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Imperialism, Colonialism, and International Law

James T. Gathii
Loyola University Chicago, School of Law, jgathii@luc.edu

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JAMES THUO GATHII†

> [The removal of the Maasai from their land] may have been just or unjust, politic or impolitic, 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.[1]

INTRODUCTION

This Article 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

† Governor George E. Pataki Professor of International Commercial Law, Albany Law School. An earlier version of this Article 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 Article 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. In addition to thanking participants at those events for their comments, I would also like to thank David Kennedy, Antony Anghie, Joel Ngugi, Sylvia Kang'ara, Celestine Nyamu, Bhupinder Chimni, Vasuki Nesiah, Karin Mickelson, Kerry Rittich, Robert Wai, Obiora Okafor, Makau wa Mutua, H.W.O. Okoth-Ogendo and Nathaniel Berman who over the years provided feedback on the ideas developed in this Article. I would also like to thank Tania Magoon for her excellent research assistance on this Article.

1. Ol le Njogo v. Att'y Gen., (1913) 5 E.A.P.L.R. 70, 80 (Kenya) (author sometimes refers to this case as "the Maasai case").

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. The first is 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. My second objective is 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 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 colonialized peoples. I illustrate this theme of resistance and effort 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. For example, British colonialism created the institution of colonial chiefs thereby melding traditional religious and Western political leaderships idioms. Further, British-Maasai contact brought kinship norms and class society together, creating the beginnings of modern statehood within the crucible of a non-Western society.

I proceed as follows. I begin by tracing the distinctions made in the literature between formal and informal empires, 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 was rarified by a highly formalist and positivist jurisprudence that: argued that the Crown's prerogatives were limitable by moral principles but not by judicial review; disaggregated territorial from suspended sovereignty; and distinguished between power and jurisdiction, on the one hand, and territorial sovereignty, on the other. This Article will ultimately conclude by exploring the parallelisms between the jurisprudence of British courts surrounding the question of protectorates in the nineteenth century, and contemporary cases such as those involving questions of the exercise of extraterritorial jurisdiction over transnational commercial conduct or in the holding of detainees abroad in the war against terrorism.

I. 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.[2] While my

2. NORMAN ETHERINGTON, THEORIES OF IMPERIALISM: WAR, CONQUEST AND CAPITAL, at v (1984).

Article will focus on imperialism and colonialism, the term "imperialism" has, over the last century, had many meanings, and its uses in specific historical contexts have been varied. It has referred to the search for investment opportunities and markets for surplus capital and productive capacity, "despotic methods of government," "empire building," and "employing the power of the armed state to secure economic advantages in the world at large."[3] It has also referred to the expansion of capitalism through industrialization and commercial development in the periphery of an empire, as opposed to territorial annexations or empire-building.[4]

Thus I hesitate to present an encompassing definition of imperialism. Instead, I will be addressing imperialisms.[5] The central themes tying these imperialisms together in the colonial context are the different modes of "dominating, restructuring, and having authority"[6] 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 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 or force of these complex of ideas or even "more precisely their configurations of power."[7] Edward Said illuminatingly reminded us why studying imperialism is important when he wrote:

> [T]o believe that politics in the form of imperialism bears upon the production of literature, scholarship, social theory, and history writing is by no means equivalent to saying that culture is therefore a demeaned or denigrated thing. Quite the contrary: my

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3. *Id.* at 5.

4. *See* John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, 6 ECON. HIST. REV. 1-15 (1953).

5. *See* ETHERINGTON, *supra* note 2, at 280 (noting, after extensively reviewing a variety of theories of imperialism, that the word imperialism has many meanings).

6. I have borrowed this phrase from Edward Said. *See* EDWARD W. SAID, ORIENTALISM 3 (1978).

7. *Id.* at 5.

> 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.[8]

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 had begun.[9] Brailsford's central thesis was that the British ruling and investing class had built the British Empire and was its primary beneficiary. He argued that the British ruling and investing class had achieved this objective through their control of British foreign policy.[10] 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.[11]

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.[12] He saw imperialism as the expansion of capitalism in the form of industrial and commercial development.[13] Thus, although European governments were scrambling over territorial annexations and empire-building in Africa, this did not constitute imperialism for Brailsford. For him, imperialism in the last

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8. *Id.* at 14 (emphasis in original).

9. It is noteworthy, though, that by 1820, about a quarter of the world's population was part of the British empire. *See generally* 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* TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD 254 (Frederick Cooper & Ann Laura Stoler eds., 1997).

10. *See* ETHERINGTON, *supra* note 2, at 100.

11. *See id.* at 101.

12. *See id.*

13. *See id.* at 102.

part of the nineteenth century was clearly distinguishable from territorial annexation or classical colonialism.[14]

Indeed, among early nineteenth-century imperialism theorists, imperialism and colonialism were two different things. For example, Rosa Luxemberg'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.[15] Luxemberg sought to explain how capitalism expanded as an economic system and, like Rudolf Hilferding, saw imperialism as the final stage of capitalism.[16]

So far, I have made the claim that imperialism and colonialism were different things. Let me now briefly examine how revolutionary socialists like Vladimir Lenin regarded imperialism and colonialism, and whether these revolutionaries espoused doctrines that were different from early nineteenth-century imperialist theorists. Lenin was critical of both imperialism and colonialism. Yet Lenin supported, and in fact pursued Soviet conquest, and justified it as the "dictatorship of the proletariat over 'backward peoples.'"[17] In effect, Lenin's repression of nationalist movements to establish a proletarian dictatorship was no less aggressive than the colonialism of the capitalist countries that revolutionary socialists condemned. What distinguished Lenin from Luxemberg was that Lenin's goal was to account for and predict the outcomes of capitalist expansion, while Luxemberg's goal was simply to explain how capitalism expanded as an economic system.[18]

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14. *Id.* at 102. Etherington 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; or 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.

15. *See id.* at 123.

16. *See id.* at 126.

17. *Id.* at 193-94.

18. *See id.* at 127.

A. *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 now Kenya.[19] The immediate reason for the declaration of the protectorate, without consultation with the 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.[20] The protectorate was sold to the British government for £250,000. This ended the Imperial British East Africa Company's seven-year trade and commercial monopoly.[21] 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 assume the task and cost of administering the territory.[22]

The coexistence of imperialism and colonialism in the East African Protectorate is evidenced by the British purchase of both the territory and the seven-year trade and commercial monopoly the Imperial British East Africa Company had previously enjoyed. 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 Luxemberg had already identified as correlated with the growth of capitalism,[23] with the *formal* empire of territorial ownership that the British were engaging in, and that Lenin was actively pursuing. In the fusion between colonialism and imperialism, protectorates collapsed the distinction between imperialism (or the expansion of surplus investment capital) and colonialism

19. *See* 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, at 206 (Feb. 1974) (unpublished Ph.D. dissertation, New York University) (on file with Bobst Library, New York University).

20. *See id.* at 204-05.

21. *See id.* at 205.

22. *See id.* at 204-05.

23. ETHERINGTON, *supra* note 2, at 123.

(or the aggressive foreign policies of conquering states in their territorial acquisitions). Thus, as Kautsky asserted,[24] imperialism was not the final stage of capitalism as Luxemberg and others had argued.[25] 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.'"[26]

B. *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 now know as Kenya into a State based not on kinship authority, but on the domination of the non-producing class (the capitalists), over the producers (the wage-laborers). In a sense, contemporary Kenya—where the domination by 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"[27]—is the state created following the establishment of the East African Protectorate in 1895.[28]

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

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24. *See id.* at 120.

