, however, that more mining and more extraction had to take place.[310] This in turn, of course, required more labor, and, in order to get more labor, it was necessary to undermine the native political institutions and structures, as labor traditionally had been attached to functions served within those institutions, a point which the Belgian representative made explicit.[311] A cycle now becomes apparent: The native becomes the agent of his own exploitation, constructing the infrastructure projects that

307. *See PMC, 28th Session, supra* note 303, at 15.

308. JAWAHARAL NEHRU, THE DISCOVERY OF INDIA 305 (1946).

309. *PMC, 28th Session, supra* note 303, at 15. A similar system was adopted for the financing of the phosphate mining of Nauru. *See generally* WEERAMANTRY, *supra* note 2.

310. Thus, the Belgian representative noted that between 1933 and 1934 the mining for gold and cassiterite had doubled. *See id.*

311. The Belgian representative saw this point clearly: He noted, in relation to Ruanda, that "if the prestige of the chiefs and sub-chiefs were not to be destroyed, the system of forced tribute, in the provisions of labour, could not be touched except with the greatest circumspection." *See id.* at 28.

were designed to extract his own resources; furthermore, the greater the imperative to extract these resources, the more demands were made on the natives, and the greater the imperative to destroy the traditional authority structures in order to create the liberated native who then could proceed to celebrate his newfound independence in the gold mines of Ruanda.[312]

All these developments had profoundly damaging effects on the mandate populations. As colonial experts at the time noted, the market, as it was constructed in colonial societies, became the central, dominant institution within those societies, distorting and undermining all other social institutions. Thus, Furnivall endorsed the view of J.H. Boeke, another colonial expert, that in tropical economies the impact of capitalist development was far more profound than in Western societies, where such development was relatively endogenous and gradual. In the tropical economies, by contrast, where capitalism was imposed from above,

> there is materialism, rationalism, individualism, and a concentration on economic ends far more complete and absolute than in homogeneous western lands; a total absorption in the exchange and market; a capitalist structure, with the business concern as subject, far more typical of capitalism than one can imagine in the so-called "capitalist" countries . . . .[313]

Economic development was the supreme system to which all other social institutions were subordinated and that all other institutions had to serve. As Furnivall powerfully argues, once established within a colony, economic forces had a

312. As Rodney notes, the infrastructure projects that were paid for by this extraction were not designed to meet the needs of the African peoples themselves. Rather, "[a]ll roads and railways led down to the sea. They were built to extract gold or manganese or coffee or cotton. They were built to make business possible for the timber companies, trading companies, and agricultural concession firms . . . ." RODNEY, *supra* note 260, at 209. For telling studies of the impact of colonial policies on contemporary African states, see Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L. L. 1113 (1995); OBIORA CHINEDU OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA (2000).

313. FURNIVALL, *supra* note 244, at 312 (quoting J.H. BOEKE, THE STRUCTURE OF NETHERLANDS INDIAN ECONOMY 412 (1942)).

profound impact on native society that hardly could be reversed by the actions of the colonial government, no matter how solicitous and well intended. Social relations were transformed purely into economic relations, political authority became a means by which the market could be furthered, and with the dissolution of the traditional checks on behavior "there remain[ed] no embodiment of social will or representative of public welfare to control the economic forces which the impact of the West release[d]."[314] Political advancement and independence hardly became a reality in these circumstances. As Nehru points out, when discussing the ways in which the British created a landlord class in India:

> The village community was deprived of all control over the land and its produce; what had always been considered as the chief interest and concern of that community now became the private property of the newly created landowner. This led to the breakdown of the joint life and corporate character of the community, and the cooperative system of services and functions began to disappear gradually.[315]

It was not only the systems of governance that were dictated by economic goals. The old model of colonialism suggested that economic progress was an end in itself and that

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314. *Id.* at 298. Furnivall's detailed and lucid exposition of the effect of individualism and market forces on traditional societies is all the more powerful for its notable lack of sentimentality or nostalgia for vanishing village communities. *Id.* at 297-99.

315. NEHRU, *supra* note 308, at 303. Nehru's analysis is important in its recognition of the role of the collaboration of native elites and colonial powers in colonial rule. By this means, Nehru argues, real authority was shifted from within the community to the colonial authority, as a consequence of which "India did not come into a world market but became a colonial and agricultural appendage of the British structure." *Id.* at 302. Furnivall further points out that political entities, which had been held together by traditional authority structures, were now broken up into economic units bound to each other purely by economic ties, and that the rule of law was vital for this project of undermining native authority. Furnivall asserts:

> The introduction of the rule of law is necessary as an instrument in the liberation of economic forces, but it breaks up the country into villages. On this plan the people are easier to govern, as they have no bond of [sic] union, but the same process, as we shall notice later, makes them less capable of self-government.

FURNIVALL, *supra* note 244, at 297.

welfare would be achieved by progress. The new model suggested instead that active state intervention was necessary to achieve welfare.[316] Native welfare was a principal preoccupation of enlightened colonial administrators and the PMC. And yet, as Lugard's own comments suggest, such concerns were entirely utilitarian: Labor was an asset that had to be preserved.[317] Given the decisive importance of economic development to the whole project of colonial governance, it followed that economic development almost inevitably distorted the policies intended to protect native welfare. Thus, as Furnivall points out, "[T]he services intended to furnish the necessary protection function[ed] mainly to make production more efficient, and the services intended to promote welfare directly by improving health and education [had] a similar result; though designed as instruments of human welfare they [were] perverted into instruments of economic progress."[318]

Law, of course, was an important aspect of this entire system. But the rule of law, as promoted by the colonial power, became largely a means by which this system of economic development was maintained and furthered. Furnivall notes that

> [t]hroughout the nineteenth century commerce was the main object of dominion, and the promotion of freedom by the rule of law, was both congenial and profitable. Direct rule of law was accordingly adopted in the name at first of commerce and freedom, and later of efficiency and welfare; the tradition of rule of law survived when, during the present century, the development of colonial resources came into the foreground, and policy shifted in the direction of capitalist autonomy.[319]

There is nothing objectionable about economic progress as such; but, in this situation, economic progress was equated with the furtherance of a system of economic inequalities specific to colonialism. Analyzing colonial economies in the period more generally, Abernethy soberly concludes that colonial economies were export oriented and specialized in the

316. *See* FURNIVALL, *supra* note 244, at 288.

317. *See* discussion *infra.*

318. FURNIVALL, *supra* note 244, at 410.

319. J.S. FURNIVALL, PROGRESS AND WELFARE IN SOUTHEAST ASIA: A COMPARISON OF COLONIAL POLICY AND PRACTICE 60 (1941).

production of a few commodities. Furthermore, the systematic integration of the colonial economy into the metropolitan economy on disadvantageous terms created even greater ties of dependency and vulnerability in the colony, a fact dramatically demonstrated during the Great Depression, when colonies suffered enormous hardships because of their links with Empire.[320] In addition, of course, the native peoples hardly received the real value of the raw materials extracted from their territories.[321]

But these were not the only reasons why economic development had a devastating impact on native societies. Rather, the dominance of the economic, as discussed, profoundly altered the whole system of legitimacy, of authority, and of meaning that held mandate societies together. The doctor and anthropologist W.H.R. Rivers, intent on identifying the cause of the massive population declines in Melanesia that accompanied the introduction of civilization to that region, argued that

> [i]t may at first sight seem far-fetched to suppose that such a factor as loss of interest in life could ever produce the dying out of a people, but my own observations have led me to the conclusion that its influence is so great that it can hardly be overrated.[322]

My argument has been that the economic and social policies actively endorsed by the PMC had profoundly damaging consequences for mandate peoples. It also must be noted, however, that in many instances, the PMC was unable to check abuses of the system by the mandatory powers themselves. Native cultures, as I have argued earlier, possessed no inherent validity for the PMC, but the PMC did recognize the importance of at least getting some impression of native views and responses. The Mandate System, however, failed to provide any formal mechanism by which the native could communi-

320. As Abernethy soberly states, "Because of such policies, the typical colony's economic prospects were unusually dependent on forces operating outside its boundaries and beyond its control." ABERNETHY, *supra* note 121, at 114.

