

stepped up their efforts to protest the destruction of cultural heritage around the world. The international community responded promptly and determinedly to the recent destruction of cultural heritage such as the destruction of the Buddha's of Bamiyan in Afghanistan by the Taliban, and the destruction of ancient cities and archaeological sites by the development projects of China and Turkey. Although dams on major rivers like the Nile, the Tigris and Euphrates and the Indus have helped civilizations develop, this shows only one side of the coin. On the other side is the possibility of an apocalypse, the irreversible destruction of the cultural and historical heritage of humankind.<sup>312</sup> Perhaps it is because people begin to realize that the cultural heritage that they leave behind them in this life may well become the cultural heritage of future generations.<sup>313</sup> Therefore, despite cultural variations, people in most places care in special ways about objects that evoke or embody or express their own or other peoples' culture.<sup>314</sup>

International discussions and efforts to protect cultural heritage are extremely important but not enough. In order to guarantee individuals access to the cultural heritage, national governments need to be pressured to translate into national and international legal obligations and responsibilities the protection of the cultural heritage of humankind located in their territory. As it is stated in the Preamble of 1968 UNESCO Recommendation, it is the duty of governments to ensure the protection and the preservation of the cultural heritage of mankind, as much as to promote social and economic development.<sup>315</sup> What is lost with the destruction of cultural property is not only the future and the past of the local people but also part of the history and cultural heritage of the world.

<sup>312</sup> Federico Mayor, *The Ethics of the Future*, (UNESCO's Advocacy of Preserving Human Cooperation and Culture of Peace), UNESCO COURIER 40 (Apr. 1, 1998).

<sup>313</sup> Boer, *supra* note 167, at 279.

<sup>314</sup> See Merryman, *supra* note 93.

<sup>315</sup> See UNESCO's Recommendations, *supra* note 68.

## THE DECOLONIZATION-MODERNIZATION INTERFACE AND THE PLIGHT OF INDIGENOUS PEOPLES IN POST-COLONIAL DEVELOPMENT DISCOURSE IN AFRICA

JOEL NGUGI\*

### INTRODUCTION

The two more important developments in Twentieth Century international law were the decolonization<sup>1</sup> movement of the 1950s and 1960s and the recognition of the emerging norm of indigenous peoples rights in international law.<sup>2</sup> More remarkable, however, there has been the creation of discourses in international law that have constrained these two developments in a way that has prevented the unleashing of their full emancipatory potential. I argue in this article that the discourse that has been deployed to "manage" the creation, development and ultimate resolution of the problems posed by both decolonization and the indigenous peoples problematique is the modernization discourse.<sup>3</sup>

The modernization discourse has been instrumental in the Third World<sup>4</sup> in creating subjects – the nation-state as a "national allegory"<sup>5</sup> and

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<sup>1</sup> See generally JOCHEN ABR FROWEIN, INTERNATIONAL LAW IN THE PERIOD AFTER DECOLONIZATION (1988) (giving a good account of decolonization and how it was handled in international law); See also DAVID BIRMINGHAM, THE DECOLONIZATION OF AFRICA (1996). See D.K. FIELDHOUSE, BLACK AFRICA, 1945 – 80: ECONOMIC DECOLONIZATION AND ARRESTED DEVELOPMENT (1986) (giving a somewhat critical view).

<sup>2</sup> See generally JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2000) (referring to the emerging norm of indigenous peoples rights, its limits, promises and politics); see also Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660 (1990).

<sup>3</sup> I define modernization not just as the adoption of the "right" values by previously primitive societies, nor the mere industrialization and transformation of hitherto peasant or subsistence societies. Rather, the term, as a discourse, also includes a mode of production of knowledge and truth. It institutionalizes a way of thinking about the way the society should be structured, and hence structures the power relations in the society. See generally ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (1994).

<sup>4</sup> In this article, I use the term "Third World" as an analytical category. See Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, in THIRD WORLD LEGAL STUDIES 1-20 (1998-99). Balakrishnan Rajagopal suggests that this conception of the "Third World" de-

the indigenous peoples as a "development problem" — that have both shaped and constrained these developments in international law. Understanding the Third World in a historically deterministic model permits particular representations of the Third World, and particular interventions by international law and international organizations to redress its backwardness.<sup>6</sup> At the same time, the representation of indigenous peoples as a "development problem" also creates representations of them that permit interventions by national law and the nation-state.<sup>7</sup> The creation of a discourse allows for a particularistic articulation of knowledge and power, the process through which social reality comes into being. Arturo Escobar, for example, explains how the "invention" of the development discourse created space for the systematic creation of concepts, theories and practices.<sup>8</sup> This in turn shapes what knowledge is "produced, recorded, stabilized, modified, and put into circulation"<sup>9</sup> — in sum what interventions to make, and how to justify them.

This article seeks to explain this double creation and the role that the modernization discourse has played in both the decolonization movement and the emergence of the norm of indigenous peoples in the Third World. I argue that the constraining effect of the interface between decolonization and modernization has been to create a double bind for the

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emphasizes the importance of geography and political ideology in the definition of the Third World. In this conception, the Third World is not a geopolitical construct referring to specific areas of the world that are economically under-developed. Neither is it an ideological position of non-alignment with either the Western powers or the former communist powers. It also is not historical category referring to the post-colonial political period in the non-Western world. Rather, the analytical category of the Third World emphasizes the power contestation between different holders and actors and its articulation in international relations.

<sup>5</sup> See Fredrick Jameson, *Third World Literature in the Era of Multinational Capitalism*, 15 SOC. TEXT 65 (Fall 1986). The creation of the nation-state in the Third World becomes a "national allegory" because it achieves a totalizing effect of shaping all motivating forces of history such as struggles based on class, gender, race, region, ethnicity and so on. It also roots the Third World in a historical deterministic model in which particular interventions would be needed to redress the problem of backwardness. For an insightful critique of Jameson, see Aijaz Ahmad, *Jameson's Rhetoric of Otherness and the 'national allegory'*, 17 SOC. TEXT 3 (Fall 1987). For an excellent elaboration and discussion of both Jameson's invention and Aijaz's critique with an insightful reflections of his own, see Rajagopal, *supra* note 4. I adopt Balakrishnan's understanding of the Third World.

<sup>6</sup> See Rajagopal, *supra* note 4; ESCOBAR, *supra* note 3.

<sup>7</sup> Here I follow the lead of Edward Said's seminal study of knowledge production and representations of truth in discourses as the determinants of how social realities are established. In this sense, representational regimes are most significant in "dominating, restructuring and having authority" over the subject. See generally EDWARD SAID, *ORIENTALISM* (1979). See ESCOBAR, *supra* note 3 (a book-length application of a similar method to the study of development discourse).

<sup>8</sup> ESCOBAR, *supra* note 3, at 39.

<sup>9</sup> *Id.* at 46.

Third World state and the indigenous peoples within them. The international legal discourse, through a development discourse that hosts several other historically deterministic discourses on progress, historiography and rationality, creates a genre of a Third World state that aspires for modernization. Yet it is prevented from this objective by the very interventions that the discourse permits. The indigenous peoples within the Third World state faced by a similar bind. They are encouraged to "modernize" by acquiring the "right" values.<sup>10</sup> Yet they are prevented from doing so by the creating discourse that seeks to intervene in their lands and cultures so as to control the natural resources under their control.

I have divided this article into two parts. Part A is further divided into six sections. The main objective of part A is to show how the decolonization-modernization interface occurred, and how modernization played a significant role in it.

In the first section of part A, I very briefly try to identify the linkages between colonialism, the concept of indigenous peoples as we know it today and the role of international law in both.

In the second section of part A, I focus on the two methods that international law has used to simultaneously enable a particularist international legal discourse and at the same time imbue this discourse with a seemingly universalist democratic and "developmentalist" content. I show in this part how a reconstruction of history enables the discourse to purge itself of its "evil" parentage and thereby hygienize its history and camouflage it with a neutral framework and structure. This façade of neutrality is maintained by a conflation of ideological and rhetorical maneuvers that disable an alternative viewpoint. I also argue that the modernization program has been particularly useful in maintaining the legal categories that have been instrumental in this process.

In the third section of part A, I show how effective these two modes of dealing with the "colonial other" through the modernization program have been in Post-Colonial Africa. While I specifically write in the special context of indigenous rights, this part hopefully will give insight as to how the decolonization moment became mixed up with the "modernization" process. In the clever decolonization-modernization conflation, both the departing Colonial state and the successor independent state shared a legitimate international law concern: development. This section is a precursor to sections four, five and six of part A, which serve the purpose of framing the issue in the general context of Africa focusing on how the

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<sup>10</sup> *Id.* at 43.

indigenous peoples in Africa found themselves in a situation where they are "wards of the State"<sup>11</sup>. I explain here how, even after the departure of the European colonialists, the indigenous peoples still lack political power at the national or even regional levels.

Part B of the article is a concrete case study of the Maasai people of Southern Kenya. It illustrates the discussion in part A through the particular example of how the Maasai people have been systematically disempowered through the interventions permitted by the modernization discourse. Contrary to popular belief, I show that the dispossession of their lands was not due to structural internal weaknesses in their traditions and their valuation of material resources or even their "stupidity" as is often made out. Rather, the instrumentality of the law as a device aimed at modernist development played a significant role in their disempowerment.

## PART A

### I. RUPTURE AND PROGRESS IN THE CONTEXT OF THE AFRICAN DECOLONIZATION MOVEMENT

It has been suggested that one of the greatest innovations of international law in the Twentieth Century was the emergence of institutions to address issues of global governance and dispute resolution.<sup>12</sup> One way to understand the emergence of institutions, Thomas Franck remarks, is as law's way of deferring the admission of its own vacuity. Institutions are the "black box" of jurisprudence:<sup>13</sup> the resilient vessel that can absorb the hypocritical flak of self-serving states hence deferring political tensions by technocratic means.

David Kennedy has observed that international legal discourse also plays an almost similar role in defining and demarcating the events of the field of international law.<sup>14</sup> He has shown how the highpoints of different theoretical and conceptual moments in international law could and usually are read as both continuity (and progress) and rupture (from the former

<sup>11</sup> *Cherokee Nation v. Georgia*, 30 U.S.L., 8 L. Ed. 25 (U.S. 1831) (using this term in a way that connotes that American Indians are in need of special "protection" like minors and lunatics). See, e.g., *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109 (U.S. 1886); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (U.S. 1974) (for specific usage of this term in Supreme Court decisions in reference to American Indians).

<sup>12</sup> Thomas Franck, *Three Major Innovations of International Law in the Twentieth Century*, 17 QUINNIPIAC L. REV. 139, 139-41 (1997).

<sup>13</sup> *Id.*

<sup>14</sup> David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT'L L. J. 373, 374 - 375 (1991).

order) at the same time. Persistently, and systematically, through alternate resort to both the progress narrative (to stabilize and maintain the integrity of the discourse, and its utopian ideals) and pragmatic renewal/reform (and malleability), international law has managed to construct its history by locking out otherwise contradictory ironies.<sup>15</sup> Ultimately, the effect created is one of an inevitable unidirectional movement. Depending on the specific discourse, this movement (of progress) may be toward multilateral governance (as preferred to formal sovereignty), liberal, free trade (as opposed to autarky), universal human rights norms (as opposed to outmoded cultural relativism) or modernization and development (as opposed to underdevelopment).

I start here by rethinking the common renderings of colonialism and decolonization and the mode of democracy and governance that this ushered into Africa in terms of the progress narrative in international law. The definitive teleological discourse that was applied to Africa in the decolonization era represented both a clean break and a moment of continuity. This way, the international legal resolution to the colonial problem both provided support for political decolonization and the assurance of conceptual continuity to the foundations of the discipline that would have been thrown into disarray by the momentous happenings heralded by the fact of decolonization. The teleological discourse written on the fabric of international law served both the purpose of silencing the contradictions presented by this moment and also to shape subsequent political discourse by giving it both a chronological and a territorial hue. At the same time the discourse would imbue membership to the club – by ascribing hitherto denied sovereignty<sup>16</sup> – as well as adjudicate on the contemporaneity or otherwise of the new states using the modernization paradigm.<sup>17</sup> To this extent, one can look at decolonization, as David Kennedy looks at the fall of communism in Eastern Europe and the "eastward extension of Western economic and legal regimes in Europe", as both rupture and progress, break and continuity.<sup>18</sup>

<sup>15</sup> *Id.*

<sup>16</sup> See generally Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999) (referring to the deployment of the concept of sovereignty as a yardstick for "civilization" to create representations that structure the reality of international legal discourse).

<sup>17</sup> See Obiora Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 HARV. INT'L L. J. 503 (2000) (referring to the deployment of the concept of sovereignty as a "peer review" disciplining tool to determine both the legitimacy of a state, and its eligibility to join the "family of nations").

<sup>18</sup> Kennedy, *supra* note 14, at 373.

In a sense, the decolonization movement in the fifties and sixties represented a moment of progress in international law. The sanctity of the conceptual integrity of sovereignty and self-determination, sempiternally an idea "preserved intact, [in international law] awaiting satisfactory conditions for implementation"<sup>19</sup> had now found fulfillment in the hitherto "dark continent". The conditions for decolonization signaled the coming to fruition of ideals always preserved in the international law fabric: self-determination.

At the same time, there was need to acknowledge, to accommodate and to manage the new states emerging from the decolonization process. In other words, there were "pragmatic imperatives" that necessitated a rupture of international legal discourse or order to assure the discipline of a needed responsiveness to comprehend the situation. To put it differently, international law was yet again being called upon to both remedy its past failings by constructing its own narrative and then project its future aspirations based on this construction. This way, the discipline preserved "both its unity and its ability to act as the axis of differentiation between cultural constructs and social forces".<sup>20</sup> Both the chronological and territorial differentiation is achieved by a unitary compulsion that drives cover over difference and insists upon the homogeneity of all experience.<sup>21</sup> The former colonies needed to move from time (T1) where they were thought to be, to time (T2) where the advanced countries in the North were through the process of modernization.<sup>22</sup> The programmatic schedule is to bring the outside into the inside – by assigning sovereignty – and then bringing it up-to-date – by the modernization process that involves a seemingly contradictory negotiation/curtailing of the just assigned sovereignty.

This double vision characterized the emergence of the Third World state in general, and the African state in particular. In this way international law facilitated, indeed obligated, the emergence of a particular brand of nation-state in Africa strikingly modeled on the

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66, 68 (1991).

<sup>22</sup> This paradigm was seen most clearly in development economics of the fifties and sixties where the general prescription was to modernize the economics of the Third World. Arturo Escobar says of the development economist of the time: "[He] played a special role....[H]e who presided over the table at which – as if they were his personal entourage – demographers, educators, urban planners, nutritionists, agricultural experts, and so many other development practitioners sat in order to mend the world." ESCOBAR, *supra* note 3, at 85.

Western State in its formal appearance. Professor Okafor has put it thus:

"The international legal ideal of the European-style nation-state has encouraged both colonial powers and contemporary African states to homogenize their social-culturally fragmented populations. Largely coercive attempts by leaders of African states to form cohesive, culturally unitary nations out of their distinct, diverse component polities have contributed significantly to the political dynamics currently at play on the African continent."<sup>23</sup>

This kind of state espoused a particular kind of "vision" that it borrowed from the international discourse and sought to transform or complete the transformation of traditional African societies to fit this model and vision. Yet both these attempts at "conversion", one by the international "system" to subsume the emerging African state into its discourse and satellite and the other by the African State to subsume the indigenous peoples into the national "mainstream" are characterized by deep-seated tensions that remain unresolved. These tensions are obscured by a rhetoric of homogenization, modernization, evolution and development.

