MODERNIST VIOLENCE: JUXTAPOSING THE LEAGUE'S PERMANENT MANDATES COMMISSION OVER THE BONDELZWARTS REBELLION AND THE US–MEXICO SPECIAL CLAIMS COMMISSION OVER THE MEXICAN REVOLUTIONS

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The trigger for this article is an odd sequence of two editorial notes in the 1924 issue of the American Journal of International Law. The first is on the Bondelzwarts rebellion and its handling by the League of Nations' Permanent Mandates Commission ('PMC'), and the second is on the United States–Mexico Special Claims Commission ('SCC') over the Mexican revolutions. I am asking whether the juxtaposition of this odd sequence can be read to function as a homology; that is, if the PMC and the SCC can be seen as homologous insofar as an abstract structure can be disengaged to be at work in both. I argue that this abstract structure entails the normalisation of the unruly subject — as instantiated in the Bondelzwarts rebellion and the Mexican revolutions — and consists of two elements: order as the trigger for the normative development of international law, and the economic as directing how order is normatively developed. Modernism serves as the macro period marker within which this abstract structure of normalisation is steeped. Cultural studies literature provides the inspiration for the drawing of five modernist facets, with which the analysis of how exactly the PMC and the SCC function as distinctively modernist structures of normalisation is performed. What such a performance intends to achieve is a different visuality that forces the gaze of the reader, like the viewer of a cubist painting, to suspend and bracket her recognition of conventional narratives on the PMC and the SCC and invites her to see them in a new way, in a much enlarged, modernist-framed international legal landscape.

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I INTRODUCTION

The trigger for this article is a sequence of two editorial notes in the 1924 issue of the *American Journal of International Law* ('*AJIL*'). The first is on the 'Status of the Inhabitants of Mandated Territory', focusing on the 'serious rebellion of the Bondelzwarts, which occurred during the summer of 1922 in the territory of South West Africa, a mandated territory of the C category and with the Union of South Africa as the mandatory power.[1] The editorial note was written by Quincy Wright, an author widely known for his work on the mandates system of the League of Nations ('LON'),[2] and his note looked closely into the debates within the LON's Permanent Mandates Commission ('PMC'). As such, the incident of the Bondelzwarts rebellion provided an apt and fitting topic with which to approach the questions raised in the Melbourne Law School's call for papers for the conference The League of Nations Decentred: Law, Crises and Legacies.

Just after Wright's editorial comment, though, there was one on 'The Settlement of Outstanding Claims between Mexico and the United States', written on the occasion of the recent ratification of two conventions between the United States and Mexico, the first signed in Washington on 8 September 1923 for the settlement of general claims, the second signed in Mexico City on 10 September 1923 for the settlement of claims arising from revolutionary acts in Mexico from 20 November 1910 to 31 May 1920. The editorial note was written by James Brown Scott.[3] Scott, together with Elihu Root, were among the founding members of the American Society of International Law ('ASIL') in 1906, and both were staunch promoters of international adjudication and arbitration, having succeeded together in bringing Latin American countries into the Hague system.[4] Scott's editorial note looked closely into the provisions of both conventions and highlighted that neither the US nor Mexico were members of the League. Rather, by setting up the two claims commissions under the two conventions, the US and Mexico seem to 'point to the Hague', which, even though it 'appears to

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1 Quincy Wright, 'Status of the Inhabitants of Mandated Territory' (1924) 18(2) *American Journal of International Law* 306, 306.

2 See, eg, Quincy Wright, 'Sovereignty of the Mandates' (1923) 17(4) *American Journal of International Law* 691; Quincy Wright, 'The Mandates System and Public Opinion' (1929) 9(4) *Southwestern Political and Social Science Quarterly* 369; Quincy Wright, *Mandates under the League of Nations* (University of Chicago Press, 1930).

3 James Brown Scott, 'The Settlement of Outstanding Claims between Mexico and the United States' (1924) 18(2) *American Journal of International Law* 315.

4 M Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' in Yves Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Martinus Nijhoff Publishers, 2008) 127, 128.

many people of the day to be a *terra incognita*', nevertheless rests upon the 'encouraging' precedent that the 'recent claims convention is in accordance with the first, which these United States ever concluded', that is, the 1794 *Jay Treaty*.[5]

So, here is a 1924 editorial note on a rebellion on a mandated territory written by Wright, a member of ASIL's 'younger generation', and pointing to the PMC in Geneva. It is followed by an editorial note on the settlement of claims arising from the Mexican revolutions through international arbitration, written by Scott, member of the older and founding generation of ASIL, and pointing to the Hague as the latest culmination of the practice of arbitration as established since the 18th and 19th centuries and closely associated with classic international law. It is telling that the years 1923–24 within ASIL were also marked by a change in its presidency and the passing over from the generation of Root and Scott, which was in favour of judicial approaches to international relations,[6] to the younger generation among whose four most active members Wright figured prominently. For Hatsue Shinohara, '[t]he contrast between these two generations highlights a shift from a sovereign state centered consciousness to one inclined toward international society'.[7]

This odd sequence of two editorial notes, both revolving around instances of rebellions and revolutions and at the same time written by authors of distinct generations and visions of international law, serves as an even more apt and fitting topic to both centre and also decentre the LON and its 'law, crises and legacies', due to their contiguity and juxtaposition. That is so because the League embodies

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5 Scott, 'The Settlement of Outstanding Claims between Mexico and the United States' (n 3) 317; *Treaty of Amity, Commerce and Navigation, between His Britannick Majesty and the United States of America, by their President, with the Advice and Consent of Their Senate*, signed 19 November 1794, 12 Bevans 13 (entered into force 28 October 1795) ('*Jay Treaty*').

6 Elihu Root was the US member of the advisory committee that drafted the *Statute of the Permanent Court of International Justice*, and Scott was the US representative to the Second Hague Peace Conference: Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' (n 4) 128. The Permanent Court of International Justice ('PCIJ'), which for Root and Scott was to be seen as the transposition of the US Supreme Court on the international plane, is thought to be related to the Hague system and not that much to the League: David Kennedy, 'The Move to Institutions' (1987) 8(5) *Cardozo Law Review* 841, 862.

7 Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge University Press, 2012) 35. As Shinohara writes, Root, Scott and other senior members had a conservative attitude towards international organisation. According to the record of the ASIL executive meeting of 19 April 1919, Root expressed his opposition to the League of Nations, saying that 'international law was mentioned in the preamble and never mentioned again. Apparently the whole Hague system was treated as scrapped': at 25. On the other hand, according to Shinohara, Wright was notable among the progressive scholars who

> regarded themselves as reformers and took a leading role … by publishing their views, engaging in debates, writing letters to policy makers …. These reformers attempted to establish a 'new' international law, because they saw the traditional one, based on the premises of the nineteenth century, as irrelevant to the twentieth century.

at 4. With regard to Root's opposition to the League, David Kennedy also notes that

> [c]ommentators today often conflate Elihu Root's enthusiasm for international legal arbitration with Wilson's enthusiasm for the League of Nations. At the time, they were *opposed visions* — indeed, Root … was a leader in the Republican fight against the ratification of the *League Covenant*. He did so … to support an alternative, legal order of rules and arbitration, rather than what he saw as the political entanglement of membership in a standing international organization.

David Kennedy, *Of War and Law* (Princeton University Press, 2006) 71–2 (emphasis added).

the 'move to institutions', a celebrated watershed in the history of the development and maturation of international law[8] and an indispensable component in the common evolutionary narrative. Less attention, though, has been paid to international arbitration and mixed claims commissions as instantiations of a different international law, which, however, was thriving and fully in action during the years of the League and operated in parallel to it.[9] Such mixed claims commissions were the dominant paradigm for the settlement of disputes between, on the one hand, the US and European states, and, on the other hand, primarily, Latin American states.[10] Often conventions establishing claims commissions followed revolutions in Latin American states, and their establishment was an essential precondition for the recognition of new post-revolutionary Latin American governments and the resumption of diplomatic relations.[11] This was also the case for the two claims conventions of 1923 between US and Mexico.[12] And it was primarily because of Mexico's non-recognition, by the US and Great Britain at the time of the Peace Conference in 1919, and a fear that inviting Mexico to the Peace Conference could be seen as granting such a recognition, that Mexico did not accede to the League until 1931.[13]

My purpose in this paper is to juxtapose two distinct international legal mechanisms existing in parallel during the same historical period and both operating to tame rebellions and revolutions. I ask whether the supervisory function of the PMC over rebellions in mandated territories could share characteristics with the arbitral decisions of the US–Mexico Special Claims Commission ('SCC') over the Mexican revolutions, and whether the PMC and the SCC can be seen as distinct 'technologies of power' used to discipline and streamline unruly subjects[14] through international law. In employing the

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8 Kennedy, 'The Move to Institutions' (n 6).

9 Frédéric Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press, 2019) 127.

10 See generally ibid.

11 See ibid 129–30.

12 AH Feller, *The Mexican Claims Commissions 1923–1934: A Study in the Law and Procedure of International Tribunals* (Macmillan Company, 1935) 21–3.

13 Manley O Hudson, 'Mexico's Admission to Membership in the League of Nations' (1932) 26(1) *American Journal of International Law* 114, 114. Hudson also notes that US President Woodrow Wilson expressed to the British representative the opinion that 'on the whole it would not be wise to include any one of the three states [Costa Rica, Mexico and the Dominican Republic] in the invitation'. Eventually, Mexico acceded to the League on 12 September 1931.

14 'Unruly entities' might have been a more generic term. However, the term 'subject' is purposefully employed given that international law has also recognised subjects that, contrary to, for instance, the assumed stability of the state, were only of a transient existence. The institution of the 'recognition of belligerency' in earlier international law is a prime example. For Julio Barberis, the recognition of belligerency has the effect of constituting the insurgents as a 'community of belligerency' (in the French original: 'la communauté belligérante'), and this community is a 'subject of international law' ('un sujet du droit des gens'): Julio A Barberis, 'Les règles spécifiques du droit international en Amérique Latine' [The Specific Rules of International Law in Latin America] (1992) 235 *Recueil des cours de l'Académie de droit international de La Haye* 81, 196. And international law's recognition and granting of such a transient subjectivity, as Kathryn Greenman points out, 'has served as a means of their management and control'. As she explains,

Foucauldian vocabulary of 'technologies of power', the purpose is to sideline questions of state sovereignty as the main explanatory factor of different treatment (for instance, that Mexico is a sovereign state, whereas the Bondelzwarts are not) and instead set the emphasis on the technical mechanism as the location of power, on the technology of the international legal discourse, on the specific strategy designed for each case and on the particularity of the devised apparatus.[15] Such an emphasis on the technology brings forth a more tentacular operation of power and, even more importantly, allows multiplicity and variation in conceiving how normalisation is achieved through international law.

The juxtaposition, then, of the Bondelzwarts rebellion and the Mexican revolutions, along with the respectively distinct international legal mechanisms of the PMC and the SCC, can be seen to function as a 'homology'. According to the method of homology, '[a]s distinct as they are from each other, these various local and concrete' mechanisms 'can nonetheless be read as homologous with each other insofar as we disengage an abstract structure which seems to be at work in all of them, according to their own specific internal dynamics'.[16] I will argue that what this abstract structure entails, being at work in both the PMC and the SCC, is the normalisation of the unruly subject. By normalisation, I mean two things: first, the element of 'order' as being a trigger for the normative development of international law;[17] and second, the element of the 'economic' as directing how order is normatively developed and which is intended to refer to aspects of

> [j]ust as it did for Vitoria's Indians, the granting of a measure of international legal personality to rebel movements, through the acknowledgment of their capacity to incur international obligations, has served as a means of their management and control.… Rather than rebel movements' inclusion in international law representing an inevitable humanisation, they have been accommodated not so as to eradicate their violence but to manage them for the purposes of 21st century imperialism.

Kathryn Greenman, 'Re-Reading Vitoria: Re-Conceptualising the Responsibility of Rebel Movements' (2014) 83(4) *Nordic Journal of International Law* 357, 396–7 ('Re-Reading Vitoria'). This aspect is important and will be further elaborated below, but it was equally significant to foreground it here in anticipation of the questions that the invocation of the term 'subject' always entails.

15 Michel Foucault, *Power/Knowledge : Selected Interviews and Other Writings, 1972–1977*, ed Colin Gordon (Pantheon Books, 1980) 93, 95, 106, 148, 184. Foucault explains that

> the question of power needed to be formulated not so much in terms of justice as in those of technology, of tactics and strategy, and it was this substitution for a judicial and negative grid of a technical and strategic one that [he] tried to effect in *Discipline and Punish* and then to exploit in "The History of Sexuality".

at 184.

16 Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (Duke University Press, 1991) 187 (emphasis omitted).

17 See Anne Orford, 'Constituting Order' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 271. Orford writes on 'order' as international law's public function: 'The assertion that international law has that kind of public law function has been made with *greatest vigour during periods of revolution* in the European state system': at 272 (emphasis added). 'Jurists were confronted with frequent changes in the membership of the family of nations *as a result of revolutions* in Europe and the New World, and questions about the *normative criteria of statehood* began to appear in urgent need of resolution': at 278 (emphasis added).

relations of imperialism involving capitalist expansion,[18] labour issues and the 'economization of government'.[19]

Modernism, as developed in the writings of cultural theorists, will serve as the macro period marker into which this abstract structure of normalisation is steeped. My choice to read the juxtaposition of the PMC/Bondelzwarts rebellion and the SCC/Mexican revolutions against the cultural current of modernism is grounded on two premises. First, there is the chronological conjunction of all three (the PMC, the SCC and cultural modernist movements) being in full swing in the 1920s[20] — a conjunction that has already attracted the attention of international legal scholarship as a prism of analysis.[21] Second, there is a certain epistemological advantage in such a choice, associated with the claim that the function of art and culture is to produce contradictions and aporias, and not solve them.[22] And this epistemological advantage is further realised in that writings by cultural studies critics on modernism provide inspiring conceptual facets with which to reframe and rethink the contradictions of the modernist period. This is not to say that I cede to any epistemological privilege or hierarchy among different academic disciplines — as, for instance, has notoriously been the case when international law has had to approach its past only through 'proper' historical

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18 Anne Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) 11(2) *Journal of International Law and International Relations* 1, 29, referring to the 'ways in which international law … emerges out of a set of imperial relations and practices organised within and in relation to empire'.

