

# Imperialism, Colonialism and International Law

James Gathii<sup>1</sup>

“[The removal of the maasai from their land] may have been unjust, politic, beneficial or injurious, taken as a whole, to those whose interests are affected. [However, [t]hese are considerations into which this court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal court of justice can afford a remedy.”<sup>2</sup>

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<sup>1</sup> © Associate Professor, Albany Law School. An earlier version of this paper was presented as a keynote address in a conference on International Law and Imperialism at the Birkbeck Law School at the University of London in May 2004. This paper was also presented at the Feminist and Legal Theory Project Workshop on ‘Across-Legal-Cultures-Post-Colonialism,’ at Emory University Law School on September 10, 2004.

<sup>2</sup> *Ole Njogo v. A.G.* 5 E. Afr. L. Protectorate Rep., Part II 1914, 70 at 80.

## **Introduction**

This paper explores the relationship between imperialism and colonialism in nineteenth century international law. I define imperialism, like late nineteenth century theorists, as the spread and expansion of industrial and commercial capitalism. By colonialism, I mean the territorial annexation and occupation of non-European territories by European states. While imperialism was reflected in nineteenth century English rules of property, tort and contract, colonialism was reflected in nineteenth century rules of acquisition of title to territory. My exploration of the relationship between imperialism and colonialism, has two objectives. First, to show that international legal doctrines surrounding British protectorates of the nineteenth century did not distinguish between imperialism as represented by the introduction of rules and practices of English private and business law into the colonies, on the one hand, and colonialism particularly as exemplified by rules of acquisition of title to territory, on the other. Second, to show that the imposition of colonial rule went hand in hand with the imposition of English rules of property, tort and contract which, in turn facilitated the expansion of industrial and commercial capitalism in the East African Protectorate. Thus there was a close relationship between rules of public international law in and those of English rules of property, tort and contract in nineteenth century protectorate jurisprudence. To achieve these objectives, I use the East African protectorate as the springboard for my discussion.

The relationship between imperialism and colonialism results in three major conclusions. First, this relationship demonstrates that international legal rules of British protectorates were internally inconsistent between their claims of liberty, on the one hand, and their repressive and illiberal consequences for colonial peoples, on the other.

Second, this inconsistency between the promise of liberty and the reality of colonial illiberalism created room for resistance and reconstitution of colonial territorial acquisition by colonized peoples. I illustrate this theme of resistance and efforts at challenging the illiberalism of colonialism using a High Court and East African Court of Appeal case brought by the Maasai of the East African Protectorate against the British government. My discussion of this case shows that this resistance was in part mediated by invoking rules of English private law such as contract, property and tort as well rules of public international law.

Finally, I show that the international law of protectorates produced a heterogeneous legal milieu of the modern and the traditional that was no less productive of hierarchical structures of colonialism than those already embedded in the national laws of colonizing and imperial powers.

I proceed as follows: I begin by tracing the distinctions made in the literature between formal and informal empire and by showing how the protectorate form of British colonialism collapsed this distinction. I then proceed to show how the East African protectorate government transmogrified Maasai peasant and property relations and how the Maasai sought to resist these incursions in British courts. I proceed to trace how the contestation and resistance of the expropriation of Maasai land in British courts is rarified by a highly formalist and positivist jurisprudence that: argues that the Crown's prerogatives are limitable by moral principles but not by judicial review; disaggregates territorial from suspended sovereignty; and that distinguishes between power and jurisdiction, on the hand, and territorial sovereignty, on the other. Before concluding, I trace the continuities between the jurisprudence of the British courts in the Maasai case

with analogous contemporary jurisprudence – including that produced by the holding of detainees in Guantanamo Bay.

### **Theoretical Background: Imperialism and Colonialism**

Classical theories of imperialism -- especially those of European theorists of the nineteenth and early twentieth centuries -- were never really centrally concerned with the question of colonialism except as a necessary but peripheral appendage of imperial expansion.<sup>3</sup> While my essay will focus on imperialism and colonialism, the term “imperialism” has over the last century had many a meaning and its uses in specific historical contexts have been varied. It has referred to “despotic methods of government,” the search for investment opportunities and markets for surplus capital and productive capacity, “empire building,” “employing the power of the armed state to secure economic advantages in the world at large”<sup>4</sup> and expansion of capitalism which refers to industrialization and commercial development in the periphery of empire as opposed to territorial annexations or empire building.<sup>5</sup>

Thus I hesitate to present an encompassing definition of imperialism. Instead, I will be addressing imperialisms.<sup>6</sup> The central themes tying these imperialisms together in the colonial context are the different modes of “dominating, restructuring and having authority”<sup>7</sup> over colonial peoples both by European and other invaders as well as by these outsiders in conjunction with local ruling elites. One important dimension of the imperialisms I discuss is that the relations between colonial peoples and their dominators

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<sup>3</sup> NORMAN ETHERINGTON, *THEORIES OF IMPERIALISM, WAR, CONQUEST AND CAPITAL*, at v (1984).

<sup>4</sup> *Id.* at 4.

<sup>5</sup> John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, *ECON. HIST. REV.*, 2d ser. VI, 1-15.

<sup>6</sup> ETHERINGTON, *supra* note 3, at 280 (noting after extensively reviewing a variety of theories of imperialism that the word imperialism has many meanings).

<sup>7</sup> These terms I have borrowed from EDWARD SAID, *ORIENTALISM* 3 (1978).

or overlords cannot be understood outside the prism of power, domination, hegemony and control. Thus the culture, economy, politics and entire complex of ideas of the colonial relation are seen or regarded in light of the power of the force of these complex of ideas or “more precisely their configurations of power.”<sup>8</sup> Edward Said illuminatingly reminded us why studying imperialism is important when he wrote:

“...to believe that politics in the form of imperialism bears upon the production of literature, scholarship and social theory, and history writing is by no means equivalent to saying that culture is therefore demeaned or a denigrated thing. Quite the contrary: my whole point is to say that we can better understand the persistence and the durability of saturating hegemonic systems like culture when we realize that their internal constraints upon writers and thinkers were *productive*, not unilaterally inhibiting.”<sup>9</sup>

Taking up Said’s challenge, I will examine a number of theories of imperialism. In 1895, the date of the declaration of the East African Protectorate, the British journalist and socialist, H.N. Brailsford argued that the age of imperialism in Britain began.<sup>10</sup> Brailsford’s central thesis was that the British ruling and investing class had built the British empire and were its primary beneficiary. He argued that the British ruling and investing class had achieved this objective through their control of British foreign policy. As a socialist, he argued that the British government should be more transparent and accountable for its foreign policy decisions. For example he argued in favor of confiscating surplus profits of the investing classes as a means of overcoming the imperialist tendencies of the British ruling class.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 14.

<sup>10</sup>It is noteworthy though that by 1820, about a quarter of the world’s population was part of the British empire. See Susan Thorne, *The Conversion of Englishmen and the Conversion of the World Inseparable: Missionary Imperialism and the Language of Class in Early Industrial Britain*, in FREDERICK COOPER & ANN LAURA STOLER, *TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD* 154 (1997).

Brailsford proceeded from the view that imperialism in the late nineteenth century was the quest by owners of capital for outlets for their surplus funds in conjunction with the armed force of the state.<sup>11</sup> He saw imperialism as the expansion of capitalism in the form of industrial and commercial development. Thus, although European governments were scrambling over territorial annexations and empire-building in Africa, this did not constitute imperialism for Brailsford.<sup>12</sup> For him, imperialism in the last part of the nineteenth century was clearly distinguishable from colonialism understood as territorial annexation.

Indeed, among early nineteenth century imperialism theorists, imperialism and colonialism were two different things. For example, Rosa Luxemburg's and Karl Kautsky's work on imperialism was not predicated on the creation of great colonial empires for investment, but rather on the establishment of an informal empire of free trade commercial and investment interests. Luxemburg sought to explain how capitalism expanded as an economic system and, like Hilferding, saw imperialism as the final stage of capitalism.

So far, I have made the claim that imperialism and colonialism were different things. Let me now briefly examine how revolutionary socialists like Lenin regarded imperialism and colonialism and if these revolutionaries espoused doctrines that were different from them. Lenin was critical of both imperialism and colonialism. Yet Lenin supported and in

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<sup>11</sup> ETHERINGTON, *supra* note 3, at 176.

<sup>12</sup> *Id.* It notes that theories of economic imperialism "may mean any of three things: 1) the use of the power of a state beyond its own borders to serve the interests of private profit seekers; or 2) the use of state power to secure real or supposed economic advantages for the state; 3) financial, commercial or industrial operations by foreign-based companies in any part of the world, which tend to limit the ability of the indigenous people to conduct their affairs as they wish." *Id.* at 190.

fact pursued Soviet conquest and justified it as the dictatorship of the proletariat over “backward peoples.”<sup>13</sup> In effect, Lenin’s repression of nationalist movements to establish proletarian dictatorship was no less aggressive than the colonialism of the capitalist countries that revolutionary socialists condemned. What distinguished Lenin from Luxemburg was that Lenin’s goal was to account for and predict the outcomes of capitalist expansion while Luxemburg’s goal was simply to explain how capitalism expanded as an economic system.

*The Formation of the East African Protectorate: The Convergence of Imperialism and Colonialism*

In June, 1895, the British Crown declared the East African Protectorate over what is Kenya today. The immediate reason for the declaration of the protectorate, without consulting its inhabitants, was the inability of the Imperial British East Africa Company to finance the administration of the territory and the refusal of the Crown to finance the operations of the Company. The Protectorate was sold to the British government for 250,000 British Pounds. This ended the Imperial British East Company seven-year trade and commercial monopoly. The directors of the Imperial British East Africa Company decided to sell the Protectorate to the British government to make the company’s commercial and trading ventures profitable since the British government would then assume the task and cost of administering the territory.<sup>14</sup>

The coexistence of imperialism and colonialism in the East African Protectorate is evidenced by the British purchase of both the territory as well as the seven-year trade and

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<sup>13</sup> *Id.* at 193-4.