On the one hand, the international system evolves in a partisan way that freezes a "western" rationality into the international legal discourse even as it presents itself as a developing system that increasingly represents most of the world population.<sup>24</sup> The international legal discourse achieves this in two ways. First, it adopts a historical narrative of progress that reconstructs the history of the discourse. This, in turn, enables the discourse to adopt a dominant historical narrative that excludes competing patterns that may contradict the dominant narrative. Second, such a stance enables the international legal discourse to give short shrift to colonialism<sup>25</sup> and other

<sup>23</sup> Okafor, *supra* note 17, at 518.

<sup>24</sup> For example, Sarah Pritchard, says:

Some might consider it questionable [to ground indigenous rights in international law] given international law's historical role in legitimizing the expansion of colonial empires and the acquisition of title to the territories of Indigenous peoples. At the end of the twentieth century, however, international law is no longer the exclusive domain of European powers with imperial agendas. (emphasis supplied).

See Sarah Pritchard, *The Significance of International Law*, in SARAH PRITCHARD (ED.), INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 2 (1999).

<sup>25</sup> See David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 99 (1999).

incursions by Western societies on non-Western ones. It also constructs the discourse as evolving and progressing - and it does this without purging itself of this historical bias but precisely by entrenching it.<sup>26</sup>

In this way, the discourse of international law imbibes and becomes the language of expressing the western rationality. To the extent that this is the rationality that operates as the "domain of truth", "normalcy" is defined by reference to the particular visions of its cultures.<sup>27</sup> Thus the non-Western cultures emerge as the "other" in the discourse. Even while the normative structures and framework of the discourse strives fastidiously to give the appearance of neutrality, the deeper structural and procedural contours of the discourse run counter to the surface proclamations of the normative framework of international law. In this way, the initial process of "homogenization" - that of incorporation of the emerging Non-Western States into the "family of nations" - ends up being a process of "differentiation".<sup>28</sup>

At the national scene, on the other hand, the concept of "internal" sovereignty would be employed by the new states to "incorporate and assimilate" those whom the classical colonizers had "forgotten" to

<sup>26</sup> See Anthony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996). Anghie illustrates how constructing the Indians as the "other" rationalized Spanish conquest to international law's different treatment of the Indians. Similarly, Anghie argues that the goal of "universalizing" international law, itself principally a consequence of the imperial expansion that took place in the nineteenth century, was achieved through the granting or withholding "sovereignty" to the non-European states. This way, the universalization of international law becomes the extension and universalization of the European experience. This, in turn, is achieved by "transmuting [the European experience] into the major theoretical problem of the discipline, [and] has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied." Anghie, *supra* note 16, at 3.

<sup>27</sup> ZYGMUNT BAUMAN, *POSTMODERN ETHICS* 226 (1994).

<sup>28</sup> A striking example of how Western "standards" enter the international legal framework as the "international criterion" is the manner in which the Western notions of statehood were applied to restrict the meaning of "peoples" as used in decolonization literature and discussions. See Delia Opekokew, *International Law, International Institutions and Indigenous Issues*, in RUTH THOMPSON (ED.), *THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: SELECTED ESSAYS ON SELF-DETERMINATION* 3 (1987). Opekokew explains how the international formulae for decolonization was "manipulated" by governments so that indigenous groups were excluded from the principles setting out the obligations of those governments to decolonize their territories. As a result of pressure from the United States and the then USSR, United Nations Resolution 1541 was passed which established guidelines for deeming a territory to be a colony in need of United Nations assistance to promote its right of self-determination. Under this resolution, classical decolonization applied only to territories that met the "salt water" theory of colonialism. The geographic separateness of overseas colonies, regionally and continentally distant from the metropolitan areas of the colonizing countries was a necessary condition of colonialism and therefore of a territory's status as a "colony" with a right to self-determination. During the debate on the declaration, Belgium argued that this should not be limited to colonies and protectorates separated by water.

"modernize".<sup>29</sup> The same argument, style and rhetoric are used to justify incorporation and assimilation of the communities that remained deeply indigenous even after the colonial encounter. Here, the African State becomes the "center" and seeks to integrate the "other" - those who still remained indigenous. Strikingly, a similar lexicon and polemics borrowed from international law are in use. In the process, indigenous people in Africa have been subjected to most inhuman treatment, their lands expropriated by the successor state and genocidal and ethnocidal practices unleashed on them.

Despite these most visibly heinous and systematic violations of human rights on distinct segments of the population, their plight has remained outside the international law discourse. Indeed there appears to be evidence of at least complicit superintendence of international institutions of these acts now famously called "integration" and "development projects" or better still, "modernization".<sup>30</sup> At the same time what has been thought to be "political" repression by governments, such as refusal to hold "democratic elections", has met serious and vehement demurrages by the international community obsequiously ready to unleash terror and other international means of enforcement against "repressive" governments.

That this latter class of violations is not prioritized by international law framework is a trend indicative of the differentiation between the "center" and the "periphery". To the extent that there is an understanding, a common language, a cord between the "international center" and the "national center"<sup>31</sup>, these violations support rather than challenge the

<sup>29</sup> Mohammed Salih, *Indigenous People and the State: An Unaccomplished Colonial Legacy and the Dilemma of Internal Colonialism in Africa*, in HANNE VEBER & ESPEN WAHLE (EDS.), *NEVER DRINK FROM THE SAME CUP: PROCEEDINGS OF THE CONFERENCE ON INDIGENOUS PEOPLES IN AFRICA* 272 (1993).

<sup>30</sup> For example, the development projects funded by the World Bank have come under sharp criticisms for, among other reasons, precluding the participation of the indigenous populations in the conception and implementation of the projects. Many of the projects have, in the end, had very disastrous and devastating consequences on the environment and on the indigenous peoples of the affected regions. In Nepal, for example, the Arun III Hydroelectric project funded by the Bank resulted in the government of Nepal forcibly resettling thousands of people. See David Bradlow, *A Test Case For the World Bank*, 11 AM. U. J. INT'L L. & POL'Y 247 (1996). See also *Sustainable Development, Human Rights and Good Governance - A Case Study of India's Narmada Dam*, in KONRAD GINTHER ET AL. (EDS.), *SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE* 420 (1994). This latter project threatens to destroy whole communities and their relationship to a major river, forests and watersheds, disrupting balances of nature without corrective mechanisms in place and if fully effected would affect a staggering 850,000 people - 40,000 families of which are already displaced.

<sup>31</sup> Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996) (arguing that the international human rights corpus envisages a particular kind of society). Mutua argues that the corpus has a particular political agenda that is to "sell" a specific typology of the State. There is clear evidence that the typology of State borne in mind is a political democracy. To the extent

hegemonic need of the "international center". The manipulation of the international formulae for decolonization to exclude indigenous peoples from the principles setting out the obligations of those governments to decolonize their territories provides a striking example.

## II. COLONIALISM, MODERNIZATION, INDIGENOUS PEOPLES AND INTERNATIONAL LAW: THE LINKAGES

Recent literature on indigenous peoples rights in international law bristles with references about the "progress" that has been made in the past decade<sup>32</sup>. However, the discipline of international law may read the progress in dealing with the problem of indigenous peoples in two ways. One way is to see the "growing awareness" of the indigenous peoples issue as evidence of the beneficial evolution of international law and to hail the progress made in this area. In this narrative, indigenous peoples have been making remarkable progress in their struggles to have their rights addressed. However, since the issues concerned are only a "recent phenomenon", international law would address their plight as witnessed by the recent explosion of legal literature in international legal discourse.

Indeed, reading the literature on indigenous peoples rights within the mainstream academy, the persistent theme is that in the last two decades the issue of indigenous peoples rights has thrust itself forcefully into the international agenda and has remained there for some time. The frequent assertion is that international law has progressed so satisfactorily that now it is apropos to tackle the problem posed by the indigenous peoples. Hence Joy Asiema and Francis Situma write:

"Although indigenous peoples have existed for a long time, it was not until 1953 that the United Nations became interested in their welfare. In that year, the International Labor Organization (ILO) launched a study of the persistent violations of their human rights. As a result, in 1957 the ILO General Conference adopted the Convention Concerning the Protection and Integration of

that the indigenous movement would seem to offer a competing vision of life, the Human rights corpus does not take indigenous struggles seriously.

<sup>32</sup> A random search on Lexis-Nexis, for example, reveals that there have been more than 100 journal articles in American legal journals on the "emerging" norm of indigenous peoples rights in the past decade. The articles include an analysis of the "norm" or case studies justifying the inclusion of certain groups as among "indigenous peoples" in international law. During this time, also, there have been efforts in the United Nations to "codify" the rights of indigenous peoples in an international instrument. Most of the works in this area celebrate the progress made in dealing with the "problem" of indigenous peoples.

Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries ...whose main objective was protection and integration of indigenous peoples into dominant culture of the state..."<sup>33</sup>

The epic story of the progress in international law is that the regime of international law emerging after World War II was one that was informed by the "truism" that "states had to...become increasingly interdependent." They thus had to struggle to contend with complexities resulting from "technological change...[making] cooperative approaches...compelling"<sup>34</sup>. One of the "contemporary" developments of international legal regimes is cited as the creation of processes in which non-state actors can use to secure recognition of their interests. Hence non-state actors and non-self governing peoples have increasingly been admitted as actors in the international legal discourse and have thereby contributed to the development and implementation of "cooperative strategies to tackle systematically issues not previously thought to require international cooperation".<sup>35</sup> One of these issues is the subject of indigenous peoples rights:

"In recent years, issues surrounding the continuing subjection of indigenous peoples have been added to this agenda. Indigenous peoples' organizations have been extremely effective in their efforts to secure recognition by the international legal system of the rights which arise from their specific historical and contemporary experiences."<sup>36</sup>

It is usual to proffer evidence of the "growing awareness" of the indigenous peoples issue as evidence of the beneficial evolution of international law. The progress is truly remarkable: After ILO Convention 107 was criticized for being "integrationist" or "assimilationist" in the 1970's, the earlier view that indigenous peoples were to be integrated or assimilated was rejected. The UN took over the mantle of leadership in this area. In May 1971 the Economic and Social Council (ECOSOC) authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to make a study of the problem of discrimination against

<sup>33</sup> Joy Asiema & Francis Situma, *Indigenous Peoples and the Environment: The Case of the Pastoral Maasai of Kenya*, 5 COLO. J. INT'L ENV. L. & POL'Y 149, 153 (1994).

<sup>34</sup> Pritchard, *supra* note 24, at 2.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 3.

indigenous populations and to suggest measures for eliminating such discrimination.<sup>37</sup>

Initial work done by the Sub-commission led to a resolution by ECOSOC establishing a Working Group on Indigenous Populations (WGIP) to review developments pertaining to the human rights of indigenous populations and to give attention to the evolution of standards concerning the rights of such populations.<sup>38</sup>

At the end of its eleventh session in 1993, the Working Group agreed upon a Draft Declaration of the Rights of Indigenous Peoples.<sup>39</sup> The Draft Declaration has been hailed as one that "covers every conceivable problem related to indigenous peoples' rights".<sup>40</sup>

This then is the story of indigenous peoples as is told by international law today. It is a story in which the indigenous peoples have continually been making remarkable progress in their struggles for justice. However, since the issue they raise is only "a recent phenomenon", it follows that no resolute vindication has yet been found. However, international legal discourse is clearly addressing their plight as witnessed by this success story.

The above story on the progress being made at the international level on indigenous peoples rights is true and epic. There is an alternative way to render this story, however. This is to regard the so-called "progress" as one way international law seeks to deny its "colonial" history and origins.<sup>41</sup> In this rendering, the "progress" in the area of indigenous peoples rights may well be one of the systematic ways that international law dismantles the external indicators of its putrescent history while internally strengthening the processes that predispose its survival and entrenchment.<sup>42</sup> One way that international legal discourse managed to preserve its unity and coherence without back-tracking when faced with the decolonization moment in Africa, was, for example, through enabling other processes that would legally contain the previous process of colonization. The process elected was one of "modernization" through "economic development". Once

<sup>37</sup> ECOSOC Res. 1589 (L), ¶ 7 (1971).

<sup>38</sup> ECOSOC Res. 1982/34 (1982).

<sup>39</sup> *Report of the Working Group on Indigenous Populations on its eleventh session*, UN Commission on Human Rights, Sub-Commission On Prevention of Discrimination and Protection of Minorities, 11<sup>th</sup> Session, Annex 1, Agenda Item 14, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993).

<sup>40</sup> Asiema & Situma, *supra* note 33, at 153.

<sup>41</sup> See ANTHONY ANGHIE, *INTERNATIONAL LAW AND THE ORIGINS OF THE COLONIAL ORIGINS OF THE STATE* (1995) (Unpublished SJD Dissertation, Harvard Law School) (At Harvard Law School Library); see also Anghie, *supra* note 16; David Kennedy, *Primitive Legal Scholarship* 27 HARV. INT'L L.J. 1 (1986).

<sup>42</sup> *Supra* note 25, at 96 - 102.

the link was made between decolonization, modernization and economic development in the teleological scripting of history, it became possible to comprehend colonization within the international legal system without raising hard questions that would throw into disarray some central tenets of international law.

In other words, there is some truth being masked by the success story. It is also true that the issue of indigenous peoples rights has remained unresolved for over five centuries since Francisco de Vitoria juggled with the jurisprudential problems posed by the Spanish occupation of Native American lands. Indeed, it is well and ably documented that the present regime of international law owes its origin to colonialism, i.e., the process of colonizing indigenous peoples' lands.<sup>43</sup>

Colonization involved establishing settler societies in indigenous ancestral territories. To facilitate this process without war and justify it, doctrines of international law were developed. Early international law publicists outdid themselves in spawning theories, to explain the legality of the invasion. Vitoria, now considered the "father" of the defenders of indigenous peoples rights himself believed that since indigenous peoples were wanting in intelligence, the Spanish could, indeed, had a duty to administer their lands.<sup>44</sup>

Other theorists such as Vattel<sup>45</sup> and Locke<sup>46</sup> believed that sovereignty could be asserted if the lands were *vacant*. Whether the lands were in use or not was given a eurocentric interpretation: mixing one's labor with the soil (referring to European practices of cultivating the lands as opposed to hunting, gathering and pastoralism practiced by the indigenous peoples.)

These sundry doctrines were synthesized to rationalize the incorporation of indigenous peoples into "states" and their subjection to legislative history. From the very outset, international law encountered the

<sup>43</sup> See generally Anghie, *supra* note 16.

<sup>44</sup> LARISSA BEHRENDT, *THE RECOGNITION OF ABORIGINAL RIGHTS IN AUSTRALIA: A STUDY OF PLURALISM AND THE POLITICS OF IDENTITY* VI 9, 1 (1998) (Unpublished SJD Dissertation, Harvard Law School) (At Harvard Law School Library), citing HONORIO, MUNOZ, *ADDRESS ON THE INTERNATIONAL COMMUNITY - ITS FORMS, ITS RIGHTS: ACCORDING TO FRANCISCO DE VITORIA* (1946). Vitoria recognized that occupation has been looked upon as one of the original titles for acquisition of ownership. Both Roman and canon law recognized this title as legitimate. See *id.* at 92. Vitoria believed Indians to be rational beings who enjoyed certain fundamental rights. As such, he rejected that papal donation to the Spanish provided a sufficient basis for Spanish rule over native Indian tribes. Yet he curiously believed that that the Indians were unfit to be sovereign and therefore the Spanish could administer the territory until "the Indians were capable of governing themselves." *Id.*

<sup>45</sup> EMERICH DE VATTEL, *LAW OF NATIONS* 172 (1852).

<sup>46</sup> See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 286-302 (1988).

problematique of indigenous peoples. And from the very beginning, the reaction of international law was to construct these people as "outside" its framework and thus not entitled to international protection.