19 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 157. Anghie employs the term to denote the 'technique of rendering the whole of mandate society in economic terms' and 'furthering a particular system of political economy that integrated the mandate territory into the metropolitan power, to the disadvantage of the former': at 179.

20 Reversely, Fredric Jameson, in justifying his choice to use imperialism to analyse modernist literature, writes, with a tint of irony, '[h]owever extrinsic and extraliterary the fact of imperialism may at first seem, there is at least a chronological justification for exploring its influence': Fredric Jameson, 'Modernism and Imperialism' in Terry Eagleton, Fredric Jameson and Edward W Said (eds), *Nationalism, Colonialism, and Literature* (University of Minnesota Press, 1990) 43, 44.

21 Nathaniel Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (1992) 4(2) *Yale Journal of Law and the Humanities* 351.

22 According to Jameson,

> the superiority of literature over philosophy — if one can put it in such trivializing language — lies in the fact that the latter generally takes its function as the solution of aporias and the overcoming of contradictions, whereas the mission of the former consists in producing them in the first place.

Fredric Jameson, *Valences of the Dialectic* (Verso, 2009) 529–30. On literature's 'mission' in being provocative, Foucault writes that, within the West's system of constraint,

> literature occupies a special place … determined to … cross boundaries, to ruthlessly or insidiously bring our secrets out in the open, to displace rules and codes, to compel the unmentionable to be told, it will thus tend to place itself outside the law, or at least to take on the burden of scandal, transgression, or revolt. More than any other form of language, it remains the discourse of 'infamy': it has the duty of saying what is most resistant to being said — the worst, the most secret, the most insufferable, the shameless.

Michel Foucault, 'Lives of Infamous Men' in Michel Foucault, *Power*, ed James D Faubion, tr Robert Hurley (New Press, 2000) 157, 174.

methods.[23] International law has its own peculiar relationship with the past,[24] and ceding to the methodological protocols of other academic disciplines can only produce a 'constraining effect on the ability of critical legal scholars to engage with the law in new and politically productive ways'.[25] Thus, my drawing from cultural studies on modernism as a method to read the juxtaposition of the PMC/Bondelzwarts rebellion and the SCC/Mexican revolutions is precisely intended as an attempt at such a bracingly productive engagement with international law.

This article will proceed as follows. Part II turns to modernism and expounds what exactly those conceptual facets are that cultural studies on modernism provide to reframe and rethink the juxtaposition of the Bondelzwarts rebellion and the Mexican revolutions, along with the international law mechanisms of the PMC and the SCC designed to address them. It is with these modernist facets that the analysis will then be performed in the corresponding parts (Part IV for the PMC, Part V for the SCC). Part II also mediates the analysis that follows in Parts IV and V by embedding the facets in how modernism has previously been employed in international legal scholarship. Part III explains why rebellions and revolutions provide an apt site on which to conduct the analysis by deploying the modernist facets. Part IV performs this modernist-faceted analysis by focusing on the League's PMC, its members and the archival records of the PMC's meetings during which the Bondelzwarts rebellion was discussed. Part V employs the modernist facets on the US–Mexico SCC, its members and the two cases that comprised its work in a timespan of almost eight years of existence and with no award being rendered, in the sense of a decision that both US and Mexico accepted as binding.[26] Part VI concludes.

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23 As Orford writes, '[i]n the case of international law, historians seek to import the conviction that historical methods provide the only form of interpretive practice that can produce an adequate knowledge of the past, not only for historians but also for international lawyers': Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke De Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, 2017) 297, 312.

24 Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (Working Paper No 2012/2, Institute for International Law and Justice, University of Melbourne, June 2012) ('The Past as Law or History?'). Nothing is more — literally — illustrative of the peculiarity of international law's relation to its past and how concepts — and also authors, their authority and their writings — 'move across time and space' than how

> there in the halls of justice [of the Department of Justice] at Washington, standing among the great law givers of the world opposite Hugo Grotius, is a good portrait of Dr Scott disguised in the habit of the Dominican theologian [Vitoria] who expounded the law of nations one hundred years before the classic treatise of Grotius.

at 2, 16–17, quoting George A Finch, 'James Brown Scott, 1866–1943' (1944) 38(2) *American Journal of International Law* 183, 188–94. Certainly, this picture tells much more about how international law develops across time and how it gets constructed and constantly reconstructed by selectively drawing from earlier periods — much more than merely situating Vitoria in the theological debates of his lifetime.

25 Orford, 'International Law and the Limits of History' (n 23) 306, referring to the 'turn to history as method': at 297.

26 Feller (n 12) 67–8.

II MODERNISM

This Part is divided into two sections. First, the conceptual facets that are drawn from cultural studies on modernism are set forth. Second, these facets are attuned to how modernism has been employed in international legal scholarship. As such, this second Part mediates and moulds the link to Part III, which looks into the rebellions and revolutions and explains why they turn out to be an apt site on which to deploy the modernist conceptual facets in order to reframe and rethink the interplay between, on the one hand, how such rebellions and revolutions are translated into the vocabulary of international law — thus coming within its ambit — and, on the other hand, the international legal mechanisms (here, the PMC and the SCC) put in place to tame them.

A *Modernist Facets*

Modernism suggests an intellectual dynamism, an effervescence of creativity. It implies a fascination with the new, a will to overcome, to multiply through breaks. For cultural critic Fredric Jameson, such overcoming and multiplication are often realised through antithetical pairs. He writes of the 'two moments of modernism' and cites examples across the spectrum of the arts: in architecture, Jugendstil versus Bauhaus; in painting, impressionism versus cubism, a symbolism of organic and vegetal forms versus a futurism of machine-age violences.[27] For Stuart Hall, modernism exceeds contrasting pairs, for it entails a multiple diffraction. As he writes, there is not 'any such thing as *the* modernist impulse, in the singular';[28] rather, it is the moment when everything

> is breaking through … when it is all happening at once — the moment of Braque, Picasso, Joyce, Klee, the Bauhaus, Brecht, Heartfield, Surrealism and Dada … one of the most fantastically exciting intellectual moments in twentieth-century history.[29]

From this effervescent atmosphere of modernism, I draw the following five modernist facets, against which I will read the juxtaposition between the PMC/ Bondelzwarts rebellion and the SCC/Mexican revolutions. These are: (i) the fascination with the new not only in terms of time but also as producing new forms of subjectivity; (ii) the elitist, academicist character; (iii) multiplicity, polyphony; (iv) the porosity to the other, the exotic, the subaltern; and (v) violence.

Regarding facet (i), 'new' in terms of time is usually taken to denote something that happens for the first time, a new beginning. Modernism aims to disperse any singular notion of time, to demonstrate that there is no 'such a thing as Time itself'[30] but rather many forms of time, variable temporalities, 'which can only be superimposed or surcharged on each other, but not fused together in one

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27 Fredric Jameson, *A Singular Modernity: Essay on the Ontology of the Present* (Verso, 2002) 150 ('*A Singular Modernity*'). As the list continues, 'in music (the early neurotic Schoenberg, whose melodies Brecht famously thought were "too sweet", versus the later theoretician of the twelve-tone system)'.

28 Lawrence Grossberg (ed), 'On Postmodernism and Articulation: An Interview with Stuart Hall' in David Morley and Kuan-Hsing Chen (eds), *Stuart Hall: Critical Dialogues in Cultural Studies* (Routledge, 1996) 131, 132 (emphasis in original).

29 Ibid 139 (emphasis in original).

30 Jameson, *Valences of the Dialectic* (n 22) 528.

overarching form'.[31] At the same time, the modernist 'new' emerges also as an obligation that produces new forms of subjectivity. To be new, to be 'modern'-ist, is 'something you must do to yourself to rise to the occasion and be worthy of the new world tendentially in emergence all around you'.[32] It is this temporal obligation to be at the edge of time that propels the modernist form of subjectivity. As Jameson writes, 'moderns feel themselves to be radically different kinds of people from those of older precapitalist traditions or those in colonial areas on the globe contemporaneous with modernism (and imperialism)'.[33] And such a feeling of a radically different — temporally advanced — subjectivity comes with the determined benevolence to bring others along also, those left in earlier times, those that are sometimes 'only one step removed from the Stone Age'.[34] In other words, the modernist subjectivity feels compelled to streamline all those other — necessarily earlier — forms of time, to compress their layers of superimposition, to attempt to fuse them into a single temporal line by forcing an imperative catching up through the rigorous demands of modernisation, of work, of education.

Facet (ii) points to the elitist features of modernism. Modernist cultural innovations were embedded in a 'highly formalized *academicism* in the visual and other arts', locked within official institutions, pervaded, if not dominated, by aristocratic and landowning classes.[35] Despite its subversive stance towards Western bourgeois society,[36] modernism insisted on the purity and autonomy of art as a defensive act to safeguard a privileged position.[37] Such an insistent autonomy was inextricably linked to modernism's elitist character, since the autonomy was largely carved out of its differentiation from mass culture and its 'seductive lure'.[38] As Hall succinctly remarks, modernism, far from directly

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31 Ibid 529. Likewise, Vincent Sherry emphasises in the introduction to his edited volume that modernism is

> not about the mannerisms … No, it is about time: it is about this new experience of vertiginous instants in which 'modernism' is most self-consciously involved, and it was about time, in the minds of those identified with this sensibility over the long turn of the twentieth century …

Vincent Sherry, 'Introduction: A History of "Modernism"' in Vincent Sherry (ed), *The Cambridge History of Modernism* (Cambridge University Press, 2017) 1, 3.

32 Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (n 16) 381.

33 Ibid.

34 To borrow the wording of JR Collins, the accredited representative of Australia for New Guinea, as cited by the PMC Member Dannevig on the occasion of the examination of the annual report for New Guinea for 1929–30, which was presented by Collins before the PMC: Permanent Mandates Commission, *Minutes of the Twentieth Session*, League of Nations Doc C.422.M.176.1931.VI. (1931) 23.

35 Perry Anderson, 'Modernity and Revolution' [1984] (144) *New Left Review* 96, 104 (emphasis in original).

36 For Terry Eagleton,

> [m]odernism reflected the crack-up of a whole civilization. All the beliefs which had served nineteenth-century middle-class society so splendidly — liberalism, democracy, individualism, scientific inquiry, historical progress, the sovereignty of reason — were now in crisis.

Terry Eagleton, *After Theory* (Basic Books, 2003) 64.

37 See Jameson, *A Singular Modernity* (n 27) 176.

38 Andreas Huyssen, *After the Great Divide: Modernism, Mass Culture, Postmodernism* (Indiana University Press, 1986) 55. For Jameson, it is the 'concept of culture [that] is the true enemy of art as such … especially art in its modernist form as the Absolute': Jameson, *A Singular Modernity* (n 27) 177–8.

engaging with the popular, rather failed its radical promise and 'pulled back into more elitist formations'.[39] Thus, modernism involved distinctively hegemonic, top-down and hierarchical traits.

Facet (iii) stresses modernism's multiplicity, polyphony and profusion of points of view. This is reflected in the multiplicity of modernist currents and movements. It also entails, though, a more radical claim, in the sense that modernism, by stressing multiplicity, aimed to break with the realism of the 19th century.[40] Modernism was remarkable in distorting and thoroughly subjectivising reality.[41] This was performed through specific techniques that challenged reality and representation. For instance, in the literary works of TS Eliot, there is not a single narrator, but the narration unfolds through perspectival shifts that 'break up the verse with the sound of many voices'.[42] In painting, cubism challenges representation in that, even if the pictured objects are recognisable as bottles of wine, banjos or flower vases, the way of their depiction demands that the viewer 'bracket or suspend' that recognition and 'attempt to "see" all those objects in some new and utterly unreferential way'.[43]

Facet (iv) emphasises that the multiplicity of facet (iii) is often achieved through a porosity to the other, the subaltern, the exotic, the colonised.[44] Modernism is considered as reacting to a 'top-heavy Victorian rationalism by turning to the exotic, the primitivist, the archaic and unconscious'.[45] An illustration of such a porosity and reactive turn can be found especially in the modernism that is associated with the art of Modigliani, Picasso, Gauguin and so forth, which 'was only possible because these "first world" artists …incorporated into their "creativity" the culture and artwork of the peoples of the non-West'.[46]

Facet (v) accentuates the 'gospel of violence' that, from Filippo Tommaso Marinetti to Ernst Jünger, from the expressionists to the surrealists, obsessed the artistic and intellectual currents of modernism.[47] 'Only war', wrote Marinetti, who was affiliated with fascism and was futurism's founder, 'knows how to rejuvenate, accelerate and sharpen the human intelligence, to make more joyful and air the nerves'.[48] At the left end of the political spectrum, surrealism was attracted to social revolution. André Breton, one of surrealism's founders, travelled in 1938 to Mexico and published with the Mexican painter Diego Rivera, and arguably with Leon Trotsky too, the 'manifesto for an independent

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39 Grossberg (n 28) 139.

40 As Rey Chow writes, 'the explicit or implicit target of much of high modernist and avant-garde literature and film is … realism — the hardcore referentiality that, for modernists and avant-garde writers, is a kind of representational ideology of a bygone era': Rey Chow, *The Protestant Ethnic and the Spirit of Capitalism* (Columbia University Press, 2002) 174.

41 Fredric Jameson, *The Ideologies of Theory* (Verso, 2008) 187, 431.

42 Michael Levenson, 'On or About 1922: *Annus Mirabilis* and the Other 1920s' in Vincent Sherry (ed), *The Cambridge History of Modernism* (Cambridge University Press, 2016) 123, 125. As the author further elaborates, that was a way to 'avoid the threat of a deadly consistency'. The multiplication of 'tones, accents, and languages' staged the profusion of points of view, with perspectival shifts 'whose relationships often remain inscrutable'.

43 Jameson, *The Ideologies of Theory* (n 41) 187.

44 Fredric Jameson, *The Modernist Papers* (Verso, 2007) 307.

45 Eagleton (n 36) 70.

46 Rey Chow, *Writing Diaspora: Tactics of Intervention in Contemporary Cultural Studies* (Indiana University Press, 1993) 36.