<sup>14</sup> Mwangi Wa-Githumo, *Land and Nationalism in East Africa: The Impact of Land Expropriation and Land Grievances Upon the Rise and Development of Nationalist Movements in Kenya 1884-1939* 200-04 (1974) (PhD. Dissertation, Faculty of Education, New York University).

commercial monopoly the Imperial British East African Company had enjoyed for the seven previous years. In the conjoining of territorial control and the monopoly over trade and commerce the British declaration of the East African protectorate of 1895 fused the *informal* empire imperialism, which scholars like Luxemburg had already identified as correlated with the growth of capitalism, on the one hand, with the *formal* empire of territorial ownership, that the British were engaging in and that Lenin was actively pursuing, on the other. In the fusion between colonialism and imperialism protectorates collapsed the distinction between imperialism or the expansion of surplus investment capital, on the one hand, from colonialism or the aggressive foreign policies of conquering states in their territorial acquisitions, on the other. Thus as Kautsky argued, imperialism was not the final stage of capitalism as Luxemburg and others had argued. Rather, imperialism's constant drive to expand as the purchase of the East African Protectorate and its trade and commercial monopoly by the British government illustrates was "one of the very conditions of the existence of capitalism."<sup>15</sup>

*Maasai Communalism and British Class Society: Transformation, Resistance and Reconstitution*

The declaration of the East African Protectorate in 1895 was the first stage in the transformation of what we know now as Kenya today into a State based not on kinship authority, but on the domination of non-producing class, the capitalists, over the producers, the wage-laborers. In a sense, contemporary Kenya, where the domination of the capitalists is necessary to safeguard the appropriation of surplus value not so much

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<sup>15</sup> ETHERINGTON, *supra* note 3, at 120.



through force but through “rights of property in the means of production and in the product and by the impersonal operation of the market”,<sup>16</sup> is the State established following the establishment of the East African Protectorate in 1895.<sup>17</sup>

The acquisition of the East African Protectorate by the British and the extension of rules of private property, tort and contract into East Africa in turn interacted with preexisting norms and practices of the African peoples in the protectorate. In this section, I will explore how the communalism of the Maasai in East Africa interacted with the capitalist mode of production that accompanied British colonialism. The extension of colonialism and projection of imperialism into East Africa involved a process of struggle of contradictory interests – in our case and taking a bird’s eye view, the Maasai peasantry, on the one hand, and the British settlers together with the British appointed Maasai “leadership”, backed by the force of empire, on the other.

The Maasai like many of the communities of the East African Protectorate were communal or peasant societies governed largely through kinship ties rather than centralized authority. Colonial and imperial contact introduced new type of relationship - a class society. Unlike a kinship society, a class society has State functionaries that lay a claim on the society’s social surplus. Prior to colonial contact, the Maasai had no such State functionaries.<sup>18</sup> In other words the Maasai did not have an institutionalized system of surplus extraction like in a class society. The intersection of the Maasai peasantry and their “leadership”, on the one hand, and the British settlers on the other, in the crucible of

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<sup>16</sup> *Id.* at 359.

<sup>17</sup> Here I am not asserting a linear progression from pre-colonial Kenya, to protectorate, to colony and finally to state. Rather, each of these are genealogical modes, each displaying its own unique dialectics and imperialisms.

<sup>18</sup> Partha Chatterjee, *More on Modes of Power and the Peasantry*, in *SELECTED SUBALTERN STUDIES* 363 (Ranjit Guha & Gaytri Chakravorty Spivak, eds., 1988). As Partha Chatterjee reminds us, it is theoretically legitimate to distinguish societies that “had recognized offices of authoritative functionaries” “from class society proper because the chiefdoms did not necessarily imply an institutionalized claim on the social surplus based on political domination.” *Id.*

colonial conquest and the bourgeois jurisprudence of British courts produced a dialectic of external domination and resistance as well as new forms of domination essential to the establishment of colonial governance and much later on the post-colonial state.

As we shall see, British colonialism in East Africa became a tragedy for the Maasai peasantry. As such, the imposition of colonial rule over the Maasai and the expropriation of Maasai land met both of the conditions that Robert Brenner identified as unambiguously favoring the supremacy of the interests of capital over those of the peasants in the feudal duel between serfs (peasants) and lords: first, where serfdom (or in our case Maasai peasantry) has been destroyed; and, secondly, where the emergence of the predominance of peasant property is circumvented.<sup>19</sup> Yet while the predominance of Maasai property was circumvented and the Maasai as a community was adversely affected by the expropriation of their lands, capitalist relations did not establish themselves unambiguously – rather there was a continuity of Maasai pastoral practices within the emerging capitalism of the colonial economy.<sup>20</sup> At best the outcome of the encounter between the Maasai and the British settler class was the beginning of a dialectical struggle between two irreconcilable visions: one Maasai and the other British as exported to the East African Protectorate by British settlers.<sup>21</sup> Moreover, this dialectical struggle is complicated by the fact that among the Maasai there emerged a class of leaders whose legitimacy was established by bourgeois forms of legality and without consultation of the Maasai people. Hence, the Maasai cannot and could not be

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<sup>19</sup> Robert Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe*, 70 PAST AND PRESENT, February 1976, at 47.

<sup>20</sup> CITE JOEL ON THE GROUP RANCHES ACT

<sup>21</sup> For these insights, I am indebted to Partha Chatterjee, *More on Modes of Power and the Peasantry*, *supra* note 18, at 366.

understood as a homogenous communal or peasant group as will become clear in discussing the treaties entered into on behalf of the Maasai and the British.

My goal in analyzing the intersection of the communalism of the maasai and the class structure introduced by the colonialism of the British settler community is to open up a space of inquiry by exploring the relationship between imperialism and colonialism. Gaytri Spivak has, for example, written about broadening Foucault's important work that demonstrated the emergence of new forms of power in the procedural techniques of European imperialism in the seventeenth and eighteenth centuries:

“Sometimes it seems as if the very brilliance of Foucault's analysis of the centuries of European imperialism produces a miniature version of that heterogeneous phenomenon: management of space -- but by doctors, development of administrations -- but in asylums, considerations of the periphery – but in terms of the insane, prisoners, and children. The clinic, the asylum, the prison, the university, seem screen -- *allegories that foreclose a reading of imperialism.*”<sup>22</sup>

My project is this broader context of the intersection of colonialism and imperialism; for, as Spivak contemplates, and as Partha Chatterjee reminds us again with reference to limiting analysis of imperialism to “modern” forms and institutions,

[w]hen one looks at regimes of power in the so-called backward countries of the world today, not only does the dominance of the characteristically ‘modern’ modes of exercise of power seem limited and qualified by persistence of older modes, but by the fact of their combination in a particular state formation, it seems to open up at the same time an entirely new range of possibilities for the ruling classes to exercise their domination.<sup>23</sup>

The genealogical and historically aware methodology I am advocating here has the advantage of complexifying simplistic visions about the purity of anti-colonial struggles,

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<sup>22</sup> Gaytri Spivak, *Can the Subaltern Speak?* in *MARXISM AND THE INTERPRETATION OF CULTURE* (C. Nelson & L. Grossberg eds., University of Illinois Press, 1988).

<sup>23</sup> Chatterjee, *supra* note 18, at 390.

which portray non-western societies as classless and as “unanimously and heroically resisting the onslaught of ‘western imperialism.’”<sup>24</sup>

Thus, for example, the establishment of colonial authority figures among the Maasai by the British East African administration did not completely abolish Maasai structures and symbols of authority; rather these western bourgeois forms appropriated Maasai authority institutions and modified it to create the equivalent of a comprador class of Maasai who in turn served to legitimate the expropriation of Maasai land. Thus, far from ending Maasai forms and symbols of authority, the superimposition of colonial administration transmogrified them with a view to make them meet the demands of appropriating Maasai land.<sup>25</sup>

#### *The Transmogrification of Maasai Peasantry and their Property Relations*

Prior to British contact the Maasai were a communal subsistence society. They were communal in the sense that they lived in large groups or clans that collectively owned large herds of cattle, and they collectively grazed throughout the then unfenced Rift Valley region of present day Kenya, moving from point to point depending on where the best pastures could be found. They were largely subsistence in the sense that their herds were held for their cultural value to the Maasai, especially in ritual sacrifice and for food rather than for sale.

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<sup>24</sup> ETHERINGTON, *supra* note 3, at 272 (further arguing that such a methodology has the advantage of non-western societies had “ruling classes, exploited peasantries, subjugated females and slaves. [And that by] exploding the myths of merrie Africa, spiritual Asia and other Rousseauistic fantasies [this methodology has] made cardboard ‘victims of imperialism’ into human beings of flesh and blood. [This methodology also] implicitly challenge[s] the self-serving propaganda of ruling elites in many parts of the world who find it highly convenient to attribute all the ills of their people to the legacy of colonialism,”). *Id.* at 272.

<sup>25</sup> This analysis is largely inspired by Chatterjee, *supra* note 18, at 388-9.

A major organizing principle of pre-colonial Maasai was defense from external threats, particularly those of neighboring communities like the Kikuyu who were raiding them for their cattle, and also to keep themselves and their cattle from destroying the neighboring Kikuyu farmlands and settled homesteads. In fact the Maasai were in the late nineteenth century famed as one of the fiercest warring community in the East African region. They used their permanent warring force not only to defend themselves but also to ensure their uninhibited access to grazing their cattle in the East African region. However, authority among the Maasai was based on kinship and religious beliefs and not simply on domination. Maasai leaders were religious figureheads known as *laibons*.