Hence the early debates about conquest and occupation of inhabited lands refer to indigenous peoples as "backward peoples" too savage and semi-barbarous to develop. It was often said that indigenous peoples were "Out side the community of international law...they are not members of it; and that international law knows nothing of the 'rights of independent tribes'."<sup>47</sup>

Indigenous peoples were considered uncivilized pagans, heathens and without sufficient measure of sophistication for them to be part and parcel of the international community. Their lack of development could not warrant their presence on land to amount to "occupation". Hence the doctrine of *terra nullius* was born to serve as a conceptual tool to justify the conquest and occupation of lands belonging to indigenous peoples even where such lands were actually inhabited. That these lands were not inhabited in a *eurocentric* way meant that they were not "occupied".

It is not possible to talk of the concept of indigenous peoples today without averting our mind to colonialism and what has been called the "colonial origins of international law".<sup>48</sup> In its first encounter, international law faced the rights of indigenous peoples. It famously reacted by constructing the indigenous as the "other" and as being outside its framework. James Anaya remarkably and succinctly summarizes the premises of international law that emerged to legitimize the force of colonization and empire rather than a liberating one for indigenous peoples thus:

The first of these major premises...was that international law is concerned only with the rights and duties of states. A second and related premise...was that international law upholds the exclusive sovereignty of states...which are presumed to be equal and independent and thus guards the exercise of that sovereignty from outside interference. ...[A]ccordingly, a third premise at the core of the positivist school of international law is law is law *between* and not *above* states....[A]nd a fourth premise...that the states that make international law and possess rights and duties under it make up a limited universe that excludes a priori indigenous peoples outside the mold of European civilization.<sup>49</sup>

<sup>47</sup> M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT IN BACKWARD TERRITORY* 16 (1926).

<sup>48</sup> See generally Anghie, *supra* note 16.

<sup>49</sup> ANAYA, *supra* note 2, at 19.

The purpose of this section is not to trash international law for its parentage and its evil infancy.<sup>50</sup> Rather, the aim is to trace its origin to show that in its evolution, international law has progressed not by purging itself of this putrescent past but by systematically entrenching it. The progress has been one of systematically dismantling the external indicators of this history while internally strengthening the processes that predispose its survival. The way the issue of indigenous peoples has been handled this century confirms this trend. International law has progressed precisely by denying this history and instead creating a new historical narrative. One such narrative is the one that rehashes history to make the indigenous peoples problematique a recent phenomenon — one over which the international law is responding to appropriately. Such a reconstructed and sanitized history allows for the prescribed amnesia that enables the international legal discourse to empty itself of its external bias while it entrenches the most pernicious bias that remains undetected as all the means of detection have been hygienized.<sup>51</sup>

The international legal discourse was unable to deal with the indigenous issue before because it represented a topic too close and central to the core of the system itself. The issue would rustle the uneasy relationship between the center and the periphery which have developed somewhat of a "see-no-evil-hear-no-evil" unholy and complicit pact among themselves.

Rights of indigenous peoples present a challenge that goes beyond national boundaries. They raise penetrating questions about the rights corpus for example. They challenge the induced amnesia in international legal discourse. They renew unanswered questions of history. At the same time, as they raise these questions at the international level, they also challenge the myth of the nation-state, especially in Africa, as they probe the state-centric sovereignty of the nation-state.

The indigenous peoples' problematique is indicative of the futility and dangers inherent in pursuing economic and political development policies that are not based on natural political communities but on artificially created entities like the nation-state. The structural progression of

<sup>50</sup> Kennedy, *supra* note 25, at 100.

<sup>51</sup> See Joyce Green, *Towards a Détente With History: Confronting Canada's Colonial Legacy*, 12 INT'L J. CAN. STUD. 85, 86–87 (1995). Green suggests that Canada is an evolving "colonial entity created by imperial and colonial interests for the express purpose of extending those interests at the expense of indigenous peoples." This goal is achieved through a synergy of cultural myth and partial historical narratives that construct a dominant narrative that through the power of its definitional language and law constructs an authoritative filter for the exclusion of certain races and cultures. Through scholarship, law, politics and culture, the dominant narrative reproduces itself while legitimizing and reifying its origins and hence becomes a vehicle for the West's cultural hegemony.

international law to produce a differentiation between a center and a periphery, too, is symptomatic of this approach. That this *differentiation*, at both the international and national scene, is achieved through attempts at *homogenizing* the society is the juristic fraud perpetrated by an unresolved historical subjugation of a people and a culture. The *homogenization* gives the legal discourse a distinctively progressive teleology through the creation of Western symbols of *progress*. The truth however is that these created symbols to which the indigenous societies are continually pressured to pay obeisance to in constructing their scale of *development* are not nearly enough to assure them of the truly *good life* as they view it and ignores the *human* element in "development". A carefully constructed program of progress, however, ensures that the discourse progresses by masking its fiercely partisan agenda through its homogenization tendencies.

A homogenization stratagem ensures that the foundational template of the discourse is not questioned. It is constructed as *immutable* - a myth sustained by its fastidious *normative* neutrality. A program of this kind oversees the evolution of *neutral* doctrines to, first, subjugate the indigenous populations and then eschew oppositional stance against it by subsuming the indigenous populations in its corpus through the process of *homogenization*.

In Africa this process involved cabining and stream-rolling all actors into the *unitary* state. Such a state would not reflect the Western notion of success symbols. Rather, it would actively deny the viability of any other human organizational organism aside from it while ensuring that the construction of the "other" as a deliberate policy in global governance through an ersatz homogenization program is finally achieved. The dysfunction of the nation-state in Africa as the obvious marginalization of the third world state in international legal discourse bears witness to the binary nature of this process. At the root, the discourse remains deeply partisan and its language of neutrality is but one of its many attributes which disable an alternative viewpoint.

### III. RECONSTRUCTED HISTORICAL NARRATIVE AS A DISABLING MANEUVER

A discipline defines its discourse, describes its ambitions and states its *raison d'être* through the history it constructs for itself. In this sense, history as the dominant narrative shapes and defines the collective consciousness of the discipline and its practitioners.<sup>52</sup> A conflation of selective construction of the significant events to be included in the history

<sup>52</sup> *Id.* at 13.

and an allegorical overstatement of certain contributions accompanied by a certain diminution of others enables the creation of a distinctive lens through which actual historical events are interpreted. A discipline quite uneasy with its history latches on to such an interpretation of history and seeks to redefine itself thereunder. This is true of the international legal discourse.

A reconstruction of history enables the discourse to define and delimit the problem to be resolved. It also provides the range of possible solutions while circumscribing them according to the capricious interests of the victor and leaving a vacant terrain sufficient enough for only a measured success in the already defined struggles. More importantly, a rehashed history also provides the *episteme* for engaging in the discourse. Such an *episteme* necessarily defines and delimits the discourse. It is in this sense that history becomes the story of progress as told by the victors<sup>53</sup>. It is a history that is characterized by a "crucial historical and geographical amnesia"<sup>54</sup> conducive to the preservation and continued development of a distorted "world view".

The overall effects of a reconstruction of history are those seen today. The continual, never-fading *eurocentrism* in international law is the most obvious consequence. It is a consequence animated by an *absence*, rather than one provoked by a *presence*, of a pernicious element in the international legal discourse. The process of colonialism and imperialism bequeathed not only a reinterpretation of a history but also engendered a suppression of knowledge in the construction of the history emerging in its aftermath. It is this *absence* that enables the international legal discourse to give short shrift to colonialism.<sup>55</sup>

The reconstruction also facilitates a reinterpretation. Vitoria fortuitously produced his ambivalent statements about the rights of indigenous peoples but is now celebrated as the first defender.<sup>56</sup> Adulatory words for him have been flowing profusely from aboriginal rights advocates such as these: "The founder of international law [Vitoria] was moved by reports of such oppression to develop standards for nations to emulate, based on respect for the human rights of each individual."<sup>57</sup> Of Lindley, of "backward territories" fame, it has been said: "...Lindley discussed the role of international law in regulating aboriginal relations. He stated that it was,

<sup>53</sup> See generally ZYGMUNT BAUMAN, POSTMODERN POLITICS (1993).

<sup>54</sup> David Slater, *Contesting Occidental Visions of the Global: The Geo-politics of Theory and North-South Relations*, in MASS ALLA DEL DERECHO--BEYOND LAW, STORIES OF LAW AND SOCIAL CHANGE FROM LATIN AMERICA AND AROUND THE WORLD 97, 99 (Issue No. 10, 1994).

<sup>55</sup> Kennedy, *supra* note 25, at 100.

<sup>56</sup> See generally Anghie, *supra* note 16.

<sup>57</sup> Opekokew, *supra* note 28, at 6.

in fact, agreed that native populations should not be considered outside the community of international law....<sup>58</sup>

The legacy of such interpretations of history is that they define the struggles. Hence, since the time of Vitoria, it became possible to restructure the tenor of the argument to be whether the indigenous peoples were "civilized enough" to be accepted into the family of nations. In the post-war period, this question was carefully rephrased as whether the indigenous peoples could be construed as *peoples* in international law possessing sufficient [eurocentric] characteristics to warrant the foundational principle of self-determination to be applied to them.

A convenient interpretation of history such as this one facilitates the nurturing of such mythological doctrines as the "Trust doctrine", for example, and the singularly pejorative and pernicious language of "guardian" and "ward" in the discourse to immediately indicate the power relations between the dominant society and the indigenous peoples. The U.S. Supreme Court perfected this style in the early Nineteenth Century in its adjudication of Native American cases. In a language reflective of the international opinion, Chief Justice Marshall, who is today celebrated as the greatest defender of Native American tribes in the U.S., could finally gather enough effrontery to pronounce in *Johnson v. McIntosh*:

But the tribes 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.... [T]he title by conquest is acquired and maintained by force. The conqueror prescribes its limits. *Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed.... Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected.*<sup>59</sup>

Significantly, Marshall indicates that the fact of invasion is a historical fact that ought to remain there - in history. He states:

We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess...[C]onquest gives

<sup>58</sup> *Id.* at 7.

<sup>59</sup> 21 U.S. 543, 589; 5 L.Ed. 681 (1823).

a title which the courts cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.<sup>60</sup>

It is this kind of attitude that pervades the international legal discourse. A prescribed absence of some part of history presents an entirely different template to start an engagement other than the one that would naturally have recommended itself.

In the Third World, instead of the formerly oppressed groups critically questioning the legal order that enabled the entrenchment of a diabolic rule as the one just past, the emerging states became impatient to attain "statehood" as defined by the former oppressor. The need to enter the "family of nations" was suddenly a deeply desired goal. No more questions were being asked about the paradox of an international legal order that had acquiesced to, even mandated their earlier subjugation. Indeed, the reverse happened. The emerging states quickly mastered the rules of the game and garnered the tools of the former "master". Alien concepts such as "sovereignty"<sup>61</sup> were soon in use against further attempts by those segments of the populations that felt dissatisfied with the emerging order. The same means used by the departing conqueror in an era just past to stunt self-determination were now in use by a different conqueror. The indigenous peoples, aspiring for their genuine existence as before, came against a new conqueror more determined than the foreign conqueror to give in to their aspirations. The original conqueror has succeeded prodigiously. A whole history of colonization and subjugation were to be given short shrift. All attempts at further "disintegration" were deemed to be a *de trop* menace to the "state".

The paradox of this development was the departing Colonist passed on the mantle of subjugation to the post-colonial state. The new states proved erstwhile in this duty. The structural significance of this was that the post-colonial state was in a very real sense being forced to adopt the reasoning of Marshall (quoted above) in their insistence on a *eurocentric* sovereignty in fighting what they perceived to be attempts at their

<sup>60</sup> *Id.* at 588.

<sup>61</sup> At its most basic, "sovereignty" refers to a framework of supreme coercive power of the state. Indisputably, such a power was absent in traditional tribal societies. The attributes of "sovereignty" as unlimited power held permanently in a single person or source; a power that is inalienable, indivisible and original (not derivative or dependent) were not characteristics of power in non-state societies. For an exclusive discussion on this, see Peter d'Errico, *American Indian Sovereignty; Now You See it, Now You Don't*, text from inaugural lecture in the American Indian Civics Project at Humboldt State University (Arcata, CA, USA) (Oct. 24, 1997). His article is available at <http://www.nativeweb.org/pages/legal/sovereignty.html>.

consolidated powers. The tragedy was that by adopting this line of reasoning, they unwittingly gave away the oppositional template from which they could have questioned the flawed international order. In the end, the eurocentric "master" had delegated the tools of subjugation to his proxy, the post-colonial state. It would be the tool through which the indigenous peoples would be, as Marshall had prescribed, "incorporated into the "victorious" nation".<sup>62</sup> The colonized had now turned colonist. The profound dilemma posed by the emergent state, dubbed "internal colonialism", has been explained thus:

The dilemma of internal colonialism, on the other hand, has emanated from calculated or miscalculated presumptions.... While the neocolonialist [classical colonialist] have shunned their past and championed causes pertaining to the respect of peoples rights to self-determination, the internal colonialists began to lose ground as the legitimacy of the post-colonial state was increasingly challenged.<sup>63</sup>

The impact of the failure to shed off this *eurocentrism* led to the uncritical acceptance of Western intellectual and socio-cultural traditions as the invariable, if not superior frameworks of enquiry<sup>64</sup>. The most acute social effect of the failure was the "needless denigration" of indigenous traditions. This, in turn, precipitated the genre of a people whose structural position in life vis-à-vis the rest of the population in the various states, too strikingly paralleled the earlier positioning between the Western colonialists and the colonized communities. This marked the birth of the indigenous rights concept in Africa.

In the indigenous peoples' struggles, the cumulative effect of this reconstruction has been the confining of their means, language and form of the struggle into the strait-jacket provided by the eurocentric international law. Their attempts to utilize the conqueror's means to dismantle the obstacles mounted by the conqueror face many pitfalls. Their helplessness as they attempt to emancipate themselves through the means provided by the "conqueror's rule of law and its discourses of conquest"<sup>65</sup> is reflected in what they deem to be their powerlessness even as they discuss at the Working

<sup>62</sup> Johnson, 21 U.S. 543 at 589.

<sup>63</sup> Salih, *supra* note 29, at 274.

<sup>64</sup> Upendra Baxi, *Some Remarks on Eurocentrism and the Law of Nations, in ASIAN STATE AND THE DEVELOPMENT OF INTERNATIONAL LAW 2-7* (R.P. Anand ed., 1972).

<sup>65</sup> ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 327 (1990).

Group. The following was the reaction after the Working Group's sessions in 1992 in Geneva:

...To some indigenous groups any kind of international instrument is a step forward; others might feel that they need more time to in order to have a chance to make an impact on the drafting process; but no group wanted to see a declaration with no chance to pass the Sub-Commission or the Human Rights Commission...[T]here is a dilemma between intensifying the drafting with the risk of having the text voted down in the Sub-Commission or in the Human Rights Commission and using more time for a general agreement in the Working Group, but losing support from other governments.<sup>66</sup>

It is quite clear here that the position taken by indigenous peoples is merely *strategic* and *relative* to that which the various governments might take. As Prof. Robert Williams observed, such self-limiting means of emancipation which pay obeisance to the "anachronistic premises" of the current system need to be re-defined radically to articulate the true vision of the indigenous peoples in the global community.