25. *See id.*

26. *Id.* (quoting Karl Kautsky, *Ultra-imperialism*, 59 NEW LEFT REV. 41, 42 (1970)).

27. *See* Partha Chatterjee, *More on Modes of Power and the Peasantry*, *in* SELECTED SUBALTERN STUDIES 351, 359 (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988). On how supposedly freely negotiated contracts have replaced conquest as the way in which the new imperial international law legitimizes unequal relations between rich and poor countries, see the excellent and original analysis of ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 239-44 (2005).

28. Here I am not asserting a linear progression from pre-colonial Kenya, to protectorate, to colony, and finally to state. Rather, each of these is a genealogical mode, each displaying its own unique dialectics and imperialisms.

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 this 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.[29] Colonial and imperial contact introduced a new type of relationship—a class society. Unlike a kinship society, a class society has state functionaries that lay claim on the society's social surplus. Prior to colonial contact, the Maasai had no such state functionaries.[30] In other words, the Maasai did not have an institutionalized system of surplus extraction that would exist in a class society. The intersection of the Maasai peasantry and their "leadership" and the British settlers, in the crucible of 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

29. *See* Wa-Githumo, *supra* note 19, at 215.

30. *See* Chatterjee, *supra* note 27, at 363. As Partha Chatterjee reminds us, it is theoretically legitimate to distinguish societies that had "recognized offices of authoritative functionaries . . . from class society proper because chiefdom may still not necessarily imply an institutionalized claim on the social surplus based on political domination . . . ." *Id.*

circumvented.[31] 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.[32] 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).[33] Moreover, this dialectical struggle was 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 with the Maasai people.[34] Hence, the Maasai cannot and could not be 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 Michel 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

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31. *See* Robert Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe*, 70 PAST AND PRESENT 30, 47 (1976).

32. *See* Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT'L L.J. 297 (2002).

33. For these insights, I am indebted to Partha Chatterjee. *See* Chatterjee, *supra* note 27, at 366.

34. *See* Chatterjee, *supra* note 27, at 358.

> asylums; considerations of the periphery—but in terms of the insane, prisoners, and children. The clinic, the asylum, the prison, the university—all seem to be screen-*allegories that foreclose a reading of the broader narratives of imperialism.*[35]

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.[36]

The genealogically and historically aware methodology I am advocating here has the advantage of complexifying simplistic visions about the purity of anti-colonial struggles, which portray non-Western societies as classless and as "unanimously and heroically resisting the onslaught of 'Western imperialism.'"[37] 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 them to create the equivalent of a comprador class of Maasai, who in turn served to legitimate the expropriation

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35. Gaytri Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271, 291 (Cary Nelson & Lawrence Grossberg eds., 1988) (emphasis added).

36. Chatterjee, *supra* note 27, at 390.

37. ETHERINGTON, *supra* note 2, at 272. Etherington argues that such a methodology has the advantage of showing that non-Western societies had "ruling classes, exploited peasantries, subjugated females and slaves." And that "[b]y exploding the myths of Merrie Africa, spiritual Asia and other Rousseauistic fantasies, [this methodology has] made the 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.*

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.[38]

C. *The Transmogrification of Maasai Peasantry and their Property Relations*

Prior to British contact, the Maasai were a communal subsistence society.[39] 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.[40] They were largely subsistence in the sense that the herds were held for their cultural value to the Maasai—especially in ritual sacrifice—and for food rather than for sale.[41]

A major organizing principle of the 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.[42] In fact, the Maasai were, in the late nineteenth century, famed as one of the fiercest warring communities in the East African region.[43] They used their permanent warring force not only to defend themselves but also to ensure their uninhibited access to grazing for their cattle in the East African region.[44] However, authority among the Maasai was based on

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38. This analysis is largely inspired by Chatterjee, *supra* note 27, at 388-89. *See also* MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 119-22, 145-65 (Geoff Eley, Nicholas B. Dirks & Sherry B. Ortner eds., 1996).

39. *See* Wa-Githumo, *supra* note 19, at 215.

40. *See* G. R. SANDFORD, AN ADMINISTRATIVE AND POLITICAL HISTORY OF THE MASAI RESERVE 20 (1919).

41. *See* ROBERT R. TIGNOR, THE COLONIAL TRANSFORMATION OF KENYA: THE KAMBA, KIKUYU, AND MAASAI FROM 1900 TO 1939, at 13 (1976).

42. *See id.* at 7-8.

43. *See* SANDFORD, *supra* note 40, at 2.

44. *See id.* at 3.

kinship and religious beliefs, and not simply on domination. Maasai leaders were religious figureheads known as *laibons*.[45]

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*.[46] Second, the Maasai were going through an environmental and epidemic disaster that resulted in the sickness and death of millions of their valued cattle.[47] 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.[48]

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 "[l]ivestock served as a barrier against colonial control," since the Maasai were not seeking to sell their labor to European farms or in the emerging colonial administration for their livelihood.[49] 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.[50] 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 also to attend colonial, missionary, and, ultimately, Kikuyu-established schools.[51] The second reason accounting for a higher ability to resist British colonial rule was that the Masaai, unlike the

45. *See* TIGNOR, *supra* note 41, at 13.

46. *See id.*

47. *See id.*

48. *See* Wa-Githumo, *supra* note 19, at 215-16.

49. *See* TIGNOR, *supra* note 41, at 9.

50. *See* SANDFORD, *supra* note 40, at 2-20.

51. *See* TIGNOR, *supra* note 41, at 9.

Kikuyu, did not have "[p]owerful 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 overrulers."[52]

Let us now briefly examine how the aforementioned predicaments made the Maasai, a society otherwise highly resistant to British colonization, amenable to colonization. At the end of the nineteenth and 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 suffered several natural disasters ranging from droughts and famine to a small-pox epidemic and locust infestations.[53] These problems, 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: "[T]heir conservatism has been so great, and their subservience to antiquated tribal custom and tradition has been so powerful that it has proved impossible as yet materially to alter and renovate their ideas."[54] 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.

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52. *Id.* at 7. Tignor also notes that the Maasai "looked upon their flocks as a safeguard against the distasteful undertakings they saw the Kikuyu engaged in." *Id.* at 9.

53. *See* John Lonsdale, *The Conquest of the State of Kenya 1895–1905*, *in* UNHAPPY VALLEY: CONFLICT IN KENYA & AFRICA, BOOK ONE: STATE AND CLASS 13, 22-25 (Bruce Berman & John Lonsdale eds., 1992). Further recorded epidemics that exacerbated these calamities included jiggers and rinderpest. *Id* at 23.

54. SANDFORD, *supra* note 40, at 1. At another place in the report, Sandford noted that, "the Masai, who number all told about 43,000 souls, possess capital to an average amount of rather more than £110 per head. They are thus, in all probability, the richest uncivilised tribe in the world." *Id.* at 3.