The contact between the Maasai and the British in the period prior to the annexation of the British East African Protectorate in 1895 occurred at a time when the Maasai were experiencing declining fortunes. First, there was a feud between two claimants to become the next religious leader or *Laibon*. Second, the Maasai were going through an environmental and epidemic disaster that resulted in the sickness and death of millions of their valued cattle. Third, the emerging British administration in the East African Protectorate, which was heavily biased in favor of settler interests in land, hung like the sword of Damocles over Maasai land.

In the absence of these predicaments, the Maasai were otherwise known to have had a relatively higher level of resistance to the imposition of colonial rule than neighboring communities such as the Kikuyu for at least two main reasons. First, Maasai “livestock served as a barrier against colonial control”<sup>26</sup> since the Maasai were not

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<sup>26</sup> ROBERT R. TIGNOR, THE COLONIAL TRANSFORMATION OF KENYA: THE KAMBA, THE KIKUYU AND MAASAI FROM 1900

seeking to sell their labor to European farms or in the emerging colonial administration for their livelihood. In addition, Maasai warriors remained away from missionary and colonial schools and wage laboring on European settler farms since they could sell off their cattle to raise colonial taxes.<sup>27</sup> By contrast, the Kikuyu, a neighboring community to the Maasai, used their central geographical location in relation to the colonial settlements not only to engage in commercialized small-scale farming and wage laboring on European farms to pay taxes, but they also attended colonial, missionary and ultimately Kikuyu established schools. The second reason accounting for a higher ability to resist British colonial rule was that they were unlike the Kikuyu, who did not have “powerful and cooperative colonial chiefs...who were able to create rudimentary instruments of local government, mainly composed of a large number of young followers who did their bidding and that of the British overlords.”<sup>28</sup>

Let us now briefly examine how the aforementioned predicaments made the Maasai, an otherwise highly resistant society to British colonization, amenable to colonization.

At the end of the nineteenth and at the beginning of the twentieth century, the various Maasai communities suffered a series of crippling internal wars over the vast seasonal grazing lands of the present day Kenyan Rift Valley and natural disasters ranging from droughts and famine to a small-pox epidemic and locust infestations.<sup>29</sup> These problems,

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to 1939 7-8(1976). Further recorded epidemics that exacerbated these calamities included jiggers and rinderpest. *Id.*

<sup>27</sup> G.R. Stanford, *An Administrative and Political History of the Masai Reserve*, (report prepared for the East African Protectorate Government).

<sup>28</sup> TIGNOR, *supra* note 26, at 7. Tignor also notes that the Maasai “looked upon their flocks as a safeguard against the distasteful undertakings of what they saw the Kikuyu engaged in.” *Id.* at 9.

<sup>29</sup> John Lonsdale, *The Conquest of the State of Kenya, 1895-1905*, in BRUCE BERMAN & JOHN LONSDALE, UNHAPPY VALLEY: CONFLICT IN KENYA AND AFRICA, BOOK ONE: STATE AND CLASS 22-5.

as we shall see below, were some of the immediate reasons accounting for the Maasai's softening attitude towards intrusion of British settlers into their lands in the Rift Valley.

At the same time, a majority of white settlers and the Protectorate government looked down upon the Maasai as a backward community. This attitude together with increasing settler demand for land laid a basis for seizures of Maasai land for settler occupation. A protectorate government publication reflected this attitude toward the Maasai in the following terms:

“their conservatism has been so great, and their subservience to antiquated tribal custom and tradition has been so powerful that it has proved as yet impossible to alter and renovate their ideas.”<sup>30</sup>

This attitude laid an important basis for justifying the forced restriction of the Maasai from their grazing land following increased white settler pressure on the protectorate government to take such action.

While there was almost no doubt that the civilizing mission of displacing the Maasai's antiquated customs was justified on invariable goodness of the “blessings of science and technology, of literacy and education, of peaceful communities and respectable education,” some white colonists were worried by the cruel injustice that accompanied this mission.<sup>31</sup> Yet when it came to the appropriation of Maasai land for white settler and commercial interests, this opposition – including that of the Secretary of State for

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<sup>30</sup>Stanford, *supra* note 27, at 1. At another place in the report, the report noted that, “the masai, who number all told about 43,000 souls, possess capital to an average amount of rather more than one hundred and ten British pounds per head. They are thus in all probability, the richest uncivilized tribe in the world.” *Id.* at 3.

<sup>31</sup> George Shepperson, *Introduction to the Fourth Edition*, NORMAN LEYS, KENYA, at vii (1973). Another group of colonists detested the “destruction by an aggressive, European imperialism, under the banner of ‘progress’, of the noble savagery of the old Africa, as it seemed to them, its communal virtues, its simple but practical self sufficiency, and its invigorating closeness to nature.” *Id.*

Colonies - was muzzled notwithstanding opposition from the secretary of state.<sup>32</sup>

Although it is disputed whether the British colonial government was responsible for undermining the ability of the different East African protectorate communities to organize the means of “survival, offence and defense”<sup>33</sup> against the natural disasters facing these communities at the end of the nineteenth century, John Lonsdale has argued that “it is scarcely open to doubt that many more of the poor would have died had they not been able to find new refuge in the civil and military labor markets of conquest.”<sup>34</sup>

*Creating Consent: The Invention of a Paramount Maasai Chief and the 1904 Maasai Agreement*

Capitalizing on the dispute between two Maasai brothers on the ascendancy of a new Maasai spiritual leader, or *laibon*, the opportunistic interests of some white settler farmer and commercial interests coincided with Lenana’s desire to ascend his father’s *laibonship*. While within the Maasai a *laibon* was only a spiritual leader, the expediency of the protectorate government was to remake him to serve its interests. By appointing him a paramount chief, Lenana was on the path to being a more a reliable ally whose authority the protectorate government could use to gain control over the feared Maasai warriors and the fertile Maasai grazing land in the Rift Valley.<sup>35</sup> From around 1893, the protectorate government sided with the cooperative Lenana against his brother

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 25.

<sup>34</sup> *Id.*

<sup>35</sup>According to Stanford, *supra* note 27, at 9. “From at least 1850 to the early eighties, the patrol Masai were a formidable power in East Africa. They successfully asserted themselves against the Arab slave-traders, took tribute from all who passed through their country, and treated other races, whether African or not, with the greatest arrogance.” *Id.* at 9.



Sendeyu.<sup>36</sup> It was Lenana who finally agreed to have the Maasai vacate their rich grazing land in the Rift Valley under the 1904 Maasai agreement in return for British recognition that he was the “leader” of the Maasai. Under the 1904 agreement, Lenana, together with other signatories on behalf of the Maasai, who did not participate in writing the agreement and who did not read the agreement itself since they could not read,<sup>37</sup> agreed that the Maasai could not be moved from the Laikipia reserve “as long as the maasai shall exist as race.” However, in 1911 the British administration in Kenya under enormous pressure from settlers sought to move the Maasai again, clearly in contravention of the 1904 agreement. As we shall see, this second agreement was the immediate reason for a judicial challenge – this case constituted resistance towards the territorial dispossession of the Maasai.

Two familiar techniques of colonial governance were being deployed in the relations between Lenana and the protectorate government: First, there was the creation of “traditional” authority to legitimize British colonial governance through Lenana’s enthronement as the leader of the Maasai<sup>38</sup>; and, second, the subsequent deployment of Maasai warriors in British punitive and cattle stock raiding operations on the authority of Lenana not only met the protectorate’s mission of military conquest, but also authorized

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<sup>36</sup>As early as 1893 Lenana was approached by the British to forbid maasai warrior raids into the neighboring German Tanganyika mandate against Lenana’s rival brother, Sendeyu. Under the terms of the Berlin treaty, the British were responsible for stopping encroachment of a rival power’s territory. This worked out quite well for both Lenana and the protectorate government: Since the government did not have the military force to stop the raids, Lenana could be relied on to forbid the raids, while the British in return promised to help Lenana military help if Sendeyo crossed into British territory. Richard Waller, *The Maasai and the British 1895-1905: The Origins of an Alliance*, J. AFR HIST, xvii 4 (1976) pp 529-553 at 545.

<sup>37</sup> According to GIDEON S. WERE & D.A. WILSON, EAST AFRICAN THROUGH A THOUSAND YEARS 165: “The maasai and their leaders had no important say in the transaction, as the only alternative to a voluntary move was forceful eviction. Thus there was no ‘agreement’ on the part of the maasai to move. Moreover, their leaders neither participated in the drafting of the ‘Agreement’ nor understood its full implications, couched, as it was, in a strange legal phraseology,” *Id.* at 165.

<sup>38</sup> MARTIN CHANOCK & SALLY FOLK MOORE, STANFORD HISTORIAN: MAHMOOD MAMDANI.

the very violence the colonial authorities had deplored of the Maasai.<sup>39</sup>

Let us examine both briefly. Lenana has been described as “the fulcrum upon which the levers of British policy rested.”<sup>40</sup> When the protectorate government appointed Lenana an administrative chief of the Maasai, it was unaware that a *laibon* was a ritual expert and not a political leader.<sup>41</sup> Paradoxically, Lenana’s ascendancy as the paramount chief of the Maasai resulted in his loss of authority, especially among the Maasai warriors upon whom the British had relied to conquer recalcitrant “tribes” and accumulate booty. Lenana’s inability to bring the warriors under his control also distanced him from the British. Eventually, when the British reorganized protectorate forces in 1902, these forces became an alternative to Lenana’s Maasai warriors. Consequently, once the protectorate government had used what they perceived as the “savage force” of the Maasai to establish themselves over East African Protectorate communities, they were in the pretext of “civilizing” the “barbaric violence” of Maasai warriors, merely sanctioning the same violence based on an exercise of legitimate or civil violence based on law and reason by establishing a protectorate force.<sup>42</sup>

Paradoxically although he was now a paramount Chief Lenana’s authority was

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<sup>39</sup> See Lonsdale, *supra* note 29.