#### IV. THE LANGUAGE OF EVOLUTION, PROGRESS, DEVELOPMENT AND MODERNIZATION AS AN IDEOLOGY

International law has tried to keep pace with the so-called evolution of mankind in his struggle to control nature, a struggle that from the Western viewpoint is unidirectional, linear and upward. It leads to "progress". Bauman<sup>67</sup> and Slater<sup>68</sup> explain how this reading of events constructs time-space as the battleground whereon the *superior future* defeats the *inferior past*. Under this construction, superiority is tested and proved in victory, inferiority in defeat.<sup>69</sup> Since the language of the victor is superior, it becomes the language of progress. The standard line is that the age of enlightenment brought with it the era of scientism that brought about technical progress that in turn produced the wherewithal for a comfortable existence for "everybody". This has been offered as the explanation for international law's shifting organizational renewal force: first by turning

<sup>66</sup> THE INDIGENOUS WORLD 145 (INTERNATIONAL WORKING GROUP ON INDIGENOUS AFFAIRS (IWGIA) Y.B. 1992)

<sup>67</sup> BAUMAN, *supra* note 27, at 226.

<sup>68</sup> Slater, *supra* note 54, at 100.

<sup>69</sup> BAUMAN, *supra* note 27, at 226.

its back on religion and then on philosophy to tread the present era in the hallowed halls of "pragmatism".<sup>70</sup>

The language of progress, meaning "technical progress", is equated with evolution to give the process respect, acceptance and rationality. With time, this rationality, though originally a viewpoint, becomes self-referential. It gradually entrenches itself as the only language adopted in support of the process. It becomes an ideology. As it establishes itself in this manner, it progressively denies *pluralism* and is reduced to pure *productivistic monism*.<sup>71</sup> Scientific rationality becomes Western rationality and in the stead of its original poise as a means, it replaces *total rationality* as an end. This signification is important because it indicates how a belief in progress was developed into an ideology that is bound up with the ideology of science. Such an ideology mystifies, confounds and confuses the "progress equation" sufficiently to conjure up a connection between scientific and technical progress and political, social and aesthetic progress where as no such logical connection exists.<sup>72</sup> International law, given its partisan provenance and the fact it is equipped no better really, limps after this *reality* and attempts to capture it in its normative framework. It is at this point of laying down a normative framework of action that the real meaning of technical and scientific progress is thus reduced to the role of revealing man's rational power.<sup>73</sup> This then creates a myth that serves an ideological function that eschews in its vision the social and moral aspects that ought to form part of the collective context. In capturing this rationality as the "domain of truth",<sup>74</sup> international law defines "normalcy" by reference to its particular cultures.

Hence, the colonial process can never be seen justifiably as an era that created or reflected the bankruptcy or inherent weakness of the international order. It would never be a justification for rethinking the diabolical deftness with which this ideology could be appropriated to subdue half the humanity. This is because it fits neatly within the evolutionary idea of technical "progress". The scientific "era" brought with it a faith in progress made possible by the "progressive" broadening of the field of effective knowledge. Science opened up hitherto unsuspected horizons for the Power of man, allowing a totally new ascendancy over nature and society by means of scientific methods and technical applications. This increase in

<sup>70</sup> Kennedy, *supra* note 25, at 95.

<sup>71</sup> TOWARDS A RE-DEFINITION OF DEVELOPMENT 104 (John Schlegel ed., 1977) (Comments by Jacques Berque).

<sup>72</sup> *Id.* at 112 (Comments by Nassif Nassar).

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

<sup>74</sup> Slater, *supra* note 54, at 100.

useful inventions and in the power of science modifies the way in which space is occupied, the import of time and the behavior of societies as they become *vectors of growth*.<sup>75</sup>

The expansion of Europe beyond its borders therefore could easily fit into this mold of *spreading* these "useful" inventions; the colonialists could simply be described as the *vectors of growth*. Hence, colonialism could be seen as an evolutionary step. An attempt to provide mankind with the wherewithal for a comfortable existence for everybody. One could imagine the colonialist justifying that we must never miss the point; the genuine "scientific" motive behind colonialism was a "good" thing. We ought, perhaps, to focus on the good side. The technological advancement brought by colonialism, the spread of progress, the real possibility of progress in hitherto "dark" and distant God-forsaken lands and, the colonialist would gleefully add, the hereafter virtual integration of the whole world. Would all this "progress" have been possible without colonialism? Surely by spreading technical and scientific progress to new frontiers it became possible to live the dreams of the Enlightenment - to banish poverty. In this same vein, one could reasonably ask why focus on colonialism anyway? If the African or the Asian was so traumatized by colonialism, so was the European traumatized by the World Wars. Each sacrificed, each suffered the result of weakness in international law.

The practical effect of conflating this ideology into the international legal framework is that it embedded itself into the international legal discourse in such a subtly mystifying manner that it ensures its existence even where the conditions that produced it disappeared. It establishes an overall supremacy that other competing modes of rationality are either silenced or put on a defensive and apologetic level. It is for this reason that the imposition of these ideas in the pre-capitalist African societies produced not a stimulated challenge but a real threat of exploitation and dependence. The ideological function of the system however, served it well as the local elite in these countries played up to this obvious ideological note, and responded to this threat by accepting a compromise, though at the cost of leaving the human masses depending on them still more helpless. Juan Gomez-Millas captures the effect of this ideology of development neatly: "The effects of that compromise have weakened the traditional structures and local cultures, and have robbed the communities of all confidence in themselves and in their own cultural background, without incorporating the new imported elements."<sup>76</sup>

<sup>75</sup> *Id.* at 101.

<sup>76</sup> Gomez-Millas, *supra* note 70, at 106.

This concept of progress as the dominant ideology has led to two linked processes in the international legal discourse. In the first place, it facilitated the unabashed entry of Western rationality into the discourse by lacing the ideology with the Western particularist contextual ideas on political, moral and social organization by propping them up as universalist scientific rationality linked to progress and development<sup>77</sup>. Such a construction, by including a Western social and political context, necessarily excludes the African one. It therefore follows, and it is not surprising at all, that the model of development and progress whose standards are reflected in the international legal discourse is that espoused by the Western rationality. The non-Western ones need and must reform to this dominant ideology and must measure up to this scale.

International law therefore imbibed, was transformed and became the language of expressing this rationality. It became the normative *episteme* for the generation and purveyance of the Western rationality. Increasingly therefore, international law espoused this epistemological and ideological rationality which was the pre-supposition the "other" cultures and nations had to accept in order to engage and be engaged by it and to influence and be influenced by it. From this point therefore, advancement or evolution of international law could only take place within the set epistemological circle and not on the outside of it. Those who by design or by inadvertence remained unaffected and uninfluenced by this rationality were to be left behind and suffer the consequences.

In Africa, the idea of progress as a dominant ideology was an extremely malleable notion that could be nurtured by the local elite into a myth justifying exploitation of the weakest in the name of "national development". In their "national" discourse, the "domain of truth" would define "normalcy" and "development" by reference to the vision tutored by the international legal discourse. The indigenous societies were therefore not to remain uninfluenced by this rationality - otherwise they would suffer the consequences.

<sup>77</sup> For an excellent, modernized version of this argument, see FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). Fukuyama argues that what we may be witnessing in the post-cold war period and the "triumph" of Western-style government system, is not just the passing of a particular period of postwar history, but the end of history as such. By "end of history", he means the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government. It might be possible to pillory Fukuyama and his "end of history" thesis as extremist but it might equally be possible to demonstrate that many other "liberal" scholars of international law basically share his way of thinking. See, eg., Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT'L L. 449 (1997) (for one successful attempt to show the link between Fukuyama and these other more "moderate" liberal scholars).

It is in this way - the use of the dominant ideology of progress - that the language of evolution and progress still remains one of the most powerful tools for creating a hegemony in the African state. It is also through it that the post-colonial state tended to accomplish the colonial legacy by placing the remaining vestiges of indigene into a *eurocentrically* recognizable scale of "progress" and development.

## V. "AN UNACCOMPLISHED COLONIAL LEGACY"<sup>78</sup>

The colonialists had managed to subsume large sectors of the indigenous populations in their "modernization" project. This was a necessary step to the colonial mission since there was a need to create a category of workers who would provide labor for the colonial enterprises. Besides, a sound colonial administration would only be possible with the establishment of a form of State that mirrored, however distantly, the Eurocentric State. However, those indigenous communities that presented no immediate political challenges or strategic material or labor interest to the colonialist were left on their own. Most of the time this would be to the indigenous communities' disadvantage since they would be caged in certain reserves that were closed off from penetration by other communities. This in itself was interference enough with the continued existence of these communities since the necessary barter and movement of goods and people across the ethnic boundaries was brought to a halt.

In the 1880's the African continent was forcibly divided up into forty-eight possessions under European hegemonies through "rule and compass".<sup>79</sup> There was no monolithic culture in the forty-eight possessions or in each of them. The division was done with complete disregard for the ethnic and linguistic units pre-existing the Western colonization.<sup>80</sup> The subjacent idea to this division was to create new nations based upon the Eurocentric principle of cultural superiority.

The creation of colonial regimes, far from homogenizing the different ethnic and linguistic groups, made the disparities more acute by

<sup>78</sup> Mohamed Salih, *supra* note 29. This phrase, which captures the situation in Africa with such accurate brevity, was first used to demonstrate how the post-colonial state in Africa simply carried on the policies of the colonial State and therefore tended to "accomplish" the legacy started by the colonialists.

<sup>79</sup> Eduardo Alberto Sadous, *Protection of Minorities in African Multi-Ethnic and Multi-Linguistic Societies*, in SATISH CHANDRA, *INTERNATIONAL PROTECTION OF MINORITIES* 78 (1986).

<sup>80</sup> See generally AMADU SESAY, *AFRICA AND EUROPE: FROM PARTITION TO INTERDEPENDENCE OR DEPENDENCE?* (1996) (giving an account of the scramble and partition of Africa); JOHN MACKENZIE, *THE PARTITION OF AFRICA, 1880 - 1900 AND EUROPEAN IMPERIALISM IN THE NINETEENTH CENTURY* (1983).

This concept of progress as the dominant ideology has led to two linked processes in the international legal discourse. In the first place, it facilitated the unabashed entry of Western rationality into the discourse by lacing the ideology with the Western particularist contextual ideas on political, moral and social organization by propping them up as universalist scientific rationality linked to progress and development<sup>77</sup>. Such a construction, by including a Western social and political context, necessarily excludes the African one. It therefore follows, and it is not surprising at all, that the model of development and progress whose standards are reflected in the international legal discourse is that espoused by the Western rationality. The non-Western ones need and must reform to this dominant ideology and must measure up to this scale.

International law therefore imbibed, was transformed and became the language of expressing this rationality. It became the normative *episteme* for the generation and purveyance of the Western rationality. Increasingly therefore, international law espoused this epistemological and ideological rationality which was the pre-supposition the "other" cultures and nations had to accept in order to engage and be engaged by it and to influence and be influenced by it. From this point therefore, advancement or evolution of international law could only take place within the set epistemological circle and not on the outside of it. Those who by design or by inadvertence remained unaffected and uninfluenced by this rationality were to be left behind and suffer the consequences.

In Africa, the idea of progress as a dominant ideology was an extremely malleable notion that could be nurtured by the local elite into a myth justifying exploitation of the weakest in the name of "national development". In their "national" discourse, the "domain of truth" would define "normalcy" and "development" by reference to the vision tutored by the international legal discourse. The indigenous societies were therefore not to remain uninfluenced by this rationality - otherwise they would suffer the consequences.

<sup>77</sup> For an excellent, modernized version of this argument, see FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). Fukuyama argues that what we may be witnessing in the post-cold war period and the "triumph" of Western-style government system, is not just the passing of a particular period of postwar history, but the end of history as such. By "end of history", he means the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government. It might be possible to pillory Fukuyama and his "end of history" thesis as extremist but it might equally be possible to demonstrate that many other "liberal" scholars of international law basically share his way of thinking. See, eg., Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT'L L. 449 (1997) (for one successful attempt to show the link between Fukuyama and these other more "moderate" liberal scholars).

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deliberate policies of divide and rule. The policy pursued by the colonial powers was designed to create a differentiation of the African peoples through unequal access to formal education and other factors that were increasingly identified with the meritocratic standards upon which societal rewards (and punishment) in the new States were to be distributed. The colonialists were able to encapsulate large sectors of indigenous peoples and subsume them under the modernization "program". This created wide disparities in the participation of State apparatus and ownership of wealth. In countries with diverse cultural roots, those who were culturally distinct from the mainstream national population were the indigenous ethnic minorities. In many cases these were the societies that inhabited remote regions or which the colonialists had, pursuant to their policies of "divide and rule", closed off. As Stephen Orvis has observed:

The effects of colonial conquest varied by region. Areas closest to the railway line and European settlement felt the greatest effects but were the first to receive via Christian missionaries a Western education, which would later prove to be the essential component of elite status. These communities were closest also to the newly profitable markets for grain [while] communities brought under colonial rule later [or never]...got a late start on education and the higher-paid labor opportunities to which it eventually led.<sup>81</sup>

In East Africa, the majority of the population is composed of Bantu speakers who were mainly cultivators and have many cultural characteristics in common. Most of the other groups gradually settled down for sedentary agriculture after initial contact with the colonialists.<sup>82</sup> The national culture of the post-colonial state was constructed from this mainstream culture spiced with the peasant characteristics picked up from the newly established market economy, which these societies had unwittingly and increasingly become dependent on. This already meant a differentiation between these dominant societies and the indigenous minority who remain "indigenous" with limited dependence on the market economy.

<sup>81</sup> STEPHEN ORVIS, *THE AGRARIAN QUESTION IN KENYA* 24 (1997).

<sup>82</sup> See W. Adams, *Visions of Environmental Change in Marakwet, Kenya*, in LEACH MELISSA & ROBIN MEARN (EDS.), *THE LIE OF THE LAND* 155ff (1996), for the suggestion that as early as 1904, the Marakwet People who part of the Kalenjin group though formerly pastoralists had already transformed to practice agriculture by use of irrigation. See also ORVIS, *supra* note 81, at 23 (for the suggestion that perhaps only the Maasai remained purely pastoralists in Kenya after initial interaction with the colonialists).

To a large extent, independence was granted on this understanding. The local elite who took over power and manned the Successor State came from the dominant groups and had an interest in expanding the market economy. They therefore took an autocratic approach to consolidating "national" unity. This approach ignored the cultural differences and identities of indigenous minorities in the name of "national" unity.

The argument in support of such an approach was always familiarly spawned around the rhetoric of *development*. For the country to *develop* it had to turn its back on "backward" tendencies and cultures. This made room for a uniform national development policy, which totally disregarded cultural diversity and differences. The major focus of this policy was, for example, to categorize the common *mwanauchi* ("the man on the street") as a *peasant* or *worker* and not as a *pastoral herder*.

The cumulative effect of this approach was a very systematic disempowerment of a distinct section of the citizenry who had a different system of production from that which was deemed to lead to "development". This was coupled by a destruction of their economic base in the name of "integrating" them and carving them into the national economy. An economy as Eurocentric as the departing colonialist expected the Post-colonial State to pursue.

In the circumstances, the concept of indigenous peoples could not be permitted to have a prominent place in Africa for three reasons. First, the dominant groups now in control of the State apparatus considered themselves "indigenous" since they too "belonged to the land." Second, the "founders" of African States, after attaining independence, postulated that the term "indigenous peoples" had divisive connotations for young nations prioritizing national consolidation and economic "development", unity, and identity after many years of colonial rule which divided Africa into antagonistic ethnic groups. The truth however is that these leaders aspired for the same monolithic power espoused by the nation-state. Any talk of *de-concentration* of those powers was therefore *de trop*. Third, and linked to the second, the desperate attempt to incorporate the indigenous peoples into the erroneously perceived nation-state was merely symptomatic of the desperate obsequiousness of the elite to become the self-appointed guardians of the inherited colonial boundaries, regardless of their implications for national or regional security.<sup>83</sup>

<sup>83</sup> Salih, *supra* note 29, at 271.