321. *See generally* WOOLF, *supra* note 164; RODNEY, *supra* note 260.

322. W.H.R. RIVERS, *The Psychological Factor*, *in* ESSAYS ON THE DEPOPULATION OF MELANESIA 84, 94 (W.H.R. Rivers ed., 1922). Rivers's work was discussed by the PMC. He is a central character in Pat Barker's novel *Regeneration*. PAT BARKER, REGENERATION (1991).

cate meaningfully with, and represent herself before, the PMC. In basic terms, the native was spoken for by the mandatory power. Initially, Smuts argued for some native representation, at least to the extent of consulting the natives as to whether or not they were agreeable to the mandatory chosen. Only the advanced mandates participated in this process. For the rest, Smuts argued, consultation simply was inapplicable, on account of the backwardness of the peoples concerned.[323] The PMC attempted to establish a system by which petitions from the natives themselves could be received. The subject of petitions was treated, however, as a delicate one, liable to generate great tensions.[324] The compromise formula, arrived at in 1923, permitted the PMC to receive petitions from inhabitants of the mandate territories, but only through the mandatory, which appended comments prior to sending the petitions on to the Commission.[325]

The peoples of the mandate territories inevitably resisted the profound changes being made to their societies and ways of life. The people of Nauru, for instance, attempted in a number of different ways to prevent the phosphate mining that was destroying their island. Tragically, however, given the various limitations of the petition system, the actions of these peoples, at least at the international level, became largely what they were represented to be by the mandatory powers.

The ironies are made clear by the Bondzelwart riots in South-West Africa, which—certain members of the PMC observed with the restraint of seasoned diplomats—could be attributed to "native grievances arising in part from legislative and administrative action in behalf of the white settlers."[326]

Political and procedural factors—the PMC's practice of giving the mandatory large discretion when the issues involved were those relating to security—largely precluded PMC criticism of the measures adopted.[327] Indeed, the Commission, as reported by Wright, partially commended the South African response "'in taking prompt and effective steps to uphold government authority and to prevent the spread of disaffection,'

323. *See* Smuts, *supra* note 10, at 28.
324. WRIGHT, *supra* note 2, at 169-78.
325. *Id.* at 169.
326. *Id.* at 209.
327. *Id.*

though because of the absence of native evidence no opinion could be expressed, 'whether these operations were conducted with needless severity.'"[328]

Within this system native discontent could express itself only as rebellion, the meaning of which was interpreted and established by the League. The PMC response to the rebellion, however, simply confirmed the existence of grievances like the lack of native participation in the Mandate System—"the absence of native evidence,"[329] to use Wright's phrase—which seems to have initiated rebellion in the first place. The meaning of this action is lost—assimilated into considerations of how the PMC should view situations where the mandate power ostensibly was acting in emergency conditions.

In the final analysis, the ambiguities of the mandate experiment were evident even to the most ardent supporters of the system, who, while recognizing its contribution toward creating a new, universal order, could not ignore the underlying problem of pluralities that this assertion of a universal order attempted to obliterate. Did the Mandate System achieve the results it sought? Wright poses this question, and despite adopting his characteristically thorough and multiperspective approach—which includes assessing the scheme by using the "judicial method," the "technological method," the "statistical method," and so forth—he offers no clear answer.[330] Instead, much of Wright's discussion is haunted by an awareness of the fact that the statistics, which he so assiduously compiled, could acquire a completely different significance in a different cultural setting. Does "economic development" mean that the welfare of the natives is in fact being protected? What do "wage levels" mean in a society where a subsistence economy prevails?[331] The doubts that Wright harbored were felt by members of the PMC, who nevertheless occasionally made

328. WRIGHT, *supra* note 2, at 198 (citing the PMC's statement from the Third Session).

329. *Id.*

330. *See id.* at 541. The difficulties that he encounters are suggested by Wright in his statement that "[b]ecause of the difficulties of statistical analysis and the presence of many imponderable factors, perhaps the subjective judgment of competent historians and observers in the areas is as reliable as the results of more refined methods." *Id.* at 549.

331. *See generally id.* at 540-81 (discussing achievements of the Mandate System).

bold assertions like, "[I]f the native races are dying out, it [is] clear that their moral and material welfare was being sacrificed."[332] The irony of prescribing such standards is not lost on Wright, who queries the extent to which the mandates have advanced "Security," "Order and Justice," and "Freedom" within the mandates.[333]

From the natives' point of view, freedom meant being let alone, an aspiration that seems doomed to disappointment in the "strenuous conditions of the modern world."[334] "Economic penetration can hardly be stopped, and if the native cannot adjust his own culture to meet it, that culture is likely to disappear altogether."[335]

Economic progress, then, is inescapable and culture must succumb accordingly. Wright reiterates, "From the native point of view, security means continuance of traditional customs, and these are frequently opposed to economic and political development."[336]

This reveals the double irony of the whole Mandate System: In seeking to liberate the mandate peoples from the "strenuous conditions of the modern world,"[337] the system instead entraps the mandate peoples within those conditions. The peculiar cycle thus creates a situation whereby international institutions present themselves as a solution to a problem of which they are an integral part. Such a situation is very much part of contemporary international relations.

This section has attempted to formulate a critique of the policies adopted and prescribed by the PMC. It is clear, however, that the PMC often did present what it perceived as a progressive and humane version of economic development, and that it was thwarted constantly in its efforts by intransigent mandatory powers that the PMC could not sanction effectively. Further, another question remains: Whether the members of the PMC were acting in bad faith and deliberately set about the task of creating a new and better form of colonialism that

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332. The comment was made by M. Rappard of the PMC. *Id.* at 550.

333. *See id.* at 563-64 (discussing Security), 564-68 (discussing Freedom), and 576-79 (discussing Order and Justice).

334. LEAGUE OF NATIONS COVENANT art. 22, para. 1.

335. WRIGHT, *supra* note 2, at 567.

336. *Id.* at 563.

337. LEAGUE OF NATIONS COVENANT art. 22, para. 1.

complied with the ethos of the times and was all the more insidious precisely because it now expressed itself in the language of liberalism and humanism, the language of trusteeship. But I am acutely aware of the care and conscientiousness with which some members of the PMC performed their duties as they perceived them, and these members' clear-sighted understanding of the realities of what was occurring in many mandate territories. For example, their scrupulous, wide-ranging, and incisive analysis of the system of phosphate exploitation on Nauru—which on the whole fell within the old, bad model of colonialism—is evidence of this. Indeed, the analysis of the PMC was vital in assembling the case that Nauru subsequently made.[338] Perhaps, then, the members of the PMC simply could not escape the colonial assumptions—regarding the natives and the character of economic relations between the colony and the metropolis—that were powerfully held and were reformulated rather than extinguished by the model of trusteeship.