47 Mark Mazower, *Dark Continent: Europe's Twentieth Century* (Penguin Books, 1999) 20–1.

48 EJ Hobsbawm, *The Age of Empire, 1875–1914* (Vintage Books, 1989) 190.

revolutionary art'.[49] In surrealism, revolution and imagination were closely linked, as both were springing from the unconscious, which implies a spontaneity unmediated by rational control and an 'emphasis on magic, accident, irrationality, symbols and dreams'.[50] In a somewhat diametrical opposition, for futurists, it was the machine age that provided a powerful imaginative stimulus, manifested in their 'exhilaration … before the machine proper — the motorcar, the steamship liner, the machine gun, the airplane'.[51]

B *Modernism in International Legal Scholarship*

Cultural modernism in international legal scholarship is largely associated with the work of Nathaniel Berman, who employed cultural modernism to advance a conceptual scheme within which he analysed nationalism and the international law of the interwar period.[52] For Berman, high modernism — 'high' as in high European culture, elite and academicist, as in facet (ii) above — entailed mainly three characteristics: (1) a critique of representation, (2) an openness to primitive sources of cultural energy and (3) innovative experimentation.[53] The first element is linked to modernist facet (iii), in that modernism, by accentuating perspectival multiplicity, entailed the radical epistemological claim of attacking any single, total, transcendental notion of reality and representation — an aspect of modernism foregrounded also by critical legal scholars.[54]

Berman, however, pivots his analysis primarily on the dual interplay and mutual interaction between elements (2) and (3), between 'primitiveness' and

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[49] Andre Breton and Leon Trotsky, 'Pour un art révolutionnaire indépendant' [For an Independent Revolutionary Art], *André Breton* (Web Page) <https://www.andrebreton.fr/work/56600100358020>, archived at <https://perma.cc/CQ9B-QGQ2>; Alexa Gotthardt, 'When Mexico Became a Surrealist Mecca', *Artsy* (online, 25 June 2019) <https://www.artsy.net/article/artsy-editorial-mexico-surrealist-mecca>, archived at <https://perma.cc/3MTP-S6QA>; Melanie Nicholson, 'Surrealism's "Found Object": The Enigmatic Mexico of Artaud and Breton' (2013) 43(1) *Journal of European Studies* 27.

[50] Eric Hobsbawm, *Age of Extremes: The Short Twentieth Century, 1914–1991* (Abacus, 1995) 180, quoting John Willett, *Art and Politics in the Weimar Period: The New Sobriety, 1917–1933* (Pantheon Books, 1978).

[51] Jameson, *The Modernist Papers* (n 44) 236.

[52] Nathaniel Berman, 'A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework' (1992) 33(2) *Harvard International Law Journal* 353; Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (n 21).

[53] Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (n 21) 353–4. Besides these three, Berman also lists a fourth; that is, the juxtaposition within a single work of irreconcilable elements under traditional criteria of coherence.

[54] As Nigel Purvis writes, 'the realization that objectivity is impossible is the basic insight of modernism … Modernists deny objectivity at either level [referentiality in the external world or unbiased processes for the production of knowledge] and they claim that truth is subjective and relative': Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32(1) *Harvard International Law Journal* 81, 119. For Mark Tushnet, critical legal studies is the 'form that modernism takes in legal thought', exactly because, '[l]ike modernism in philosophy and sociology, it displaces settled understandings' and

> is justified in the way all modernist programs are … in shattering congealed forms of life by showing that they have no particular integrity. And whatever makes that demonstration effective — utopian yearnings, close analysis of legal texts, concrete proposals — is part of the program.

Mark Tushnet, 'Critical Legal Studies: An Introduction to Its Origins and Underpinnings' (1986) 36(4) *Journal of Legal Education* 505, 517.

'experimentation'.[55] He demonstrates how interwar legal writers resembled high cultural modernists in experimenting with a range of legal techniques in an effort to absorb creatively the new impulses of the primitive.[56] This is done especially in his analysis of plebiscites as a new legal experiment to harness nationalist passions.[57] Thus, Berman keeps within a dual moment, a paradox of 'double departure' and 'double law', emerging from the experimental and the primitive, while his testing ground remains the European continent, concerned with the passions of nationalism and minority protection.[58] My emphasis, though, in reading the juxtaposition of the PMC/Bondelzwarts rebellion and the SCC/Mexican revolutions against the five modernists facets is in keeping with the polyvalence of modernism as multiple diffraction, which exceeds dualisms and whose terrain and field of application also exceed Europe.

Beyond the cultural variation, modernism has been employed in international legal scholarship largely in association with two implications: (i) as a link to pragmatism and (ii) as a sense of transition, of reconstruction. These two aspects are analysed below, with a special emphasis on the second, precisely because of the accent here on modernism as a period of multiple diffraction, across geographical continents and currents of thought.

1 *Modernism as a Link to Pragmatism*

Modernism as a link to pragmatism is succinctly captured in the phrase, 'the core modernist assumption [is] that laws are tools with purposes'.[59] This aspect is related to the appearance of international institutions and especially the LON, whose entrance provided a determinant parameter to supersede earlier doctrinal

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55 Berman, 'Modernism, Nationalism and the Rhetoric of Reconstruction' (n 21) 366.

56 Nathaniel Berman, '"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law' (1993) 106(8) *Harvard Law Review* 1792, 1804–6 ('But the Alternative Is Despair').

57 Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (n 21) 366. For Berman, the experimental legal technique of internationally supervised plebiscites signified a departure from an international law formerly concerned only with legally established states. And this departure was necessitated exactly in order to find solutions to the problem posed to European stability by separatist nationalism. In this sense, Berman's element (3) on technical legal experimentation can be compared to the elitist character of modernist facet (ii) above, in that both Berman's 'experimentation' and cultural modernism's elitist character evince modernism's determination to absorb any forces that could jeopardise the privileged position of the elites.

58 Berman, 'But the Alternative Is Despair' (n 56) 1806. Berman's testing ground remains the European continent, as his case studies include, first, the Aaland Islands in order to examine the plebiscite principle and minority protection, and second, the cases of Saar and Danzig, whereto he turns to analyse the experiment of internationalisation. Moreover, for Berman, the 'primitive' of cultural modernism is largely comparable to 'nationalism' in international legal modernism: Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (n 21) 365. Thus, Berman makes no forays to analyse how the 'primitive' played out beyond Europe, in the context of LON's mandates or in the functioning of the mixed claims commissions in Latin America.

59 Karen Knop and Annelise Riles, 'Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the "Comfort Women" Agreement' (2017) 102(4) *Cornell Law Review* 853, 915.

dichotomies between naturalism and positivism,[60] a parameter that shifted the emphasis towards institutional functionalism and pragmatic management.[61] Distinctive of this new international law was its commitment to 'furthering social goals' by being based on the social sciences.[62] As Wright extensively set out,

> [p]sychologists, biologists, anthropologists, sociologists, economists, political scientists, international lawyers, historians, geographers, administrators, publicists, and humanitarians' have written about the undoubted 'problem of backward areas.[63]

The mandates system visualised the 'problem',[64] and the League's supervisory authority ensured that, contrary to the past, where admittedly '[s]cience … had a part … in the development of colonies', now science could guide national policy wisely, exactly because science was placed under the LON's supervision.[65]

Thus, we see modernism as pragmatism, as the pragmatism that international institutions, the new actors at the international legal scene, bring along by basing their actual workings on science in order to ensure the effective implementation of their mandate. This aspect of modernism will be addressed in Part IV, where the discussion turns to the PMC's handling of the Bondelzwarts rebellion. However, the prominence of modernism as pragmatism risks overaccentuating just one of the implications of modernism by overshadowing others — just like the LON's coming onto the legal scene overshadowed other sites of international legal activity and especially the mixed claims commissions. Given the purpose of this article to not only centre, but also decentre, the League through its juxtaposition

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60 Purvis (n 54) 81–3. In a similar vein, for Anghie, the 'new international law of pragmatism' challenged the formalism and the positivism of the 19th century, and it was especially the mandate system that 'embodied many of the insights of pragmatism in its operations': Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics* 513, 522 ('Colonialism and the Birth of International Institutions').

61 For Balakrishnan Rajagopal, '[p]ragmatism is the credo of international institutions': Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions' (2000) 41(2) *Harvard International Law Journal* 529. For David Kennedy, '[t]he establishment of the League seemed a move from utopianism to pragmatic politics, from theory into practice because and to the extent it excluded utopians from the narration of its establishment': Kennedy, 'The Move to Institutions' (n 6) 875–6. Kennedy cites William Rappard, member of the PMC, on whom more will follow in Part III, as one of the narrators that emphasised the 'movement from charter to actual workings': at 876 n 96. The exact words of Rappard as cited: 'This institution … has not developed along the lines of its fundamental charter, but has nevertheless tended by other, rather simpler processes towards its natural goal, the pacific organization of international relations.' The interpretative approach of Henri Rolin, foregrounding the LON's practice as superseding the text of the *LON Covenant*, can also be read as such a pragmatic 'actual-workings-oriented' move: H Rolin, 'La pratique des mandats internationaux' [The Practice of International Mandates] [1927] 19 *Recueil des cours de l'Académie de droit international de La Haye* 495; *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) pt I ('*Covenant of the League of Nations*') ('*LON Covenant*'). See below Part II(B)(2) on modernism as a sense of transition and reconstruction.

62 Anghie, 'Colonialism and the Birth of International Institutions' (n 60) 539.

63 Wright, *Mandates under the League of Nations* (n 2) 582.

64 Ibid 584.

65 Ibid 586.

to the US–Mexico SCC, an emphasis on modernism as transition and reconstruction is warranted.

2 *Modernism as a Sense of Transition and of Reconstruction*

Modernism as a sense of transition pervades the international legal writings of the interwar period, and as such it is the one that chronologically coincides with cultural modernism. For international lawyers too felt the impact of the decline of European liberalism towards the turn of the 19th century and the atmosphere of intellectual revolution that brushed aside the scientific and political certainties of the 1880s.[66] And, not too unexpectedly, the impact was particularly felt among the liberal lawyers of the Institut de Droit International ('IDI'), which, despite its prolific activity, hardly saw any implementation of its resolutions into national laws or treaty texts, according to its annual reports of 1888–89 and 1896.[67] Following these upheavals though, and in the aftermath of the First World War and the establishment of the LON, what was distinctive of much of the international legal writing in the 1920s and 1930s was that it 'was oriented towards a reconstruction, associated with a feeling of social and political transition'.[68] A site where such a reconstructive verve and spirit of transition figured prominently is in the interwar courses of the Hague Academy — itself established in 1923 — most of which were 'at least as much works of philosophy or legal theory … than expositions of valid norms'.[69] The transition here is already expressed in the widening range of what is considered as a pertinent topic for international legal writing, with titles now extending from classical international

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66 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2004) 89.

67 Ibid. Interestingly, Koskenniemi writes that in the 'melancholy passage' of the Secretary-General Rolin-Jaequemyns' annual report of 1888, Rolin-Jaequemyns could 'cite only one official reference to the works of the Institute — a passage from a settlement of a dispute between Mexico and the United States where the latter had referred to an 1878 resolution on criminal jurisdiction'. And to be more precise, Rolin-Jaequemyns makes this reference while elaborating on how the special authority of jurists would be reinforced if invested with 'real influence' in the world; that is, if its resolutions and projects on such a variety of topics (like the conflict of laws, extradition, laws of war, the procedure of international arbitration, maritime prizes etc) were 'textually transformed' into laws or international treaties. For the moment, however, Rolin-Jaequemyns could cite only one fact of such 'transformation into the real world'; that is, that the *US invoked at length, in order to draw authority in her favour*, the conclusions adopted by the Institute in 1878 on the territorial jurisdiction: Institut de Droit International, 'Notices et documents relatifs à l'histoire et aux travaux de l'Institut' [Notices and Documents Relating to the History and Works of the Institute] (1888–89) 10 *Annuaire de l'Institut de Droit International* 2, 48–9 (in the original: 'l'affaire Cutting, le gouvernement des États-Unis invoquait tout au long, comme faisant autorité en sa faveur'). At the Cutting affair, the US protested Mexico's assertion of passive personality jurisdiction over the crime of libel: John G McCarthy, 'The Passive Personality Principle and Its Use in Combatting International Terrorism' (1989–90) 13(3) *Fordham International Law Journal* 298, 302–3.

68 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 159 n 1 ('*From Apology to Utopia*').

69 Ibid 187 n 72.

law[70] topics[71] to the LON, the mandates, finance and labour, while others evince more reflective-theoretical studies or constitute discipline-building exercises through incursions into history.[72]

Modernism as a sense of transition and reconstruction finds an exemplary site in the Hague courses also because one can witness here the juxtaposition and simultaneous coexistence of different international legal methods and philosophies. Thus, the more positivist-scientific[73] study of 1923 on the 'adjacent waters in the territory of states' by George Grafton Wilson, a member of the IDI and editor of the *AJIL* who had written earlier on the law of war and international maritime law,[74] is close to the 1928 course by Francisco-José Urrutia Olano, member of the IDI and the Permanent Court of Arbitration ('PCA'), and Colombia's representative at the LON, on 'the codification of international law in America', a course that opens with the origins of Latin American revolutions, tracing them to the spirit of 18th century French philosophers, the French and the American revolutions, and Jules Mancini and Simón Bolivar.[75]

Urrutia Olano's course is, thus, linked to the 1931 course on the 'principle of nationalities' by Robert Redslob, who writes on the 'psychological foundations of the nation', also citing Mancini and Ernest Renan,[76] and in whose scholarship Berman finds an 'ideal-type' of a modernist international lawyer inspired by the 'primitive' sources of 'energy' and 'vitality' found in Redslob's construction of 'nationalism'.[77] Redslob, however, excluded from such vital national impulsions those peoples in mandated territories. Rather, to the contrary, in his course, he advances the rightfulness for sovereigns to pursue '*autarkeia*' through the

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70 For the term 'classical international law', see Emmanuelle Tourme-Jouannet, 'The Critique of Classical Thought during the Interwar Period: Vattel and Van Vollenhoven' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 101, 102, where the author suggests that 'classical international law' implies a conception of the system of international law with respect for the sovereign freedom of states at its centre.

71 For instance, the ones cited in the 1888 IDI report by Rolin-Jaequemyns: see above n 67.

72 Like, for example, a course on the influence of the reformation on the development of international law, on the ideas of Machiavelli or on of the work of Grotius, to enter more familiar territory in contemporary terms. Even a cursory perusal of the titles of the courses of the period illustrates well the widened scope of what would be considered as pertinent interrogations in international law: see 'Collected Courses of the Hague Academy of International Law', *Brill* (Web Page, 2021) <https://referenceworks.brillonline.com/browse/the-hague-academy-collected-courses>, archived at <https://perma.cc/SY47-LJF8>.