## VI. "COMPLIANCE" AND "IDENTIFICATION" OF EUROCENTRIC CIVILIZATION IN AFRICA AS AN EXPLICATING PHENOMENON

From the brief historical account given above, it can be said that in a very real sense, the colonial history of Africa can be viewed as a process aimed at incorporating indigenous peoples and resources into the European realm in order to facilitate their exploitation.<sup>84</sup> As a complete political and economic project, this involved an elaborate re-construction of the social and political realities found in Africa at the time. The two processes described above were in overuse.

The first step was to style the African cultures as "primitive". Borrowing from the thesis of Vitoria, reflected in the General Act which came out of the Berlin Conference of 1885, the European disguised his interests in Africa with an altruistic aim of bringing "civilization" to the "savages" and the "primitive".<sup>85</sup> The acceptance of this position gradually transformed this task to one of "modernization" and then facilitating "development". The fact that all these words could be used synonymously to refer to the "task" of the colonialist soon obscured and obliterated the imperialistic designs of the scheme.

At that same time, a century of imposed ideology on a people at artificially differentiated levels produced a differentiation among the African societies in a manner not unintended by the colonialist. The colonial policies applied a selective approach that reached more into certain sectors of the African society considered more useful to the colonial project than others. It ought to be understood that the colonial scheme was eventually to impose a full-fledged capitalist system on the African societies.<sup>86</sup> The forcible expropriation of land was to take the place of primitive accumulation of capital. Labor was therefore required to facilitate the process. This could not be provided by the traditional African societies or by pastoralists. The sedentary African societies had to be turned into peasants to ensure a supply of labor. It was these societies that the colonialists reached and earmarked for "modernization".

In a typical *reconstructive* fashion alluded to above, in an environment where the European way ensured "progress" and well-being, it became easy for the colonialist to use *Eurocentric* tokens to reward those

<sup>84</sup> *Id.* at 273.

<sup>85</sup> See Anghie, *supra* note 16.

<sup>86</sup> But see generally JOHN HOBSON, *IMPERIALISM: A STUDY* (1987). Hobson argues that the economic motive was not the operative one in the colonization of Africa.

who "adhered" to the "modern". Hence formal education, instruction in the language of the colonialist and other "benefits" were used to reward certain societies while others were left out. Further, in each society those who collaborated and showed promise in the European ways were the ones who benefited more from the administrative and educational opportunities provided.

The overall effect of these colonial "divide and rule" policies was the creation of two sets of African culture: large societies whose cultures and traditions have been encapsulated into the colonialists' traditions and small pockets of "preserved" or "indigenous cultures", often inhabiting the spatial and political periphery of the State.<sup>87</sup> These smaller societies thus remained to a large extent "indigenous" while those that served the ex-colonial masters became "modernized".<sup>88</sup>

In this complicated scenario, the now "modernized" Africans took over the role of the colonialists in the Post-colonial State. The Post-colonial African State unwittingly reinforced the political values inherited from the Colonial State apparatus.

Psychoanalytically, these changes could be attributed to two processes whereby the European influence was accepted for different motivational purposes.<sup>89</sup> The emerging African elite accepted the influence because of *compliance*: they hoped to achieve a favorable reaction after donning the European culture. They saw a clear chance of gaining social recognition, material wealth and potentiality for future leadership positions by accepting, lock, stock and barrel, the European ways. Thus the satisfaction derived from accepting the influence was due to the *social effect* of accepting the influence.

The dominant ethnic groups that produced the elite leaders, on the other hand, accepted the influence because they already could identify themselves with the colonialist. They accepted influence because of the need to establish or maintain a satisfying self-defining relationship to the "others" – the "indigenous other". Here, the satisfaction derived from identification is due to the *act* of conforming as such. In any event, it was

<sup>87</sup> Salih, *supra* note 29, at 275.

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

<sup>89</sup> See Herbert Kelman, *Compliance, Identification and Internalization*, 2 J. CONFLICT RESOL. 51 (1958) (for a detailed analysis of the reasons that drive people or societies to accept influence from different sources). Compliance results when one is, in way or another, controlled by another – as in a student obeying the teacher, or a child complying with a parent's values. Identification is the process whereby a person has a desire to form a relationship with another or a group. Such a desire may lead the person to adopt the other person's or group's values. With internalization, the value with accompanying behavior is adopted as meaningful for its own sake.

clear to the dominant groups that they were to play similar roles as the colonialists with respect to the "others". In no case was the Western influence accepted and *internalized* because of its content or because it induced behavior which the various societies found intrinsically rewarding.

The long and short of it all is that in the end, the indigenous peoples were not fully subsumed into the market economy introduced by the colonialists. The effect was that the indigenous peoples were left in a particularly vulnerable position when the colonialists left. The new State recognized and declared the "modern" way the correct path to "development". At the same time, meritocracy for the assigning of societal rewards and punishment were to be based on the Western "modern" ways. Untutored in the ways employed by a new intrusive and ubiquitous State manned by an elite with everything to gain from their unheralded assimilation, the indigenous peoples could only lose the battle that pitted them against the post-colonial State. National interests meant uniform "development" policies that further disempowered the indigenous peoples in their attempts to protect their lands and natural resources in a system unknown to them.

## PART B

### I. INTRODUCTION

In this part, I attempt to show how the process of transposing the decolonization moment into an elaborate modernization program aimed at achieving "economic development" enabled a parallel process of silencing, dominating and disempowering other sectors within the African State. I use the Maasai peoples of Southern Kenya as a concrete example of how this happened.

As the African State borrowed from international law a legitimating discourse of "modernity" aimed at entrenching itself, certain voices within the State are silenced. As discussed in this part, the indigenous voice is one such silenced voice. In the pages that follow, I explore in detail how the process of "othering" the Maasai peoples in post-colonial Kenya has been brought to fruition.

It would appear that the praxis of international law is implicated in this position of "entrapment" that the Maasai peoples find themselves in. Yet it does not appear clear whether the discourse has sufficiently redressed the problem or whether it, indeed, should or could do anything about it. Perhaps the question of the Maasai peoples is only a core national problem – but

even then, a narrative of deprivation of basic human rights as systematic as this should have attracted significant international attention and remedy. The analysis also shows how the national discourse plays a certain legitimating role in furthering an essentialized view of indigenous peoples and of the Maasai peoples by constructing "indigeness" as a binary pair to "modernity". The effect is that "indigeness" is necessarily defined in negative terms and without any redeeming qualities. "Modernity", on the other hand, is defined as good and desirable and is understood in a linear historical progressivist fashion: The *indigene* must evolve into the *modern*. Both the "indigene" and the "modern" are given fixed ideological meanings unreflective of the fluidity on the ground. As a result of this fixity, by definition, it becomes impossible to harness or "domesticate" modernity in indigenous ways as these are deemed to be mutually exclusive.

The international legal discourse further creates a legal consciousness that allows putting in place a programmatic scheme that pretends to be addressing the plight of the Maasai peoples but ends up disempowering them. Finally, the analysis renews the question of the legitimacy of the post-colonial African State. The case of the Maasai is a poignant reminder for a rethinking of the question of the steamrolling and cabining of human societies into the universalistic statist formulation that persistently produces patterns of disempowerment of some groups by the groups that hold power. The indigenous movement in Africa is a challenge to the ready assumption that the Post-Colonial State is sacrosanct. More generally, the indigenous movement, animated and justified by a case such as that of the Maasai, impugns the apparent and assumed immutability and indispensability of the necessity of the State to global organization. The challenge that the indigenous movement poses is that local politics may, indeed, need to be the center of the global.

### II. THE MAASAI PEOPLES AND MAASAI COUNTRY<sup>90</sup>

The Maasai are part of the "Maa-speaking" group of peoples in East Africa who presently live in the three administrative districts of Narok, Kajiado and Trans Mara in the southern part of the present day Kenya. In pre-colonial times the Maasai inhabited a vast stretch of land reaching from the Vicinity of Lake Rudolf (today known as Lake Turkana) in the north down to about the latitude of Dar es Salaam in the south. This region was

<sup>90</sup> This part is owed, in no small measure, to KERIAKO TOBIKO, LAND (GROUP REPRESENTATIVES) ACT: A CASE STUDY OF ILKAPUTIAE MAASAI GROUP RANCHES OF KAJIADO DISTRICT (1989) (Unpublished LL.B Dissertation, University of Nairobi) (At University of Nairobi Law Library).

bordered on both sides by the escarpments of the Great Rift Valley and was altogether more than 600 miles (almost 1000 km) in length and almost 200 miles (approximately 300 km) in width at the points of its largest extension.<sup>91</sup>

After the initial colonial incursion into their land, the Maasai lost half their original territory including the most fertile and best-watered parts.<sup>92</sup> The Maasai continued losing their tribal land base during the colonial period and after independence. Today, what may be inaccurately called "Maasai country" is the present-day Kajiado and Narok Districts in Southern Kenya.<sup>93</sup> The total population of the Maasai peoples presently numbers about 600,000 persons.<sup>94</sup> 95% of all Maasai still live in their traditional home area and they are the only purely pastoral group in Kenya.<sup>95</sup>

Most of Maasailand is marginal. It is characterized by seasonal and unreliable rainfall. The highland region west of Rift Valley has only one rainy season per year with rain falling at intervals from November to May. The Rift Valley and most of the Eastern region have two main rainy seasons – long and heavy rains from March through June and short rains between November and December. This inconsistency in rainfall renders most of Maasailand unfit for arable farming<sup>96</sup>. Consequently and unsurprisingly, pastoralism practiced according to well-defined and elaborate systems of transhumance was the Maasai's way of life.

That the Maasai peoples' livelihood is solely dependent on the herd is reflected in the nature and character of their land tenure system and resource utilization patterns. Both of these are greatly interrelated with their

<sup>91</sup> DIRK BERG-SCHLOSSER, *TRADITION AND CHANGE IN KENYA* 151 (1984).

<sup>92</sup> For a detailed survey of the actual incursions and how much loss of land it entailed, see generally Kenneth King, *The Maasai and the Protest Phenomenon*, 12 J. AFR. HIST. 117 (1971).

<sup>93</sup> This is inaccurate because upon attaining independence, it was resolved at the Lancaster Conference that

[T]he nation of Kenya was to be the country which hitherto had been known as the colony and protectorate of Kenya....the pre-colonial nation-states and communal ownership of land were to go forever....the market economy which had been introduced by the colonialists was to continue....any one could own land in any part of the country....and all rights in land acquired under the colonial land laws were to be protected by the new Constitution.

See Gibson K. Kuria, *The Role of Land in the Constitutional Process*, a paper presented at the Forum on "Land Rights, Utilization and Equity Under a New Constitution" in Nairobi, Kenya on June 14, 1995 (unpublished). Members of ethnic communities could acquire land outside their traditional homelands. For reasons discussed later in this paper, many individuals from other ethnic groups moved into the Maasai districts and acquired land there.

<sup>94</sup> Republic of Kenya, *Kenya Population Census* (1990).

<sup>95</sup> BERG-SCHLOSSER, *supra* note 91, at 154.

<sup>96</sup> See TOBIKO, *supra* note 90.

stock-management mechanism, which determines who may graze and what his stock where or where to erect a settlement. Since land relationships are an incident of the total culture of a people, and the culture is, in turn, shaped by the peoples' way of life, which is influenced by the ecological conditions of the areas they occupy, this insight into the Maasailand habitat is relevant. The fragile ecological conditions influenced the Maasai pastoral system that was marked by traditional patterns of migration in accordance with the shifts in rainfall patterns. What the Maasai practiced was not "nomadism", however, made out by most colonial literature. The Maasai peoples had a well-organized system of transhumance with equally well-developed migratory patterns. Far from the common cliché that the African tenure system was "communal" in the sense of ownership of the *res*, land among the Maasai was subdivided into different portions owned by a subtribe called *olosh*. The *olosh* is a self-contained ecological unit. It is equipped with both the dry season grazing lands and the lower plains for wet season grazing. During the dry season, members of the *olosh* would migrate to the "higher-lands" (*isipuki*) for greener pastures and water only to descend to the plains when the rains fall next. The decisions on when to migrate would be made by a council of elders of that particular *olosh*.<sup>97</sup>

In this sense, the idea of "communal" ownership can have meaning with its reference *only* to the guarantee that each individual member of the group had to access the *res*. Clearly however, the Maasai fastidiously distinguished between "belonging to" and "not belonging to", contrary to the colonialists' claims. Further, the reason given for the supposition that the Maasai could have no claim to their lands because they merely ranged freely over vast areas in search of pasture and water is, as shown above, flawed. This clarification is important because arguments have lingered even in post-colonial Kenya that the Maasai cannot claim the land base they had in the period immediately preceding colonialism "considering the way property in land is acquired in human society."<sup>98</sup> The argument, familiarly eurocentric but now advanced by members of the dominant groups in Kenya, is that the Maasai peoples' "nomadic" way of life was inconsistent with a system of defined rights in land since they did not work on the land "sufficiently" to be entitled to the land in accordance with the "Labor Theory" of acquisition of rights in land.<sup>99</sup>

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

<sup>98</sup> See generally, Gibson K. Kuria, *Who Owns Land in The Rift Valley?*, SUNDAY NATION, Apr. 23, 1995; C.K. MEEK, *LAND, LAW AND CUSTOM IN THE COLONIES* 78 (1949).

<sup>99</sup> The basic idea in this theory is that people are entitled to hold as property whatever they produce by their "initiative, intelligence and industry". The argument is that labor adds value to a thing worked on and therefore the laborer is entitled to the transformed thing.

The underlying assumption of this argument confirms the success of the processes of rewriting history - constructing difference as the "other" as earlier suggested. The argument is now coming from the former colonized himself: it is only sedentary and agricultural communities that can be said to have "mixed their labor with the soils" by tilling the lands. Consequently, it is only in such communities that there can exist a system of rights in land. This was the reasoning explicit in the colonial policies toward Maasai land. It is a reasoning that is implicit in the post-colonial State's policies toward Maasai land.

### III. ENCOUNTER WITH CLASSICAL COLONIALISM: MODERNITY AND SOVEREIGNTY AS THE AXIS OF DISEMPOWERMENT

From the outset the tools of international law confounded the Maasai. The two Maasai treaties with the British colonialists in 1904 and 1911 were the earliest forms of actual expropriation of land by the colonial "government" in Kenya.<sup>100</sup> It is ironic, but not surprising, that the British constructed the Maasai as a sovereign group to facilitate carving off land from them.<sup>101</sup>

James Gathii has agonized over the "paradoxical contradictions" presented by the Maasai treaties of 1904 and 1911.<sup>102</sup> He argues that the fact that the East African Court of Appeal in the case of *Ole Nchoko Vs. AG*<sup>103</sup> concluded that the Maasai were a *sovereign* entity capable of entering into a treaty is apparently in conflict, among other things, with the fact that Kenya was declared a protectorate on June 15, 1895, marking the beginning of official British rule in Kenya.<sup>104</sup> James Gathii argues that the adjudication

<sup>100</sup> Technically speaking, it is inaccurate to describe this period as "colonial" since only a protectorate status was declared over East Africa (present day Kenya) on June 15, 1895. Kenya only became a "colony" in 1920.

<sup>101</sup> Not much has been written about the Maasai treaties, and how they were negotiated. For a brief, historical account, however, see ROBERT TIGNOR, *THE COLONIAL TRANSFORMATION OF KENYA: THE KAMBA, KIKUYU AND MAASAI FROM 1900 TO 1939* (1976).