While there was almost no doubt that the civilizing mission of displacing the Maasai's antiquated customs was justified with the invariable goodness of the "blesssings [sic] of science and technology, of literacy and education, of peaceful communities and respectable religion," some white colonists were worried by the cruel injustice that accompanied this mission.[55] Yet, when it came to the appropriation of Maasai land for white settlers and commercial interests, this opposition—including that of the Secretary of State for Colonies—was muzzled.[56]

Although it is disputed whether the British colonial government was responsible for undermining the ability of the different East African Protectorate communities to organize their means of "survival, offence and defence"[57] 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 a new refuge in the civil and military labour markets of conquest."[58]

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

Capitalizing on the dispute between two Maasai brothers (Lenana and Sendeyu) over the ascendancy of a new Maasai spiritual leader, or *laibon*, the opportunistic interests of some white settler farmers and commercial interests coincided with Lenana's desire to ascend his father's *laibonship*.[59] 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

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55. George Shepperson, *Introduction to the Fourth Edition* of NORMAN LEYS, KENYA, at vii, vii (4th ed. 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 with, as it seemed to them, its communal virtues, its simple but practical self-sufficiency, and its invigorating closeness to Nature." *Id.*

56. *See id.* at 119-28.

57. *See* Lonsdale, *supra* note 53, at 25.

58. *Id.*

59. *See* SANDFORD, *supra* note 40, at 15-18.

appointing him a paramount chief, Lenana was on the path to being a more 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.[60] From around 1893, the protectorate government sided with the cooperative Lenana against his brother Sendeyu.[61] 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.[62] 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 themselves could not read[63]—agreed that the Maasai could not be moved from the Laikipia reserve "so long as the Masai as a race shall exist."[64] 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.[65] As we shall see, this second agreement was

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60. *See id.* According to Sandford, "[f]rom at least 1850 to the early eighties, the pastoral 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.

61. 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 give Lenana military help if Sendeyu crossed into British territory. *See* Richard Waller, *The Maasai and the British 1895–1905: The Origins of an Alliance*, 17 J. AFR. HIST. 529, 545 (1976).

62. *See* SANDFORD, *supra* note 40, at 180.

63. *See* GIDEON S. WERE & DEREK A. WILSON, EAST AFRICA THROUGH A THOUSAND YEARS 165 (Africana Publ'g Corp. 1970) (1968) ("The Masai 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 Masai 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.").

64. *Id.*

65. *See id.*

the immediate reason for a judicial challenge—a case that 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;[66] 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 the very violence the colonial authorities had deplored of the Maasai by the British.[67]

Let us examine both briefly. Lenana has been described as "the fulcrum upon which the levers of British policy rested."[68] 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.[69] 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.[70] 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.[71] Consequently, the use by the protectorate government of what it perceived as the "savage force" of the Maasai to establish themselves over East African Protectorate communities, by incorporating Maasai warriors into the newly established protectorate force, effectively sanctioned the same violence

66. *See generally* MAMDANI, *supra* note 38; MARTIN CHANOCK, THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902–1936: FEAR, FAVOUR AND PREJUDICE (2001).

67. *See* Lonsdale, *supra* note 53, at 23-27.

68. Waller, *supra* note 61, at 540.

69. *See id.* at 541-42. In 1901, Lenana was elevated to a "salaried status" with a monthly allowance of six British pounds. *Id.* at 543.

70. *See id.* at 542.

71. *See id.* at 549.

the warriors had been shunned for, only this time it was regarded as a lawful exercise of legitimate or civil violence based on law and reason.[72]

As previously noted, although he was now a paramount Chief, Lenana's authority was undermined by his collaboration with the British protectorate government.[73] Consequently, the British became the "dominant partners in the alliance"; Maasai interests were thereafter relegated to the side.[74] Colonial governance created Lenana's authority 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 case.

The relationship between the various Maasai communities and their cattle and the British, as reflected by these two agreements, was procured by force, deception and organized lobbying by 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 preserve their society intact, which was both rigid and deeply suspicious of further innovation."[75]

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72. Several measures were tried by the protectorate government to stop Maasai warriors from their "barbarous acts being performed under the shelter of [the British] flag." *Id.* 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. 21, 23-25 (1996).

73. Terence Ranger, *The Invention of Tradition in Colonial Africa, in* THE INVENTION OF TRADITION 211, 236 (Eric Hobsbawm & Terence Ranger eds., 1986). According to 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.*

74. Waller, *supra* note 61, at 549. This was the process of turning the savage into a soldier. *See* Ranger, *supra* note 73, at 234.

75. *See* Waller, *supra* note 61, at 529.

E. *Formal and Informal Empire in the East African Protectorate and the Maasai Case: From Slave Trade to Free Trade*

There were 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. The Imperial British East Africa Company justified its interest in this region on the premise that legitimate commerce or trade was the best cure for slave trade.[76] 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.[77] 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.[78] The protectorate government argued that cutting these links 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.[79]

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

76. *See generally id.* at 540-42.

77. *See* Wa-Githumu, *supra* note 19, at 201.

78. *See id.* at 202.

79. *See id.*

empire of trade and commerce in the protectorate.[80] 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 Luxemberg, Hobson, and others argued.[81] 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.[82] 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 of investment[83]—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

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80. For example, the Companies Act of 1907, 7 Edw. 7 c. 50 (Eng.), was made applicable to the East African Protectorate by the Companies Act of 1908, 8 Edw. 7. c. 12 (Eng.), which, in relevant part, enabled "any company incorporated in a British Possession, which has . . . [satisfied the] particulars specified in . . . the Companies Act, 1907, shall have the same power to hold land in the United Kingdom as if it were a company incorporated under the Companies Acts, 1862 to 1907." The Crown Lands Ordinance of 1915 made all land in Kenya Crown land and introduced the concept of private ownership of land. *See* Crown Lands Ordinance No. 12 (1915). *See also* TIGNOR, *supra* note 41, at 30.

81. *See generally* D. K. FIELDHOUSE, ECONOMICS AND EMPIRE 1830-1914 (1973).

82. *See generally* KWAME NKURUMAH, NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM (1965); WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (1973).

83. *See* RICHARD D. WOLFF, THE ECONOMICS OF COLONIALISM: BRITAIN AND KENYA, 1870–1930, at 29 (1974).

between the Maasai's claim of a British breach of contract and the British government's defense of its decision to move the Maasai away from their land inconsistently with their promise in 1904 not to do so. I will begin by briefly discussing the institution of British protectorates, as this was the international legal institution that played the most crucial role in mediating the conflict between the Maasai and the British.

II. 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 W. E. Hall have argued that protectorates were a mode of avoiding the assumption of financial burden for colonial possessions.[84] 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.[85] However, the fact that East Africa was not fully incorporated into the British Empire between 1895 and 1920 did not hinder the protecting administration from opening up the country to British settler occupation and controlling its inhabitants as fully as if it were a 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.[86]

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 *Ol le Njogo v. Attorney*

84. *See* W. E. HALL, INTERNATIONAL LAW 27 (1880).

85. *See* Y. P. GHAI & J. P. W. B. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT 20-21 (1970).

86. *See* Alison Field-Juma, *Governance and Sustainable Development*, *in* IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 9, 19 (Calestous Juma & J. B. Ojwang eds., 1996).

General,[87] 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 *Ol le Njogo* 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.[88]

Another paradoxical aspect of this case is that the Maasai 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, in fact, had complete control and jurisdiction.[89] 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 "so long as the Masai as a race shall exist."[90]

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.[91] The paradox here is that it was the Maasai who were arguing they were *not* sovereign and it was the British who were arguing that the Maasai *were* sovereign. In reality, the British government was both de jure[92] and de facto[93] exercising its full plenary authority as if the protectorate was a colony.