VII. THE MANDATE AND THE DISSOLUTION OF SOVEREIGNTY

A. *Sovereignty, Government, and Economic Power*

Sovereignty, in its most basic sense, is associated with power. The burden of my argument, however, is that the transference of sovereignty to non-European peoples, as undertaken by the Mandate System, was simultaneous with, and indeed inseparable from, the creation of new systems of subordination and control administered by international institutions. These new systems diminished the actual powers that could be exercised by the ostensibly sovereign non-European state. The relationship between "sovereignty" and "government" is key to understanding how this subordination was effected.

Formal sovereignty is based on the existence of effective government;[339] and government, as conceptualized with regard to the mandate territories, was created principally for the

338. *See* WEERAMANTRY, *supra* note 2, at 101-22.

339. Indeed, pragmatist jurists such as Lansing, who sought to identify the real source of power that was the basis of formal sovereignty, might have focused more readily on the concept of "government" because it might have provided a better sense of the sociopolitical realities underlying the juridical form. *See* LANSING, *supra* note 60, at 61-65.

purpose of furthering a particular system of political economy that integrated the mandate territory into the metropolitan power, to the disadvantage of the former. This was achieved by a technique of rendering the whole of mandate society in economic terms, by a process that might be called the "economization" of government. These developments correspond closely with what Foucault, to whose work my discussion is indebted, analyzes as a new and specific form of government that is based, not on the institutions of "sovereignty," but on economy: "[T]he very essence of government—that is, the art of exercising power in the form of economy—is to have as its main objective that which we are today accustomed to call 'the economy.'"[340]

In these terms, the Mandate System transferred only sovereignty to mandate peoples, not the powers associated with "government" in the form of control over the political economy. Paradoxically, this denial of power took place even as the promotion of "self-government" officially was proclaimed to be a central goal of the Mandate System. Rather, for mandate peoples, the acquisition of sovereignty, of political powers, was accompanied by the simultaneous withdrawal and transference of economic power to external forces.

The Mandate System, having transformed the native and her territory into an economic entity, proceeded to establish

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340. Michel Foucault, *Governmentality*, *in* THE FOUCAULT EFFECT 87, 92 (Graham Burchill et al. eds., 1991). Foucault's analysis of the crucial link between the emergence of political economy and the modern art of "government"—as opposed to the earlier preoccupation with government, which had focused on relations of sovereignty—is especially illuminating for an understanding of the Mandate System. Foucault argues:

> The new science called political economy arises out of the perception of new networks of continuous and multiple relations between population, territory and wealth; and this is accompanied by the formation of a type of intervention characteristic of government, namely intervention in the field of economy and population. In other words, the transition which takes place in the eighteenth century from an art of government to a political science, from a regime dominated by structures of sovereignty to one ruled by techniques of government, turns on the theme of population and hence also on the birth of political economy.

Id. at 101. My reading of Foucault is indebted to Duncan Kennedy's analysis of the relationship between Foucault's work and that of the legal realist Robert Hale. *See* DUNCAN KENNEDY, SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 83-125 (1993).

an intricate and far reaching network of economic relationships that connected native labor in a mandate territory to a much broader network of economic activities extending from the native's village to the territory as a whole, to the metropolis, and, finally, to the international economy. Integrated in this way into a dense and comprehensive network of economic power, the native and, indeed, the entire mandate society became vulnerable to the specific dynamics of the network. Given that the mandate territory was inserted into this system in a subordinate role, its operation inevitably undermined the interests of mandate peoples.

Pragmatic international law played a crucial role in establishing and sustaining this system. The complex economic network established by the Mandate System, which linked the natives of the mandate territories with the international economy, was supported and enabled by a comprehensive and flexible legal/administrative system, which corresponded with and undergirded the economic links.[341] A legal system—a new international law—now expanded to comprise norms, policies, standards, regulations, and treaty provisions. It was a system that extended from the mundane, minor procedures of collecting information for the drafting of labor legislation in specific mandate territories to the great proclamations regarding the sacred trust of civilization made in Article 22, the foundation of the entire Mandate System itself.

Nor was the distinction between formal sovereignty and economic power lost to international lawyers of the interwar period. As the PCIJ itself asserted in the *Austria-Germany Customs Case*[342] when elaborating on the concept of sovereign independence:

> [T]he independence of Austria, according to Article 88 of the Treaty of St. Germain, must be understood to mean the continued existence of Austria with her present frontiers as a separate State with sole right of decision in all matters *economic*, political, *financial* or other with the result that that independence is vio-

341. An examination of the *List of Questions Which the Permanent Mandates Commission Desires Should Be Dealt With in the Annual Reports of the Mandatory Powers* suggests all these links. *See* 10 LEAGUE OF NATIONS O.J. 1322-28 (1926).

342. Advisory Opinion No. 41, Customs Régime Between Germany and Austria, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5).

> lated, as soon as there is any violation thereof, either in the *economic*, political, or any other field, these different aspects of independence being in practice one and indivisible.[343]

Similarly, in the *Lighthouses in Crete and Samos Case*,[344] the distinction between sovereignty and government is elaborated:

> [S]overeignty presupposes not an abstract right, devoid of any concrete manifestation, but on the contrary, the continuous and pacific exercise of the governmental functions and activities which *are its constituent and essential element*.[345]

The relationships among sovereignty, government, and economy also have been the subject of Foucault's analysis on the changing character of "government." For Foucault, this is evident in the shift from what he terms "the constants of sovereignty" to "the problem of choices of government," which once again he describes in terms that are recognizable from an analysis of the Mandate System. What Foucault describes is "the movement that brings about the emergence of population as datum, as a field of intervention and as an objective of governmental techniques, and the process which isolates the economy as a specific sector of reality, and political economy as the science and the technique of intervention of the government in that field of reality."[346]

It is in the Mandate System that we see international law developing a formidable set of institutions and legal techniques for addressing the issue of government, of the political economy of a nonsovereign entity. The crucial point is that, unlike the European state, which is Foucault's subject, the specific system of political economy that directs and shapes the

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343. *Id.* at 12 (emphasis added). For a discussion of the meaning of economic independence in the interwar period, see WEERAMANTRY, *supra* note 2, at 323.

344. Lighthouses in Crete and Samos (Fr. v. Greece), 1937 P.C.I.J. (ser. A/B) No. 71 (Oct. 8).

345. *Id.* at 46 (separate opinion of Judge Séfériadès) (emphasis in original). Notably, Séfériadès was paraphrasing Max Huber in making this argument for his own purposes.

346. Foucault, *supra* note 340, at 102. While noting this shift, Foucault also points out that "sovereignty is far from being eliminated by the emergence of a new art of government . . . [;] on the contrary, the problem of sovereignty is made more acute than ever." *Id.* at 101.

government in these territories is a colonial political economy. This is evident from a study of the operation of the Mandate System and the writings of Lugard and other colonial administrators. The inequalities resulting from this system are analyzed by Hobson and Woolf in the early twentieth century and have been the subject of ongoing work on the part of more recent scholars, such as Andre Gunder Frank[347] and Samir Amin.[348] Consequently, it was precisely the mandate peoples' ability to exercise "governmental functions" effectively that was undermined profoundly by the type of government being created in mandate territories, even as these peoples were being guided ostensibly toward self-government and sovereignty.[349] These developments resulted in the instantiation of pervasive and structural economic inequalities in a system that claimed to provide formal political equality.[350]

B. *Sovereignty and the Science of Colonial Administration*

The Mandate System established novel forms of control by creating, in effect, new sciences of social and economic development that precluded the articulation or promotion of alternative systems of society or political economy within the mandate territories. In its efforts to promote self-government, supervise the mandate power, and ensure the progress of the mandate territory, the PMC collected an unprecedented volume of information. The PMC dealt not only with conventional matters regarding legal status, but also with population,

347. *See generally* ANDRE GUNDER FRANK, THE UNDERDEVELOPMENT OF DEVELOPMENT (Franklin Vivekananda ed., 1991). A study of the discussions and debates of the PMC lends considerable credibility to the work of dependency theorists, since those discussions make it clear that what is being created is a subordinate economy.