73 In Lassa Oppenheim's sense: see L Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2(2) *American Journal of International Law* 313.

74 George Grafton Wilson, 'Les eaux adjacentes au territoire des États' [Adjacent Waters in the Territory of States] (1923) 1 *Recueil des cours de l'Académie de droit international de La Haye* 123; George Grafton Wilson, 'Insurgency and International Maritime Law' (1907) 1(1) *American Journal of International Law* 46. Also, on the occasion of the *Hague Convention (VII) of 1907 Relating to the Conversion of Merchant Ships into War-Ships*, see George Grafton Wilson, 'Conversion of Merchant Ships into War Ships' (1908) 2(2) *American Journal of International Law* 271.

75 FJ Urrutia, 'La codification du droit international en Amérique' [The Codification of International Law in America] (1928) 22 *Recueil des cours de l'Académie de droit international de La Haye* 83.

76 Robert Redslob, 'Le principe des nationalités' [The Principle of Nationalities] (1931) 37 *Recueil des cours de l'Académie de droit international de La Haye* 3, 15–16. Redslob was professor of international law in Strasbourg and appears outside the networks of international lawyers, according to his biographical note in the Hague course: at 4.

77 Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (n 21) 363–5.

acquisition of colonies.[78] Yet Redslob, in his study on the mandates, which he communicated to the LON,[79] did not outright rule out the possibility that inhabitants of mandated territories could form their own nation-state, albeit necessarily 'under the auspices and the authority of the mandatory power'.[80] And Redslob's organic metaphors shifted to the LON, with the LON imagined as a system of 'Alpine lakes' capable of holding the sovereignty of the mandated territories by conjoining the overflowing force of the external organic projections of its member states.[81]

Modernism as a reconstructive challenge is also manifested through divergences on what the optimal legal method to study art 22 of the *Covenant of the League of Nations* ('*LON Covenant*') was. For Giulio Diena, member of the IDI and vice-president of the LON's commission for the progressive codification of international law, in his 1924 course on the mandates, one has to proceed by first studying the historical events and political causes that led to art 22 before

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78 Robert Redslob, 'The Problem of Nationalities' (1931) 17 *Transactions of the Grotius Society* 21, 26–7, 31–2. If that were not possible, then 'open door' treaties could constitute another form of security, as a last resort. In his words: 'Enfin, quand il n'aura pas les moyens de se constituer des possessions transmarines ou des sphères d'intérêts, il s'efforcera du moins d'assurer le rayonnement indispensable à son action économique par des traités lui garantissant la porte ouverte': Redslob, 'Le principe des nationalités' (n 76) 32. Not least, Redslob found in the 'Boers of South Africa' an excellent example of how stabilisation can be achieved between 'organic nationalism' and 'civisme', given that the Boers, 'all while they managed to conserve their ancestral traditions, so profoundly engraved in their being, became citizens of British faith'. In the original:

> Nous citerons les Boërs de l'Afrique … qui, tout en conservant leurs traditions ancestrales, si profondément gravées dans leur être, sont devenus des citoyens de foi britannique … une loyauté parfaite au grand Commonwealth qui est constitué, non par la lettre de la loi, mais par les liens de l'esprit … une harmonie qui fera toujours l'étonnement du monde.

at 74–5.

79 See Letter from Director of the Section of the Mandates to Robert Redslob, 6 December 1926 (League of Nations Registry No 55850).

80 Robert Redslob, 'Le système des mandats internationaux' [The International Mandates System] (1926) 15 *Bulletin de l'Institut Intermediaire International* 284, 306 n 3. Redslob refers to art 7 of the mandate for Palestine. As he writes, '[d]'autre part, rien n'empêche ces habitants de devenir nationaux d'un État particulier qu'ils formeraient eux-mêmes sous les auspices et sous l'autorité du Mandataire'.

81 Ibid 310. In the original:

> Ce phénomène n'implique pas un pouvoir central au-dessus des États sociétaires. Il y a une puissance nouvelle, oui, mais ce n'est pas une puissance qui s'élève en hauteur, non, c'est une *puissance latérale* … imaginons un système de lacs alpestres qui communiquent entre eux … Seulement, qu'un jour les flots croissants débordent un rivage, des contingents de tous les lacs afflueront pour s'élancer, avec une force conjointe, hors des anciennes barrières.

(emphasis in original).

analysing its text under proper juridical methods.[82] Henri Rolin, the IDI's associate and member of several of the LON's legal committees, opens his 1927 course on the practice of mandates by objecting to Diena's method. Given that art 22 is not a 'model of legal drafting', this allowed the LON to adjust its 'elastic terms … freely to the exigencies of experience'.[83] Rolin's study aimed to collect this data of practice to superpose, in a corrective revision, practice on theory.[84]

Reconstructive permutations and a recast re-emergence of earlier legal materials accompanied another encounter between Diena and Rolin. Both were instrumental in creating the LON's committee for the conference on the progressive codification of international law.[85] Among the three selected conference topics, the one on states' responsibility for damages caused in their territory to the person or property of foreigners figured most prominently.[86] This topic echoed a 1927 IDI resolution,[87] which can be traced back to a 1900 IDI resolution on state responsibility for damages suffered by foreigners in the event

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82 Giulio Diena, 'Les Mandats Internationaux' [The International Mandates] (1924) 5 *Recueil des cours de l'Académie de droit international de La Haye* 211, 216, 229, 231–42. Diena proceeds first by recalling the historical events and the political causes that led to the arrangement of the LON's mandates: at 216. He highlights that art 22 was the solution as to what would happen to the colonial territories of the defeated Germany and Ottoman Empire; the solution of internationalisation as an alternative to annexation 'pure and simple': at 217–18. Interestingly, this meant that art 22 would not be considered as applicable to the victor states' own colonies, which may well have been bordering one another: at 218; see below n 144, 163, 197. Diena then proceeds in his second chapter to analyse art 22 with proper legal methods: Diena (n 82) 230. These range from domestic law analogies to idealist, positive-scientific methods, or analysing it as a type of special administration complemented with the principles and rules of the international law of sovereignty: at 231–42.

83 Rolin, 'La pratique des mandats internationaux' (n 61) 497–8. Rolin hoped that the importance of such an analysis would not escape international lawyers, because the lessons from practice are nothing but authentic interpretations of art 22, and, as such, they have the same obligatory force as the text of art 22 itself: at 608–9.

84 See generally Rolin, 'La pratique des mandats internationaux' (n 61).

85 Guillaume Sacriste and Antoine Vauchez, 'The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s' (2007) 32(1) *Law and Social Inquiry* 83, 101.

86 The other two topics were nationality and territorial waters: Green H Hackworth, 'Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners: The Hague Conference for the Codification of International Law' (1930) 24(3) *American Journal of International Law* 500, 500.

87 Institut de Droit International, *Responsabilité international des états à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers* [International Responsibility of States for Damages Caused in Their Territory to the Person and Property of Foreigners] (Resolution, Session de Lausanne, 1 September 1927). The Rapporteur was Leo Strisower, also member of the Curatorium of the Hague Academy, who delivered a course on 'extraterritoriality and its principal applications' in the very first volume of the Hague Academy courses in 1923: Leo Strisower, 'L'exterritorialité et ses principales applications' [Extraterritoriality and Its Principal Applications] (1923) 1 *Recueil des cours de l'Académie de droit International de La Haye* 229, 231. The 1927 IDI session was held at Lausanne, under the presidency of James Brown Scott. In the avant-propos of its *annuaire*, it mentions fondly the 'garden-party' that was offered to its members by Sir Eric Drummond, the Secretary-General of the League: Institut de Droit International, 'Avant-Propos' [Foreword] (1927) 33(3) *Annuaire de l'Institut de Droit International* v, vi.

of riots, insurrection or civil war.[88] The 1900 IDI resolution was initiated exactly against the background of Latin American arbitrations for damages caused to foreign merchants in the course of civil wars and insurrections.[89] At the 1930 conference, the questions of denial of justice, the special status of aliens and international standards for the judiciary and police forces were intensely debated; Colombia, Mexico, Salvador and Uruguay were particularly active and opposed their views to those of Britain, France and the US.[90] This modernist recasting, occasioned by the LON's conference, shows how interwoven were the issues of laws of war, state responsibility, protection of foreigners and arbitration.[91]

For modernism as a sense of transition and reconstruction, the examples just adduced aimed specifically to demonstrate the modernist coexistence on the international legal landscape of classical laws of war, positivist-scientific methodologies, organic-vitalist romantic approaches to nationalism and revolution,[92] and divergences on how to legally analyse the *LON Covenant*, through either a retrospective historic interpretation or a prospective emphasis on

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88 Institut de Droit International, *Réglement sur la responsabilité des etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile* [Regulation on the Responsibility of States for Damage Suffered by Foreigners in the Event of Riot, Insurgency or Civil War] (Resolution, Session de Neuchâtel, 10 September 1900) ('*Réglement sur la responsabilité*'). The same year, the IDI also issued another resolution, closely linked to that one, on the 'rights and duties of foreign powers, in the event of an insurrectional movement, vis-à-vis the governments established and recognized and struggling with the insurrection': Institut de Droit International, *Droits et devoirs des puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection* [Rights and Duties of Foreign Powers in the Case of Insurrectional Movements towards the Established and Recognised Governments Which Are Grappling with the Insurrection] (Resolution, Session de Neuchâtel, 8 September 1900) ('*Droits et devoirs*').

89 As de Bar, one of the rapporteurs of the 1900 IDI resolution, remarked, '[t]he Institut was justified in putting in its agenda this theory of compensation', in order to examine it according to the legal science: L de Bar, 'De la responsabilité des États: A raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile' [On the Responsibility of States: For Damage Suffered by Foreigners in the Event of Unrest, Riot or Civil War] (1899) (2nd ser) 1 *Revue de Droit International et de Législation Comparée* 464, 465. That followed the jurisprudence of arbitral decisions issued in the course of the preceding years that rejected the principle of non-responsibility, as the latter was invoked by the Latin American republics, among which more than one had been the 'theatre of civil wars and insurrections'. The Latin American states were, to the contrary, held to be liable to provide compensation to a large extent for the damages suffered by foreigners. The practice of Latin American states of inserting clauses of non-responsibility in commercial and consular treaties, like the 1892 treaty between the Empire of Germany and the Republic of Colombia, was disapproved of and considered dangerous by the Europeans, 'especially by the merchants established in the Latin American republics'.

90 Hackworth (n 86).

91 Indeed, so interwoven that an author of the time, in asking 'whether or not there exists any rule of international law with respect to the private property of aliens', found that the matter had not been 'considered by the majority of the text-writers except in connection with the conduct of war': John P Bullington, 'Problems of International Law in the Mexican Constitution of 1917' (1927) 21(4) *American Journal of International Law* 685, 694.

92 Accepted though only for states or, with a bit of a stretch, for the LON, but certainly not for populations in mandated territories.

subsequent practice.[93] Ultimately, they aimed to demonstrate how the LON's codification initiative provided an encounter, a crossing of strands of international legal regulation of different temporal trajectories, that signalled how issues of laws of war, revolutions and insurrections, international responsibility, protection of foreign private interests, international arbitration and the LON's scope of competences were all intimately connected in a characteristically modernist way.

My intention in this Section B on modernism in international legal scholarship was precisely to demonstrate, through its staging and performance, how exactly legal modernism — like cultural modernism — entailed a polyvalence, a period of multiple diffraction. By bringing together cultural and legal modernism, Part II aimed to mould and pave the link for the analysis of the PMC and the SCC through the five modernist facets. It aimed to analyse each, the PMC and the SCC, as constituting a new international legal mechanism for taming and regulating rebellions and revolutions; as a mechanism whose members felt legitimated to do so also because of their new subjectivity, their modernity, their being at the forefront of evolution(s); mechanisms of an elitist, hegemonic, autonomous character, polyphonous and multiple, intrigued by the exotic, the subaltern, the temporally alien as a field to deploy their workings and drawn by the violence of rebellions and revolutions as a phenomenon to be tamed, to be regulated and temporally streamlined. It is to why the violence of rebellions and revolutions is such a compelling site for the enactment of the international legal mechanisms such as the PMC and the SCC as modernist taming technologies that the next Part now turns.

III REBELLIONS AND REVOLUTIONS AS AN APT SITE TO DEPLOY THE MODERNIST FACETS

In the introduction, I suggested that the purpose of juxtaposing the PMC's supervisory function over the Bondelzwarts rebellion with the US–Mexico SCC's arbitral decisions over the Mexican revolutions was to read this juxtaposition as a homology. That is, it was in order to disengage from both the PMC and the SCC the abstract structure of the normalisation of the unruly subject. By normalisation I meant two things: first, the element of order as being a trigger for the normative

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93 Divergences that could well directly impact on the scope of powers of the LON institutions. An example can be found in the scope of the supervisory function of the PMC itself. The *LON Covenant* provided only the provision of art 22(9) to the effect that '[a] permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates'. The issue that arose then was whether the PMC could rightly be concerned only with matters specifically stipulated in the mandate texts or whether it could examine the whole material and moral situation of the peoples under the Mandate. The question was resolved in favour of the latter, broad approach, following the Hymans report, named after the Belgian representative that presented it to the LON Council: M Van Rees, *General Competence of the Mandates Commission: Note by M Van Rees*, League of Nations Doc C.P.M.511.(1). (15 November 1926) ('*General Competence of the Mandates Commission*'); Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015) 49. Rolin, who was in favour of 'practice' as the 'authentic interpretation of article 22', had served as secretary to Paul Hymans when the latter was the Belgian minister of foreign affairs at the time of the Peace Conference and had assisted the work of the committee that elaborated the *LON Covenant*: Rolin, 'La pratique des mandats internationaux' (n 61) 609; Jean Salmon, 'Henry Rolin: 1891–1973', *Société française pour le droit international* (Web Page) <http://www.sfdi.org/internationalistes/rolin/>, archived at <https://perma.cc/8QJV-32PH>.

development of international law; second, the element of the economic as directing how order is normatively developed. This abstract structure of normalisation is steeped into modernism, to be imagined as a prism that presents the five modernist facets under (a) above. Before expounding how this modernist five-faceted structure of normalisation is present in the PMC (Part IV) and the SCC (Part V), this Part focuses on the two elements of order (as the trigger) and the economic (as the direction of the normalising structure) and explains why it is that rebellions and revolutions in particular prompt the deployment of disciplining international legal technologies.