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87. Ol le Njogo v. Att'y Gen., (1913) 5 E.A.P.L.R. 70, 89 (Kenya) (holding that the East Africa Protectorate was a foreign country and not part of the British dominion).

88. For a similar example in the U.S. context, see, e.g., *Worcester v. Georgia*, 31 U.S. 515, 560-61 (1832), in which the Court noted that the "settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection."

89. *Ol le Njogo*, 5 E.A.P.L.R. at 86-87.

90. *Id.* at 73.

91. *See id.* at 86.

92. By virtue of the Foreign Jurisdiction Act of 1890, 53 & 54 Vict., c. 37 (Eng.).

93. By virtue of Crown's actual control of the protectorate.

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,[94] the Attorney General made rigorously formalist and strictly positivist arguments seeking to convince the court to recognize the East African Protectorate not for what it actually was, but simply to accept the label of a protectorate being a foreign country.[95]

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.[96] In addition, it was plausible to argue that British settlement over Maasai land that had begun before the 1904 Agreement constituted a mode of acquisition of territory by the Crown.[97] Thus, as the Maasai argued, they were not an independent state capable of entering into treaties.[98] 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.[99]

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94. The Court of Appeal for East Africa 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 elements of sovereignty*." *Ol le Njogo*, 5 E.A.P.L.R. at 91 (emphasis added).

95. *See id.* at 86-89.

96. *See id.* at 81.

97. Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 472 (2003). Note that Morris Carter, C.J., of the Court of Appeal for Eastern Africa 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." *Ol le Njogo*, 5 E.A.P.L.R. at 89.

98. *See Ol le Njogo*, 5 E.A.P.L.R. at 80.

99. *See id.* at 77.

The East African Court of Appeal 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.[100] 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 land-related civil contract cognizable in a British court.[101] In effect, in *Ol le 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 prohibited the Maasai from founding their legal claims in equity on either contract or tort. Thus, the argument on behalf of the Maasai—i.e., 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[102]—failed when both the High Court and Court of Appeal held the agreements to be treaties and thus that no action could lie against them.[103] Similarly, injunctive relief preventing the implementation of the 1911 Agreement as a 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 carrying out an act of State."[104] The action in contract to enforce the 1904 Agreement against a move from the Laikipia Reserve[105] and the action in tort seeking damages resulting from the loss of cattle and failing to provide a road between the Northern and Southern Maasai reserves as agreed in the 1904 Agreement, were all held to

100. *See id.* at 88-94.

101. *See id.* at 94.

102. *Id.* at 79.

103. *See id.*

104. *Id.* at 80.

105. *See id.* at 79.

constitute acts done under a treaty.[106] As such, they were acts of state against which the court could not entertain challenges, either surrounding their validity or even "a want of authority on the part of the [treaty's] signatories."[107] Not even Lenana, the British-appointed Chief *Laibon* of the Maasai, could bring such a suit, the courts held.[108]

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's Case*.[109] The Maasai also relied on case law, particularly from India and New Zealand, all of which had, in a variety of ways, overcome the jurisdictional bar of both the act of state doctrine and the claim that certain British possessions, such as the British East African Protectorate, were foreign countries over which British courts had no jurisdiction.[110]

From the Indian cases, the Maasai argued that with respect to territories in which British courts had jurisdiction, the British government could not make treaties—only agreements with its subjects.[111] Therefore, from the *Nireaha* case from New Zealand, the Maasai argued that the 1904 Agreement was an agreement as to land tenure under which the Maasai obtained legal rights enforceable in British courts.[112] 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.[113]

By clothing resistance in the garb of contestations from prior encounters with the British Empire, the lawyers arguing on behalf of the Maasai joined a long tradition of

106. *See id.* at 78-79.

107. *Id.* at 79.

108. *See id.*

109. Calvin v. Smith (*Calvin's Case*), (1608) 77 Eng. Rep. 377 (K.B.).

110. *See Ol le Njogo*, 5 E.A.P.L.R. at 81-82.

111. *See id.* at 81.

112. *See id.*

113. *See id.*

seeking to hold the exercise of British colonial authority accountable by resorting to judicial review. In bringing the case, the Maasai advanced the claim that the conduct of the British government within the 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,[114] precisely because (besides the powers it was granted by the legislature) the Crown did not have any arbitrary power left;[115] and further, that if the courts ousted themselves of jurisdiction to adjudicate the case, that would constitute an arbitrary act.[116]

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.[117] By being born in the realm, a subject was liable to burdens on 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.[118]

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 attempted to make this feudal logic fit their circumstances as much as they sought to align with it. First, the Maasai challenged this feudal logic by arguing

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114. *See id.* at 80.

115. *See id.* at 87.

116. *See id.* at 82.

117. *See Calvin's Case*, 77 Eng. Rep. at 408.

118. *See* Hulsebosch, *supra* note 97, at 456.

they were members of the realm and not outsiders to it,[119] both by birth in the realm and also because of the Crown's control and jurisdiction over the East African Protectorate.[120] Second, by denying they were sovereign, the Maasai sought to perfectly align themselves with the feudal logic of *Calvin's Case*, because being within the realm meant one owed allegiance to the Crown. To demonstrate that they owed allegiance to the Crown, they argued that they could be charged for treason under protectorate laws.[121]

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 the fact 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 had prevailed in arguing the jurisdiction 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 declined to use prevailing international legal arguments to overcome the objection of the Crown that protectorates were

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119. *See Ol le Njogo*, 5 E.A.P.L.R. at 81. A. Morrison, representing the Maasai, argued: "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 observed: "At the present time . . . [the Maasai] 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.

120. *See Ol le Njogo*, 5 E.A.P.L.R. at 80, 84. A. Morrison argued for the Maasai: "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.

121. *See id.*

outside the realm and, as such, that judicial review as a shield against imperial 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.[122]

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 civilised states . . . [but] "International law touches [P]rotectorates of this kind [Protectorates over uncivilised and semi-civilised 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."
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> . . . 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.[123]

This quote is paradoxical. On the one hand, the Court found that the Maasai were capable of entering into a treaty, and on the other hand the Court also found 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,

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122. In this respect, I argue against the claim made by L. L. Kato that by giving preference to the domestic law of the United Kingdom, common law courts downplayed the utility of international law in countering the despotic application of the domestic law of the realm over colonial peoples. *See* L. L. Kato, *Act of State in a Protectorate—In Retrospect*, 1969 PUB. L. 219, 222-23. Thus, I agree with U. O. Umozurike, who argues: "[I]nternational law developed by Western powers before the 20th century served as a buttress for the colonisation of African peoples. It connived at the subordination of African dignity to Western economic interests. It was essentially racialist and therefore 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.J. 47, 80-81 (1967).

123. *Ol le Njogo*, 5 E.A.P.L.R. at 91-92 (quoting W.E. Hall, International Law 126 (5th ed. 1904)) (modifications in original).

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?

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 not reviewable in the Crown's courts.[124] Specifically, the Court of Appeal noted, in agreeing with the court below, "[a]ll that was decided was that treaties had been made with the Masai, 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."[125]

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 insofar 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's 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

124. *See id.* at 96. Chief Justice Morris Carter argued: "I do not find that the Chief Justice of the East Africa 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.*

125. *Id.*

attitude, implicitly embracing colonial misgovernance by the Crown, is not lost on the Court. However, rather than acknowledge the decision's endorsement of colonial malfeasance, the Court apologetically—but quite likely actually 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 civilised men have to control a great multitude of the semi-barbarous."
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> . . . .
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> If in the interests of peace and good government it was considered necessary that the Masai 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.[126]

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.[127] In fact, the East African Court of Appeal cited Article 35 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,[128] 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 12 of the Foreign

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126. *Id.* at 97 (quoting Rex v. Earl of Crewe *ex parte* Sekgome, (1910) 2 Eng. Rep. 576, 610 (K.B.)).