348. *See generally* SAMIR AMIN, IMPERIALISM AND UNEQUAL DEVELOPMENT (1977).

349. The resulting instantiation of pervasive and structured economic inequalities in a system of formal political equality is a concern of legal realist analysis that derives from Marx. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, *in* AMERICAN LEGAL REALISM 101, 108 (William W. Fisher III et al. eds., 1993). The complex relationship between formal equality and racial and economic subordination is the subject of the pioneering work done by critical race theory scholars and Latin American critical race theory scholars. *See* sources cited *supra* note 9.

350. This is also an important strand of legal realist analysis that derives from Marx. *See, e.g.*, Hale, *supra* note 349.

health, education, land tenure, wages, labor matters, external revenue, order and justice, public works, and services.[351] The information gathered enabled Wright to provide comparative statistics on matters such as birth rates,[352] per capita health expenditures,[353] and amounts spent on agriculture in different mandatories. A study of these details, the different types of information sought, and the techniques by which this information could be manipulated attests to the Mandate System's aspiration to know the most intimate details of native life. The amount and classes of information collected from the mandates were massive and expanded as the system developed over the years. In an annex headed *List of Questions Which the Permanent Mandates Commission Desires Should Be Dealt With in the Annual Reports of the Mandatory Powers*, the headings include: Status of the Territory; Status of the Native Inhabitants of the Territory; International Relations; General Administration; Public Finance; Direct Taxes; Indirect Taxes; Trade Statistics; Judicial Organisation; Police; Defence of the Territory; Arms and Ammunition; Social, Moral, and Material Condition of the Natives; Conditions and Regulation of Labour; Liberty of Conscience and Worship; Education; Public Health; Land Tenure; Forests; Mines; and Population.[354] The mandatories are presented with a number of more detailed questions under each of the headings; thus, under the heading Conditions and Regulation of Labour, the mandatories are presented with seventeen further questions.[355]

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351. These are only some of the matters included in his table of contents that Wright chooses to discuss on the basis of the available information provided. *See* WRIGHT, *supra* note 2, at xi-xiii.

352. "French investigations in Togoland indicate that each woman on an average gave birth to 4.03 children during her life, of which 3.02 live after fifteen years." *Id.* at 553. This preoccupation with understanding population in different ways exemplifies Foucault's point that population is a central concern of the government of political economy.

353. $0.07 in Togoland, $0.06 in Cameroons and West Africa, and $0.04 in Equatorial Africa. *Id.*

354. 10 LEAGUE OF NATIONS O.J. 1322-29 (1926).

355. *Id.* And in turn each question can be quite detailed, e.g., "Does the local supply of labour, in quantity, physical powers of resistance and aptitude for industrial and agricultural work conducted on modern lines appear to indicate that it is adequate, as far as can be foreseen, for the economic development of the territory?" *Id.* at 1325.

Knowledge was thus gathered from the furthest peripheries and consolidated by the League; it then was subjected to a number of interpretive and disciplinary processes, including the sciences of administration (through the PMC), legislation (through the Council), and adjudication (through the PMC in some limited capacity, in that it made comments as to whether or not the terms of the mandate were being fulfilled; and more explicitly, through the PCIJ). This knowledge was assimilated and synthesized by the most eminent colonial administrators available. Thus, the Hon. Ormsby-Gore stated of the constituents of the PMC:

> Its members must possess all knowledge—native law, native religion, native psychology, native customs, methods of combating disease and vice, understanding of climate, geographical and economic conditions, principles of colonial administration throughout the world from the beginning.[356]

As a consequence of all this, for the purposes of the mandate, the natives existed more vividly in Geneva, where all this information was gathered and processed, than they did in the mandate territories themselves.[357] The use of these new techniques of monitoring and management created an entirely new science. As Wright again, very perceptively, notes, "Nothing less than a science of colonial administration based on a deductive and experimental method was here contemplated. The discovery by such a method and verification by practical application of useful principles and standards is probably the most important contribution which the mandates system could make."[358]

The mandate territories, then, provide both the information that is synthesized into scientific models by the PMC and the laboratory in which this new science may perfect itself through its "deductive and experimental method." The science created out of these processes transcends the particularities and imperfections of specific types of colonial administration in particular territories.

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356. WRIGHT, *supra* note 2, at 137 (quoting ORMSBY-GORE, THE LEAGUE OF NATIONS STARTS, AN OUTLINE BY ITS ORGANIZERS 119 (London 1920)).

357. For an example of how this operated to the disadvantage of the natives, see WEERAMANTRY, *supra* note 2, at 172-73.

358. WRIGHT, *supra* note 2, at 229.

Economics was crucial for this project, for it was understood to be a universal discipline that transcended the cultural particularities of specific mandate territories. This was vital to the operation of the mandate, which otherwise lacked the means of making sensible comparisons between Papua New Guinea in the Indian/Pacific region and the Cameroons in Africa. It was only if Papua New Guinea and the Cameroons, with their radically different cultures, nevertheless could be assessed by the same criteria—economic criteria—that it appeared intellectually valid to derive from the experiences of Papua New Guinea a set of policies and principles that could be applied in some way to the Cameroons. There was an important complement, then, between the economization of government, which transformed all aspects of mandate territories into economic phenomena, and the emergence of this science, which then could theorize and extrapolate upon the entities so homogenized through the single discipline of economics.

Thus, the Mandate System is crucial for the emergence of this new science: Without its centralized authority, scholars concerned with colonial problems had to rely on the cruder science of "comparative colonial administration."[359] Seen in this way, the Mandate System enabled the deployment of other disciplinary techniques—derived from psychology, for example—in the management of colonial relations; indeed, it created new disciplines. Further, these new and more powerful claims to create a science—Wright continuously uses the term—is crucial for the legitimatization of this new, massively intrusive form of administration. The transformation of backward territories is undertaken no longer by colonial powers seeking to further their own interests; rather, it is undertaken by a disinterested body of colonial experts intent on acquiring the knowledge of native practices, customs, psychology, institutions, and economies, not for the purpose of furthering profits, but rather to enable them to formulate the policies necessary to ensure the proper development of native peoples. Objective, disinterested scientific knowledge, then, justifies these practices.

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359. An example of this would be Furnivall's work comparing different colonies in South East Asia. *See, e.g.*, FURNIVALL, *supra* note 244.

This universal science enabled the League to deal with A, B, and C mandates, with the British administration of Middle Eastern territories on the one hand and with the French administration of the Cameroons on the other. Each of these cases now merely exemplified aspects of, and was incorporated into, the larger science of administration by the League. Once this dynamic was established, the peculiarities of each territory and method of administration strengthened rather than disrupted the master science and the model of the nation-state it produced. Each peculiarity now represented an "experiment" assimilated into the Mandate System that enabled it to adjust and perfect the League's model of the non-European nation-state and the science that created it.