A *Order as the Trigger*

There is a mythology of rebellions and, even more, of revolutions. As Roland Barthes writes,

> in our mythology, violence is taken by the same prejudice as literature or art: we cannot suppose for it any other function than that of expressing a depth, an interiority, a nature, of which it [violence] would be the primary language, savage, un-systematic.[94]

If surrealists were fascinated by social revolutions, as it was suggested above, this was also because such a fascination was in line with surrealism's quest for and attraction to mystery and depth, the '"magical" qualities … of an Unconscious that seems to speak and vibrate through' the outbursts of revolutionary energy.[95] And this revolutionary energy also aimed to subvert time, to attempt a 'renovation of historical time', to '[reinvent time] as a dimension of novel possibility'.[96] Thus, revolutions serve as 'axial event[s]' that 'disrupt synchronic time and reveal the latter as a heterogeneous pattern of surcharged layers'.[97]

Such an explosive imaginary of rebellions and revolutions can be safely assumed to not fit easily with international law's mechanisms of normalisation. Revolutions were often pictured in the feminine, as passionate 'political struggles … less amenable to the guidance of reason', if only to accentuate through the contrast the 'manly character' of the state,[98] the 'strong state … that lasts … above revolution … [and] that personified the masculine traits of reasonability, strength,

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94 Roland Barthes, *L'Empire des signes* [Empire of Signs] (Editions d'Art Albert Skira, 1970) 139. In the original: 'Dans notre mythologie, la violence est prise dans le même préjugé que la littérature ou l'art: on ne peut lui supposer d'autre fonction que celle d'*exprimer* un fond, une intériorité, une nature, dont elle serait le langage premier, sauvage, asystématique.'

95 Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (n 16) 173. This quest and attraction is, for Jameson, the 'Utopian vocation of surrealism', which 'lies in its attempt to endow the object world of a damaged and broken industrial society with … mystery and depth'.

96 Sherry (n 31) 5. Sherry provides the example of the new calendar of revolutionary France, which renamed the months of the calendar year as the 'most explicit sign of the imaginative aspiration for a new time', and remarks that 'the manifest failure of this ambition is scored into the title of Karl Marx's 1852 … *The Eighteenth Brumaire of Louis Napoleon*'.

97 Jameson, *Valences of the Dialectic* (n 22) 523.

98 Aoife O'Donoghue, '"The Admixture of Feminine Weakness and Susceptibility": Gendered Personifications of the State in International Law' (2018) 19(1) *Melbourne Journal of International Law* 227, 237, quoting Johann Caspar Bluntschli, *The Theory of the State* (Clarendon Press, 1885) 193. As O'Donoghue cites from Bluntschli, one of the founding members of the IDI, '[t]he State … cannot afford to weaken its manly character by the admixture of feminine weakness and susceptibility': O'Donoghue (n 98) 237.

resolve and rationality'.[99] Ensuring that the international legal order comprised only such states was one of the public law functions of international law, as Anne Orford remarks, and this function was asserted with the 'greatest vigour during periods of revolution' and expressed through the articulation of the normative criteria of statehood.[100]

Also tailored along the normative criteria of statehood, though, was another set of criteria: a mechanism of the classical laws of war, namely, the recognition of belligerency. These criteria found a formulation in art 8 of the 1900 IDI resolution on the rights and duties of foreign powers in the event of an insurrectionary movement vis-à-vis the established and recognised governments combatting the insurrection.[101] It is telling that this IDI resolution was one of the two that the IDI adopted in its 1900 session — the second being the one on state responsibility vis-à-vis foreigners in the event of insurrections or civil wars cited above, which was re-examined by the IDI in 1927 and reached, in a modernist recast, as a 'series of differentiations',[102] the LON's 1930 codification conference.[103]

Recognition of belligerency appeared to be always in tandem with questions of international responsibility, and the conjunction of the two served as a disciplining technology of international law. This technology functioned through the criteria for the recognition of belligerency, which were articulated not only in the 1900

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99 O'Donoghue (n 98) 250–1.

100 Orford, 'Constituting Order' (n 17) 272, 278. See also Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011) 161, 207.

101 *Droits et devoirs* (n 88) art 8. According to art 8, third powers were allowed to recognise a revolting party as belligerent (i) if the latter possessed territory, (ii) if it constituted a regular government exercising the rights of sovereignty on that territory and (iii) if the fighting was conducted through organised troops subject to military discipline and conforming to the laws and customs of war.

102 Koskenniemi, *From Apology to Utopia* (n 68) 165 (emphasis omitted). As he writes in connection to his own structuring pendulum of apology/utopia,

> [m]odernism is best understood as a continuing series of differentiations which utilize the utopianism/apologism opposition in order to create space for a doctrine which will not be fully either. … Modernism will dissolve itself into a series of differentiations, a procedure for making arguments but not one for adopting positions.

(emphasis omitted).

103 'Keynote Address by Nico Schrijver' in United Nations (ed), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill Nijhoff, 2021) 414, 417–18. Nico Schrijver, President of the IDI (2017–19), writes on the 'interaction between the Institut and the League of Nations' and observes that when the LON created in 1924 the 'Committee of Experts for the Progressive Codification of International Law', in charge of the preparation of the 1930 codification conference, this Committee 'was composed of 17 members, 6 of them members of the *Institut* at the time of its creation, including the President of the Committee, Mr Hammerskjöld, and the Vice-President, Mr Diéna': at 417. Schrijver continues in examining the link between the IDI and the LON's Committee:

> The League of Nations reached out to the *Institut* in 1925, requesting advice on topics of international law for which international agreement would be possible, and communicated a list of subjects adopted by the League's Committee of Experts for the *Institut* to study. Following this, the *Institut* established a commission during its 1925 session in The Hague to study the topics adopted by the Committee of Experts and reported on it at the next session in 1927.

Thus, according to Schrijver, at the time of the 1930 LON's codification conference, 'the *Institut* had adopted resolutions on all three subject matters before the Codification Conference: in 1927 on the responsibility of States and in 1928 on nationality and territorial waters': at 417–18. As Schrijver concludes, 'the preparatory work for the Codification Conference was to a large extent inspired by the resolutions of the *Institut*': at 418.

IDI resolution but also in subsequent influential scholarship.[104] These criteria (of order) determined which entity was responsible in international law and often slipped down the scale,[105] recognising other 'intermediary stages' like the 'recognition of insurgency'.[106] The existence of the criteria brought rebels, insurgents and revolutionaries within the regulatory ambit of international law, serving as a means to gauge their activities and tame rebellions and revolutions. International law's recognition of such transient subjectivities, its 'granting of a measure of international legal personality to rebel movements', has served, as Kathryn Greenman writes, 'as a means of their management and control'.[107] In the two cases that comprised the work of the US–Mexico SCC, both of which ended with no award being rendered, the most acrimonious divergences between the American and the Mexican commissioners were precisely on the interpretation of art III of the *Special Claims Convention*, which enumerated the forces for which Mexico could be held responsible under the Convention's provisions.[108] And their most bitter controversies revolved precisely around the meaning of 'revolution', with Mexico's responsibility being dependent on the characterisation of the forces in question as 'revolutionists', 'insurrectionists' or 'bandits'.[109]

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104 For instance, Hans Kelsen advances the argument that for the recognition of insurgents as a belligerent power, three conditions must be met:

> (1) The insurgents must have a government and a military organization of their own.
>
> (2) The insurrection must be conducted in the usual technical forms of war …
>
> (3) The government of the insurgents must in fact control a certain part of the territory of the state in which the civil war takes place, *ie*, the order established by the insurgents must be effective for a certain part of the territory of this state.

Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35(4) *American Journal of International Law* 605, 616. See also Hans Wehberg, 'La guerre civile et le droit international' [Civil War and International Law] (1938) 63 *Recueil des cours de l'Académie de droit international de La Haye* 2, 88. See also Kathryn Greenman, 'Common Article 3 at 70: Reappraising Revolution and Civil War in International Law' (2020) 21(1) *Melbourne Journal of International Law* 88. Greenman explains that, contrary to conventional narratives of Common Article 3 of the 1949 *Geneva Conventions* breaking new ground in regulating non-international armed conflicts, the latter had long before been the object of international legal regulation, always in tandem with commercial interests. Thus, the real revolution of Common Article 3 was in breaking with the commercial background and embedding their regulation within a humanitarian framing.

105 If we were schematically to imagine in a declining order, starting from the state, to belligerency, to insurgency, to rebellions, to riots. That would be a scale that roughly captures the spectrum between the two extremities of international war and domestic crime.

106 Wehberg (n 104) 101. See also Quincy Wright, 'The Bombardment of Damascus' (1926) 20(2) *American Journal of International Law* 263. As Wright writes, '[i]nsurrection is a question of fact, not of recognition', and '[p]ublicists generally agree that insurgents are entitled to the benefits of the law of war' — and now the criteria appear — 'if … the insurgents have constituted a government regular in form, if they are masters of a part of the territory, if they act as in a regular war': at 270.

107 Greenman, 'Re-Reading Vitoria' (n 14) 396.

108 *Special Claims Convention between the United States and Mexico for the Settlement of Claims of American Citizens Arising from Revolutionary Acts in Mexico from November 20, 1910, to May 31, 1920*, signed 10 September 1923, 9 Bevans 941 (entered into force 19 February 1924) ('*Special Claims Convention*').

109 See, eg, *Cornelia J Pringle (Santa Isabel Claims) (United States v Mexico) (Decision)* (1926) 4 RIAA 783 ('*Santa Isabel*'); *Naomi Russell, in Her own Right and as Administratrix and Guardian (United States v Mexico) (Decision)* (1931) 4 RIAA 805 ('*Russell*').

International law's disciplining vocabulary on the criteria of belligerency and responsibility, triggered and developed in normative terms by the need to tame rebellions and revolutions but tied to and derived from the criteria of recognition of statehood and the classical international law of sovereignty, could not be deployed for rebellions in mandated territories. Modernist reconstruction is set in motion, the international legal vocabulary gets adjusted and order turns (back) to the head of the scale, with the PMC asserting the necessity for the mandatory power to 'uphold Government authority and to prevent the spread of disaffection' from the Bondelzwarts rebellion.[110] The PMC did not question the mandatory's task to impose order, and its supervisory function was largely a timid endeavour to examine whether 'excessive' (in its draft text) or 'needless' (in its report) 'severity' was employed in the conduct of the mandatory's military operations.[111]

Order as a normative trigger in the PMC's work was expressed in the PMC developing its internal procedures and modus operandi on how to handle instances of rebellions and risings in mandated territories; that is, what questions could be asked by the representative of the mandatory power before the PMC,[112] whether representatives of the native populations could be heard and whether the PMC's function was more akin to a judicial or simply an advisory (supporting of the mandatory power) one. And the PMC developed these procedures always with an

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110 Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (1923) annex 8b ('Report on the Bondelzwarts Rebellion') 294 [10]. 'Rebellion' was also the word that the PMC employed in the title of its draft text: at item 179 ('Enquiry regarding the Bondelzwarts Rebellion of 1922: Discussion on the Report of the Commission to the Council') 134. By contrast, as the title already indicates, the 'Memorandum on the Bondelzwarts Rising and Its Suppression by Major Herbst, Secretary to the Native Affairs Department of the Union of South Africa' used the word 'rising': at annex 15 ('Memorandum on the Bondelzwarts Rising and Its Suppression by Major Herbst, Secretary to the Native Affairs Department of the Union of South Africa') ('Memorandum on the Bondelzwarts Rising and Its Suppression by Major Herbst'). The difference ('rising'/'rebellion') is not without significance, given the implications that it has for the evaluation of the suppressive measures taken by the mandatory power. A 'rising' is of lesser intensity, whereas it is only a 'rebellion' that could — arguably — justify the use of airplanes and bombing of the natives. The issue was emphasised in the letter by the Anti-Slavery and Aborigines Protection Society of 23 July 1923, submitted to the Secretary-General of the League and annexed to the PMC's minutes of the same third session: at annex 8 ('The Bondelzwarts Rebellion of 1922: Letter Dated July 23rd, 1923, from the Anti-Slavery and Aborigines Protection Society to the Secretary-General of the League') 287. For the society, it was 'obviously of primary importance to know whether there was in fact a rebellion, or whether this was merely a punitive expedition, undertaken to punish these natives for not complying … with certain demands of the civil law or police regulations', and it is on such a clarification between the two terms that the PMC's '[j]udgment on the Administration's proceedings must, in [the Society's] opinion, depend from the outset on this issue' (emphasis omitted).

111 'Enquiry regarding the Bondelzwarts Rebellion of 1922: Discussion on the Report of the Commission to the Council', League of Nations Doc A.19.1923.VI. (n 110) 136; 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) 294.

112 A questionnaire was adopted by the Commission on 27 July 1923 on 'General Questions' and on 'Remedial Measures': Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (1923) annex 8a ('The Bondelzwarts Rebellion of 1922: Questionnaire Adopted by the Commission on July 27th, 1923') 289. Pedersen specifies that it was Van Rees (the PMC's Vice Chairman at that session) and Lugard who came up with the list of questions: Pedersen (n 93) 122.

'anxiety … to safeguard the prestige and the authority of the mandatory Power'.[113] The Bondelzwarts rebellion was the first to occupy the PMC, but the procedures that the PMC developed in handling this affair were largely taken up when it was confronted a bit later with the (in)famous rebellion in Syria, which culminated in the bombardment of Damascus by the French in 1925.[114] In its report on these 'disturbances',[115] the PMC premised its considerations on the acknowledgement that it was 'part of the duty of the mandatory Power to maintain order in the mandated territories', even if that would oblige the mandatory power to adopt measures 'particularly painful when they are taken by a guardian against his ward'.[116] As the report continued,

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113 As the PMC's member, Orts emphasised to the accredited representative of France before the PMC on the occasion of the examination of the final report of the French government for Syria and the Lebanon for 1925: Permanent Mandates Commission, *Minutes of the Tenth Session*, League of Nations Doc C.632.M.248.1926.VI. (1926) 128. According to Orts,

> [i]n July 1925 the rebellion had broken out in the Jebel Druse; it had spread to Damascus and the other parts of Syria by October and, when the Commission had met at Geneva in that same month to hold its sixth session, matters had taken a very grave turn in Syria.
>
> At that date the Commission, anxious not to increase the difficulties of the mandatory Power, had decided to postpone all discussion of the situation in Syria and to examine the position at an extraordinary session to be held in Rome in the following spring. The anxiety which the Commission had shown to safeguard the prestige and authority of the mandatory Power at a critical moment seemed to have been ignored by M de Jouvenel.