<sup>40</sup> Waller, *supra* note 36, at 540.

<sup>41</sup> *Id.* at 542. In 1901, Lenana’s status was elevated into a ‘salaried status’ with a monthly allowance of six British pounds. *Id.* at 543.

<sup>42</sup> Several measures were tried by the protectorate government to stop maasai warriors from their “barbarous acts being performed under our [British] flag.” Waller, *supra* note 36, at 549. These measures included the promulgation of a strict code of conduct for punitive expeditions, *Id.* at 549-50. For a similar though not parallel experience among the indigenous communities of Papua New Guinea and Australian colonialists, see Joseph Pugliese, *Cartographies of Violence: Heterotopias and the Barbarism of Western Law*, 7 AUSTL FEMINIST L. J., 23-5 (1996).

undermined by his collaboration with the British protectorate government.<sup>43</sup> Consequently, the British became the ‘dominant partners in the alliance’. Maasai interests were thereafter relegated to the side.<sup>44</sup> Colonial governance created Lenana, precisely to undermine his community and gain control of it. There can be no better way of establishing how well this claim fits Lenana’s fate and that of the Maasai than to examine the adjudication surrounding the Maasai agreements of 1904 and 1911 in the Maasai cases.

The relationship between the various Maasai communities and their cattle and the British as reflected by these two Agreements was based on the colonizing power, deception and condescension of British colonial interests. Hence, Richard Waller has noted that while the 1904 and 1911 agreements emphasized the “special status” of Maasai-British relations in the East African protectorate, the agreements “in fact marked the beginning of a long retreat from involvement with the colonial power and the replacement of a highly flexible and innovatory response to the advent of colonial rule by a determination to keep their society intact, which was both rigid and deeply suspicious of further innovation.”<sup>45</sup>

(49 words)

### *Formal and Informal Empire in the East African Protectorate and the Maasai Case*

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<sup>43</sup> Terence Ranger, *The Invention of Tradition in Colonial Africa*, in *THE INVENTION ON TRADITION* 236 (Eric Hobsbawm & Terrence Ranger eds., 1994) According to Terrence Ranger, “The colonial manipulation of monarchy and indeed the whole process of traditional inventiveness, having served a good deal of practical purpose, eventually came to be counterproductive [for the Maasai].” *Id.* at 236.

<sup>44</sup> Waller, *supra* note 36, at 549. This was the process of turning the savage into a soldier, *see* Ranger, *supra* note 43, at 234.

<sup>45</sup> *See* Waller, *supra* note 36, at 529.

There are at least two imperialisms in Maasai/British relations in the East African Protectorate. The first was the expanding form of *capitalism* into East Africa, or the informal empire of trade and commerce. The second was, of course, *territorial* acquisition of East Africa to become part of the formal British empire.

I will first address the interplay between the informal imperialism of expanding capitalism and formal empires of colonial territorial control in the East African Protectorate. As noted above in Part \_\_, the Imperial British East African Company justified its interest in this region on the premise that legitimate commerce or trade was the best cure for slave trade. Thus the Company's objectives, and subsequently those of the British administration after 1895, were justified by the humanitarian objective of supplanting the vibrant slave trade that was primarily headquartered off the East African coast. To do this, the protectorate administration argued in favor of cutting links with the rich financiers and owners of the slave routes and caravans off the East African coast, who were mostly Swahili and Arab. The protectorate government argued that would instead help establish agricultural plantations and ranching farms for European settlers funded not by the slave trade financiers, but by flows of capital from the British government and private sources in Europe.

Together with the introduction of rules of private property, tort and contract, these flows of capital in turn helped to consolidate the establishment of an informal empire of trade and commerce in the protectorate. Some critics have argued that the sources of capital from Britain were too small compared to the expenditure necessary to establish colonial administration and, therefore, that there could not have been economic imperialism in

East Africa in the sense that Luxemburg, Hobson and others had argued.<sup>46</sup> However, such an analysis ignores the various forms and ways in which colonial possessions became indispensable to British capital and industry for their growth and development over many decades, particularly as protected sources of cheap raw materials like cotton. In addition, capital flows to these colonial possessions generated enormous linkages of political alliances that were indispensable to those involved on both ends of the relationship, which in turn sustained the continued commercial and industrial links between the core and the periphery.<sup>47</sup> Thus, as Richard D. Wolf has convincingly argued, merely focusing on economic aggregates to discount the case for economic imperialism without specifics as to the underlying historically developed economic structures and patterns and investment<sup>48</sup> -- and I may add their legal forms-- is to miss a big part of the picture of British imperialism in East Africa.

Having demonstrated the relationship between imperialism as the expanding capitalism of empire and colonial territorial occupation, I will now proceed to discuss how rules of international law mediated the conflict between the Maasai's claim of a British breach of contract claim, and the British government's defense of its decision to move the Maasai away from their land inconsistently with their promise in 1904 not move them again. To do so, I will begin by briefly discussing the institution of a British protectorate as this was the international legal institution that played the most crucial role in mediating the conflict between the Maasai and the British.

## **Part II**

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<sup>46</sup> D.K. Fieldhouse, *Economics and Empire: 1830-1914*, 1976

<sup>47</sup> See Walter Rodney, *How Europe Underdeveloped Africa*, 1973; Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism*, 1965

<sup>48</sup> RICHARD D. WOLFF, *THE ECONOMICS OF COLONIALISM: BRITAIN AND KENYA, 1870-1930* (1974).

## **The Status of Protectorates Under Nineteenth Century International Law**

As alluded to earlier, in 1895 the British government declared East Africa a protectorate. Protectorates were a very unique form of empire. They were an interlude between full annexation and the pre-colonial status. Scholars of international law like H.E. Hall have argued that protectorates were a mode of avoiding assuming financial burden for colonial possessions.<sup>49</sup> The East African Protectorate lasted for twenty-five years – 1895-1920. In 1920, Britain acquired full power over the whole country by declaring it a colony.<sup>50</sup> However, the fact that East Africa was not fully incorporated into the British empire between 1895-1920 did not hinder the protecting administration from opening up the country to British settler occupation and controlling its inhabitants fully as if it were a full colony. In fact, many observers have noted that protectorates were governed as colonies – which were, according to the logic of the Crown, the best example of territory within the dominions of the Crown.<sup>51</sup>

Thus, while in the theory of British protectorates East Africa was a foreign country outside the dominions of the British government, in practice and contrary to the East African Court of Appeal decision in *Ole Njogo-v-AG*,<sup>52</sup> (hereinafter the Maasai case(s)), the East African protectorate was really a part of the British empire as much as it was during the subsequent colony period. The effect of the holding in the *Ole Njogo* case is that although East Africa was a foreign country outside the dominions of the Crown, the Crown or its representatives had unlimited powers in the protectorate.

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<sup>49</sup> H.E. HALL, INTERNATIONAL LAW 27.

<sup>50</sup> YP GHAI & JPWB MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT 20 (Nairobi: Oxford University Press, 1970).

<sup>51</sup> C JUMA & J.B. OJWANG, IN LAND WE TRUST 30.

<sup>52</sup> *Ole Njogo, et. al v. Attorney General of the EA Protectorate* (1914) 5 EALR 14.

Another paradoxical aspect of this case is that for the Maasai to prevail, they argued that they did not have sovereignty since the British government was exercising full criminal, civil, legislative, executive and judicial functions in the protectorate, and that it in fact had complete control and jurisdiction. Thus, the Maasai claimed that they, like other British subjects who were under its complete control and jurisdiction, could bring suit to enforce the 1904 agreement under which the Maasai were relocated to a reserve from where the British promised not to remove them “as long as they shall exist as a race.”<sup>53</sup>

By contrast, on behalf of the British Crown, it was argued that the Maasai were sovereign since a protectorate was outside the dominions of the Crown; and, since the Maasai resided in a foreign country, they were sovereign by virtue of having territorial sovereignty and had, as such, validly entered into the 1904 treaty. The paradox here is that it was the Maasai who were arguing they were not sovereign and the British were arguing that the Maasai were sovereign, although in reality the British government was both *de jure*<sup>54</sup> and *de facto*<sup>55</sup> exercising its full plenary authority as of the protectorate was a colony.

The Attorney General for the British government was, in effect, arguing in favor of a fictional sovereignty for the Maasai by conveniently ignoring the fact that the Maasai were a fully administered tribe of the Crown. To advance this theory of fictional sovereignty successfully,<sup>56</sup> the Attorney General made rigorously formalist and strictly positivist arguments seeking the court to recognize the East African Protectorate not for

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<sup>53</sup> *Id.*

<sup>54</sup> By virtue of the Foreign Jurisdiction Act.

<sup>55</sup> By virtue of Crown’s actual control of the protectorate.

<sup>56</sup> The Court of Appeal for East indeed argued, “[a] declaration of a Protectorate in itself has no such effect, [making the maasai British subjects], as in theory such a declaration presupposes the existence of both a protecting and protected states and the continuance in the latter of some sovereignty” *Ol le Njogo v. A.G.*, *supra* note 2, at 91(emphasis added).

what it actually was, but simply to accept the label of a protectorate being a foreign country.