The League's system of gathering, processing, and interpreting information by an apparatus consisting of a carefully administered and synchronized set of bureaucrats and adjudicators is significant, not only because it articulates a new version of the non-European state, but also because it provides a function and justification for this new form of international institution. Once the master science of colonial administration is established, the Mandate System legitimizes itself by monitoring the progress of these backward territories, by devising ever-more-sophisticated ways of detecting deficiencies, and by formulating new standards by way of remedy.[360] Basically, then, the continuing existence of these institutions is dependent on the existence of such a deficiency, which in turn is created by these institutions in more sophisticated ways. This science of colonial administration represents a formidable type of power simply because it defines, in compelling, detailed, and ostensibly objective and scientific terms, the normal or desirable goal that all peoples should seek. It prescribes, further, elaborate techniques of achieving this desired state. This is what might be termed, once again following Foucault, "disciplinary governance," by which society is controlled, not through the enforcement of the laws, but rather by

360. I use this terminology and formulate this analysis in my thesis, Antony Anghie, Creating the Nation-State: Colonialism and the Making of International Law 275, 283-84 (1995) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author).

defining the normal, the standard, and the truth against which deviations are identified and then remedied.[361]

C. *Sovereignty and Native Will*

The mandate project of transforming native peoples and territories was intimately linked with a further technique that was self-consciously developed and deployed by the Mandate System: Desirable native behavior was to be promoted, not through physical punishment, but through persuasion. The mandate rendered the native visible and amenable to the mechanisms and techniques of administration through the vocabulary of birth rates, productivity, wage rates, and so forth. It was the ambition of the PMC to know the native in every detail: The native was to be studied in terms of psychology as well as "his physical and moral development" since this was vital for "furthering the economic progress of the country which is an essential condition of general prosperity."[362] In essence, every detail of native life was collected, assimilated, processed, recombined, and reconstituted in ways that point to new modes of understanding and penetrating. This new mode recreated and managed the native under the philosophy that "the body becomes a useful force only if it is both a productive body and a subjected body."[363]

Subjugation was to be achieved by discipline, not force. The discovery of psychology had a profound impact on the discipline of colonial administration. It was the conceptualization of the interior, not only of the sovereign state, but also of the native himself—the native's psychology—that gave rise to new possibilities of control and management. The techniques and policies formulated by the Mandate System were explained best by Wright's argument that "[h]uman action may in fact be directed by many methods other than coercion. The possibilities of these methods are just on the threshold of exploration . . . ."[364]

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361. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 170 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978). "These [the mechanisms of disciplinary governance] are humble modalities, minor procedures, as compared with the majestic rituals of sovereignty or the great apparatuses of the state." *Id.*

362. 11 LEAGUE OF NATIONS O.J. 1541 (1926).

363. *See* FOUCAULT, *supra* note 361, at 26.

364. WRIGHT, *supra* note 2, at 269.

This system of control is what Guha might term dominance without hegemony—"a dominance in which the movement of persuasion outweighed that of coercion without, however, eliminating it altogether."[365] Nor was it the case that this method of persuasion was simply a part of the theory of experts; these techniques of control were understood and utilized by colonial officials.[366] The construction of the science of colonial administration is crucial to this project, then, because it is linked intimately with the task of normalization, of creating the universe against which the native will be found wanting and that will lead ultimately to reform desired by the native herself.[367]

By this means, international law and institutions entered, in the most intimate and intrusive ways, both into the territories and into the natives to be transformed. They sought to transform mandate territories, not simply by means of legal regulation, but also by changing the very character of social reality as experienced by mandate peoples: They sought nothing less than to alter the manner in which the inhabitants of these territories experienced themselves and their surroundings. Land was changed into an asset, and native customs into obstacles to progress. If particular native practices were to justify themselves now, they had to do so against the massive system of scientific truth constructed by the mandates, which now could make new and more powerful claims to being univer-

365. Ranajit Guha, *Introduction* to A SUBALTERN STUDIES READER, 1986–1995, at ix, xviii (Ranajit Guha ed., 1997). Guha points out that this technique was used by the Raj; in the Mandate System, then, we might see the gradual internationalization of this technique.

366. Thus, an Australian official seeking to get the people of Nauru to leave their phosphate-rich island for Australia and become assimilated as Australians asserted:

> I believe that a policy of encouraging and helping assimilation can be pursued by us steadily and unostentatiously and that its prospects of success will not be affected *if we do not openly disclose it to the Nauruans as a deliberate policy.* Assimilation must develop from spontaneous choice by individual Nauruans and from opportunities presented. We can steadily help both of these to develop.

WEERAMANTRY, *supra* note 2, at 289.

367. As Foucault asserts, "Discipline 'makes' individuals; it is the specific technique of power that regards individuals both as objects and as instruments of its exercise." FOUCAULT, *supra* note 361, at 170.

sal.[368] The native became a stranger to himself. We might see this theme evident in a number of Mandate System policies, such as in the use of native institutions to further the project of modernity.

D. *Sovereignty, Difference, and the New Technologies*

The significance of the Mandate System lies, not only in the new system of control and management it brought into being, but also in the related question of the techniques and technologies devised and used by international law and institutions for this purpose. A central argument of this article has been that sovereignty doctrine and various important techniques of international law emerged out of the attempts made by international law to resolve the problem of cultural difference as it was understood by jurists in the interwar period. A crude distinction may be made between doctrine and technique, whereby doctrine refers to a particular conceptualization of sovereignty, and technique to the mechanisms developed by international law to make this concept a reality. In the case of the mandates, the conceptualization of sovereignty as something that could be created, not only in its juridical form, but also in its sociological form, provoked the development of a series of techniques including the fusion of law with administration and all its trappings. The relationship between the two issues of doctrine and technique is mutually reinforcing and dialectic. Indeed, in the final analysis, the distinction between the two appears artificial: The elaboration and development of technique enabled the League lawyers to conceive of sovereignty in new ways, just as these new ways of understanding sovereignty called forth new techniques and new interdisciplinary projects involving law, administration, psychology, and economics. At a more intimate level, the same process occured with respect to the native: The native both generated these techniques, disciplines, and innovations and in turn was generated by them, for the application to the na-

368. *See* MICHEL FOUCAULT, *Two Lectures, in* POWER/KNOWLEDGE 78, 93 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980) ("There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.").

tive of these techniques revealed further deficiencies in native society and practice. The process was continuous, self-sustaining, and endless, given the premise that difference was deficiency and must be remedied, and given too that the Mandate System developed ever more sophisticated ways of registering difference.

I have argued that the problem of cultural difference has been crucial to the development of international law. The new technologies of the interwar period give the dynamic of difference a very specific and far reaching character in the Mandate System that might be better appreciated by a contrast between the positivist nineteenth-century regime and the pragmatist regime of the Mandate System. Whereas positivism insists on focusing on autonomous law, pragmatism posits a jurisprudence based on rules, standards, policies, and administration. The classical positivist criteria for statehood—government, population, and territory—are now rendered in the Mandate System, in detailed sociological terms. Thus, for example, in the Mandate System, territory is understood now in terms of resources and economic development; population is understood in terms of health issues, mortality rates, hygiene, and labor concerns; and government is conceptualized in terms of the reform of native political institutions. Put another way, the formal positivist criteria of statehood—government, population, and territory—are transformed from mere criteria, which have to be satisfied, into projects to be undertaken by the Mandate System. Because of the suppleness and penetration of pragmatic jurisprudence, the objects of administration within a territory can be isolated, refined, selected, and reconnected in numerous ways. Thus, the dynamic of difference now operates with respect to the most intimate aspects of a native's life—his psychology, customs, and health—all of which could be characterized as backward and deficient and requiring remedying. The imposition of sanctions following any failure of the natives to meet universally posited standards no longer takes the form of punishment alone; rather, the application of new and formidable disciplines of management seeks to transform, not the body, but the soul of the native—"a punishment that acts in the depth on the heart, the thoughts, the will, the inclinations."[369]