De Jouvenel was the High Commissioner of France for Syria.

114 Especially on the two issues of (i) whether the mandatory was to hold an independent inquiry into the rebellion and transmit it to the PMC and (ii) whether the PMC could also receive and hear representatives of the populations. As the PMC's French member, Jean-Baptiste Paul Beau, highlighted, the Bondelzwarts affair was the 'first time the Commission had been confronted with an event of such importance, and its present attitude would to some extent determine the procedure afterwards to be followed in such matters': Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (1923) 62. Thus the Bondelzwarts set a negative precedent for hearing the representatives of the natives, which was not mitigated, even for Rappard, for whom '[t]he Commission had always maintained that its task was of a judiciary kind' and the 'principle of impartiality obviously favoured the proposal that the native representatives should be heard'; however, given the force of the precedent, setting it aside would require particularly strong reasons, which Rappard did not find to be present in the Syrian case: Permanent Mandates Commission, *Minutes of the Eighth Session (Extraordinary)*, League of Nations Doc C.174.M.65.1926.VI. (1926) 158.

115 'Disturbances' was the term during the discussions of the eighth extraordinary session: Permanent Mandates Commission, *Minutes of the Eighth Session (Extraordinary)*, League of Nations Doc C.174.M.65.1926.VI. (n 114) 160. However, the PMC's final report on the session employed the term 'revolt': at annex IV ('Report to the Council of the League of Nations on the Work of the Eighth (Extraordinary) Session of the Permanent Mandates Commission') 198, 205.

116 'Report to the Council of the League of Nations on the Work of the Eighth (Extraordinary) Session of the Permanent Mandates Commission', League of Nations Doc C.174.M.65.1926.VI. (n 115) 206. In the PMC's report, the passage just cited is preceded by the PMC's statement that it

> will not be expected to comment on the military operations which were undertaken in consequence of the insurrection in the Jebel Druse and the subsequent disorders.
>
> It [the PMC] prefers to reserve its opinion on the character of the measures of repression till it is able to examine them in the light of the report of the enquiry which M de Jouvenel has been instructed to carry out …

— a statement that echoes the remark by Pedersen: see Pedersen (n 93) 160.

> it is desirable in Syria as in other mandated territories that the governing consideration … should be to preserve the moral authority of the Mandatory free from all blemish and to do nothing which may compromise the future success of its policy …[117]

nor, one could add by implication, anything to compromise the future success of the mandate system as a whole or the legitimacy of the PMC itself by compelling it to perform such delicate acrobatics.

Wright, in an article on the bombardment of Damascus, examined the incident with both of international law's disciplining legal vocabularies, that is, that of the classical laws of war and of the PMC's supervisory function over the mandatory power.[118] After some references to James Lorimer, and the question of whether laws of war could apply to peoples from a different culture or under tutelage being resolved in the positive (if Syrians were 'themselves prepared to observe it'), Wright proceeded to analyse the incident as one of 'domestic violence', which, according to international law, may be '(1) mob violence, brigandage or banditry, (2) insurrection, or (3) civil war'.[119] He concluded that the violence in Syria was an 'insurrection' because '[i]nsurrection is a question of fact, not of recognition'; he repeated the same set of criteria as the one for belligerency,[120] deemed laws of war applicable and expressed a 'strong presumption against the legality of the bombardment of Damascus by the French'.[121] Turning to examine whether the PMC's supervisory function could be a remedy, he asserted that the 'mandate for Syria holds France responsible for maintaining order. Consequently, measures for suppressing … insurrection would normally be a fulfilment rather than a violation of the mandate.'[122] He claimed that the League Council could, under art 22 of the *LON Covenant*, hold an investigation on the spot, but, basing himself on the PMC's Bondelzwarts precedent, he noted the 'practical objection to such investigations, mainly on the ground that they impair the mandatory's prestige and

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117 'Report to the Council of the League of Nations on the Work of the Eighth (Extraordinary) Session of the Permanent Mandates Commission', League of Nations Doc C.174.M.65.1926.VI. (n 115) 206.

118 Wright, 'The Bombardment of Damascus' (n 106).

119 Ibid 268–9. According to Pedersen, Wright at the time 'had received funding from the Guggenheim Foundation and a sabbatical' from his university post as professor of international law at the University of Chicago and travelled to 'London, Paris, Geneva, and the Middle East to conduct interviews and gather material' for his book *Mandates under the League of Nations*. Wright and his wife

> arrived in Beirut on 30 October 1925, less than two weeks after the bombardment of Damascus, and while they rearranged their schedules to take a trip to Baghdad first, they nevertheless made their way to Damascus in mid-November, where they saw the damage first-hand. That bombardment (as well as the fact that the French officials in Syria refused to speak with him with any frankness about their policy) affected Wright …

Pedersen (n 93) 149–50.

120 Wright, 'The Bombardment of Damascus' (n 106) 270. As Wright notes,

> [t]he revolutionary movements in Colombia, 1885, Chile, 1891, Brazil, 1893, Haiti, 1902, were treated as insurrections in American state papers and by such text writers as Wilson … Lawrence … Hyde … The United States has treated the revolutionary factions in Mexico since 1912 as insurgents.

at 271 n 29.

121 Ibid 273.

122 Ibid 279.

capacity to administer'.[123] Hence, the normative development of order within the PMC was channelled towards investigating the causes of such 'unfortunate states of affairs', in the hope of 'reforming the conduct of a mandatory'.[124] But even so, within such an investigatory frame channelled toward these causes, PMC member Pierre Orts could still pose the question to Major Herbst, South Africa's representative before the PMC, whether it was 'not one of these cases of collective loss of reason on the part of an ignorant population most anxious to throw off the European yoke?'[125]

This, then, is how rebellions and revolutions trigger order and normatively develop international law: either through the formulation of criteria of belligerency/insurgency tailored along the criteria of statehood in order to gauge the actions of rebels and determine their responsibility before claims commissions, or through the formulation of internal procedures aiming to strike a delicate equilibrium between, on the one hand, supervising the exercise of the mandate in accordance with art 22, and, on the other, safeguarding the 'authority and prestige' of the mandatory power, required for the maintenance of order in the mandated territories — an equilibrium rather conspicuously tilted to the latter.

B *The Economic Direction*

In the introduction of this Part, I remarked that order as the trigger of the abstract structure of normalisation, present in both the PMC and the SCC, was normatively developed in a direction given by the economic. 'Economic' is admittedly a rather broad term, but it is employed intentionally so in order to cover the array of imperialist relations ranging from trade and investment to labour. The term 'direction' is in keeping with Antony Anghie's thesis that colonialism and imperialism were central to the development of international law — that, indeed, international law was not something fixed and coherent on its own, but it was developed, formed and shaped through and in response to the interactions arising out of the colonial encounter.[126] Such an economically directed, relational development of international law can be found in both disciplining vocabularies, that is, in the laws of war and the SCC, as well as the PMC's supervisory function.

Regarding the laws of war and the criteria of belligerency/insurgency, Wilson notes that

> [t]he existence of an insurrection … may be a matter largely of domestic concern, but particularly since the middle of the nineteenth century and with the

123 Ibid.

124 Ibid 280, quoting Permanent Mandates Commission, *Minutes of the Seventh Session*, League of Nations Doc C.648.M.237.1925.VI. (1926).

125 Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (n 114) item 177 ('Enquiry regarding the Bondelzwarts Rebellion of 1922: Audition of Major Herbst') 122 ('Audition of Major Herbst').

126 Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 19) 3–5.

> development of maritime relations, there has developed a body of international practice in regard to insurrections in foreign states.[127]

Most of the belligerent rights were rights at sea, the rights of visit, search and seizure of vessels and cargoes and contraband of war and good prize.[128] Such rights meant that a belligerent ship had 'as a general rule … the right to stop a neutral commercial vessel in the open sea and to proceed to search it to see whether it is observing the rules of neutrality, especially as to contraband'.[129] But, of course, such an 'attack' on 'neutral commerce' could be permitted only for insurgents that are responsible, who can exercise the requisite 'propriety' and have 'the proper prize tribunal'.[130]

What 'proper' and 'responsible', however, should be taken to mean, and this for both sea and land, is an entity that can be held liable to pay compensation for injuries and damages.[131] Such an entity would be the 'successful revolutionists' succeeding the state.[132] Or, and here is the emphasis and the disciplining technology in action, it could be entities whose mere factual force could be imposed on the state, whose activities were gauged against the criteria of statehood/belligerency/insurgency — even if they did not eventually succeed and even if they were not recognised. That was, for instance, the case of the Victoriano Huerta government in Mexico, one of several administrations in Mexico's turbulent 1910–20 period, whose activities were held to entail Mexico's international responsibility in certain decisions of the US–Mexico General Claims

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127 Wilson, 'Insurgency and International Maritime Law' (n 74) 50. In the same vein, for Hans Wehberg, one of the main reasons that the Polish revolution of 1830–31 did not attract any recognition of belligerency or interest from the 'great powers' (France, Great Britain and the US), despite fulfilling the factual criteria, was primarily because it took place in an enclosed space in the European continent, in a country without any ports or any particular commercial connection at stake: Wehberg (n 104) 24. Wehberg also refers to Henry Wheaton, according to whom one could hardly expect that the US, in a 'civil war occurring in a country of central Europe, deprived of ports', could ever even have the occasion to recognise to the insurgents the right of belligerency (in the French original: 'Wheaton … a montré qu'on peut à peine se représenter que les États-Unis d'Amérique, dans une guerre civile qui se déroula dans un pays d'Europe centrale dépourvu de ports, puissent jamais avoir l'occasion de reconnaître aux insurgés le droit de belligérance').

128 Wilson, 'Insurgency and International Maritime Law' (n 74) 52.

129 *The 'Carthage' (France v Italy) (Award)* (Permanent Court of Arbitration, 6 May 1913) 4.

130 Wilson, 'Insurgency and International Maritime Law' (n 74) 58.

131 See ibid.

132 And in contemporary international law, now to be found in art 10 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts: International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Agenda Item 162, Supp No 10, UN Doc A/56/10 (2001) ch IV(E)(1) ('Draft Articles on Responsibility of States for Internationally Wrongful Acts') art 10.

Commission ('GCC').[133] And in one of those decisions, the case *George W Hopkins* of 1926, Huerta's activities entailed Mexico's responsibility on the basis of the privileged status of foreigners and their vested rights, and despite the fact that the US had not recognised Huerta.[134] As Greenman notes, the main operating rationale for international state responsibility to also cover de facto (gauged against the criteria), unsuccessful, unrecognised revolutionary movements or governments was to provide 'increased stability and security for the merchants and investors who made up the bulk of aliens; it sought to guarantee business as usual'.[135]

Thus, the state, as the only available entity that could be held internationally responsible and be drawn to arbitration,[136] served as a shell into which to impute the activity of revolutionary movements, successful or not, recognised or not — but whose actions jeopardised foreign economic interests.[137] In such a scheme, the criteria of belligerency/insurgency served as a second-order shell, providing the legal vocabulary to gauge and argue on the character of the revolutionary

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133 This was held although Mexico 'contended strenuously' otherwise, as Feller writes, given that Huerta ascended to power through usurpation and murder, seizing power from President Francisco I Madero: Feller (n 12) 160. As Feller continues, Mexico's contention that Huerta could be neither a de jure nor a de facto government 'was, most people would say, irrational' and 'not based on the logic of traditional international law concepts', and '[y]et it seems to have sprung from so deep rooted a conviction of disgust and repudiation of Huerta that it finally succeeded in forcing its way past the barrier of logic': at 160–1. Feller's rather condescending tone was not that exceptional, given that also in the heated exchanges of opinions among the commissioners in the two cases of the SCC the US commissioners did not hesitate to reprimand the Mexican commissioners for failing to cite proper authorities and resorting to interesting sources to substantiate their arguments: see below n 274.

134 *George W Hopkins (United States v Mexico) (Decision)* (1926) 4 RIAA 41. As the decision noted,

> nonrecognition of the Huerta administration by the American government under the Wilson administration was not dependent upon Huerta's paramountcy in Mexico. It meant that, even if it were paramount, it came into power through force by methods abhorrent to the standards of modern civilization … and hence, while the Government of Mexico continued to exist and to function, its administration was not entitled to recognition.

at 47 (emphasis omitted). This passage was immediately followed by the section on the '[p]rivileged status of foreigners' and, according to para 16, 'it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws'. With regard to Huerta's recognition, it is interesting that, as Feller writes, the Huerta administration had been recognised as de jure government by a number of European states: Feller (n 12) 160.

135 Kathryn Greenman, 'The Secret History of Successful Rebellions in the Law of State Responsibility' (2017) 6(9) *ESIL Reflections*.

136 As Greenman remarks,

> [t]he doctrine of state responsibility for rebels can thus be understood as a response to the decolonization of Latin America: that is, a response to the need to 'externalise what had been internal aspects of colonial law and governance'. Due to the particular situation of Latin America, having already gained recognition as independent states in the first half of the nineteenth century, the means of protection employed in other regions, such as extraterritorial jurisdiction or unequal treaties in Asia and the Middle East, were not available. A method of protection was required that was compatible with the new republics' formal sovereign equality.

Kathryn Greenman, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels' (2018) 31(3) *Leiden Journal of International Law* 617, 637.