<sup>102</sup> James Gathii, 'Colonial Treaties' on Re-trial: *The Maasai Cases and Late Nineteenth and Early Twentieth Century Public International Law* (1999) (unpublished, manuscript with author).

<sup>103</sup> East African Protectorate Reports, Vol. V, Part I, 1913 at 70-114. This case is ordinarily wrongly cited as *Ole Njogo v. AG*. However, the Maasai do not have the "nj" diphthong sound and "njogo" is most definitely not a Maasai name.

<sup>104</sup> Gathii, *supra* note 102:

The decision of the court rested on whether or not the agreements were treaties under international law. One of the paradoxes of the case is that the basis upon which the various Maasai groups sought the protection of their land from colonial expropriation

of the Maasai case over the treaties illustrates "how the contradictory and fragmented manner in which the intersection of Western Public International Law and British municipal law discourse legitimated colonial governance".<sup>105</sup>

It may however be argued, without going into the convoluted reasoning of the court, that based on the still prevailing notion of European States acquiring radical title to conquered territories by "discovery", the Maasai case could still have been adjudicated in exactly the same way that it was. The notion is that the Crown is vested with the radical title to land as soon as it "discovers" a territory. The natives continue to enjoy "usufructual" rights, or rights of occupation, until the Crown does a *specific* positive act to extinguish those rights. Treaty making is only one way of such extinguishment.

This interpretation is further buttressed by the promulgation of the Crown Lands Ordinance of 1915.<sup>106</sup> This ordinance defined Crown Lands to include land in the actual occupation of Africans and land reserved by the Governor for the use and support of members of the Native tribes.<sup>107</sup> This same kind of reasoning was applied in *Johnson v. McIntosh*.<sup>108</sup> The right of "discovery" abrogates all existing native interests in the land. The tribe does not lose its "sovereignty" however, since "discovery gave an exclusive right to extinguish the [native] title of occupancy....and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."

The fact that Britain assumed occupation of Kenya via the General Act of 1885, which emphasized the "trust relationship" between the colonizing nations and the natives, seems to confirm rather than deny this interpretation. It was thought that the Crown acquired radical title to but had to utilize its position in a rational way "unique to its obligations to the natives".<sup>109</sup> As long as the act by the Crown could be rationally tied to its unique relationship as the guardian of the "native Maasai ward", the courts would not intervene.

depended on the claim that they were not sovereign. The court however asserted that the Maasai were sovereign and therefore had capacity to enter into the 'treaties.'

<sup>105</sup> *Id.* at 9.

<sup>106</sup> Crown Lands Ordinance No.12 (1915).

<sup>107</sup> *See id.* §.5.

<sup>108</sup> US (8 Wheat.) 543, 5 L.Ed. 681.

<sup>109</sup> For this view, see *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474 (1974). Justice Blackmun said in the majority opinion: "Resolution of the instant issue turns on the unique legal status of [native] Indian tribes...and the assumption of a "guardian-ward" status". He then continues: "As long as special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such judgements will not be disturbed." *Id.* at 555.

That the treaties were only the chosen expedient mode of extinguishing the assumed rights over land held by the Maasai is confirmed by the characteristic answer given by Governor Charles Elliot when asked whether the Maasai had the right to inhabit particular districts on September 7, 1903. He answered:

As a matter of expediency, it may sometimes be best to make reserves [for them], but as a matter of principle, I cannot admit that wandering tribes have a right to keep other and superior races out of larger tracts of land merely because they have acquired a habit of straggling (sic) over far more land than they can utilize.<sup>110</sup>

This attitude by the British continued well into the colonial era and was inherited by the Post-colonial State. Implicit in this response is the objective to pin pastoralism down as it (pastoralism) was seen (then) as a way of life that kept the Maasai idle, unnervingly on the move and impervious to the benefits of the constraints of "civilization" and, now, "modernization" and "development".

The seemingly special manner in which the colonialists initially expropriated land from the Maasai (through treaties) can be explained in two ways, both of which are historically significant to the Maasai's position today. First, the Maasai were reputed to have been fierce warriors. Acutely aware of its military limitations at the time, the British government wisely considered it prudent to seek the allegiance of the Maasai.<sup>111</sup> The second reason for treating the Maasai peoples differently was precisely because they were pastoralists. The colonialist had interests in encouraging fixity in residence for purposes of taxation and forced labor. They also wanted to discourage members of other communities from infiltrating into the seemingly "empty" Maasai country and hence thwart the colonial aims of forcing the Africans to work in the European plantations through the imposition of a poll tax. It was certainly easier to tax settled cultivators than wandering herdsmen. In the case of the Maasai therefore, it was particularly

<sup>110</sup> Ole Kenta, *Maa Development Association: Our Story*, a paper presented to the United Nations Experts Seminar on practical experiences regarding indigenous land rights and claims, at White Horse, Canada (March 23-24, 1996).

<sup>111</sup> A harder question might be why the Maasai agreed to enter into the treaties in the first place. Gathii, *supra* note 102, at 4 (explaining it in terms of "disaster, intrigue, power and condescension"). He reasons that at this time the Maasai were facing periods of drought, epidemic and internecine civil wars and were severely weakened. Even while these factors as cited by Gathii were significant, it is also true that the Maasai understanding of land and of the possible meanings to the treaties played a major role.

crucial that they be accorded "sovereignty" to facilitate the colonial maneuvers. In this sense, "sovereignty" was the colonial tool used to differentiate the Maasai from the rest – first seemingly to their advantage but, subsequently, with grave consequences.

The consequences of this policy are still felt today. First, pastoralism was constructed as conservative and primitive, while sedentary agriculture was progressive. Explicit government policies were espoused to discourage pastoralism. This was all too easy to do given the Western conceptions of pastoralism as the epitome of African "primitivity". To this end, incentives such as token education opportunities and "chiefships" were given to the sedentary groups to encourage the other groups to turn sedentary. Second, divisions of interests arose between the agriculturalists and the pastoralists. Since the district boundaries were rigidly marked along ethnic lines to mark out "tribes", these tribes started claiming ethnographic purity that the colonialists expected of them, quite unlike the hospitable eclecticism that had existed before.<sup>112</sup> Significantly also, agriculturalists and pastoralists began to specialize in specific forms of production and lost their previous understandings. Their trade became channeled through ethnic diaspora.

From the beginning, therefore, the colonial authorities were bent on boundary building in ethnic terms and used this as a deliberate policy to encourage the pastoralists to "settle". The Maasai were in this way closed off from the rest of the colony. Moreover, since they did not have to recoup their capital from the State, as they were not paying taxes, the Maasai did not have to "invest" their earnings. The agriculturalists had to do just that, on the other hand. The agriculturalists therefore invested their earnings in formal education and thus won at an early stage a footing in the skilled labor market of government, the railway and business. Gradually, this allowed the agriculturalists to take up particular positions in the government. They also got off to an early start accumulating wealth in the monetary sense. As the Maasai remained closed off in the reserves, this development only heightened the process of differentiation already on the way. Where once there had been ecological arenas of exchange, regional inequalities of wealth were already on the way.<sup>113</sup> These divisions of interests were important to the colonialist as a form of political control. The colonial authorities therefore encouraged the increasing differentiation.

<sup>112</sup> J.M. Lonsdale, *When Did The Gusii (Or Any Other Group) Become a Tribe?*, 5 KENYA HIST. REV. 123 (1977).

<sup>113</sup> J.M. Lonsdale, *The Conquest of State*, in W.R. OCHIENG (ED.), A MODERN HISTORY OF KENYA 1895 – 1980 7 (1989).

In addition, the nascent colonial capitalism ensured the marginalization of pastoralism on the altar of expansion of sedentary agriculture. It is therefore true that the impact of colonialism was more immediate and severe among the pastoralists. In these ways, the colonialists set off the process that would ensure that the Maasai peoples would continue to carry a certain legacy of "backwardness" due to these historically localized compulsions. The point made here is that the colonial policies impacted the pre-colonial social formations differently and therefore ended up incorporating (by commission, as in where they subsumed the pre-colonial societies in the "modernization" program, or by omission, as in where they did not subsume some communities like the Maasai but bounded them in a State that espoused a completely different vision of life from theirs) them on different terms into the local and international capitalist system.<sup>114</sup> As sketched out above, the colonial project, being essentially a profit-making venture based on the capitalistic production model to generate profits, encouraged and rewarded practices that were akin to capitalistic process of capital formation and accumulation. In this equation, a pastoral society committed to its traditional lifestyle of livestock rearing and transhumance represented an inconvenience best settled by closing them off from the mainstream except when the lands they occupied were required for the capitalist project. This then was the fate of the Maasai peoples.

Understanding the colonial State fundamentally as a direct agency of imperialism and an engine of underdevelopment then is important in understanding the unique position of the Maasai even after the post-colonial State assumed power. The imposition of colonial rule entailed the process of capitalist penetration of African economies. Colonialism, then, "effected the articulation of indigenous mode of production with the capitalist mode of production. However, for a capitalist mode of production to be achieved, it must be preceded by a period of primitive accumulation of capital."<sup>115</sup> In the colonial period, the State was the instrument of primitive accumulation of capital on the settlers' behalf. Apart from direct appropriation of African land, this process involved the transformation of African land relations and production processes by inducting some African societies into the capitalist system. It was these Africans who had been inducted to this system who were given the mantle of leadership in the countdown to independence. Inheriting the full colonial apparatus with a profound capitalist orientation as the articulated goal, the capitalist engine backed by the State's coercive power was soon deployed against forces that were seen as holding back a

<sup>114</sup> Tiyanbe Zeleza, *The Establishment of Colonial Rule, 1905-1920*, in OCHIENG, *supra* note 113, at 44.

<sup>115</sup> KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 875-76 (1978).

full transformation to the capitalist model. The Maasai peoples who had, ironically, been closed off by the colonialists and had hence survived this transformation were now targeted for "development" and "assimilation". In this sense, the successor State turned out to be worse than the colonial predecessor as the former claimed a legitimacy to intrude into the life of the Maasai peoples to forge them into the national mainstream.

The result was that the Maasai were, in the end, subjected to double jeopardy. The apparent *benign neglect* by the Colonial State that characterized the colonial policies regarding the Maasai peoples *after* carving off their most productive land and interfering severely with their system of transhumance, was the excuse for the successor State to "integrate" them by use of "special programs" and legislation. As it were, these "integrationist" development policies were nothing more than attempts to further dispossess the Maasai peoples of their remaining tribal land base.

#### IV. THE POLITICS OF "COMPLIANCE" AND "IDENTIFICATION" AT INDEPENDENCE AND THE FORMATION OF A "MODERN" STATE IN KENYA

In a very real sense, the modeling of Kenya into a eurocentric State began in the early 1950's with the growing political unrest as the result of the exacerbating land problem caused by the reserve policy. The measures taken by the colonialists to stem the growing unrest would eventually ensure the creation of a post-independent Kenya modeled after the eurocentric State in every way and carefully nurtured to ensure the interests of the departing colonialists were well taken care of.

The Crown Lands Ordinance of 1915 had definitively disentitled Africans of their rights in land by defining "crown lands" to include land in the actual occupation of Africans and land reserved by the Governor for the use and support of members of the native tribes.<sup>116</sup> Though the Governor could create reserves for the benefit of the "native tribes", by dint of section 54, such reservation of land was not to confer on the Africans any right to alienate the land or any part thereof. Besides, section 56 of the Ordinance provided that land reserved for the use of a native tribe could at any time be reclaimed and alienated by the settlers.

With this enactment, the British had at last cast aside their prudish cloak of modesty and renounced all native interests in land. All natives became "tenants" at the will of the Crown and could be dispossessed at any time. The ultimate importance of this position in the colonial equation was

<sup>116</sup> Crown Lands Ordinance, § 5.

that the vesting of all land in the Crown provided the colonial government with the legal basis for reorganization of land tenure without the impingement of customary native tenure rules or needs. The significance of this legal position was that the land so acquired would be the carrot that would be later used to attract and forge an alliance with the emerging local elite in the countdown to independence.

The ultimate dispossession of African land achieved in 1915 accelerated the creation of African reserves as more lands were created to give room for the in-coming settlers encouraged by the newly found security in tenure spawned by the 1915 Ordinance. However, as the native population was increasing steadily in the reserves, the problem of land shortage soon struck. Inevitably this forced many of the affected Africans to seek waged employment as laborers in the European farms – a consequence not unintended by the colonialists.

However, even with the legal security question sealed, the political security question renewed the probing of the wisdom of complete denial of African land rights in the colony. The insecurity and frustrations among Africans was evident in especially Kikuyu country and in Kavirondo.<sup>117</sup> This arose concurrently with the rise of organized political opinion among the Africans most affected by the reserve policy. The land question was clearly provoking African unrest that the colonial government could hardly deal with. The sense of insecurity and restlessness within the reserves was so unmistakable that it threatened the colonial administration.<sup>118</sup>

After a series of political strategies failed and with the land question becoming a critical political and economic issue provoking such radical and militant responses as demands for restoration of stolen lands, the colonialists put their finger on the correct political tool of managing and maintaining the structures of oppression despite, and in spite of, the growing resistance.<sup>119</sup> This was in the idea of co-optation.

<sup>117</sup> "Kavirondo" referred to the present Nyanza and Western Provinces of Kenya.

<sup>118</sup> For two good accounts of the relationship between land shortage, rising political restlessness and the rise of organized political organization in Kenya, see generally STEFAN JOHANNES KRIEGER, *PROPERTY RIGHTS IN LAND AND STATE BUILDING IN COLONIAL KENYA* (1989); HASTINGS OKOTH-OGENDO, *TENANTS OF THE CROWN: EVOLUTION OF AGRARIAN LAW AND INSTITUTIONS IN KENYA* (1991).

<sup>119</sup> The colonial authorities had appointed a number of commissions that were mandated to "consider the best ways to accelerate the economic development of East Africa and improving the social conditions of the Africans...and especially regarding the sense of grievance among Africans over the land question." This included the Ormsby-Gore Commission of 1924-25, the Hilton-Young Commission of 1927-29 and the Morris-Carter Commission of 1934. However, whereas, invariably the reports of these Commissions bore the rhetoric that Kenya was an African country and that therefore the rights of Africans were paramount, the view that this led to the "adoption of existing indigenous institutions of government in the interests of native development". H.F. MORRIS, *INDIRECT RULE AND THE SEARCH FOR JUSTICE* (1972) (Part II is

The reserve policy had precipitated such serious problems of landlessness, especially in Kikuyu country, that it culminated in the Mau Mau Revolt.<sup>120</sup> The restlessness was fuelled by the fact that the land shortage forced more families to be more dependent on waged employment and, with time, social differentiation became evident in the rural areas as certain homesteads were placed to accumulate more than others; and certain communities more than others.<sup>121</sup> The colonial economy of expansion of settler production based on contraction of native production and increased proletarianization of the latter was a recipe for open revolt from the masses.

As aforesaid, the colonial response to the growing unrest was co-optation. The various policy strands were put together in a comprehensive government policy document by the then Assistant Director of Agriculture, R.J.M. Swynnerton.<sup>122</sup> In the Swynnerton Plan, the problem facing African agriculture was constructed to be "the consequence of African land tenure system" and not land shortage caused by colonial expropriation. It thus eschewed the obvious causal relationship between the imperialist occupation and the colonial land policies and the problems facing African agriculture. Rather, it argued that the basic problem was the indigenous tenure arrangements. This way, the colonialists found a springboard for recommending "modernization" and "reform" to remove the constraints posed by the African tenure arrangements. Unsurprisingly, the Swynnerton Plan proposed individualization of tenure among the Africans as the panacea.