369. FOUCAULT, *supra* note 361, at 16.

Crucially, the problem of cultural difference was presented in the Mandate System, not in terms of the distinction between the civilized and uncivilized, but rather in terms of the backward and advanced. This formulation opened a more comprehensive version of the dynamic of difference. For, as Wright notes, the concept of "backwardness" connotes a lack of self-determination, a lack of Europeanization, and a lack of economic progress;[370] of these three interrelated concepts, however, "the economic sense of the term has been [the] most significant, the others tending to follow as consequences."[371] Thus, whereas the dynamic in the nineteenth century employed principally racial and cultural concepts, the dynamic now establishes economic categories. It is in the Mandate System, then, that we arrive at this pivotal moment, when the "uncivilized" are transformed into the economically backward; when international law begins to discard a vocabulary that appears racist and problematic and adopts a new series of concepts that appears neutral and universal because it is based on economics and on expression of scientific fact rather than on an assertion of cultural superiority by a European civilization that had come perilously close to destroying itself. While the nineteenth-century sciences that preoccupied themselves with issues of racial superiority[372] have been discarded, the twentieth-century science of economic development is profoundly important to international relations. Thus the dynamic of difference now acquires a new impetus, a new project, a new way of characterizing and supposedly remedying deficiency.

It is in the non-European world that international law acquires a different form and, indeed, creates new types of control and management. We might see the operation of law in the Mandate System in terms described by Foucault, who was concerned to show "the extent to which, and the forms in which, the law (not simply the law, but the whole complex of apparatuses, institutions and regulations responsible for their

370. WRIGHT, *supra* note 2, at 584.

371. *Id.* Wright proceeds to argue that economic backwardness was itself the "byproduct of the industrialization of Europe," which led to the search for raw materials, markets, and opportunities for investment. *Id.*

372. For an example of such writings, see KARL PETERS, NEW LIGHT OF DARK AFRICA (1891) *reprinted in* IMPERIALISM 74 (Philip D. Curtin ed., 1971). The writings of Lugard himself might be included in this category.

application) transmits and puts in motion relations that are not relations of sovereignty, but of domination."[373]

My argument, following Foucault, is that we see in the Mandate System the difficulties of applying conventional doctrines of sovereignty to those territories, of identifying the "distillation of a single will,"[374] the unitary sovereign. What we see in elaborate and stunning detail, however, is the role that law[375] plays in creating relations of domination, relations that almost render irrelevant the formal sovereignty for which these societies ostensibly were being prepared.

VIII. THE LEGACIES OF THE MANDATE SYSTEM: TOWARD THE PRESENT

The contemporary significance of the Mandate System may be understood at a number of different levels. Most immediately, it is noteworthy that Iraq, Palestine, and Ruanda-Urundi were all mandate territories. The records of the PMC and the League more generally illuminate the attempts by international institutions to address these conflicts (sometimes, perhaps, exacerbating or indeed creating the conflicts), attempts that may be traced back to the origins of international institutions and the creation of the League itself. International law and institutions continue to grapple with the issue of administering certain territories. Recent attempts by the United Nations to administer states such as Somalia, Cambodia, Timor, and Kosovo are contemporary manifestations of a project that began with the Mandate System and continued in a more refined and comprehensive form with its successor, the Trusteeship System.[376] As Wilde notes in his recent survey of

373. FOUCAULT, *supra* note 368, at 95-96.

374. *Id.* at 97.

375. Although Foucault appears to see "law" as an important aspect of all these forms of control, it appears as though he adopts a somewhat formalist idea of law. Thus, he describes the "traditional weapons of sovereignty" as "laws, decrees, regulations." Foucault, *supra* note 340, at 98. Thus, as Kennedy argues, "Foucault gives law an important place in his general social theory, but his version of law is, unfortunately, prerealist." *See* KENNEDY, *supra* note 340, at 83-84.

376. Ruth Gordon has contributed outstanding studies of some of these themes. *See, e.g.*, Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903 (1997); Ruth Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301 (1995).

these efforts, International Territorial Administration is seen as a response to two major problems—"a perceived sovereignty problem" and a "perceived governance problem"[377]—that are precisely the problems that the Mandate System attempted to address. The assumptions inherent in these projects—about the people and territories to be administered, the character of "progress," and the actual legal techniques and instruments used by institutions to effect the transformations of these societies—all derive in important ways from that earlier, formative experiment.

Perhaps for the people of the Third World, the significance of the Mandate System lies in the unique type of sovereignty it brought into being. "A state proper—in contradistinction to colonies and Dominions—is in existence when a people is settled in a country under its own sovereign Government," asserts McNair.[378] The colony, then, according to the definition provided by McNair, is the negation, the opposite, of a sovereign. It is through the exercise of the powers of government, furthermore, that sovereignty can exercise itself and become a reality. The inverted character of non-European sovereignty is suggested further by Wright, who argues that the mandate is the object and not the subject of sovereignty[379] and hence cannot be analyzed in the same way as sovereignty in Western states. The extraordinary goal of the Mandate System was to reverse this situation and to transform the colony into a sovereign state. It is clear that the Mandate System was an extraordinary innovation in the field of international law; it furthered the cause of international justice in extremely significant ways. The Mandate System played a profoundly important role in enabling the emergence of Namibia and Nauru, to name but two examples of former mandate territories, as sovereign, independent states.

Equally, however, the processes by which this transformation from colony to sovereign state occurred had important and enduring consequences for the non-European state, and it is misleading to focus simply on the outcome, on the achievement of sovereign statehood, rather than on the

377. Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583, 587 (2001).

378. OPPENHEIM, *supra* note 1, § 64.

379. WRIGHT, *supra* note 2, at 295.

unique character of that statehood that stems in part from the mechanisms that created it. The technologies devised in the Mandate System to manage relations between the colonizer and the colonized continue to play a profoundly important role in managing relations between their successors, the developed and undeveloped/developing. In strictly legal terms, the Mandate System was succeeded by the Trusteeship System. But in terms of technologies of management, it is the Bretton Woods Institutions (BWI)—the World Bank and the International Monetary Fund (IMF)—that are the contemporary successors of the Mandate System.[380] Indeed, whereas the Mandate System was confined in its application to the few specified territories, the BWI in effect have universalized the Mandate System to virtually all developing states, as all these states are in one respect or another subject to policies prescribed by these institutions.

The BWI, like the Mandate System, in seeking to ensure the "well-being and development" of Third-World countries, are seeking to do so by integrating Third-World economies into the international economic system in ways that are essentially disadvantageous to Third-World peoples.[381] The techniques, justifications, and legitimating devices they use for these purposes fundamentally derive from the Mandate System. Thus, for example, the new "science of colonial administration" that the mandates brought into being is, in its most important elements, the new "science of development" that provides the legitimating foundation of contemporary development institutions such as the World Bank. It is the Mandate System that created an ostensibly universal science by which all societies may be assessed and advised on how to achieve the goal of economic well-being and development.[382] The technologies and techniques of the Mandate System, now refined and elaborated, are used by the World Bank, for example, to

380. Anghie, *Time Present and Time Past*, *supra* note 3, at 246.

381. The negative impact of BWI policies on Third-World countries has been extensively documented. *See, e.g.*, MICHEL CHOSSUDOVSKY, THE GLOBALISATION OF POVERTY (1997).