137 Ibid.

movement in question. In *Naomi Russell, in Her Own Right and as Administratrix and Guardian* ('*Russell*'), one of the two cases that comprised the work of the US–Mexico SCC and which will be further addressed in Part V, at stake was precisely the status of the Orozco revolution. The American commissioner argued on the basis of Pascual Orozco's 'plan' and 'magnitude', its being a 'formidable revolutionary movement' and that 'international law requires that compensation must be made for property appropriated',[138] the Mexican commissioner replying that 'Mexico never contemplated … any responsibility … for … unsuccessful revolutionists' and that the 'criterion to distinguish revolutionary forces is of three species: grammatical, legal and historical'.[139]

Turning to the PMC, up until very recently, the economic aspects of the mandates system were rarely emphasised in international legal scholarship.[140] Yet, for William Rappard, member of the PMC, the League had 'always been identified' with the 'struggle for freer international trade'.[141] For Frederick Lugard, equally a PMC member, the 'only distinction' between the B and the C mandates was that '[e]qual commercial opportunity to States members of the League of Nations is guaranteed in Mandates of the B class only'[142] — the seemingly more prominent distinction, according to art 22(6) of the *LON Covenant*, that only the C mandates were to be administered 'under the laws of the Mandatory as integral portions of its territory' having been brushed aside,[143] given that Britain inserted exactly such an 'as an integral part of its own territory' clause in its B mandates over Togoland and Cameroons.[144] What this clause of art 22 of the *LON Covenant* entailed was highly controversial, especially because much of the debate was centred on whether the mandatory power acquired sovereignty over the C mandates. And the scope of art 22(6) and its relation to sovereignty was addressed in two reports prepared by PMC members precisely in connection with economic matters and against colonial and Imperial considerations.

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138 *Russell* (n 109) 820, 824, 831.

139 Ibid 857, 870.

140 But see Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 19) 162–8; Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020) ch 3; Luis Eslava, 'The Moving Location of Empire: Indirect Rule, International Law, and the *Bantu Educational Kinema Experiment*' (2018) 31(3) *Leiden Journal of International Law* 539, 565–6; Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press, 2019) 196–7; Cait Storr, '"*Imperium in Imperio*": Sub-Imperialism and the Formation of Australia as a Subject of International Law' (2018) 19(1) *Melbourne Journal of International Law* 335, 357–9.

141 William E Rappard, *Post-War Efforts for Freer Trade* (Geneva Research Centre, 1938) 9.

142 Frederick Lugard, 'The Mandate System and the British Mandates' (1924) 72(3736) *Journal of the Royal Society of Arts* 535, 542.

143 *LON Covenant* (n 61) art 22(6); ibid 541–2.

144 DFW Van Rees, *Les mandats internationaux: Les principes généraux du régime des mandats* [The International Mandates: The General Principles of the Mandate Regime] (Rousseau, 1928) 62. Britain was not alone, as Belgium too, with regard to the B mandate over Rwanda-Burundi attributed to it, issued a decree in 1925 declaring the territory of Rwanda-Burundi administratively united to the colony of the Belgian Congo: see at 64–6. The issue was discussed within the PMC, and the PMC was satisfied that the Belgian representative provided some clarifications and dissipated the doubts that had arisen from 'unfortunate interpretations' of the Belgian law ('interprétations fâcheuses'): at 66.

The first was a 1923 report on the system of state lands in B- and C-mandated territories, prepared by Daniel François Willem Van Rees.[145] In his report, Van Rees discussed extensively the question of 'sovereignty of the mandatory powers',[146] taking issue in particular with Rolin's view, expressed in his widely cited article on the 'system of colonial mandates', that, for the C mandates, 'integral portions of its territory' could have 'no other meaning than annexation',[147] whereas for the B mandates, the administrative duties of art 22(5) required for their fulfilment 'full legislative, administrative and judicial powers, that is to say, sovereignty'.[148] Van Rees, in order to counter Rolin, asks: 'In point of fact, however, would it be legally impossible to delegate the government of the territory to a foreign Power without in any way affecting the sovereignty?'[149] He searches for a precedent in the colonial history and finds plenty of cases, 'particularly [in] the history of Great Britain and the Netherlands', whereby private trading companies were authorised to govern extensive colonial areas without possessing legal sovereignty over those areas.[150] What is striking is the immediate relevance that Van Rees sees in such precedents in order to refute Rolin's views, and that he considers himself 'justified in quoting them as proof that the authority to govern … does not by any means necessarily include sovereignty over the

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145 The significance of this issue is grasped when considered together with the fact that the lands of the B and C mandates came from the dissolution of the German colonies that brought the respective territories in Africa and in the Pacific under the LON's mandate system, and along with the question of land ownership relations between the native population, the white settler and the mandatory power. The issue came within the purview of the PMC following relevant discussions over land administration among colonial powers, the divergences of 'best practices' between Britain and France and the fact that the PMC seemed, according to Pedersen, to endorse the British approach in Tanganyika as the 'model' system: Pedersen (n 93) 124, 135–6. As Pedersen explains, Tanganyika, a British B mandate, attracted the praise of the PMC for its restrictive policies on land transfer in 1923: at 138. At the same time, the British Anti-Slavery and Aborigines Protection Society criticised the French approach in its B mandate over French Cameroon on the ground that French legislation declared all 'vacant' land to be the 'private domain of the state'. The Anti-Slavery and Aborigines Protection Society wrote to the PMC urging strict prohibitions against land alienation: at 139. It was thus that Van Rees began working on land laws, and his report of December 1922 was annexed to the minutes of the PMC's third session (20 July to 10 August 1923), the same that examined the Bondelzwarts rebellion: Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (n 114) annex 2 ('The System of State Lands in B and C Mandated Territories'). For the background of Van Rees' land report, see Pedersen (n 93) 136–9.

146 'The System of State Lands in B and C Mandated Territories', League of Nations Doc A.19.1923.VI. (n 145) 217–21.

147 Henri Rolin, 'Le système des mandats coloniaux' [The Colonial Mandates System] (1920) (3rd ser) 1 *Revue de Droit International et de Législation Comparée* 329, 347.

148 Ibid 349. This author is Henri Eugène Auguste Marie Rolin, who is not to be confused with the Henri Rolin cited above: see above n 61. Henri Eugène Auguste Marie Rolin was counsel of the Superior Council of Congo and member of Belgium's Colonial Council. For this Rolin, to 'take away from the Powers a prey' and vest it in the domain of the League would in fact be the 'realisation of a communist dream, a form and an attempt of international communism': at 358.

149 'The System of State Lands in B and C Mandated Territories', League of Nations Doc A.19.1923.VI. (n 145) 219.

150 Ibid 220. Van Rees cites the British and Dutch East India Companies, who 'were invested with political and military powers' and 'were *de facto* sovereigns', and, from 'modern times', the British North Borneo Co and the Royal Niger Co as 'examples of trading concerns holding public authority with the duty of governing territories the sovereignty over which is vested in the British Crown'.

territory'.[151] That Van Rees finds such a parallelism pertinent is telling of the mindset and the worldviews through which a PMC member perceived and understood the functioning of the mandates.

The second report was a 1924 note on the loans, advances and investment of private capital in mandated territories, prepared by Lugard.[152] Here, the issue was the 'apprehensions among the capitalists likely to hinder them either from investing their money in existing private enterprises or from inaugurating new enterprises in a mandated territory'.[153] Lugard's note was motivated by information communicated to the PMC by the administrator of South West Africa, Gysbert Hofmeyr, according to which Hofmeyr 'on two occasions … had endeavoured to raise small loans for South-West Africa but … he had been unable to obtain any subscribers'.[154] Lugard remarked that this was a 'very serious economic disability',[155] and his note was prepared so that the PMC could decide if it should ask the LON's Council to take some action in order to dissipate such uncertainties existing 'in certain circles'.[156] The issue of sovereignty over the B and C mandates appeared again, now in connection to the 'unilateral revocability [of the mandates] which was in the minds of the capitalists'.[157] Lugard referred to Rolin, for whom the 'attribution of a colonial mandate [was] in its nature final and in perpetuity',[158] and also to Wright, who, by contrast, advanced the view that the mandate was in fact an international agreement between the League of Nations and the mandatory and could normally be terminated only by agreement between the two.[159] Eventually, Lugard proposed that the League Council could make two

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151 Ibid.

152 Permanent Mandates Commission, *Minutes of the Fifth Session (Extraordinary)*, League of Nations Doc C.617.M.216.1924.VI. (1924) 154–6.

153 Ibid 154. Along with the issue that 'those who had already acquired property in mandated territories could not induce bankers to advance any money on mortgages': at 156.

154 Ibid 156. This information can be read together with Pedersen's remarks on Hofmeyr's administration that as soon as Hofmeyr assumed office, he 'swiftly began demarcating landholdings, arranging loans, and advertising for South African settlers': Pedersen (n 93) 116. As for Hofmeyr's mindset, suffice it to cite from Hofmeyr's statement regarding the annual report of the Union of South Africa for 1923 on the administration of the mandated territory of South West Africa — a report that Hofmeyr submitted to the PMC in its fourth session in 1924 in order to dissipate criticisms raised in connection with the Bondelzwarts rebellion:

> I have already referred to the map showing the private property, owned mostly by the German farmers. … We therefore have an important body of Germans, whose descendants will make good citizens, but who, at the present time, are ultra-patriotic in their attachment to their fatherland. … I need not remind this Commission that a native problem still exists for South Africa. … The native of South-West Africa has only been in contact with the white man, as a civilising factor, for thirty years. Before he came under the white man's Government, he knew only the missionaries, traders and some Boers. … Previous to that, he had lived a wild life … a life of spoliation and work was unknown to him.

Permanent Mandates Commission, *Minutes of the Fourth Session*, League of Nations Doc A.13.1924.VI. (1924) 43–4.

155 Permanent Mandates Commission, *Minutes of the Fifth Session (Extraordinary)*, League of Nations Doc C.617.M.216.1924.VI. (n 152) 156.

156 Ibid 155.

157 Ibid.

158 Ibid, quoting Rolin, 'Le système des mandats coloniaux' (n 147) 351.

159 Permanent Mandates Commission, *Minutes of the Fifth Session (Extraordinary)*, League of Nations Doc C.617.M.216.1924.VI. (n 152) 156, quoting Wright, 'Sovereignty of the Mandates' (n 2).

declarations: first, that the mandate was 'only in practice revocable by common agreement'; and second, that since the mandatory powers over the B and C mandates had 'full powers of administration and legislation as if they were sovereign over these territories, the titles to land or other titles' would remain valid whatever changes might occur later.[160]

In this second report as well, the synergies between the PMC and the mandatory powers, the way that the issues are framed and the directness of the words used (eg 'fear[s] among private capitalists')[161] cannot but eloquently demonstrate whose interests the PMC saw itself responsible for safeguarding in the first place — how, after all, the PMC viewed itself as tasked with being a facilitator of international capital flows and investment so that the mandated territory could be modernised and economically developed.[162] It is telling that Rappard in his 1947 Hague Academy course on 'retrospective views' on the League, in his brief account of the PMC, finds as the 'only inconvenience of a certain gravity' that appeared in the course of the PMC's work, the 'hesitations of certain financiers to engage their capitals in territories whose future seemed more uncertain than that of the neighbouring colonies'.[163] As for the 'well-being' — to use the wording of art 22(1) of the *LON Covenant* — of the native populations, the PMC's views can be glimpsed through the statement of its member, José Capelo Franco Frazão, Count of Penha Garcia, that 'the civilising efforts of the mandatory Power

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160 Permanent Mandates Commission, *Minutes of the Fifth Session (Extraordinary)*, League of Nations Doc C.617.M.216.1924.VI. (n 152) 155.

161 Ibid 156.

162 Thus echoing Lorimer, who writes that 'a state's prosperity was a predominant criterion for assessing its "value". For "wealth is the result of the moral and intellectual qualities of the population as much as, if not more, than of the physical means at their disposal"': Martti Koskenniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27(2) *European Journal of International Law* 415, 422, quoting James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (William Blackwood and Sons, 1883) vol 1, 185.

163 William E Rappard, 'Vues rétrospectives sur la Société des Nations' [Retrospective Views on the League of Nations] (1947) 71 *Recueil des cours de l'Académie de droit international de La Haye* 111, 181. In the original:

> Le seul inconvénient de quelque gravité qui soit apparu à la Commission au cours de ses travaux naissait des hésitations de certains bailleurs de fonds en Europe à engager leurs capitaux dans des territoires dont l'avenir leur paraissait plus incertain que celui des colonies voisines.

In a striking passage that precedes the one just cited, Rappard argues that if the material and moral advancement of the natives was the primordial preoccupation of the authors of art 22 of the *LON Covenant*, no one in the long run would draw more certain advantages than the mandatory powers themselves: at 180. That is because their colonial administrators were fortunate to have the support of the PMC in their efforts to obtain from the metropole the indispensable credits for the development of the mandated territories. And the development of the mandated territories would ultimately make them more 'interesting clients', for both the mandatory power and the other member states of the LON, because they could more freely export manufactured goods to the mandated territories and, at the same time, also more freely import the raw materials and food staples that they needed from the mandated territories. And if the 'settlers of the white race' ('colons de race blanche') were getting irritated at times because of the excessive, in their eyes, concern granted to the natives because of the international supervision ('vigilance internationale'), they also well profited by the general prosperity that resulted therefrom: at 181.

involved an obligation on the part of the native to work'.[164] In fact, when the PMC was examining in 1930 the annual report of Australia on New Guinea, the Australian representative was content to inform the PMC that, through its administration, 'the practices and interests of modern civilisation are gradually being inculcated into the native mind, and not the least of these interests, is the replacing of war by work'.[165] Closer to the Bondelzwarts, in the memorandum on the 'rising' prepared by Major John Herbst, Herbst reported that the administration 'had done its part to remedy … this undesirable state of affairs', the presence of 'bitter animosity on the part of both master and servant'; he also reported that the administrator 'impressed upon the natives the necessity for work', even if an 'exhortation to labour is not popular anywhere'.[166] And such views were not without resonance among the PMC's members. As the PMC member Alfredo Augusto Freire d'Andrade insisted,

> unfettered economic development was the best way to fulfil the 'sacred trust' … Africans must be made to work — for surely the [*LON Covenant*]'s prohibition on forced labour was not intended to undermine 'the obligation of labour, which is the foundation of all civilised society'.[167]

That labour issues were of utmost importance is institutionally attested to by the fact that an ILO representative was present in most of the PMC's sessions and could participate in the discussions.[168] This institutional PMC–ILO linkage, however, most probably raised more expectations than realisable improvements, and this, again, on the presumption that the ILO had rather differing views on the 'necessity' — and desired type — of native labour.[169]

Thus, an agile economic equilibrium was performed by the PMC, facilitating and encouraging the inflows of international capital and investment in the

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164 Permanent Mandates Commission, *Minutes of the Twentieth Session*, League of Nations Doc A.13.1924.VI. (n 34) 23; *LON Covenant* (n 61) art 22(1). The Count of Penha Garcia's statement was on the occasion of the examination of the Annual Report for New Guinea for 1929–30, as presented by the accredited representative of Australia, Collins, before the PMC.