The Maasai, by contrast, made anti-positivist arguments to demonstrate that the positivist arguments advanced on behalf of the Crown were spurious at best. For example, the Maasai argued that since an East African Legislative Council had been established, it would not have been conceivable that the Maasai had any vestige of sovereignty left.<sup>57</sup> In addition, it is plausible to argue that British settlement over Maasailand that had begun occurring before the 1904 Agreement constituted a mode of acquisition of territory by the Crown.<sup>58</sup> Thus, as the Maasai argued, they were not an independent state capable of entering into treaties.<sup>59</sup> Indeed, suggesting that the Maasai were sovereign was to overlook the fact that Lenana, designated the Chief Laibon by the British, and all the other representatives who supposedly signed the 1904 treaty on behalf of the Maasai were all chosen by the East African commissioner.<sup>60</sup>

The East African Court of Appeals disagreed with the assertions that the Maasai were subjects of the British empire and instead endorsed the arguments made on behalf of the British crown holding that the Maasai had validly entered into the agreement of 1904 since they had retained sovereignty to sign a treaty with the British government. This holding that the Maasai retained sovereignty to enter into a treaty, although they were a protected group of the British government, was held sufficient to overcome the argument that the Maasai had entered into a civil contract in relation to land cognizable in a British

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<sup>57</sup> Ole Njogo v. A.G., *supra* note 2, at 81.

<sup>58</sup> Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, L. & HIS. REV. 439, 472 (2003). Note Morris Carter C.J. in the East African Court of Appeals judgment observed that "[i]t has not been argued before us that East Africa has been acquired by settlement by His Majesty, nor has the Court been asked to take any evidence upon this point." *Ole Njogo v. A.G.*, *supra* note 2, at 89.

<sup>59</sup> Ole Njogo v. A.G., *supra* note 2, at 80.

<sup>60</sup> *Id.* at 77.



court. In effect, in *Ole-Njogo*, although the British government's jurisdiction in theory was limited since Kenya was a protectorate and therefore not part of the British empire like a colony, the Court nevertheless immunized the British government's conduct from judicial challenge.

By finding that the agreements were treaties, the court effectively deprived the Maasai of founding their legal claims in equity or either in contract or tort. Thus the argument on behalf of the Maasai that the British government failed its obligations as trustee to uphold the commitments it made to the Maasai in the 1904 Agreement not to move them from the Laikipia Reserve<sup>61</sup> failed when both the High Court and Court of Appeal held them to be treaties and no action could lie against them. Similarly, injunctive relief preventing the implementation of the 1911 Agreement for being in violation of the 1904 Agreement was dismissed as "it would in its crudest form be an injunction to officers of the Government to prevent them from carrying out an act of State."<sup>62</sup> The action in contract to enforce the 1904 Agreement against a move from the Laikipia Reserve<sup>63</sup> and the action in tort seeking damages resulting from the loss of cattle and failing to provide a road as agreed in the 1904 Agreement were all held to constitute acts done under a treaty and as such were acts of state against which the court could not entertain challenges surrounding their validity or "even any circumstance impinging on the capacity of its [the treaty's] signatories."<sup>64</sup> Not even Lenana, the British appointed Chief Laibon of the Maasai, could bring such a suit, the courts held.<sup>65</sup>

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<sup>61</sup> *Id.* at 79.

<sup>62</sup> *Id.* at 80.

<sup>63</sup> *Id.* at 79.

<sup>64</sup> *Id.* at 78-9.

<sup>65</sup> *Id.* at 78-9.

*Contestation and Resistance in the Empire's Courts and with the Laws of the Empire*

By going to the courts of the British Empire for redress, the Maasai were using a mode of resistance and contestation that had been successful on behalf of the Scots in the landmark *Calvin* case.<sup>66</sup> The Maasai also relied on and from case law, particularly from India and New Zealand,<sup>67</sup> all which had in a variety of ways overcome the jurisdictional bar of both the act of state doctrine or the claim that certain British possessions such as the British East African Protectorate were foreign countries over British courts had no jurisdiction.

From the Indian cases, the Maasai argued the principle that where courts had jurisdiction, the British government could not make treaties - only agreements with its subjects.<sup>68</sup> From the *Nireaha* case from New Zealand, the Maasai argued the principle that the 1904 agreement was an agreement as to land tenure under which the Maasai obtained legal rights enforceable in British courts.<sup>69</sup> Further, pursuant to *Calvin's* case, which I will discuss further below, the Maasai argued that they were not aliens in protectorate courts and further argued that the question of whether the Maasai were British subjects was irrelevant to their entitlement to a remedy in protectorate courts.<sup>70</sup>

By clothing resistance in the garb of contestations from prior encounters with the British Empire, the Maasai lawyers were joining a long tradition of seeking to hold the exercise of British colonial authority accountable by resorting to judicial review. In bringing the case, the Maasai were arguing that the British government's conduct within the

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<sup>66</sup> *Id.* at 81.

<sup>67</sup> *Id.* at 81.

<sup>68</sup> *Id.* at 81.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

protectorate should be guided and reviewed by the same rules of governance applicable between it and its citizens within Britain. Most simply put, the Maasai case was predicated on the view that British colonial governance ought to be exercisable only in accordance with the law<sup>71</sup>, precisely because, besides the powers it was granted by the legislature, the Crown did not have any arbitrary power left,<sup>72</sup> and further that if the courts ousted themselves of jurisdiction to adjudicate the case, that would constitute an arbitrary act.<sup>73</sup>

But in borrowing from precedents seeking to govern its colonial authority the Maasai had to overcome more than the fact that the East African Protectorate was outside the territory of the British Empire. Within the jurisprudence of the British empire, the Maasai were aliens in more senses than the fact that their territory was outside the territorial possessions of the Crown. This is because since Calvin's Case in 1602, the bond between the King or Queen, on the one hand, and his or her subjects on the other, was birth within the territory of the Crown by parents owing allegiance to the Crown.<sup>74</sup> By being born in the realm, a subject was liable to burdens to the public imposed by the Crown and as such a subject was entitled to access to the Crown's courts and to rights to land.<sup>75</sup>

Calvin's Case laid down the feudal logic that birthright was the absolute precondition for enjoying the privilege of litigation and with it a remedy from the Crown's courts. The Maasai not only challenged this feudal logic but also sought to align with it. First, the Maasai challenged this feudal logic by arguing they were members of the realm and not

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<sup>71</sup> *Id.* at 80.

<sup>72</sup> *Id.* at 87.

<sup>73</sup> *Id.* at 82.

<sup>74</sup> Calvin's Case, State Trials, 2:655, 77 Eng. Rep., at 408.

<sup>75</sup> Hulsebosch, *supra* note 57, at 456.

outsiders to it,<sup>76</sup> both by birth in the realm and also because of the Crown's control and jurisdiction over the East African protectorate.<sup>77</sup> Second, by denying they were sovereign, the Maasai sought to perfectly align themselves to the feudal logic of Calvin's case since being within the realm meant you owed allegiance to the Crown and that as a society you not sovereign. To demonstrate that they owed allegiance to the Crown, they argued that they could be charged for treason under protectorate laws.

The fact that the Maasai had what seemed to be compelling arguments consistent with the feudal logic they were using to advance their case against the Crown and the fact that they nevertheless failed is significant but perhaps not surprising. It is significant because the Court found that the Crown owed no remedy to the Maasai notwithstanding that the Crown had complete jurisdiction and control over the East African Protectorate. This outcome was therefore consistent with the view that although the Crown had such complete jurisdiction over and within the protectorate, the Crown's courts did not. This result is perhaps unsurprising because it was not the first time that the Crown has prevailed in arguing the scope of its Courts did not reach outside the Crown's realm. Significantly, international law was necessary to buttress the unavailability of judicial review in a protectorate.

Herein then lies the reason why the Maasai lawyers delined to use prevailing international legal arguments to overcome the objection of the Crown that protectorates were outside the realm and as such that judicial review as a shield against imperial

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<sup>76</sup> Ole Njogo v. A.G. *supra* note 2, at 81. Morrison for the Maasai argues: "This case should be read in the light of Calvin's case, where 'alien' is defined. A Masai is not an alien in the Courts of the Protectorate..." *Id.* Similarly, the court observes: "At the present time [the masai]...say the sovereignty of the Crown in the Protectorate is complete, and just as the Masai were formerly subjects of their chief (Calvin's case), so they are now necessarily subjects of the Government of the Protectorate, if not actually British subjects," *Id.* at 105.

<sup>77</sup> Ole Njogo v. A.G. *supra* note 2 at 80 & 84. Morrison for the masai argued: "The complete exercise of the jurisdiction of the Crown in the Protectorate in fact places the subjects of the Protectorate on the same footing as British subjects." *Id.* at 84.

colonial governance was unavailable. In fact, rather curiously it was the domestic law –embodied in the private law rules of property, contract and tort that seemed to offer better hope for the Maasai than international law.<sup>78</sup>

The fact that international law did not offer much hope for a remedy in favor of the Maasai is explained by the Court as follows:

“Treaties are the subject of international law which is a body of rules applied to the intercourse between civilized states...[But] [i]nternational law touches Protectorates of this kind (Protectorates over uncivilized and semi-civilized peoples)...by one side only. The protected states or communities are not subject to a law of which they never heard, their relations to the protecting state are not therefore determined by International Law...It must, however, I think, be taken to be governed by some rules analogous to international law and to have similar force and effect to that held by a treaty, and must be regarded by Municipal Courts in a similar manner.”<sup>79</sup>

This quote is paradoxical. On the one hand, the Court finds that the Maasai were capable of entering into a treaty, and on the other hand the Court also finds that the relations between the Maasai and the British government could not be governed by rules of international law since the Maasai had never heard of them. One must necessarily ask, if Maasai/British relations could not be governed by international law, how could the Maasai enter into a treaty, which, by definition, is a creature of and is governed by rules of international law? How could international law only be available for the purpose of establishing that the Maasai could enter into a treaty but not for the purpose of establishing if the treaty had been observed in accordance with rules of international law?