382. For an important critical approach to development theory, see ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (1995); Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195 (2000).

legitimize its activities and to expand the range of issues with which it deals.[383] The basic intellectual division of labor instantiated by the Mandate System persists in the operations of institutions such as the World Bank and the IMF. The developing countries provide raw materials, not only in the form of primary commodities, but also in the form of information. This information is processed by the World Bank into knowledge, theories of development, and best theories of practices, which are then promoted as scientific, authoritative truths. As commentators have noted, the production of knowledge is becoming crucial to the World Bank, which aspires to maintain its authority and legitimacy by becoming sovereign over the entire subject of development, as reflected by the recent World Bank report entitled "Knowledge for Development."[384] Deviations from these truths are accompanied frequently by economic disciplining, as international markets often require states to adopt BWI policies.[385] Though the Third-World states now being administered are ostensibly sovereign states that can decide their own policies, these states, in fact, only have doubtful control over their economies—a situation exacerbated by globalization.

My broader point is that there is a unique relationship between international institutions and the non-European world—a uniqueness that was evident when the League first was established[386] and that continues today. It remains the case that it is only in the non-European/undeveloped world that these technologies are applied in their extraordinarily intrusive form, for it is the condition of backwardness that requires the application of these technologies. Further, as in the case of the Mandate System, the people who are the objects of this system, the peoples of the Third World, are denied any

383. I have elaborated on some of the themes discussed below in Anghie, *Time Present and Time Past*, *supra* note 3, at 266. For an illuminating discussion of the activities of the World Bank and its assumptions about human nature and economics, see David Williams, *Constructing the Economic Space: The World Bank and the Making of Homo Oeconomicus*, 28 MILLENNIUM J. INT'L STUD. 79 (1999).

384. WORLD BANK, WORLD DEVELOPMENT REPORT: KNOWLEDGE FOR DEVELOPMENT (1998)

385. *See* Robert Wade, *Japan, the World Bank, and the Art of Paradigm Maintenance:* The East Asian Miracle *in Political Perspective*, 217 NEW LEFT REVIEW 3 (1996).

386. *See* discussion *infra* Part III.

effective decision-making power. The governance structure of the BWI ensures that it is the rich, industrialized countries that control the BWI and use this control to pursue their own interests while ostensibly promoting development. Further, the current World Bank concern to promote "good governance" and "democratization" resembles in important respects the Mandate preoccupation with promoting "self-government;" in each case, the character of the government being promoted is shaped by economic considerations, by an interest in furthering economic policies that often are in the interests of the developed states rather than the citizens of the developing country.[387] Similarly, just as the PMC defined "welfare" in such a manner as to further its particular concept of economic development, the World Bank, which recently has made far reaching claims as to how it has adopted and furthered various human rights norms, arguably has interpreted those norms as being satisfied by the problematic form of economic development it promotes.[388]

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387. See the important body of work by James Gathii that outlines the genealogy of the World Bank's good governance project, its connections with the World Bank's neoliberal economic policies, and the impact of these initiatives on African states. *See, e.g.*, James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107 (1999); James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971 (2000). It even might be argued that the Mandate System was more advanced than the BWI in several respects. First, the most senior figures of the Mandate System, such as Lugard, had an intimate knowledge of the colonial societies for which they prescribed policies—whatever might be said about the uses to which this knowledge was put. The heads of both the IMF and the World Bank rarely possess any particular expertise in the economics and conditions of developing countries. Second, the operations of the Mandate System were subject to judicial scrutiny: Issues arising from possible breaches of the laws governing the creation and operation of the Mandate System could be referred to the PCIJ. The BWI are not subject to such independent scrutiny, despite the fact that many of their policies, particularly in recent times, clearly appear to violate their constituent documents. This development illustrates the ways in which law can create systems of management and control that, once established, elude conventional legal techniques of accountability. The IMF and World Bank, which are creations of international law, are not in any meaningful way subject to the control of international law. *See* Anghie, *Time Present and Time Past*, *supra* note 3, at 271.

388. *See* Anghie, *Time Present and Time Past*, *supra* note 3, at 254.

My preoccupation has been to point out the different ways in which these institutional disciplines and technologies have sought to control and manage the Third World. But the elaborate and cunning ways in which colonial relations are reproduced should not be taken to suggest that they invariably triumph. These systems of control are resisted inevitably by the people subject to their application as part of an ongoing struggle that, as Balakrishnan Rajagopal has argued persuasively, has shaped powerfully the character of contemporary international institutions.[389] Further, I do not intend this analysis to be deterministic, to suggest that a former colony never can succeed in escaping its origins. Rather, my hope is to identify some of the factors that inhibit such a metamorphosis.

If my analysis is correct, then the tragedy for the Third World is that the mechanisms used by international law to achieve decolonization also were the mechanisms that created neocolonialism and that, furthermore, the legal structures, ideologies, and jurisprudential techniques for furthering neocolonialism largely were in place before Third-World states actually attained independence. The Mandate System had devised a set of technologies that would compromise that independence and maintain, indeed entrench, the division between advanced and backward states. Having in this way ensured the existence of the division, international law and institutions nevertheless proclaim themselves intent on bridging that division, on promoting global equality and justice. This project and the many initiatives that are a part of it are inherently problematic because it is precisely the international system and institutions that exacerbate, if not create, the problem that they ostensibly seek to resolve.

This point is illustrated by a reconsideration of the basic contradiction that afflicted the Mandate System, the contradiction between attempting to promote self-government while establishing an economic structure that recreated colonial relations. As Nehru, Furnivall, and others recognized, however,

389. *See* Balakrishnan Rajagopal, *International Law and the Development Encounter: Violence and Resistance at the Margins*, 93 AM. SOC'Y INT'L L. PROC. 16 (1999); Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L.J. 529 (2000).

the pursuit of such economic policy makes real self-government impossible because government is made subservient to unequal economic development. In these circumstances, the Western political institutions transferred to these territories, ostensibly for the purpose of promoting self-government, very often will fail to bring about the intended social and political benefits. This is because these institutions, too, become distorted in the colonial setting and serve largely to further economic inequalities. The function of the rule of law in the colonies, observed Furnivall, was to further commerce, but this version of the rule of law hardly could empower and unite a society when its very operation expanded commerce at the expense of the social and political integrity of that society.

The international financial institutions, and in particular the World Bank, now confront this same contradiction, having followed a more circuitous route. Although created as institutions promoting economic development, they are now increasingly involving themselves in governance projects explicitly designed to create the political institutions that further their particular model of development. It is an extremely problematic model, however. The BWI understand poverty and underdevelopment to arise from factors that are purely endogenous to developing societies. As a consequence, all the BWI's initiatives and programs—of good governance, transparency, and anticorruption—are directed toward reforming the backward, developing country. The BWI, however, make no effort to reform the fundamental structures of the international economy itself—structures that largely operate to the disadvantage of developing countries. Nor, unsurprisingly, do the BWI choose to recognize the crucial role they play in maintaining these structures. The BWI, after all, are controlled by the most powerful states, in whose interests these structures operate. Rich countries provide massive subsidies to various sectors of their economies and engage in highly protectionist behavior. These developed-country policies remain untouched by the BWI, which use their financial power to pry open extremely vulnerable developing-country markets, and prevent any state-led industrial promotion. In effect, the BWI, due to a lack of authority, make no effort to prescribe for the developed countries the policies that are imposed on developing countries.