127. Indeed, as Judge Farlow King noted in justifying the agreements notwithstanding their effect on the Masai: "a treaty could be entered into with them as 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.

128. *See id.* at 92.

Jurisdiction Act.[129] 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 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 to be. 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.

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 disaggregations to resolve the tensions and contradictions in their arguments: first, by arguing that 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 and *suspended* sovereignty on the other; and third, by making the distinction between power and jurisdiction on the one hand and territorial dominion on the other.[130]

In my view, each of these distinctions and disaggregations is crucial and, in fact, a persistent feature 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.

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129. *See id.* at 102-03.

130. *See id.* at 88. Chief Justice Morris-Carter argued the East African Protectorate had "'not been annexed so as to become part of Her Majesty's territorial dominions. . . . in the sense of power and jurisdiction, but it is not under his dominion in the sense of territorial dominion.'" *Id.* (quoting *Rex v. Earl*, 2 Eng. Rep. at 603-04).

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

One of the most familiar ways in which common law courts arrived at the conclusion that they could not legally interfere with, or limit the exercise of, the Crown's prerogatives extraterritorially was by invoking the act of state doctrine. In so doing, common law courts effectively made the entire complement of the Crown's prerogatives in a protectorate or foreign possession not amenable to judicial review and 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. 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.[131]

A second rationale for the view that the prerogatives of the Crown are morally and not legally limitable is found in the East African Court of Appeal's argument that it was "settled law that the King can neither do nor authorise a wrong."[132] 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.'"[133]

A third premise of the moral limitations principle is stated in *Ol le Njogo*, where the court found that common law courts have no jurisdiction over acts of state. Finally, the moral limitation principle of the Crown's powers is based on the view that since protectorates were foreign territory, though the Crown had authority over them, the jurisdiction of the common law courts did not go abroad.

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 cases

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131. *See id.* at 100.

132. *Id.* at 112.

133. *See* Hulsebosch, *supra* note 97, at 478 (quoting 3 PARL. HIST. ENG. (1628) 487).

like this would be "'by way of appeal to the justice of the State which inflicts it.'"[134] 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![135] 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."[136]

As will be discussed later in this Article, this argument has also been used in a rather recent case—i.e., the Guantanamo Bay Detainee case.[137]

B. *The Disaggregation of Territorial Sovereignty and Suspended Sovereignty*

I have already shown that the Crown argued 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 the 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 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. 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.[138]

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134. *Ol le Njogo*, 5 E.A.P.L.R. at 113 (quoting Baron v. Denman, (1848) 154 Eng. Rep. 450 (Exch. Div.)).

135. *See id.* at 112.

136. *Id.* at 113.

137. *See infra* Part IV.A.

138. *See Ol le Njogo*, 5 E.A.P.L.R. at 92.

However, the courts' finding that the Maasai were sovereign raised the paradox that, in actuality, 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 began 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.[139] This argument that Maasai sovereignty was in suspense is also attributed to John Westlake, a leading international legal expert of such colonial cases.[140] 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 "'distinguish[able] from territorial sovereignty by however thin a line.'"[141]

C. *The Distinction between Power and Jurisdiction and Territorial Sovereignty*

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

139. *See id.*

140. *See id.*

141. *Id.* at 92 (quoting JOHN WESTLAKE, INTERNATIONAL LAW 184 (1904)).

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 [the recognition of jurisdiction of tribal Chiefs by Section 46 of the Native Courts Regulation of 1897] is a recognition of a jurisdiction pre-existent to and apart from jurisdiction conferred by the Order in Council, and is a remnant of sovereignty still remaining in the Masai; if this be so a further reason is furnished for considering that a treaty might be made with the Masai.[142]

What is really striking about this argument 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 courts.[143]

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[144] did not constitute territorial

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142. *Id.* at 93.

143. Such use of high formalism to preclude judicial intervention in the foreign affairs context is not unfamiliar in other contemporary contexts outside the Guantanamo Bay 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 within 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, 180 U.S. 208, 231 (1901); Estados Unidos Mexicanos v. Decoster, 229 F.3d 332, 339 (1st 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.). *But see* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609-10 (1981) (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).

144. *Ole le Njogo*, 5 E.A.P.L.R. at 77.

sovereignty, but rather, vestiges of sovereignty distinguishable from territorial sovereignty. Again, the East African Court of Appeal stated:

> [S]overeignty can still be retained by a State which cedes by 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.[145]

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 Maasai sovereignty. What we see here, especially in the creation of Maasai leadership through legislative efforts such as the 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 on 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 the 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 went out of its way to observe that the Village Headmen Ordinance 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.[146] Thus the act of state doctrine was a crucial device for the court to preclude it from inquiring into whether those appointed by the crown from among the Maasai to

145. *Id.* at 92.

146. *See id.* at 94.

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.[147] 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 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 unimpeachable 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, even if their selection and appointment was inconsistent with the customs of the Maasai people.[148]

As noted earlier in this Article, the designation of these chiefs by the British in turn established an institutionalized

147. According to Justice King Farlow, "[i]t is also clear that the Crown in making a treaty can select or recognize such persons as it may think fit as representatives to bind the other high contracting party. I see nothing in the Village Headmen Ordinance . . . to prevent the Government from selecting chiefs or other persons from among the Masai to represent the Masai people." *Id.* at 110.

148. *See id.*

claim on the social surplus based on their political domination of the Maasai. In short, these juristic forms 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, 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 the Maasai automatically fell in lock step with their appointed leadership—they were not 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 a 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,"[149] is the State that was established following the annexation of the East African Protectorate in 1895.[150]

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

149. Chatterjee, *supra* note 27, at 359.

150. *See supra* note 28.

their so-called sovereignty the Crown argued it had. After all, a declaration of a protectorate under prevailing jurisprudence did not extinguish but rather presupposed the continuation of "some elements of sovereignty"[151] on the Maasai, 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 their local government, whatever form that government may in fact take."[152]

In addition, the Court fortified its decision by observing that the 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.[153] 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.[154]

Similar arguments about the distinction between territorial sovereignty and jurisdiction arose in habeas cases arising from protectorates. Although the Habeas Corpus Act of 1862 did not prohibit habeas petitions from protectorates, this distinction was invoked to prevent issuances of the writs. *Rex v. Earl of Crewe*[155] serves as an example. In that case, an African chief, Sekgome, was arrested, detained, and deported under the authority of the British High Commissioner in the Bechuanaland Protectorate.[156] In a proclamation, the High Commissioner

151. *Ole le Njogo*, 5 E.A.P.L.R. at 91.

152. *Id.* at 90.

153. *See id.* at 87, 89.

154. *See id.* at 88, 92.

155. (1910) 2 Eng. Rep. 576 (K.B.). *See also Reviews of Books*, 36 BRIT. Y.B. INT'L L. 493, 495 (1963).