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<sup>78</sup> In this respect, I argue against the claim made by L.L. KATO, *THE ACT OF STATE IN A PROTECTORATE* 223 that by giving preference to the domestic law of the U.K. common law courts downplayed the utility of international law in countering the despotic application of the domestic law of the realm over colonial peoples. *Id.* 223. Thus, I agree with U.O. Umozurike who argues: “International law developed by western powers before the 20<sup>th</sup> century served as a buttress for their colonization of African peoples. It connived at the subordination of African dignity to western economic interests. It was basically racist and contrary to the basic norms of law applicable to all mankind.” U.O. Umozurike, *International Law and Colonialism in Africa: A Critique*, 3 E. AFR. L. REV., April 1970 No. 1, 47, 80. See also KATO, at 448.

<sup>79</sup> *Ole Njogo v. A.G.*, *supra* note 2, at 91-2.

According to the East African Court of Appeal, its finding against the Maasai was not based on the fact that the Maasai had no rights but rather its decision was the necessary consequence that anything done by the Crown pursuant to a treaty was an act of state that was un-reviewable in the Crown's courts.<sup>80</sup> Specifically, the East African Court of Appeal noted in agreeing with the court below, "[a]ll that was decided was that treaties had been made with the Maasai, and that they could not be enforced by Municipal Courts, and that acts done by officers of the Government in carrying out these treaties were acts of State and not cognizable by the Courts."<sup>81</sup>

It seems obvious from the foregoing that the findings of the British courts were not simply based on the act of state doctrine or for that matter the fact the protectorates were outside the dominions of the Crown. Rather, the decision was also racist in so far as it proceeded from the view that the Maasai were uncivilized or semi-civilized. Such a view of the Maasai proceeded both from the Court's view of the superiority of British civilization and Maasai backwardness and inferiority. In addition, the unavailability of a remedy in the Crown's courts as a result of conduct flowing from the Crown and its agents was not simply inconsistent with the self proclaimed commitment to the rule of law by the Crown, but also an implicit endorsement of the Crown's otherwise illegal conduct by its courts. The necessary implication of the decision is that the Crown could engage in any conduct howsoever inconsistent with the rule of law in relation to peoples considered uncivilized or semi-civilized residing in a protectorate even if the Crown had complete jurisdiction and control. This attitude implicitly embracing colonial misgovernance by the Crown is not lost on the Court. However, rather than acknowledge

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<sup>80</sup> *Id.* at 96. Morris-Carter C.J. argued "I did not find that the Chief Justice of the East African Protectorate has found that protected native subjects have no rights against the Protectorate Government, or that the Masai and their chiefs are not under the original jurisdiction of the High Court." *Id.* at 96.

<sup>81</sup> *Id.* at 96.

the decision's endorsement of colonial malfeasance, the Court apologetically but quite likely unapologetically observed:

“The idea that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English lawyers. It is made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous...If in the interests of peace and good government it was considered necessary that the maasai should be moved, it was a natural and politic course for the Government to come to an agreement with them with this object in view.”<sup>82</sup>

Clearly from this quote, it did not seem that the court was making any distinction between English law and English culture – the English were civilized and the Maasai were not. As such, the British could really do no wrong, for civilized people are better placed to make decisions over a multitude of semi-barbarous people. Importantly, anything done in the interests of peace and good government, God forbid, could not be inconsistent with the mandate of the enlightened over the unenlightened.<sup>83</sup> In fact, the East African Court of Appeal cited Article 43 of the Berlin Act of 1884 to make the point that a declaration of a protectorate over an uncivilized region came with an obligation to establish a system of authority<sup>84</sup> and such a system of authority over a barbaric and uncivilized people was compelled by the needs of peace, order and good government as required by Article 13 of the Foreign Jurisdiction Act.<sup>85</sup> Here we see a neat overlap of the domestic law of the British Empire and international law insofar as both were cited for approving the proposition that the establishment of a system of governance over a

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<sup>82</sup> *Id.* at 97 (quoting from *Rex v Earl of Crew* 1 Moore 459).

<sup>83</sup> Indeed as Judge Farlow King noted in justifying the agreements notwithstanding their effect on the masai: “a treaty could be entered into with a sovereign power, should such a course be thought desirable. Circumstances pointed in this direction. It was obvious that the Masai, with their roving habits and warlike traditions, were not desirable neighbors for white settlers, and that their presence along the recently constructed railway was hardly consistent with the public interest.” *Id.* at 110.

<sup>84</sup> *Id.* at 92.

<sup>85</sup> *Id.* at 103.

people within a protectorate did not constitute a denial of their territorial sovereignty. I need not emphasize that it is precisely the establishment of such authority that undermines the argument that the Maasai were sovereign as the courts in this case found the Maasai were. The courts in this case were not unaware of this contradiction: they had an answer ready-made, and the next part of this article addresses how the Court's high legal formalism and strict positivism filled in such inconvenient inconsistencies.

### **Part III**

#### **The Courts' High Legal Formalism and Strictly Positivist International Law**

As I noted above, to fully appreciate the legal construction of British East African protectorate as laid down by the Courts in the Maasai case, it is useful to consider how the Courts deployed the following distinctions and dis-aggregations to resolve the tensions and contradictions in their arguments:

- First, by arguing the limitation of the Crown's prerogatives was available only through moral principles or the good will of the Crown, but not by judicial review.
- Second, by making the distinction between *territorial* sovereignty on the one hand from *suspended* sovereignty on the other; and
- Third, by making the distinction between power and jurisdiction on the one hand from territorial dominion on the other.<sup>86</sup>

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<sup>86</sup> *Id.* at 88. Morris-Carter C.J. argued the East African Protectorate had "been annexed so as to become part of Her Majesty's dominion in the sense of power and jurisdiction, but it is not under his dominion in the sense of territorial dominion." *Id.*



In my view, each of these distinctions and dis-aggregations are crucial and in fact are persistent features of legal governance under colonial and imperial structures even in the contemporary period. I will say a little about how each of them facilitated the outcome in the Maasai case and point to overlaps with contemporary cases in my conclusions.

*The Crown's prerogatives are Limitable by Moral Principles or its Good Will but not by Judicial Review.*

Let me begin by saying a few words about the Courts' finding that acts of state or indeed the entire complement of the Crown's prerogatives in a protectorate are not amenable to judicial review and are only limitable at the discretion of the Crown by moral principles. According to the East African Court of Appeal, the moral principles limitation on the Crown's prerogative is based on a number of premises, three of the most important being: First, that in relation to a foreigner, the Crown can do anything and everything without recourse to judicial review, while by contrast the Crown is limited in its powers in relation to its subjects because it has authority over its subjects only as established by the legislature.<sup>87</sup>

Second, the East African Court of Appeals argued that it is "settled law that the King can neither do, nor authorize a wrong."<sup>88</sup> Indeed, it will be remembered that Sir Edward Coke had long before reassured the Crown that the common law courts would not meddle with anything done "beyond the seas."<sup>89</sup> Third, as we have seen already, the courts in the

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<sup>87</sup> *Id.* at 100.

<sup>88</sup> *Id.* at 112.

<sup>89</sup> Hulsebosch, *The Ancient Constitution and the Expanding Empire*, *supra* note 57, at 477 (citing Commons Debates, 1628, 3:487).

Maasai case found that common law courts have no jurisdiction over acts of state.

In light of these justifications against availability of judicial review in favor of the Maasai, the East African Court of Appeal concluded that the only remedy in case like this would be “by way of appeal to the justice of the State which inflicts it.”<sup>90</sup> A treaty to which the Crown was a party in Judge King Farlow’s view only imposed moral obligations on both the Crown and the Maasai!<sup>91</sup> These moral obligations, he like his brethren held, were outside the jurisdiction of the Crown’s courts. According to this logic, it was not really that the Maasai were without a remedy, although they did not have one under the law; rather their remedy lay “upon the sense of justice of the Government in dealing with their claims.”<sup>92</sup>

#### *The Dis-aggregation of Territorial Sovereignty and Suspended Sovereignty*

I have already shown the Crown argued that the Maasai were sovereign because this argument was necessary to establish a basis for declining to provide judicial relief. To credibly argue that the Maasai were sovereign, the Crown had to demonstrate that they (Maasai) had territorial sovereignty or dominion over their territory. Only then would it have been possible to find that the Maasai had entered into a treaty ceding their territory to the British. The major argument advanced to support this proposition was not the facts on the ground to demonstrate effective control but rather the view that the East African Protectorate was a foreign country outside the dominions of the crown. In other words, territorial sovereignty was reduced to a mere technical sovereignty.

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<sup>90</sup> *Ole Njogo v. A.G.*, *supra* note 2, at 113. King Farlow J. cited the words of Parke B. *Id.*

<sup>91</sup> *Id.* at 112.

<sup>92</sup> *Id.* at 113.

It is noteworthy of course that to fortify this conclusion, the courts invoked other justifications. For example, that until and unless there was a formal act of annexation of the East African Protectorate, notwithstanding the Crown's complete jurisdiction and control, the Protectorate remained outside the Crown's dominions.<sup>93</sup>

However, the Courts' finding that the Maasai were sovereign raised the paradox that in actual fact the Maasai did not have effective control over their territory as a sovereign is presumed to have under international law. Indeed the Maasai had given up their territorial sovereignty in both the 1904 and 1911 agreements in addition to the fact that settlers had begun appropriating Maasai territory for themselves with the tacit and at times explicit support of the East African Protectorate government.