However, the real aim of the Swynnerton Plan was to create a landed African class that would participate more soundly in intensive and large-scale agriculture. Such a class would be stable and acquire the characteristics of a conservative middle class hence providing a bulwark against nationalism and the radical policies that were thought to go with it.<sup>123</sup>

extremely misleading). These public exercises were only meant to disguise the colonialist' stark imperial interests. "[This view] distorts the nature of the relationship between the African and European sectors of the colonial economy and gives little insight into the manner in which these indigenous institutions were manipulated and transformed. [The idea] was to exploit the natural resources of the colonies in the interest of the English economy..." OKOTH-OGENDO, *supra* note 118, at 3.

<sup>120</sup> For three good, if differing accounts of the Mau Mau Movement and the centrality of land in the struggle, see G. MAUGHAM-BROWN, *LAND, FREEDOM AND FICTION* (1985); WUNYABARI MALOBA, *MAU MAU AND KENYA: AN ANALYSIS OF A PEASANT REVOLT* (1993); TABITHA KANOGO, *SQUATTERS AND ROOTS OF MAU MAU 1905-63* (1987).

<sup>121</sup> G. KITCHING, *CLASS AND ECONOMIC CHANGE IN KENYA: THE MAKING OF AN AFRICAN PETITE-BOURGEOISIE 1905 - 1970* 55ff (1980).

<sup>122</sup> Government of Kenya, *A PLAN TO INTENSIFY AFRICAN AGRICULTURE* (1954) [hereinafter *Swynnerton Plan* or *Plan*].

<sup>123</sup> Y.P. GHAI & J.P.W.B. MCAUSLAN, *PUBLIC LAW AND POLITICAL CHANGE IN KENYA* 91 (1970).

It was here that the first seeds of the *eurocentric* Post-colonial State in Kenya were planted.

By arguing that progress was conditional upon tenure reform, the Swynnerton Plan was merely affirming "that time was ripe for major reorganizations in the political economy of colonialism."<sup>124</sup> This explains why the leitmotif of the Swynnerton Plan was *tenure reform* rather than *land reform or redistribution*. Such a construction would justify the reforms to the African peasantry while maintaining the pattern of land distribution. As Okoth-Ogendo notes, two facts prove this to be true. First, the Swynnerton Plan only targeted peasants within the "Mau Mau districts". Second, even there, it was directed at a select group of educated, "progressive" farmers already engaged in the production of settler crops – that is, the emerging local elite. To this extent, individualization of tenure was a political tool that came in handy to blunt Africans' demand for land redistribution.<sup>125</sup>

It ought to be borne in mind that this was the decolonization era in international law. While it was clear to the colonialists that they had to leave, it was imperative that they carry out the decolonization in such a way that the economic and social systems that had been established in the colonies were never disturbed or altered. The overriding aim was to retain the economic basis of colonialism.<sup>126</sup> For this strategy to come to pass, it was necessary for the colonialists to bestow power in the hands of collaborators, that being the emerging local elite. The elite class would have a stake in the status quo and thereby safeguard the link between the former colony and the imperial power by espousing conservative economic and social policies. Of course that group of "conservative elite" had to be created first and this was the function of the tenure reforms of the 1950s.

The impact of the so-called tenure reforms was the creation of a class of conservative nationalists who, though eager for political independence since that would ensure them the powers of the State, were not inclined to support radical policies or politics. This way the problem of the Mau Mau uprising was skillfully navigated and the stage was set for cautious conservative politics. The colonialists had succeeded in their primary approach to systematically diffuse political nationalism by creation of a social class within the African ranks having similar interests, aspirations and ideals as those of the ruling colonial elite. This local elite desired and lusted

<sup>124</sup> OKOTH-OGENDO, *supra* note 118, at 71.

<sup>125</sup> *Id.*

<sup>126</sup> Maloba Wunyabari, *Nationalism and Decolonization, 1947-1963*, in OCHIENG, *supra* note 113, at 197. The then Governor of Kenya is reported to have commented: "[T]he British empire is not breaking up, but growing up....The increased volume of inter-imperial trade resulting from an expanding commonwealth would assist in solving economic problems." EAST AFRICAN STANDARD, Oct. 13, 1956, at 1, *cited in* Wunyabari, *supra* note 126.

for the power of the State that created their positions in the society. To them, the State was "immutable" as it already existed and the only question to be decided was when the mantle of leadership of that State, however oppressive, would be passed to them. Much to the delectation of the colonialists the singular aim of the political elite was to inherit the State.<sup>127</sup>

This power equation ensured the "birth" of the *eurocentric* post-colonial Kenya with the local elite breathlessly waiting to accept the colonial influence in anticipation of the perquisites of the all-powerful Colonial State. Hence they "complied" with the colonialists' vision since they hoped to achieve the favorable result of inheriting the Colonial State. They therefore accepted, indeed coveted, the idea of the State because of what it would offer them as the assumed leaders. Besides, it created space for them to rule. As for the dominant societies that produced these leaders, the fact that a significant transformation of social relations had already taken place within the societies, making them substantially adopt the European way of life, made them feel that they could "identify" themselves with the colonialists. It is no wonder then that soon they would seek to "integrate" the "others" whom it now appeared to them were so different and inferior. The impact of this identification process is to exaggerate the differences between the groups and then seek to construct the difference as indicia of superiority by giving value to the difference. With the self-interested assistance of the "complying" elite – both from Maasailand and the outside – this was the attitude that assailed the Maasai peoples at independence.

## V. CONSEQUENCES ON THE MAASAI PEOPLES

At the time of independence in Kenya, it was accepted that the "Kenya nation" was to be the "the country that hitherto has been known as the colony of Kenya and the laws then in force to continue in force in the [post-colonial] State".<sup>128</sup> The consequence of this acceptance was not only to accept the sanctity of private property as formulated by the colonial regime but also the validity of colonial expropriation. The independence Constitution immortalized the position by declaring that there would no nationalization of farms "without due process of the law" since this would go against "basic canons of international law".<sup>129</sup> In this way, all land acquired under the colonial land laws were to be protected by the Constitution and customary of pre-colonial land tenure that "gives way to a

<sup>127</sup> Wunyabari, *supra* note 126.

<sup>128</sup> Kuria, *supra* note 98, at 3.

<sup>129</sup> KENYA CONST. § 75.

communalistic way of life" was to be replaced as land became fully commoditized.<sup>130</sup>

The stated policy of the post-colonial government was to continue with individualization of title to land in all areas since this "achieves conspicuous economic progress".<sup>131</sup> The project was one of "achieving economic progress". As the first President stated, there was no alternative for all Kenyans than to pursue this vision. "KANU [The ruling party]", he said, "has accepted the principle of private ownership in land and free enterprise".<sup>132</sup> Here the president was doing nothing more than cloaking the "integrationist" project in the rhetoric of "economic progress" and "development". The existence of the State apparently legitimated the pursuit of uniform economic policies throughout Kenya. The chosen "economic path" was the individualization of title and the making of Kenya a "free enterprise" society. No competing visions of the country would be tolerated.

As earlier suggested, such a stance by the post-colonial government, whose legitimacy in the first place was dubious, would lead to the forcible subsuming of the indigenous communities into the "national mainstream" through increased and State-sponsored incursions into their land in the name of "economic development". The consequences of these policies on the Maasai peoples are described below.

#### A. CONTINUED EXPROPRIATION OF LAND AND CONTRACTION OF TRIBAL LAND BASE

The first major consequence of the "national" development policies on the Maasai peoples under the guise of "development" was unmitigated incursions into their lands. As we noted earlier, the colonial authorities had closed off the Maasai peoples in certain districts where they continued to live their traditional pastoral lifestyles making do with the tribal land base they still held. However, the construction of the Post-colonial State apparently gave the State the legitimacy to make policy decisions on optimum land use in the country. To this end, there was a general feeling that the pastoral economy was not only breaking down but also was failing to contribute to national development.<sup>133</sup>

<sup>130</sup> *Id.*

<sup>131</sup> JOHN HARBESON, NATION-BUILDING IN KENYA: THE ROLE OF LAND REFORM 78 (1973).

<sup>132</sup> Jomo Kenyatta, Minutes of Kenya Constitutional Conference Meeting, KNA, Record of the Ninth Meeting, Feb. 21, 1962, at 26.

<sup>133</sup> Kimpei Munci, *Grazing Schemes and Group Ranches as Models For Developing Pastoral Lands in Kenya*, in P.T.W. BAXTER & RICHARD HOGG (EDS.), PROPERTY, POVERTY AND PEOPLE: CHANGING RIGHTS IN PROPERTY AND PROBLEMS OF PASTORAL DEVELOPMENT 110 (1990).

As the colonialists had done earlier, pastoralism was perceived as a problem: either of the pastoralists' conservatism or as an irrational system of land/resource utilization.<sup>134</sup> The land held by the Maasai was therefore seen as "fallow" land and new frontier for incursion and development, this was validated by the government's oft-repeated "individualization" project coupled by the Constitutional guarantee that Kenyan citizens could own land anywhere in the Republic. Explicit policies were adopted which either facilitated or formalized infiltration of other communities into Maasailand. The bottom line was that the government was "committed" to freeing up all the "idle" land held by the Maasai. This not only favored the communities that were cultivators but encouraged them to settle on Maasailand in a bid to have Maasailand "contribute to national development". Hence the rhetoric of "national development" as the explicit and conspicuous goal of the State came in handy. A quintessential example of this process is the de facto encouragement and legalization of the "Kikuyu expansionist dynamic" in the period immediately following independence.

#### B. "THE KIKUYU EXPANSIONIST DYNAMIC"

The Kikuyu ethnic group is the most populous in Kenya.<sup>135</sup> It represents the characteristics of the dominant society in the Post-colonial Kenya. The Kikuyu suffered the most indiscriminate alienation of land at the onset of colonialism due to the fact that they occupied very fertile land. This rendered thousands of Kikuyus landless.<sup>136</sup> The aim of the colonial authorities was to force the Kikuyu to provide cheap labor for the European settlers.<sup>137</sup>

However, the Kikuyu propelled by clan ("mbari") expansion and competition by the entrepreneurial ambitions of the cattle-owning "ahoi" (landless Kikuyus), responded to the colonial pressure by moving on to the settlers' land in the Rift Valley<sup>138</sup> as squatters. Here they would reside and cultivate part of the settlers' land in return for labor. With time however, particularly after the Resident Native Labor Ordinance of 1937,<sup>139</sup> which

<sup>134</sup> *Id.* at 122.

<sup>135</sup> The Kenya Population Census of 1989 indicated that there were 7 million Kikuyus. It is generally agreed that this is a very conservative figure of the members of the group.

<sup>136</sup> KANOGO, *supra* note 120, at 10 ("By July 1910, there were 11,647 Kikuyus, whose land had been alienated, on the Kiambu-Limuru settler farms cultivating approximately 11,300 acres of land then owned by European settlers. Some of these squatters were the original owners of these farms.").

<sup>137</sup> *Id.*

<sup>138</sup> Rift Valley is one of present day Kenya's provinces and is home of the Maasai peoples and the other former pastoralists.

<sup>139</sup> Resident Native Labor Ordinance No. 5 (1937).

clamped down on squatters, the Kikuyu started moving into areas set aside for other communities. This happened easily among the pastoralists. This infiltration was so extensive that as early as 1936 there were fears that the Kikuyu would completely monopolize the few areas in the Maasailand unit.<sup>140</sup> When independence finally came, the Kikuyu were firmly entrenched in the more arable parts of Maasailand thanks to colonial policies that had driven them out of their original homelands. More significantly, the Kikuyu considered themselves the rightful owners of the lands they occupied outside their traditional homelands.<sup>141</sup>

The situation was worsened by the fact that the agricultural reforms of the 1950s tended to favor the Kikuyu. With the benefit of registered holdings and the backing of the first post-colonial government, more Kikuyus got credits and loans to purchase land from departing colonialists when the white highlands, part of which was former Maasailand, became a commercial entity.<sup>142</sup> In this way the resettlement policies were instrumental in facilitating infiltration into Maasailand. The Maasai were not only ill-prepared to purchase their land back due to their remoteness from the center of the colonial commercial economy but also had been disadvantaged by the lack of State patronage which was given to the Kikuyus.

<sup>140</sup> KANOGO, *supra* note 120, at 107.

<sup>141</sup> *Id.* Kanogo quotes a Kikuyu former freedom fighter, Gachago Kagere as articulating the thinking of the Kikuyu thus:

The Kikuyu squatters in the Rift Valley were fighting for land in that area. The other "nduriri" [non-Kikuyus] did not know how to fight for land. People like the Maasai did not know how to fight for land. They had given in....and had been moved to several places to make room for Europeans. So the Kikuyu had to fight and later claim any land (emphasis added).

<sup>142</sup> A significant aspect of the agrarian reform of the 1950's that further facilitated influx of other communities into the Rift Valley was the resettlement policy. Though the political rhetoric was that the resettlement was "designed to deal with....the distribution of land to the landless", in fact resettlement was again used as a tool to deflate political pressure and the potential disaster "posed by the army of landless and unemployed [most of whom had fought the Mau Mau war and had nothing to show for it]" See HASTINGS OKOTH-OGENDO, *THE POLITICAL ECONOMY OF LAND LAW: AN ESSAY IN THE LEGAL ORGANIZATION OF UNDERDEVELOPMENT IN KENYA* 357 (1978) (Unpublished SJD Dissertation, Yale Law School). Also, since land had to be paid for, the demonstrable ability to repay the loans advanced were an important factor in the selection of new settlers. The general result was that the majority of the people who were actually settled were not necessarily the absolutely landless people but the members of the emerging petit-bourgeois who had been favored by the agrarian reforms of the 1950's who not only had sufficient wealth for the purpose but also the State machinery in their support. See also HARBESON, *supra* note 131, at 78ff.

### C. MINISTERIAL AND EXECUTIVE DECLARATIONS

Under the Land Consolidation Act (Chapter 283, Laws of Kenya), the first step in the individualization of land holdings is for the minister to "declare" a district an "adjudication district". This enables individual members residing therein to make land claims. After adjudication, title deeds are issued under the Registered Lands Act (Chapter 300, Laws of Kenya), which makes the owner thereof the indefeasible and absolute owner.<sup>143</sup> Further, a first registration is not impeachable even on grounds of fraud of mistake.<sup>144</sup>

As shown above, part of the colonial legacy was that members of other communities had already infiltrated into Maasailand as early as 1936. Hence, when in 1961 the minister applied the Land Consolidation Act to a substantial part of the "Maasai land unit which lies within the Kajiado District, excepting the townships of Kajiado and Ngong and the Trading centers of Athi River, Selengei, Kiu, Mashuru, Metto, Shambole, Bissel, Loitokitok, Sultan Hamud, Simba, Mile 46, Namanga",<sup>145</sup> the first people to have their land adjudicated in Maasailand were the non-Maasai who were already familiar with the registration process. These were the recent "immigrants" who had already seen the operation of the system in central Kenya as early as 1956 as part of the Swynnerton Plan reforms.

Among the first areas to be adjudicated under the Act were the highland areas of Ngong and the slopes of Mount Kilimanjaro, which had represented the best of the dry season grazing land available to Maasai herders. With the security of the indefeasible title, this had the effect of pushing the Maasai herder deeper into the arid plains. On the other hand the issuance of title deeds to these individuals settled the question of ownership in these areas. Besides, Maasai in influential government positions took advantage of the situation to award to themselves large tracts of land in close cooperation with the County Council that under the Constitution was the repository of all Trust Lands.<sup>146</sup>

<sup>143</sup> Registered Land Act, No. 300, §§ 27-28.

<sup>144</sup> *Id.* § 143.

<sup>145</sup> KENYA GAZETTE, Legal Notice No. 562 (1961).