156. *See id.*

indemnified the subordinate officer for the detention, and further prohibited any process questioning the legality of the arrest, or detention, or any matter so connected with, to have any effect within the protectorate.[157] Sekgome first attempted to challenge his detention in the High Court of Griqualand (northern Cape) but failed.[158] Sekgome made an offer to the Commissioner in 1907 to renounce his claim to the chieftainship if he was freed and allowed to emigrate to a part of Barotseland (now part of Zambia).[159] His offer was rejected and so was his petition for release in May 1908.[160] In early 1909, Sekgome was offered release from detention on the condition that he agreed to take up residence in the eastern part of the Transvaal; Sekgome, however, decided not to accept the offer. Instead, Sekgome challenged his three-year detention in the King's Bench in England, where he applied for a writ of habeas corpus directed to the Secretary of State for the Colonies, the Earl of Crewe.[161] Sekgome's application centered on the validity of the instrument that kept him in detention—namely, the proclamation by the High Commissioner. The Divisional Court heard the case initially and dismissed his application on two grounds: first, that the protectorate was a foreign dominion of the Crown within Section 1 of the Habeas Corpus Act of 1862 (although the legislation did not expressly preclude habeas for protectorates as opposed to colonies and dominions); and, second, the Divisional Court denied relief on the ground that the Earl of Crewe was not the custodian of the body of Sekgome, and, therefore, the writ was improperly addressed to him.[162]

An appeal ensued. A divided court dismissed the appeal, relying upon the ground that the proclamation by the High Commissioner was a valid enactment, which could

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157. *Id.*

158. *See* Sekgome Letsolathebe v. Panzera, 1906 (10) S.C. 90 (HCG) (S. Afr.), cited in A.J.G.M. Sanders, *Sekgoma Letsholathebe's Detention and the Betrayal of a Protectorate*, 23 COMP. & INT'L L.J. S. AFR. 348, 353-54 (1990).

159. *Id.* at 354.

160. *Id.*

161. Rex v. Earl of Crewe, (1910) 2 Eng. Rep. 576 (K.B.).

162. *Id.* at 579.

not be questioned by a court of law.[163] In brief, the court found that there was

> no court of law in the protectorate which could have issued a writ of habeas corpus, and in addition decided that the Habeas Corpus Act of 1862 applied to His Majesty's "territorial dominions" only, and therefore not to the protectorate. By taking this stance, the court put itself in a position to dispose of Sekgome's complaint finally and authoritatively. [164]

The case was representative of an ambiguous and complicated status associated with a protectorate, which was "both a political and legal antinomy, bristling with juridical contradictions as well as with international difficulties," and was depicted as "'a territory earmarked for the future enjoyment of the protecting State.'"[165] Despite the fact that a British Protectorate was not deemed part of the dominions of the Crown, it was legally subject to the jurisdiction of the British Crown, which had its power over natives as well as British subjects.[166] Pursuant to an Order in Council made under the Foreign Jurisdiction Act 1890, the High Commissioner had the authority to "exercise in the Bechuanaland Protectorate the powers of Her Majesty," and to issue proclamations in the administration of justice and good governance of all persons within the Protectorate, provided any such acts were not in violation of the Act of Parliament.[167]

The appellate court upheld the proclamation authorizing Sekgome's detention as a valid exercise of executive power. In particular, Lord Justice Farwell did not hesitate to reach the conclusion that the Act of 1890 allowed the Crown to establish a despotism by virtue of which the High Commissioner exercised judicially unreviewable authority.[168] The other justices also "deplored the possibility by which a man might at any time be

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163. *Id.*

164. Sanders, *supra* note 158, at 356.

165. Norman Bentwich, *Habeas Corpus in the Empire*, 27 LAW Q. REV. 454, 458 (1911).

166. *See id.*

167. *See id.*

168. *See id.* at 460.

deprived of the protection of the law."[169] It is indeed "a harsh result that the natives in a protected territory lose, together with the control of their country, the protection of their own customs without obtaining that of the legal system of the protecting country."[170]

However, Lord Justice Vaughan Williams held that the arrest and detention of Sekgome were acts of state and were therefore not judicially reviewable.[171] According to him,

> an act which would otherwise be an actionable wrong may be so authorized or adopted by a Government as to make it an act of State for which no individual is liable, has been limited to actions done by an English officer in a foreign country to a foreigner in discharge of orders received from the Crown.[172]

Thus, since the protectorate was considered a foreign country, it afforded immunity to acts of the King's officers.[173] As in *Ol le Njogo*, the *Sekgome* court held that, in a protectorate, courts do not have the power to review the conduct of the Crown even though in both cases the Crown had complete control and jurisdiction of the protectorates. However, because of the fact that, in a protectorate, the Crown was held not to have territorial dominion, the courts could not issue orders against it.

IV. THE CONTEMPORARY RELEVANCE OF THE MAASAI CASE

We have seen that the East African Court of Appeal, in its decision in the Maasai case, invoked technical arguments by making distinctions between territorial sovereignty or dominion, on the one hand, and power, jurisdiction, or control, on the other; or by arguing the prerogatives of powerful governments, while not limitable by judicial review, are limitable by moral principles or political or diplomatic

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 460-61 (citing Baron v. Denman, (1848) 154 Eng. Rep. 450 (Exch. Div.)).

173. *Id.* at 461.

intervention,[174] to justify its decision. These arguments are not restricted to the Maasai case but are in fact ubiquitous amongst analogous common law cases, including those of the U.S. federal judiciary. Ultimately, these arguments, which are predicated on such technical distinctions around questions of jurisdiction and remedy, are about power—particularly with regard to questions of the breadth and scope in the relations between the metropole and the periphery, rule and the ruled, the protectors and the protected, the U.S. government and its control and jurisdiction over distant lands, the federal government and the Indian nations,[175] the several States and the Indian nations,[176] and the federal government and its many territories, and so on.

A. *The Moral Principles Limitation in Analogous 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. Indeed, this argument can be traced as far back as Justice Marshall's decision in *Strother v. Lucas*,[177] which held that "[t]he officers to whom jurisdiction for the sale of lands shall be sub-delegated, shall proceed with mildness, gentleness, and

174. *See, e.g.*, *Ol le Njogo*, 5 E.A.P.L.R. at 112-13. Lord Justice King Farlow, in denying an appeal from an indigenous community alleging breach of a contract on the part of the British government, argued that the community's only remedy was "'by way of appeal to the justice of the State which inflicts it,'" since the community's remedy lay "upon the sense of justice of the Government in dealing with their claims." *Id.* at 113.

175. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 543 (1832) ("But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.").

176. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

177. Strother v. Lucas, 37 U.S. 410 (1838).

moderation, with verbal, and not judicial proceeding . . . ."[178] Another classic along this line of reasoning is Justice Sutherland's famous dictum in the U.S. Supreme Court case, *Curtiss-Wright*.[179] In that case, Justice Sutherland held that the President's foreign affairs power, unlike his domestic power, is not limited by constraints such as the Bill of Rights[180]—a view that the Supreme Court has recently reiterated.[181]

I will begin the discussion by first drawing out parallelisms between the Maasai case and the Guantanamo Bay Detainee cases with regard to the four premises underlying the moral principles limitation that were outlined earlier.[182] Take, for example, the first premise 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.[183] This seems similar to

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178. *Id.* at 440. *See also* Johnson v. McIntosh 21 U.S. 543, 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . ."). In *Strother*, by contrast, with regard to the White settlers, the Court found, 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." 37 U.S. at 446.

179. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

180. *Id.* at 320.

181. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that evidence obtained pursuant to a warrantless search carried out under the supervision of U.S. officials in a Mexican residence or against a Mexican citizen was admissible since the Constitution does not protect noncitizens with respect to the extraterritorial conduct of the U.S. government, even though the evidence would not have been admissible in a U.S. criminal proceeding if the search had occurred in the United States. In a similar context, in *United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002), *cert. denied*, 537 U.S. 1038 (2002), the court of appeals 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.

182. *See supra* Part III.A.

183. *See* Ol le Njogo v. Att'y Gen., (1913) 5 E.A.P.L.R. 70, 100 (Kenya).

the argument that the Bush administration is making in the Guantanamo Bay Detainee cases.

The second rationale mentioned above for the view that the prerogatives of the Crown are morally, and not legally, limitable is the "settled law that the King can neither do nor authorise a wrong."[184] A telling, modern example of this rationale is evident in the reason given by Paul Clement on behalf of the Bush administration in the *Padilla* case in April 2004 before the Supreme Court.[185] 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, Clement argued that the United States does not torture, and that the good will of the United States was the best check against torture.[186]

Another parallelism is exemplified by the third premise of the moral limitations principle—i.e., as is stated in the Maasai case, common law courts have no jurisdiction over acts of state. Again, this argument is very similar to the one made in defense of holding the detainees at Guantanamo Bay, as I will show below. While common law courts use the act of state doctrine, U.S. federal courts invoke the separation of powers constraint to preclude judicial interference with Executive extraterritorial (or foreign affairs) conduct, particularly during wartime.

In addition, the fourth moral limitation principle of the Crown's powers is based on the view that, since protectorates were foreign territory, and though the Crown had authority over them, the jurisdiction of the common law courts did not go abroad. This argument by now has been used extensively to defend the holding of detainees in Guantanamo Bay, a foreign country like the East African Protectorate in *Ol le Njogo*, although the United States has complete jurisdiction and control over the island very much the same way the British had over the East African Protectorate. In other words, 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 does not extend to foreign citizens abroad even

184. *See id.* at 112.

185. Transcript of Oral Argument, Padilla v. Rumsfeld, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 1066129.

186. *Id.*

where the detainees are held under the complete jurisdiction and control of the United States.

Furthermore, as mentioned above with regard to the Maasai case, the East African Court of Appeal concluded that the only remedy in a case such as that would be "by way of appeal to the justice of the State which inflicts it."[187] Likewise, 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.[188] Rather, they are entitled to diplomatic and political review and scrutiny and, as such, are not without a remedy. In *Rasul v. Bush*, the Bush administration argued that:

> "[The] responsibility for observance and enforcement of these rights [stated in the 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."[189]

I raise the Bush administration's argument in the Guantanamo Bay 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 *Ol le Njogo* to come up with this argument. 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

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187. *Id.* at 113; *Ol le Njogo*, 5 E.A.P.L.R. at 113 (quoting the "words of Parke B.").

188. *See also* Cherokee v. Georgia, 30 U.S. 1, 20 (1831) ("If it be true that the Cherokee nation have rights, this is not the tribunal in which in those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.").

189. Brief for the Respondents at 47, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334 and 03-343) (quoting Johnson v. Eisentrager, 339 U.S. 763, 789 n.14. (1950)). 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.

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 that the Maasai courts developed.

The premises underlying the moral limitations principle are especially evident when foreign injury claims against the U.S. government relate to national security or essential interests, particularly in the war context. One such example is *El-Shifa Pharmaceutical Industries Co. v. United States*.[190] In 1998, the U.S. bombed a pharmaceutical factory in the Sudan for involvement in the production of materials for chemical weapons and its association with Osama bin Laden. After the bombing, the U.S. government confirmed that the bombing was mistaken since there was no proof that there was any production of chemical weapons at the factory or link to Osama bin Laden. The owners of the pharmaceutical factory, Sudanese citizens, sued the U.S. government in the Court of Federal Claims to recover compensation for the destruction of their factory.[191] The court dismissed the suit on the premise that when the President exercises his Commander-in-Chief powers, courts are hamstrung to give relief to injured foreign citizens, even if the President acted mistakenly. Thus, while in *El-Shifa Pharmaceutical Industries*, the court argued that deference to the Commander-in-Chief's war-making powers precluded the Court from giving relief, in the common law cases glossed over in *Rasul*,[192] courts similarly abstained from deciding cases involving injury to non-citizens or non-citizen property within the empire's colonial possessions. 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.[193]

Similar arguments deploying extraterritoriality to preclude outcomes that would hold powerful governments

190. El-Shifa Pharm. Indus. Co. v. United States, 55 Fed. Cl. 751 (2003).

191. *Id.*

192. *See generally* Rasul v. Bush, 542 U.S. 466 (2004).

193. *El-Shifa Pharm. Indus. Co.*, 55 Fed. Cl. 751 (2003).

to account have also been deployed as recently as 2001 in the context of European Court of Human Rights. In its December 2001 decision in *Bankovic v. Belgium*,[194] the European Court of Human Rights declined to issue orders sought by six Yugoslavian nationals against the seventeen NATO member states concerning the bombing of the Serbian Radio and Television Headquarters in Belgrade in the course of the NATO air campaign during the Kosovo conflict.[195] The applicants alleged that their rights to life and to freedom of expression, as well as their right to an effective remedy, guaranteed under the European Convention on Human Rights, were infringed.[196]

The European Court of Human Rights dismissed the application, holding that it lacked jurisdiction because the European Convention was territorial in scope, and does not apply to the territory of non-contracting states—such as Yugoslavia—unless it can be established that the affected individuals or territory were within the "effective control" of contracting states.[197] This rationale is analogous to the holding by the District Court for the District of Columbia that the United States does not have de facto sovereignty over Guantanamo Bay.[198] In *Bankovic*, the European Court of Human Rights held it had no jurisdiction to determine the liability of the allied NATO powers for alleged damage to the radio and television stations in Yugoslavia. Similarly, the District Court in *Rasul* had found, on analogous grounds based on extraterritoriality, that it could not entertain a suit to determine the responsibility of the United States for holding foreign nationals at Guantanamo Bay indefinitely. Ultimately, *Rasul* notwithstanding,

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194. Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333, *reprinted in* 123 INT'L L. REP. 94 (2001).

195. *See* 123 INT'L L. REP. at 98-99. *See also* Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to Be Learned From It*, 25 FORDHAM INT'L L.J. 95 (2001) (discussing the failed attempt to commence an investigation of illegal aerial bombardments by U.S.-led NATO allies in the Kosovo intervention).

196. *See* 123 INT'L L. REP. at 102.

197. *Id.* at 110.

198. *See* Rasul v. Bush, 215 F. Supp. 2d 55, 71-73 (D.D.C. 2002) (characterizing the United States' position with respect to Guantanamo Bay as merely that of a lessee of property, and the detainees status as merely that of migrants).

common law courts and metropolitan authorities often deploy arguments about extraterritoriality to immunize the conduct of Western powers and the United States outside their geographic limits.[199]

B. *The Distinction Between Power and Jurisdiction and Territorial Sovereignty*

The distinction between power and jurisdiction, on the one hand, and 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[200] or barely have the ability to control their economic and political destiny?[201]

The Bush administration's 2002 National Security Strategy mobilizes this distinction by arguing that states that cannot stand by themselves have conditional sovereignty.[202] Some scholars have even argued that re-colonization may be necessary to address the crisis of failed states.[203]

Makau wa Mutua has argued forcefully that failed sub-Saharan African states blindingly adopted the Westaphalian model of statehood, and he traces the illegitimacy of the contemporary African state to the alien

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199. In a similar context, the court in *United States v. Duarte-Acero* 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. 296 F.3d 1277, 1283 (11th Cir. 2002), *cert. denied*, 537 U.S. 1038 (2002).