To address this anomaly – i.e. the fact that on the ground the Maasai did not have effective control although it was asserted that they were sovereign -- the court invoked the idea that Maasai territorial sovereignty was in suspense during the period of the protectorate “until territorial annexation” took place in 1920.<sup>94</sup> This argument that Maasai sovereignty was in suspense is also attributed to Westlake, a leading international legal expert of such colonial cases.<sup>95</sup> The East African Court of Appeal, presumably to be parsimonious in its finding that the Maasai were sovereign, further argued that the East African Protectorate was a foreign country and that the exercise of a full range of arguably sovereign rights and powers within the Protectorate by the Crown were

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<sup>93</sup> *Id.* at 92.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

“distinguish[able] from territorial sovereignty by however thin a line.”<sup>96</sup>

*The Distinction between Power and Jurisdiction on the one hand, and Territorial Sovereignty, on the other*

Another way of framing the distinction between territorial dominion and suspended sovereignty was the East African Court of Appeal’s distinction between power and jurisdiction exercised by the Crown in the Protectorate on the one hand, from territorial sovereignty on the other. As we have noted above, one of the ways that this distinction was maintained was by the insistence on Maasai territorial sovereignty and especially the fact that it was suspended. Another way in which Maasai territorial sovereignty was insisted on was not so much in its suspension or thinness during the protectorate period but rather in its existence in the pre-protectorate period. Thus, the East African Court of Appeal argued:

“It is at least arguable that this [section 46 of the Native Courts Regulation of 1897 recognizing jurisdiction of tribal chiefs] recognition of jurisdiction pre-existent to and part from jurisdiction conferred by the Order in Council, and is a remnant of sovereignty still remaining in the maasai; if this be so a further reason is furnished for considering that a treaty might be made with the maasai.”<sup>97</sup>

What is really striking about this quote is the quality of the obsessiveness in seeking a basis, whatever basis, for establishing that the Maasai could enter into a treaty with the Crown. This obsessiveness was driven in large measure to establish that there could not be judicial redress for an act of state; for once the agreements were designated treaties, they were automatically clothed in the garb of untouchable acts of state by the Crown’s

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 93.

courts.<sup>98</sup>

Another aspect of this obsessiveness was the trouble the Court took to establish that the powers and various jurisdictional competencies exercised under the authority and instructions of the Crown through the Secretary of State for Colonies<sup>99</sup> did not constitute territorial sovereignty but rather vestiges of sovereignty distinguishable from territorial sovereignty. Again, the East African Court of Appeal:

“Sovereignty can still be retained by a State which has ceded by a treaty part of its territory with full jurisdiction in that part, there would seem to be no difficulty in holding that, where an exercise by a protecting state of the three elements of sovereignty takes place by sufferance [for a cause]: (1), that exercise should not be deemed to carry with it more of the sovereignty than is necessary; (2), it is competent to the protecting State to permit some vestige of sovereignty to remain in the native authority; and (3), the protecting state must be taken to have permitted this, unless and until it has assumed full sovereignty by annexation.”<sup>100</sup>

I think that the most important aspect of the obsession with establishing Maasai sovereignty notwithstanding the Crown’s massive involvement in almost all the Executive, Judicial and Legislative affairs in the East African Protectorate is the finding that the Maasai acquiesced in this involvement, and therefore it could not be understood to constitute a violation or even a usurpation of their [Maasai] sovereignty. What we see here, especially in the creation of Maasai leadership through legislative efforts such as the

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<sup>98</sup> Such acts of high formalism to preclude judicial interventions in the foreign affairs context is not unfamiliar in other contemporary contexts outside the Guantanamo detainee cases. For example, in the U.S. the *parens patriae* doctrine (which allows sovereigns to sue on behalf of their citizens in the courts of another country) has been narrowly re-formulated to apply only to states with the U.S. federal system on the basis that such states have surrendered their separate status and become part of the deferral system and as such could be granted review by the courts. By contrast, foreign states had no such access as they were not part of the federal system, *see Missouri v. Illinois*, 110 U.S. 208, 241 (1901); *Alfred L. Snapp et. al v. Puerto Rico ex rel Barez*, 458 U.S. 592, 609-610 (holding that Puerto Rico could assert *parens patriae* standing and U.S. courts could assume jurisdiction based on principles of federalism – in this case because Puerto Rico directly participated in the federal employment scheme); *Estados Unidos Mexicanos v. Decoster*, 229 F. 3d 332 (1<sup>st</sup> Cir. 2000) (a foreign state cannot obtain jurisdiction in a federal court to assert a quasi-sovereign interest involving civil and labor rights protections of its citizens by a private employer within the U.S.).

<sup>99</sup> *Ole le Njogo v. A.G.*, *supra* note 2, at 77.

<sup>100</sup> *Id.* at 92.

Native Courts Regulation of 1897, are not simply juristic tools that contradicted the facts on the ground, but rather the initial stages in the construction of a type of authority based not kinship and religious belief among the Maasai, but one based on domination. A bourgeois form of the early State that was juridically autonomous but in fact subservient to the interests of empire. It is crucial to note that though the courts were wary of inquiring into the treaties since they constituted acts of state, the East African Court of Appeal in particular went out of its way to observe that the Village Headmen Ordinance<sup>101</sup> and the Native Courts Regulation of 1897 established a basis for selection of persons among the Maasai by the Crown to make treaties with it for the removal of the Maasai people from their land. Thus the act of state doctrine was a crucial device for the court to preclude it from inquiring into whether those appointment by the crown from among the Maasai to enter into a treaty with it could do so on behalf of the Maasai. By declining to enter into such an inquiry with regard to the Village Headmen Ordinance and the Native Courts Regulation, the courts in effect legitimated the establishment of authority based on domination, for how they were selected or if they in fact represented the Maasai people was irrelevant.<sup>102</sup> It was therefore not simply the formalism of appointment to office of chief that was crucial, but rather the effect the appointment had in legitimating colonial authority by establishing status differentiation between the Maasai chiefs as political leaders and the Maasai people as followers, even though there was no consultation with the Maasai people. It is remarkable how status differentiation between leaders and followers by virtue of the superior rank of leaders gives the leader authority to speak on behalf of the people and to make commitments on their behalf

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<sup>101</sup> *Id.* at 94.

<sup>102</sup> According to King Farlow J., "It is also clear that the Crown in making a treaty can select or recognize such persons as it may think fit as representatives to hind the other high contracting party. I see nothing in the Village Headman Ordinance, 1902...to prevent the Government from selecting chiefs or other persons from among the Masai to represent the Masai people." *Id.* at 110.

without consulting them. By acquiescing to the authority of these chiefs, the Court in the Maasai case was legitimating the authority of these chiefs to move the Maasai people from their land once, and then again in contravention of earlier contractual commitments not to do so. The Court was also sanctifying as un-impeachable the authority conferred on these chiefs once dressed up in the bourgeois form.

My argument here is therefore that the juristic techniques of the bourgeois form employed by the courts are not at all bothered by forms of authority that have been established in accordance with bourgeois logic; it is totally irrelevant if such authority had the democratic legitimacy with the Maasai people. The court was simply satisfied by the fact that the Chiefs had been selected under the legislative authority of the East African Protectorate,<sup>103</sup> even if their selection and appointment was inconsistent with the customs of the Maasai people.

As noted earlier in the paper, the designation of these Chiefs by the British in turn established an institutionalized claim on the social surplus based on their political domination of the Maasai. In short, these juristic form of the chieftaincy among others were crucial to the establishment of market relations that favored British settler interests and those Maasai closest to the British at the expense the rest of the Maasai.

I want to re-emphasize as I have argued from the outset, that at best the outcome of the encounter between the Maasai and the British settler class was the beginning of a dialectical struggle between two irreconcilable visions: one maasai and based largely on kinship, the other British as exported to the East African Protectorate by British settlers,

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<sup>103</sup> *Id.* at 110.

and largely I would argue bourgeois and class based. This dialectical struggle was complicated by the fact that among the Maasai there emerged a class of British designated leaders whose legitimacy was established by bourgeois forms of law and state accompanied by state violence. However, this does not in any sense imply that Maasai automatically fell in lock in step with their appointed leadership – they were and are not a homogenous communal or peasant group.

Thus, the declaration of the East African Protectorate in 1895 was only the first stage in the transformation of a pre-colonial largely communal community and its incorporation into the global economy fast on the road towards what we know now as Kenya today -- a State based not on kinship authority, but on the domination of non-producing class, the capitalists, over the producers, the wage-laborers. In a sense, contemporary Kenya, where the domination of the capitalists is necessary to safeguard the appropriation of surplus value not so much through force but through “rights of property in the means of production and in the product and by the impersonal operation of the market,”<sup>104</sup> is the State that was established following the annexation of the East African Protectorate in 1895.<sup>105</sup>

Within this new bourgeois form, the consent of the Maasai became the quintessential hallmark to mediate and respond to the anti-formalist and anti-positivist claim brought by the Maasai that the power and jurisdiction exercised by the Crown in the Protectorate undermined their so-called sovereignty that the Crown argued they had. After all, a declaration of a protectorate under prevailing jurisprudence did not extinguish but rather

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<sup>104</sup> *Id.* at 359.

<sup>105</sup> Here I am not asserting a linear progression from pre-colonial Kenya, to protectorate, to colony and finally to state, rather each of these are genealogical modes each displaying its own unique dialectics and imperialisms.



presupposed the continuation of “some elements of sovereignty” on the Maasai<sup>106</sup> and it was for this reason the Maasai were competent to enter into a treaty with the British. Further, according to the courts the Maasai were “the subjects of their chiefs or local government, whatever form that government may in fact take.”<sup>107</sup>

In addition, the Court fortified its decision by observing that crown had not made a grant of a Constitution to the Maasai and as such this was evidence that the East African Protectorate had not become part of the dominions of the Crown since there had been no establishment of full British constitutional rule.<sup>108</sup> Indeed, while the Maasai harped at their lack of power and jurisdiction, which was being exercised by the Crown in the Protectorate, the Court insisted that territorial sovereignty rather than those powers and jurisdictional mandates of the Crown was the decisive test of who was sovereign. To further establish the case against the Maasai, the Court emphasized that no formal act of annexation by the Crown had taken place to make the East African Protectorate a part of the British empire.<sup>109</sup>

### **The Contemporary Relevance of the Maasai Case**

#### *The Moral Principles Limitation in Analogous the U.S. Cases*

The argument that the Crown’s authority is only limitable by moral rather than judicial review is not new in federal litigation analogous to the Maasai case. This threat can be traced as far back to Justice Marshall’s decision in *Johnson v McIntosh*, where he held

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<sup>106</sup> Ole le Njogo v. A.G., *supra* note 2, at 91.