<sup>146</sup> Upon Kenya becoming independent, all land that was not registered in the names of individual proprietors was declared to be "trust land" held by the County Council of the area where the particular parcel of land was located to be held "in trust for all people ordinarily resident in the area." See KENYA CONST. § 114. As an example of these corrupt schemes, TOBIKO, *supra* note 90, shows that by 1956, 56,000 acres of the total 806,000 acres in the Kaputia Section of Kajiado district had been divided between 28 families.

#### D. PUBLIC APPROPRIATION OF MAASAILAND

Legislative acts have been a potent tool used to expropriate Maasailand, without providing for compensation, for public purposes. Four of the most important National Parks in Kenya are former Maasai areas. These are Tsavo, Amboseli, Nairobi and Maasai Mara National Parks. These parks were carved out of Maasailand without compensation following the same principles of marginalization. The National Parks Ordinance of 1945 allowed for specific areas to be set aside by the Governor exclusively for wildlife as National Parks. Under this Ordinance, the Nairobi and Tsavo national parks were gazetted in 1945 and 1948 respectively. They include some of the best grazing and natural resources traditionally used by the Maasai.

Upon attaining independence, this Ordinance was christened the National Parks Act, still without any provisions as to compensation. Under it, two more parks were declared: Amboseli and Maasai Mara in 1974. It was later replaced by the Wildlife (Conservation and Management) Act in 1977.<sup>147</sup> This later Act in section 6(2) enacts that all parks declared as such under the previous ordinances are declared National Parks. It also contains restrictions on residence and prohibition of certain acts within a National Park, for example, permitting any domestic animal to stray thereon.

#### E. ENACTMENT AND IMPLEMENTATION OF GROUP RANCHES LAW

It was believed in Kenya that land tenure reform had to take the form of the conferment of exclusive property rights over parcels of land to individuals or corporate entities. As indicated above, the colonial government initiated this in 1956 in Kikuyu country. Upon independence, the Post-colonial State obsequiously wanted to continue with the policies. One of the pressures necessitating this approach came from the Kikuyus who had settled in areas other than their traditional "tribal" land. The politico-administrative leaders in the Post-colonial State also saw this as a chance to seize more lands in the registration process for speculation purposes.

In the Maasai districts, this approach presented a profound problem. As aforesaid, the colonialists had basically closed off the Maasai districts. At the time of independence, therefore, land was still held in traditional tenure arrangements in these areas. The government's view was that the traditional tenure arrangements were wasteful and backward and had to be replaced.

<sup>147</sup> Chapter 376, Laws of Kenya.

The overriding aim was to integrate the Maasai into the Mainstream and transform their land into individual ownership. However, since it was felt that the pastoralists were not "yet ready" for individual ownership, a novel registration system was suggested to gradually encourage the Maasai to "settle down". This was the Group Ranches law enacted via the Land (Group Representatives) Act.<sup>148</sup> Under this system, communal lands are divided into smaller units (ranches), which are then registered in the names of group ranches (three to ten members) elected by members of the group in undivided shares.

The rationales for the establishment of the Group Ranches were "assimilationist". The main objective was to help settle the Maasai and discourage their capricious movements. The real objectives behind the enactment of the Group Ranches law were to transform the pastoral regions into more productive economic units.<sup>149</sup> The welfare, culture and rights of the local peoples were really not in the equation. The government's aim was to first, secure a legislation to revitalize controlled grazing by districts that had been started during the time of British administration and, second, to make administrative arrangements to enforce grazing management.

Besides, both these undertakings required heavy funding. When the government sought financial assistance in the form of grants and loans from international financial institutions, the security of registered land titles were required.<sup>150</sup> Since the government was determined to "settle down" the Maasai "whose capricious movements were judged to be severely curtailing their commitment to the State and their participation in the national government....and give the government greater political and economic control over them in terms of imposition of taxes, enforcement of stock control measures and introduction of 'modern' techniques of animal husbandry, the Group Ranches project recommended itself."

To gain the acceptance of the Maasai, it was suggested that the Group Ranches law be actually based on Maasai culture since the land would be divided to members of "traditional groups". The government would also be able to "develop" the Maasai country, by provision of cattle

<sup>148</sup> *Id.* at No. 287.

<sup>149</sup> The government, for instance, was alarmed by a report of the East African Livestock Survey of the mid-1960s that if positive action was not taken to commercialize the pastoral areas, Kenya would have been forced to import meat by the 1970's. The government was therefore nudged to ensure that "commercial" ranching was introduced in the pastoral areas to forestall this possibility. See TOBIKO, *supra* note, at 90.

<sup>150</sup> The World Bank categorically insisted that "Registration is a pre-requisite of the range development program....without the certainty of ownership...provided by registration, no agency should be prepared to lend money for range development." See WORLD BANK, Lawrence Commission Report 13 (1966).

dips and dams, through the loans from the international financial institutions. Finally, the Group Ranches law would prevent the influx of non-Maasai people into Maasailand.

Hence, at its inception, the Group Ranch program was cited as an example of land reform that was respectful of community values dear to the Maasai culture. However, this is nothing more than a *tromp l'oeil* reform meant to install progressive juxtaposition of individual properties.<sup>151</sup> The proponents of the project were only interested in the Maasai culture in so far as isolated elements for the justification of Western concepts of power and ownership can be found.

The underlying assumptions of the Group Ranches law were thus (deliberately) erroneous and on its implementation led to definitive trends of further contraction, denudation and despoilment of Maasailand:

- (i) The pejorative objective of "settling down" the Maasai through legislation was not only mischievously assimilationist but was also founded on the absurd view that the Maasai roam aimlessly over their land. It overlooked the fact that they migrate according to the dictates of eco-climatic factors and that legislating that they "settle down" in the face of these factors, which necessitate their migrations, is not only destructive of their culture but is also tantamount to destroying their economic base.
- (ii) The objective that the Group Ranches would curb the dangers of overgrazing and foster greater concern for the preservation of range resources was a further attempt to eschew the glaring reality that the problem of African agriculture was a direct consequence of appropriation of land by colonial authorities. Further, this argument is based on the erroneous colonial belief that nomadic pastoralism is inherently destructive.
- (iii) As already observed, the argument that the Group Ranch was an institution whose framework and structure was based on traditional structures is defective. The subtribe ("oloshu") formed the basic as well as the ultimate unit of land ownership in Maasai among the Maasai peoples.

<sup>151</sup> XAVIER PERON, LAND PRIVATIZATION AND PUBLIC APPROPRIATION OF LAND AMONG THE MAASAI: A STATUS OF DOUBLE DEPRIVATION 11 (Institute for Research in Africa, Paper No. 22, 1993).

- (iv) Further, far from being an efficient bulwark against corruption in land acquisition, the Group Ranches project has been a lucrative resource for greedy politicians and politico-administrative leaders. In addition, due to political patronage non-Maasai have managed somehow to place their names in the group registers.<sup>152</sup> Moreover, in the demarcation process, the politico-administrative leaders acquired the fertile and arable areas of Maasailand only leaving the semi-arid portions to the traditional Maasai herders.

The overall result has been to tie the traditional Maasai to the traditional pastoral economy on less extensive, more arid lands and with his traditional migratory patterns curtailed. Moreover, after benefiting from the best parts of Maasailand in "one of the most dramatic land rackets on the African continent",<sup>153</sup> the politico-administrative elite have now called for a changed policy to one of individualization of the group ranches. The pattern is discernible: after allocating themselves the best parts of Maasailand and placing their kinsmen in the Group Ranches registers, it is time to take stock of their riches. The President, without elaboration, voiced the new government policy: "The issue of Group Ranches will create problems in future".<sup>154</sup> In other words, it is time to "grab" what is left of Maasailand. The reason given by the president for such a drastic executive edict was simply that "[there was need]...for the owners....to get title deeds to their land." This was stated as though title deeds were a sort of magic wand that the Maasai peoples would wave to solve the problems of denudation and potential starvation that the announcement heralded.

#### F. INDIVIDUALIZATION OF GROUP RANCHES

Finally, after a torturous history, the government has resorted to simply individualizing land owned by the Maasai. The government has done this in spite of evidence to the effect that such sub-division would completely ruin the Maasai's traditional economy.

At present, with the prospects of sub-division, land speculation is currently at its height and with high stakes involved. Ignorant of all the complexities involved in this highly manipulative land business, the Maasai

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> DAILY NATION, Apr. 15, 1989, at 9, cited by PERON, *supra* note 151 (quote by President Daniel Moi).

peoples remain the helpless victims and scapegoats they have always been since the fake treaties of 1904 and 1911.

The process of adjudication and sub-division is under an adjudication officer seconded by the Ministry of Lands and Settlement. Herein lies the perversity of the system: in the absence of proper control, abuses are perpetrated at the expense of the traditional Maasai. On the one hand, land officials, in exchange for large sums of money, give out to corrupt leaders plots whose value in quality and quantity is way above that which is legally acceptable to each group member. On the other hand, the register is often unilaterally modified to feature in the adjudication list names of people other than the original group ranch members. Ultimately, the traditional Maasai would end up with some few hectares of semi-arid and tick-infested land that nobody wants. A long trail to "modernization"!

## VI. THE IMMEDIATE IMPACTS

The first obvious impact of the culmination of all the above factors is overstocking, resulting in land denudation and despoilment as a direct result of the blockade of the traditional migratory patterns. With the higher grazing pasturelands already appropriated, long periods of drought await the Maasai as a result of the sudden territorial fixity impelled by the sub-division of land.

Another inevitable result of individualization is the massive sale and the merging of land to form enclosed commercial ranches. Where privatization was carried out earlier, this trend can already be noted. The area around Kajiado and Athi River along the Great North Road provides a clear example of what predictions of tomorrow will be. Today, along this road, instead of the formerly vast open spaces of communal land, now lie American-type ranches. With this development, there is fast emerging a new tribe of landless Maasai, since those who are encouraged or forced, by the fear of being cabined off by a ranchers' land, to sell their patches of land at very low prices have nowhere to go.<sup>155</sup>

State institutions have marginalized the Maasai to a position that important decisions about their lives are taken without their consultation.<sup>156</sup> They have become "mere spectators to all these developments and changes

<sup>155</sup> M.K. VAN KLINKEN (ED.), *THE FUTURE OF THE MAASAI PASTORALISTS OF KAJIADO DISTRICT 105* (1990) (Proceedings of a colloquium held in Limuru, Kenya, May 28-31, 1989, at 105).

<sup>156</sup> MUKHISA KITUYI, *THE STATE AND THE PASTORALISTS: THE MARGINALIZATION OF THE KENYAN MAASAI* (1985).

affecting them and have played no significant role in influencing them."<sup>157</sup> The twin contradictory forces of exploitation and change operating on the double paradigm of "modern" education and integration into the national economy and against the localized historical compulsions that are the legacy of colonialism, the traditional Maasai is a hapless victim of processes he has no control over. The impact of this "integration" is the politicization of almost all sectors.<sup>158</sup> From the period of colonialization, the local chiefs at the locational level have been political appointees. The independence compromise explored earlier in this paper saw the rise of an internal elite in Maasailand who closely mirrored those at the national level.

Hence, the attainment of independence did not alter the oppressive colonial formula of "appointing" leaders. Rather, an apologetic pattern of politics bred by the "identification" process described earlier emerged whereby politics came to be dominated by two linkage patterns: affinity and patronage.<sup>159</sup> The ubiquitous post-colonial state epitomized by an all-powerful president is the aftermath of the oppressive Colonial State. Thus, political patronage became increasingly centralized around the presidency. In the end, the criterion for political leadership is not the ability to represent the interests of the local communities but one's effectiveness as an "official organizer", that is, "socializing the population into accepting the official ideology."<sup>160</sup>

The first impact of this was to dismantle completely the traditional leadership. This was especially due to the rise of the one-party State in Kenya and the subordination of the emerging elite to the political patronage structure.<sup>161</sup> The implementation of the Group Ranches law also facilitated the emergence of a new class of non-traditional leaders in the form of officials of group ranches. The upshot of it all is that the Maasai's traditional leadership has been made irrelevant and the pattern of representation that has emerged does not in any way ensure true representation of their interests in the so-called national economy.

With time, it became a source of embarrassment and discomfort for one to be a Maasai in independent Kenya. The Maasai herder was painted as a primitive and atavistic creature who invited more amusement and intrigue than attention to their plight and rights as human beings. Living so near the world-famous wildlife of Kenya's famous National Parks, tourists

<sup>157</sup> M.K. Van Klinken, *Maasai Pastoralists in Kajiado (Kenya): Taking the Future in Their Own Hands*, in VEBER & WAEHLE, *supra* note 29, at 75.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> C. RAKODI, *THE LOCAL STATE AND URBAN LOCAL GOVERNMENT IN ZAMBIA* 28 (1988).

<sup>161</sup> Van Klinken, *supra* note 157, at 76.

were encouraged to visit and see them – presumably as a group of people frozen in a historical past.

While the Maasai peoples are stubbornly “conservative”, choosing to adhere to their traditional customs, traditions and rituals even in the face of official pressure, they are a subject of common derision in the country. For example, there has been increasing pressure to forcibly require them to change their traditional way of dressing.<sup>162</sup> The government has also persistently threatened to ban their cultural expressions even when these have no immediately or verifiable negative impact on the so-called national economy. Besides, the government has sought not to mold the Maasai traditions to be in tune with the contemporary times but to abolish them wholesale and without community participation in the decision-making process. The invariable argument in favor of this is always that such practices “retard development”. It behooves us to ask then it is development for whom. Of course latent in this argument is the equation of “development” with modernity and modernity with progress. Needless to say, this equation is false, tenuous and self-serving.

### CONCLUSION

This article has been, essentially, an attempt to rethink the common rendering of two developments in international law in the second half of the 20<sup>th</sup> Century – decolonization and the emerging norm of indigenous peoples rights. Both of these developments are usually celebrated as signaling important changes in the increasing responsiveness of international law to solving the real problems of the world. However, I argue, rather than represent a definitive about-face that permits international law to purge its own complicity in the construction of categories that are oppressive, both the moments could be read as double-moves; important junctures in the history of international law when it becomes imperative to update the vocabulary of the discipline, but while maintaining its operational repertoire. I argued that the modernization paradigm as an implicit operational foundational objective of the discipline, provided the necessary wherewithal in terms of vocabulary, and style of argumentation to enable this process. By constructing the moment of “decolonization” as a moment to deal with the problem of

<sup>162</sup> See Saruni Ngulay, *Inyuat e-Maa/Maa Pastoralists Development Organization: Aims and Possibilities*, in VEBER & WAEHLE, *supra* note 29, at 97. It is reported, for example, that in 1977 the Maasai suffered the agony of being told by their very own Member of Parliament: “Cover up your buttocks within six months or I resign.” *Id.* To this, a fellow Maasai Member of Parliament retorted: “The Maasai peoples are quite civilized and reserve their rights to wear trousers or just to remain in cultural *shukas*. Nobody is going to force us to wear trousers just because Europeans do!” *Id.*

“underdeveloped areas” through a “program of development based on the concept of fair dealing”<sup>163</sup>, it became possible to make that moment also a “moment of modernization.” Modernization – as both the objective and the means of desired change in the Third World – then became the constraining tool that hosted the programs and metaphors for the reconstruction of history. The reconstruction silenced particular histories, and shaped the teleology of the future. In the silencing, constraining and shaping that takes place, the Third World State is required, yet prevented from acquiring full status as a modernized state, while the indigenous groups within the Third World state are required, yet prevented from becoming fully modernized. The modernization paradigm, therefore, constrains both the Third World State and the indigenous peoples within them.

<sup>163</sup> HARRY TRUMAN, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES (1964), *cited in* ESCOBAR, *supra* note 3, at 3.