200. *See generally* John H. Jackson, *The Varied Politics of International Juridical Bodies—Reflections on Theory and Practice*, 25 MICH. J. INT'L L. 869 (2004).

201. *See* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903 (1997).

202. National Security Strategy of the United States, Sept. 2002, *available at* http://www.whitehouse.gov/ncs/nss.html.

203. *See, e.g.*, 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 (1995).

character of the Westaphalian model.[204] Obiora Okafor has shown how the uncritical reception of international legal doctrines resulted in reproducing "the colonial era's violent and brutal state-building" into post-colonial Africa.[205] Ikechi Mgbeoji has also persuasively shown how, by upholding the fictional nature of the Liberian state, the United States and European countries legitimized and encouraged a civil war.[206]

C. *Imperialism in Contemporary Time*

As noted at the outset, one of the fundamental aspects of imperialism is the notion of expansion of economic and investment interests. This understanding of imperialism would lead to the hypothesis that a nation engaged in imperialism would naturally seek to protect its interests abroad by invoking extraterritorial jurisdiction. On the surface, it would seem that the ease with which U.S. federal courts invoke extraterritorial jurisdiction over commercial conduct is inconsistent with their reluctance to examine the legality of extraterritorial detentions of enemy aliens. However, as I have argued elsewhere:

> [I]t is precisely because of this apparent incongruity that jurisdiction over extraterritorial commercial conduct must be examined. The motivations for barring extraterritorial jurisdiction to enemy aliens and finding jurisdiction over extraterritorial commercial conduct reflect perfect symmetry, because both advance the interests of the United States—one its global commercial interests, the other its domestic and global security interests.[207]

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204. *See* Dr. Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

205. Obiora Chinedu Okafor, *After Matyrdom: International Law, Sub-State Groups, and Construction of Legitimate Statehood in Africa*, 41 HARV. INT'L L.J. 503, 511 (2000).

206. *See* IKECHI MGBEOJI, COLLECTIVE INSECURITY: THE LIBERIAN CRISIS, UNILATERALISM, AND GLOBAL ORDER (2003).

207. James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 364 (2003).

United States v. Aluminum Company of America[208] is one of the leading statements of the extraterritorial application of U.S. commercial laws. The court in that case applied U.S. antitrust laws to extraterritorial commercial events, despite a lack of any express Congressional intent to make the statute applicable extraterritorially.[209] The Supreme Court endorsed this rule, known as the effects doctrine, in its decision in *Hartford Fire Insurance Company v. California.*[210] Although the discussion up to this point seems to indicate that federal courts will invoke extraterritorial jurisdiction over any commercial conduct abroad, there have been incidents of judicial abstention, particularly in cases addressing issues raised by legislation on environmental issues[211] and civil rights.[212] These instances of judicial abstention from commercial activities reflects the fundamental proposition of promoting U.S. commercial interests abroad, unfettered by public policy considerations. Therefore, just as courts invoke notions of extraterritoriality to immunize the conduct of the United States outside their geographic limits—as in the denial of jurisdiction over habeas corpus petitions by foreign detainees, thereby promoting U.S. governmental interests abroad—courts invoke similar arguments in order to promote U.S. commercial interests abroad.

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208. 148 F.2d 416 (2d Cir. 1945).

209. *Id.* at 443 (holding that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . . ."). The case, therefore, stands for the proposition that the Sherman Act subjects extraterritorial commercial conduct that has substantial, direct, and foreseeable effects on U.S. domestic or foreign commerce to liability in federal courts. This doctrine is also referred to as the effects doctrine.

210. 509 U.S. 764, 796-99 (1993). The Court asserted that the United States antitrust laws will apply "even where the foreign state has a strong policy to permit or encourage such conduct." *Id* at 799.

211. *See, e.g.*, Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1352 (D.C. Cir. 1981) (holding that the court lacked jurisdiction to review the consequences of maintaining a nuclear reactor overseas on both foreign citizens and citizens of the United States who are residing in that foreign country).

212. *See, e.g.*, EEOC v. Arabian Am. Oil. Co., 499 U.S. 244, 258 (1991) (holding that Title VII of the Civil Rights Act did not extend to an American citizen employed by an American Corporation abroad). Congress subsequently reversed this holding. *See* 42 U.S.C. § 2000e(f) (1991).

CONCLUSION

This Article sought to explore the relationship between imperialism and colonialism in nineteenth-century international law. As we have seen, 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. My examination of the relationship between imperialism and colonialism demonstrates that the international legal rules of British protectorates were internally inconsistent with their claims of liberty and their repressive consequences for colonial peoples. This resulting inconsistency created an opportunity for resistance and reconstitution of colonial territorial acquisition by colonized peoples, as evidenced in the Maasai cases. 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 over 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 the British 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 property, contract, tort, and maritime law, to support the expanding capitalist economy in the East African Protectorate proceeded without restriction. Finally, we have seen how the same detailed jurisdictional structure or type of high formalism and positivism, like the one which the Maasai courts developed, is engrained in the jurisdictional power map of expanding and conquering empires—especially as the same arguments put forth by the Maasai courts in reaching its conclusion in barring jurisdiction are parallel to those proffered in the contemporary U.S. cases dealing with habeas petitions from foreign detainees at

Guantanamo Bay.[213] Ultimately, it seems, whether a court will invoke jurisdiction over extraterritorial conduct, either governmental or commercial, turns on whether the extraterritorial conduct serves its nation's interests.[214]

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 what is patent to all who have observed the African native, that he is fundamentally inferior in mental development and ethical possibilities (call it soul if you will) to the white man.
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> . . . .
>
> . . . We have undertaken his education and advancement, as we have carefully explained by the mawkish euphemisms in which we wrap our [European] land-grabbing schemes. . . .
>
> A good sound system of compulsory labour 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 . . . . Then let the native be compelled to work so many months in the year at a fixed and reasonable rate, and call it compulsory education.[215]

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213. *See generally* Lauren Benton, *Constitutions and Empires*, 31 LAW & SOC. INQUIRY 177 (2006), *and* James Thuo Gathii, *The American Origins of Liberal and Illiberal Regimes of International Governance in the Marshall Court*, 54 BUFF. L. REV. 765 (2006) (exploring the links between imperialism today and in the past). In a related development, in 2004 the Maasai brought suit against the British government in British courts for the British removal of the Maasai from their land in contravention of the 1904 Agreement. *See* Paul Redfern, *Colonialism: Britain Faces Lawsuit from EA*, E. AFR., Jan. 26, 2004, *available at* www.nationaudio.com/News/EastAfrican/26012004/Regional/Regional2601200425.html.

214. Here there is no better work than that of Antony Anghie's in showing the persistence of imperialism in international law from its roots in naturalism into positivism and into its contemporary self-determination phase of institution building and sovereign equality. *See* ANGHIE, *supra* note 27.

215. EWART S. GROGAN & ARTHUR H. SHARP, FROM THE CAPE TO CAIRO 351-60 (1902), *quoted in* Wa-Githumo, *supra* note 19, at 224.

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.