<sup>107</sup> *Id.* at 90.

<sup>108</sup> *Id.* at 87 & 89.

<sup>109</sup> *Id.* at 88 & 92.

that “mildness, gentleness and moderation, with verbal, and not judicial, proceeding.”<sup>110</sup> Another classic along this line of reasoning is Justice Sutherland’s famous dictum in the U.S. Supreme court case, *Curtiss-Wright*. In this case, Justice Sutherland held that the President’s foreign affairs power, unlike his/her domestic power, is not limited by constraints such as the Bill of Rights – a view that the Supreme Court has recently reiterated.<sup>111</sup>

Similarly, the finding of the East African Court of Appeal that common law courts had no jurisdiction over acts of state has also been used by federal courts in the U.S. Rather than applying the act of state doctrine though, the Executive branch often argues that the separation of powers doctrine constrains courts from interfering the Executive’s constitutional authority to be the sole organ in the realm of foreign affairs particularly during wartime.<sup>112</sup>

Another similarity between the Maasai case and contemporary federal court jurisprudence is that just as the Crown argued that protectorates were foreign territory outside the jurisdiction of the Crown’s court, the Executive branch has argued that habeas

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<sup>110</sup> *Johnson v. McIntosh* 21 U.S, 543, 590 (1823). By contrast, with regard to the White settlers, the Court finds after examining their customs, usages and local laws: “Such are the laws, usages and customs of Spain, by which to ascertain what was property in the ceded territory, when it came into the hands of the United States, charged with titles originating thereby; creating rights of property of all grades and description.” *Id.* at 446.

<sup>111</sup> *US v Verdugo-Urquidez* 494 US 259 (1990) the Supreme Court held that evidence obtained pursuant to a warrantless search carried out under the supervision of U.S. officials in the Mexican residence or a Mexican citizen was admissible since the Constitution does not protect noncitizens with respect to the extraterritorial conduct of the US government, even though the evidence would have been admissible in a U.S. criminal proceeding if the search had occurred in the U.S. In a similar context, *United States v. Duarte-Acero*, 296 F 3d 1277, 1283 (11th Cir. 2002), *cert. denied* 537 U.S. 1038 (2002), affirmed a district court ruling that U.S. Drug Administration Enforcement Agents do not have a duty to comply with the International Covenant on Civil and Political Rights when they act outside the United States and within the boundaries of another country.

<sup>112</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751 (2003)

does not extend to foreign citizens abroad even where the detainees are held under the complete jurisdiction and control of the U.S.

In addition, the Bush administration has argued that since the foreign detainees cannot invoke the jurisdiction of U.S. federal courts, it does not mean that they are without remedies. Rather, they are entitled to diplomatic and political review and scrutiny and as such are not without a remedy. Let me quote from the Bush administration brief in *Shafiq Rasul et al. v George Walker Bush et al.*:

“[The] responsibility for observance and enforcement of these rights [Geneva Convention] is upon political and military authorities. [These] rights of alien enemies are vindicated ... only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.”<sup>113</sup>

I raise the Bush administration’s argument in the Guantanamo detainee cases to illustrate one of the overriding objectives in this project—i.e. to show the continuity, power and resilience of a common doctrinal framework in imperial and colonial projections of empire. Of course this is not to suggest that the Solicitor General’s office in the Bush administration has been foraging the archives for cases like the Maasai case to come up with this argument. No, that would be giving them too much credit. Indeed the point here is that these structures are so embedded in the jurisdictional power map of expanding and conquering empires of the common law variety that one does not even have to have heard of the Maasai case to come up with a detailed jurisdictional structure or the type of high formalism and positivism like the one the Maasai courts came up with.

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<sup>113</sup> Brief for the Respondents in *Shafiq Rasul et al v. George W. Bush et al; Fawzi Khalid Abdullah Fahad Al Odah et al v. United States of America*, Nos. 03-334 and 03-343 (citing the supreme courts opinion in *Eisentrager v. Johnson*, 339 U.S. 789 n. 14 (argued in the Supreme Court early April, 2004). Brief signed by Theodore Olsen et al, March 2004. In several other contexts, U.S. courts have held that judicial relief would create undesirable conflicts with remedies that Congress and the Executive branch had in the foreign affairs domain).

A final example here is the reason given by Paul Clemente on behalf of the Bush administration in the *Padilla* case in April 2004 before the Supreme Court. He argued that there should be no judicial review of holding of enemy combatants or habeas and when pressed what would ensure there was no torture Clemente argued that the US does not torture and that the good will of the US was the best check against torture.

*Distinction Between Power and Jurisdiction and Territorial Sovereignty*

The distinction between power and jurisdiction, on the one hand from territorial sovereignty on the other in the Maasai case is an important forerunner of the notion of failed states – for how else does it differ from the juridical statehood of so many juridical states that have no effective control over their territory<sup>114</sup> or barely have the ability to control their economic and political destiny?<sup>115</sup>

The Bush administration's 2002 National Security Strategy mobilizes this distinction by arguing that states that cannot stand by themselves have conditional sovereignty.<sup>116</sup> Some scholars have even argued that re-colonization may be necessary to address the crisis of failed states.<sup>117</sup>

Makau wa Mutua has argued forcefully that failed sub-Saharan African states blindly adopted the Westphalian model of statehood and he traces the illegitimacy of the

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<sup>114</sup> John Jackson, Juridical Statehood

<sup>115</sup> Ruth Gordon, Failed States article

<sup>116</sup> National Security Strategy of the United States, September 2002

<sup>117</sup> See Inis L. Claude, Jr., [The United Nations of the Cold War: Contributions to the Post-Cold War Situation](#), 18 *Fordham Int'l L.J.* 789, 790, 793 (1995)

contemporary African state to the alien character of the Westphalian model.<sup>118</sup> Obiora Okafor has also shown how international legal doctrines peculiar to Africa were invented to ostensibly.<sup>119</sup> Ikechi Mbeoji has also persuasively shown how upholding the fictional nature of the Liberian state, the U.S. and European countries legitimized and encouraged a civil war.<sup>120</sup>

### *Conclusion*

This paper has sought to show how the British empire as a “byzantine network of territories, jurisdictions, institutions, and peoples,”<sup>121</sup> was built by unsystematic and contradictory impulses. Thus, while the formal understanding of protectorates was that they were foreign countries, the Maasai unsuccessfully argued that their sovereignty was illusory because the British administration had complete control and jurisdiction the British East African protectorate administration. Clearly, both the oppressive and contradictory nature of imperial expansion in turn informed resistance and reconstitution and even though the Maasai failed in their efforts to use the right of litigation in common law courts to resist empire. However, even though the Maasai were precluded from exercising the right to sue the crown, the march of the common law in the establishment of regimes of private law of private property, contract, tort and maritime law, to support the expanding capitalist economy in the East African protectorate proceeded without restriction.

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<sup>118</sup> See also Makau Wa Mutua, “Redrawing the Map of Africa: A Moral and Legal Inquiry,” *Virginia Journal of International Law*

<sup>119</sup> Obiora Okafor, “After Matyrdom: International Law, Sub-State Groups, and Construction of Legitimate Statehood in Africa,” 41 *Harvard International Law Journal* 503 (2000)

<sup>120</sup> Ikechi Mgbeoji, *Collective Insecurity: The Liberian Crisis, Unilateralism and Global Order*, 2003

<sup>121</sup> Hulsebosch, *supra* note 57, at 479.

In conclusion, I am compelled to quote at length the words of Ewart S. Grogan, one of the most well-known and richest settlers in Kenya at the time of the taking of Maasai land. This quote in my view captures both the formal empire of land acquisition for settler purposes as well as its connection to the establishment of regimes of private law to superintend over the surplus of the colonial economy to the non-laboring classes:

“I will ignore Biblical platitudes as to the equality of men, and take as a hypothesis that the African is fundamentally inferior in mental development and ethical possibilities to the white man.... There was no need for ‘mawkish euphemisms’ to wrap up ‘European land grabbing schemes.’ What was needed was a ‘good sound system of compulsory labor,’ it would ‘do more to raise the “nigger” in five years than all the millions that have been sunk in missionary efforts for the last fifty.’...The native ought to be compelled to work so many months in the year, this should be called compulsory education.”<sup>122</sup>

Clearly, the colonial mission of taking territorial control was not conceptually separable from the establishment of regimes of labor and tax law that forced Africans to work on commercial plantations. In addition, the emerging regime of property law reflected in individual ownership in land not only privatized land ownership but also disinherited the Maasai of their collective ownership of land. Ultimately, both the project of territorial conquest and that of the expanding capitalist economy built on the extraction of surplus capital went hand in hand. International law was deeply implicated in this conflation of formal and informal empire and in the creation of the modern African state.

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<sup>122</sup> E.S. GROGAN & A.H. SHARP, FROM CAPE TO CAIRO 350-362 (1902), *quoted in* Mwangi Wa Githumu, *Land and Nationalism in East Africa: The Impact of Land Expropriation and Land Grievances Upon the Rise and Development of Nationalist Movements in Kenya 1884-1939*, *supra* note 14 at 224).