If, then, the causes of poverty are located at least in part at the international rather than the purely local level, the BWI's focus on national reform is misplaced. Consequently, as in the Mandate System, good-governance and rule-of-law projects can achieve only partial and often unpredictable results in bettering the conditions of Third-World peoples. Ironically, it is precisely because of this failure that the BWI can propose new initiatives and new approaches to development—like participation, governance, anticorruption, and transparency—that further their reach and their powers of intervention into the deepest recesses of the supposedly sovereign Third-World state. It is this inevitable failure that gives the BWI a reason to exist and, indeed, to expand the scope of their actions. The BWI, in many ways replicating the attitudes of Lugard and Root, inevitably attribute the failure of these projects—of economic development, good governance, and the rule of law—to the inveterate corruption and disorganization of Third-World societies. The failures of Third-World countries and the pathologies of the postcolonial states are many. But it is also an inconvenient fact that, in general, people do not readily accede to their own dispossession and to the mechanisms, such as good-governance projects, that can cause their dispossession.

Colonialism is a thing of the past. This is the broad understanding that informs the conventional narrative of international law. The principal concerns of this article are to question this assumption and to examine how this narrative sustains itself and how international law seeks to suppress its relationship with colonialism—a relationship that was, and continues to be, central to international law's very identity. An examination of the Mandate System makes it clear how colonialism continues. The colonial policies and management techniques formulated by Lugard were adopted and refined by the Mandate System, and these same practices continue today through the BWI. The shift from a discourse based on race to a discourse based on economics is crucial to the conventional narrative of international law. The characterization of non-Europeans as inferior based on racial categories is regarded as unacceptable and unscientific. But the civilizing mission of the BWI and the interventions such a mission requires can be justified on the basis that they are necessary in order to transform and improve the welfare of an economically deprived

group of people. The neutral, scientific discourse of economics justifies these expanding and increasingly sophisticated forms of intervention. Race is distanced from international law in this way, even as an alternative vocabulary with which to characterize and reform the uncivilized as "developing" emerges.

My argument is that we might see both in the Mandate System and in the BWI the reproduction of the basic premises of the civilizing mission and the dynamic of difference embodied in the very structure, logic, and identity of international institutions. Further, it may be the case that the basic premises of the civilizing mission are reproduced in a number of other arenas in which international institutions have played a crucial role in attempting to regulate international affairs.

Thus, for example, Jose Alvarez has shown how the structure of the international criminal tribunal for Rwanda served in important respects to obscure the West's complicity in the genocide that took place there.[390] But I do not wish to suggest that international institutions invariably and inevitably reproduce this logic of the civilizing mission and always operate against the interests of the peoples of developing countries. A study of the Trusteeship System, which succeeded the Mandate System, shows, for example, how international institutions evolved to give voice to the peoples of the trust territories. An examination of the history of the Nauru Case reveals how the people of Nauru succeeded in protecting their interests, at least in part, through an astute use of these procedures.[391] This examination of the Mandate System is not intended, then, to be determinist. Rather, it attempts to outline certain historically based concerns that might enhance an understanding of the operation of international institutions and the role they play in contemporary international relations.

Pragmatism played a crucial role in enabling this transition from colonialism to neocolonialism, and it is possible to trace correspondences between interwar pragmatism and the ideas articulated by American jurists. These ideas have an enduring significance because of the emergence of the United States as the one global superpower and the many initiatives the United States has taken to remedy the problems of the

390. *See* Alvarez, *supra* note 305, at 391.

391. On these issues, see generally WEERAMANTRY, *supra* note 2.

Third World. Thus, we might see the current campaigns focusing on democracy promotion,[392] nation building, the rule of law, and law and development as continuing upon and elaborating, in complex ways, an approach to these problems that combines Root's particular concept of self-government, Pound's idea of law as social engineering, and Alvarez's program of constructing an international law that is sensitive to social concerns.

An understanding of American approaches to colonial problems is crucial to an understanding of the Mandate System. But the inquiry may also be reversed. What is the impact of colonialism on the development of American international law? What would it mean to write a history of American international law that takes as its central theme America's emergence as an imperial democracy and the effect of that larger project on the development of American international law? How are the tensions inherent in the term "imperial democracy" addressed? In what ways can the learned societies, the methodologies and the educational institutions of American international law be seen to be participating in this project and its attendant paradoxes? How does a state whose very identity is based on its revolt against colonialism become itself an imperial power? These issues acquire a new importance as the United States now exercises an imperial power historically rivaled only by Rome.[393] This development has been accompanied by the emergence of a "hegemonic international law"[394] that appears to be based on late-nineteenth-century

392. For an incisive critical study of these projects, see SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS (2000).

393. There is a considerable current literature that approvingly makes the connection between the United States and Rome. For a brief overview, see Philip S. Golub, *The Dynamics of World Disorder: Westward the Course of Empire,* LE MONDE DIPLOMATIQUE, Sept. 2002.

394. *See* Detlev F. Vagts, *Hegemonic International Law,* 95 AM. J. INT'L L. 843 (2001). As Vagts notes, "the historical record shows that it can be convenient for the hegemon to have a body of law to work with, provided that it is suitably adapted." *Id.* at 845. *See also* Anne-Marie Slaughter, *Notes from the President: Old Rules, New Threats,* NEWSL. AM. SOC'Y INT'L L. (American Society of Int'l Law, Washington, D.C.) July/Sept. 2002, at 1, 10. For important critical studies of the implications of some of the contemporary schools of American international law, see CHIMNI, *supra* note 9 (analyzing the works of Morgenthau, the Yale school, and Richard Falk); Kennedy, *supra* note 78; KOSKENNIEMI, *supra* note 36, at 413-509; and José E. Alvarez, *Do Liberal States*

concepts of sovereign prerogative and that seeks to liberate the United States from the noisome developments in international law inaugurated by the League of Nations. I have attempted to trace the transitions from nineteenth-century to twentieth-century approaches to sovereignty. But such transitions are never complete and rarely prevent the resurfacing of the older framework in certain circumstances. Now, in the twenty-first century, nineteenth- and twentieth-century techniques, technologies, and justifications for imperialism are merging to form a new and complex synthesis.

IX. CONCLUSION

It is in the operation of the Mandate System that we might see, almost as in a fossil recording a crucial transition in the history of a species, a number of shifts in the history of international law: from positivism to pragmatism; from law to institutions; from sovereignty to government; from race to economics; from conquest to decolonization; from colonialism to neocolonialism; from exploitation to development; and from England and France to the United States. While each of these themes is important, I have attempted to explore them in terms of my major concern to understand the distinctive character of non-European sovereignty. My argument has been that non-European sovereignty is distinctive on account of the mechanisms and processes that brought it into being despite the appearance of equality between European and non-European sovereignty—an appearance that supports the dominant theoretical paradigm of international law, which examines the question of how order is created among equal and sovereign states, rather than attempting to question the character of this equality. I have argued that nineteenth-century jurists built racial discriminations into their conceptualization of sovereignty. Similarly, in the interwar period, conceptualizations of sovereignty incorporated economic inequalities within it. As a consequence of this, non-European sovereignty suffered—and continues to suffer—a particular vulnerability that arises from the system of economic power into which it was integrated even as it became sovereign.

Behave Better? A Critique of Slaughter's Liberal Theory, 12 EUR. J. INT'L L. 183 (2001).

The basic structures of colonialism, I conclude, are reproduced in all the major schools of international jurisprudence: naturalism, positivism, and pragmatism. If this is the case, then we must surely rethink the prevalent history of the discipline, which sees each of these schools of jurisprudence as being significantly different from the others. My argument is that while these schools are distinctive, what is astonishingly disturbing is that they all have served to reproduce colonial relations. It is in this sense that I argue that, far from being ancillary to the discipline, colonialism is central to its very constitution. Formal sovereignty is extraordinarily important, and provides Third-World states with a vital means of protecting and furthering their interests. But the enduring vulnerabilities created by the processes by which non-European states acquired sovereignty pose an ongoing challenge, not only to the peoples of the Third World, but also to international law itself.