165 Permanent Mandates Commission, *Minutes of the Eighteenth Session*, League of Nations Doc C.366.M.154.1930.VI. (1930) 46. The two accredited representatives of Australia (Percy Coleman and Richard Casey) were accompanied also by the government anthropologist Ernest Chinnery when they presented Australia's annual report for New Guinea for 1928–29 before the PMC.

166 'Memorandum on the Bondelzwarts Rising and Its Suppression by Major Herbst', League of Nations Doc A.19.1923.VI. (n 110) 332–3. The reference to 'master and servant' is not figurative. There was actually a 'Masters and Servants Act' to which Major Herbst referred when interrogated by the PMC on whether the natives received any protection in the event that the employer did not observe the terms of their contract: Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (n 114) 120. Major Herbst was the Secretary to the Native Affairs Department of the Union of South Africa.

167 Pedersen (n 93) 131. As Pedersen further notes,

> [e]ven after the Council confirmed that forced labour for private enterprises was indeed forbidden, d'Andrade continued to carp about the need for 'realism' and to support the web of taxes and controls the South West African administration had devised to drive Africans to work on white farms.

168 See Lugard, 'The Mandate System and the British Mandates' (n 142) 541.

169 In Lugard's interestingly chosen words, '[the ILO representative's] cooperation will, no doubt, ensure that "Labour" will be brought into closer touch and sympathy with these overseas territories': ibid. See also Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 19) 164–8, on the preoccupation of the PMC with labour issues.

mandated territories while fostering the mandatory's efforts to instil into the native populations the imperative to work. It is instructive that the one female member of the PMC, Anna Bugge-Wicksell, brought the two aspects together eloquently in her report on her visit to 'some coloured schools' in the US, which aimed to demonstrate good practice for the 'village or bush schools in the B- and C-mandated territories' and noted that

> [i]n the Permanent Mandates Commission we have long since grasped the fact that the placing of manual work in the very centre of school instruction is of the greatest importance for the material well-being of the population and for the economic development of the country through and for the native populations.[170]

For Bugge-Wicksell, an African system of education, suitable for the 'African mentality', inspired by the US coloured schools in the southern states but with an 'advantage over the American coloured schools in that they are not obliged to keep up to the academic standards of white schools', would be, in her words, 'a necessary condition of the fulfilment of the sacred trust of civilisation'.[171] It would also be in furtherance of the 1924 PMC resolution on education policy, according to which,

> by making character-training and discipline, the teaching of agriculture, animal husbandry … and elementary hygiene the keynote of educational policy, the gradual civilisation of the native populations as well as the economic development of the countries will be furthered in the best possible manner.[172]

This section argued that in both the US–Mexico SCC and the LON's PMC, the normative criteria of order were developed with economic considerations in mind. For the SCC, this ensured that there would be an entity answerable and responsible on the international plane for damages caused to the private property (or life) of foreigners. That entity would be either the successful revolutionists or the state surviving the revolutions, to which the actions of intermediary, de facto, unsuccessful revolutionists could be imputed. For the PMC, it was economic development that prescribed how order in the mandated territories should be implemented and what the PMC's advisory supervision entailed. And this economic development implied a clear division of labour, with the PMC on the one hand supporting the mandatory powers (and the white settlers) in bringing industry, capital and civilisation, and on the other hand inculcating on the native populations the value of work and preparing them for the task through accordingly adjusted education. How, then, did the PMC function as a disciplining structure of normalisation of the unruly native, safeguarding order as prescribed by economic considerations, as a structure steeped into modernism and presenting the five modernist facets? It is to this that the next Part now turns.

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170 Permanent Mandates Commission, *Minutes of the Twelfth Session*, League of Nations Doc C.545.M.194.1927.VI. (1927) annex 6 ('Some Coloured Schools in the United States') 182, 184.

171 Ibid 186.

172 Ibid 181. Bugge-Wicksell's visit was '[o]n the kind invitation of the Phelps Stokes Fund, New York', and she 'had the privilege of visiting, in February and March of 1927, several coloured schools in the Southern States' of Virginia, South Carolina, Atlanta and Nashville. In concluding her report, she remarks that the US coloured schools have been a 'valuable source of information and stimulus' for the establishment of an African system of education, suitable for the 'African mentality': at 186.

IV THE PMC AS A MODERNIST STRUCTURE OF DISCIPLINE OVER THE BONDELZWARTS REBELLION

This Part will argue that the PMC functioned as a modernist structure of discipline over the Bondelzwarts rebellion, whereby order was expressed in the normative development of the PMC's internal procedures and modus operandi on how to handle instances of rebellions and risings in mandated territories, an order developed against the economic considerations set forth in the previous Part. The PMC unfolded as a modernist structure presenting the five modernist facets advanced in Part II(A) above; that is, a structure that is (i) itself new and whose members also feel imbued with a new form of subjectivity, (ii) elitist and autonomous, (iii) polyphonous in its internal workings, (iv) intrigued by the exotic and (v) prompted by violence. This last facet, and why rebellions and risings serve as such an apposite trigger for setting the modernist structure of discipline into motion, was explained in Part III. It suffices to emphasise, though, that in the case of the Bondelzwarts rebellion, the presence of this modernist facet of violence was even stronger, in that the PMC had only held two sessions before this affair, and the 'protracted, divisive, and high-profile inquiry' that the PMC held over the Bondelzwarts affair was its 'first real test', helping the PMC to 'crystallize [its] ideals, define its practice [and] enhance its reputation', and being the instrument through which the PMC established its authority.[173]

Order as the trigger for development of the PMC's internal procedures was expressed in how the PMC perceived its advisory/supervisory role, whether the PMC should hear representatives of the natives, what the content of the discussions was and what questions were to be posed to the mandatory's representative before it. This content was primarily focused on the causes of the rebellion, and it is here that the economic element appears. In fact, according to the PMC's report, the causes could be traced back to grievances stemming from three pieces of legislation: a dog tax, a vagrancy law and a decree for branding irons.[174] And the approach of the PMC to these issues was performed in line with the modernist facets.

A *Polyphonous in Its Internal Workings*

Starting with facet (iii) on the PMC being polyphonous in its internal workings serves as a way to introduce the PMC's individual members, and it allows us to better follow the discussion of the Bondelzwarts rebellion as recorded in the PMC's archival minutes. It was during the PMC's third session, held at Geneva from 20 July to 10 August 1923, that the Bondelzwarts rebellion was discussed.[175] The PMC's members present were the Italian Marquis Alberto Theodoli,[176]

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173 Pedersen (n 93) 113.

174 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) 293.

175 Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (n 114).

176 Theodoli is described as an 'aristocrat, diplomat, politician, and banker' who 'had served as Italy's representative on the Commission on Ottoman Public Debt', had 'been part of the Italian delegation at the Peace Conference' and later defended Italy's conquest of Abyssinia: Pedersen (n 93) xiii, 61, 125.

the Dutch Van Rees,[177] the Portuguese d'Andrade,[178] the French Jean-Baptiste Paul Beau,[179] the Swedish Bugge-Wicksell,[180] the British Sir Lugard, the Belgian Orts[181] and the Japanese Kunio Yanagita.[182] Lugard deserves special mention in that, besides having served as the colonial Governor-General of Nigeria,[183] he was considered as 'one of the greatest living authorities on Colonial matters' in Rappard's words,[184] an 'intellectual [giant] of colonial administration' inspired by racialist evolutionist anthropology,[185] and he was the author of the much influential book *The Dual Mandate in British Tropical Africa*,[186] in which he elaborated his system of 'indirect rule' through native chiefs, a system that became codified as 'more or less official [British] policy'.[187] Rappard, at the time of the Bondelzwarts affair in 1923, was serving as the director of the Mandates Section,

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177 Van Rees had followed his father into service in the Dutch East Indies and, on his retirement in 1914, was Vice President of the Dutch Council of the Indies: ibid xiii, 61. Van Rees had also published two books on the PMC and the mandates system: Van Rees, *Les mandats internationaux: Les principes généraux du régime des mandats* (n 144); DFW Van Rees, *Les mandats internationaux: Le contrôle international de l'administration mandataire* [The International Mandates: International Control of Mandatory Administration] (Rousseau, 1927).

178 D'Andrade was a soldier and Governor-General of Mozambique: Pedersen (n 93) xiii, 61.

179 Beau had held various diplomatic posts in the Far East, culminating as Governor-General in Indochina: ibid 61.

180 Anna Bugge-Wicksell was the only female PMC member, a 'veteran women's suffrage and peace campaigner' and 'especially vigilant' like her successor, the Norwegian Valentine Dannevig, on educational questions as it was referred to above: ibid 62, 134. Bugge-Wicksell was a Swedish-based Norwegian lawyer, probably appointed to the PMC because of Sweden's 'relative disinterest in its position as the one nonmandatory power': Glenda Sluga, *Internationalism in the Age of Nationalism* (University of Pennsylvania Press, 2013) 69.

181 Orts was a 'lawyer and diplomat from a family of lawyers and diplomats', legal advisor to the King of Siam and then 'a confidential councillor in the Belgian colonial ministry', in which role he achieved the ceding of Rwanda and Burundi to Belgium: Pedersen (n 93) 61.

182 Yanagita was a parliamentary official who had published works on ethnology and folklore and was 'unusually progressive and open-minded', but he does not appear as intervening during the PMC's discussions: ibid 62. Yanagita is actually considered the founder of Japanese folklore studies and nativist ethnology and is the author of the 1910 book *Tōno Monogatari* [Tales of Tōno], a literary classic: Marilyn Ivy, *Discourses of the Vanishing: Modernity, Phantasm, Japan* (University of Chicago Press, 1995) 66, 79.

183 Pedersen (n 93) xiii.

184 WE Rappard, 'The Practical Working of the Mandates System' (1925) 4(5) *Journal of the British Institute of International Affairs* 205, 208.

185 Bentley Allan, *Scientific Cosmology and International Orders* (Cambridge University Press, 2018) 178, 199.

186 FD Lugard, *The Dual Mandate in British Tropical Africa* (2nd ed, William Blackwood and Sons, 1923). As Lugard explains, the mandate is 'dual' in that it rests on moral and material obligations of Europe towards the 'subject races'. In his words,

> the moral obligations … include such matters as the training of native rulers; the delegation to them of such responsibility as they are fit to exercise; the constitution of Courts of Justice free from corruption and accessible to all; the adoption of a system of education which will assist progress without creating false ideals; the institution of free labour and of a just system of taxation; the protection of the peasantry from oppression, and the preservation of their rights in land … The material obligations, on the other hand, are concerned with development of natural resources for the mutual benefit of the people and of mankind in general. They involve the examination of such questions as 'equal opportunity' and 'Imperial preference,' and other problems of economic policy.

at 58.

187 Allan (n 185) 178.

and thus he only appears in the PMC's discussions in connection with the administrative arrangements on the drafting of the final report.[188]

Given the colonial background of most of the PMC's members, Susan Pedersen's remark that the Commission 'resemble[d] a spa for retired African governors' is not an overstatement.[189] And yet, this did not mean that the PMC's members' points of view were in accord. Their differing perspectives represented colonial antagonisms, for instance, between Lugard's views on strict racial separation and d'Andrade's 'Darwinian fantasies' of racial mixing to submerge the Africans in accordance with 'natural law'.[190]

Moreover, d'Andrade's military background was shown in his interventions during the examination of Major Herbst by the PMC. For d'Andrade, the fact that the natives 'left their houses' and 'collected in the lager … was equivalent to a declaration of war',[191] and it was important to know 'who fired the first shot'.[192] In the draft text of the PMC's conclusions,[193] d'Andrade disagreed with the conclusion on the 'excessive severity' of the repression. For him, this question required consideration not only from the 'European standpoint, but also from that of South Africa', depicted as 'vast African territories … [with] a very small white population submerged in the midst of a large black population'; in such a landscape and '[i]n view of the danger of the rebellion spreading', the administration was obliged to act promptly and effectively.[194] In the final text of the PMC's report, the word 'excessive' was removed, with the PMC reservedly expressing its inability to assess whether the military operations were conducted with 'needless severity or not', coupled with the observation that 'once open

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188 Rappard was professor of economic history at the University of Geneva and head of several Swiss diplomatic missions. Other posts included his serving as an adjunct professor of political economy at the Harvard University (1911–13), member of the International Committee of the Red Cross (1919–20), rector of the University of Geneva (1926–28), director of the Geneva Graduate Institute at its creation in 1928 and President of the International Conference of Economic Statistics (1934–36), to indicate only some of his positions, as referred to in the biographical note of his 1947 Hague Academy course: Rappard, 'Vues rétrospectives sur la Société des Nations' (n 163) 113. Rappard served as director of the Mandates Section during the years 1920–24, and then as member of the PMC from 1925–39: Pedersen (n 93) xii. Thus, Rappard participated during the PMC discussions about the disturbances in Syria. As for Rappard's appearance on the PMC's records in connection with the administrative arrangements for the drafting of the PMC's final report, it is remarked that Rappard in his intervention took great care to prevent any 'extremely unfortunate' impression that the secretariat could be viewed as having any influence over the PMC and thus jeopardising the latter's impartiality and 'prestige': 'Enquiry regarding the Bondelzwarts Rebellion of 1922: Discussion on the Report of the Commission to the Council', League of Nations Doc A.19.1923.VI. (n 110) 136.

189 Pedersen (n 93) 62.

190 Ibid 133.

191 Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (n 114) 122.

192 Ibid 125.

193 Or rather impressions, as its text hastened to specify in para six: 'Under these circumstances, the Permanent Mandates Commission is bound to offer its conclusions, or rather impressions': 'Enquiry regarding the Bondelzwarts Rebellion of 1922: Discussion on the Report of the Commission to the Council', League of Nations Doc A.19.1923.VI. (n 110) 135.

194 Ibid 136.

resistance has been offered, it is difficult to … abandon [operations] before complete surrender'.[195]

The polyphony in the PMC's internal workings was also reflected in the way it decided to internally proceed in order to reach its final text, whereby '[e]ach member would draft conclusions in accordance with his feeling and views on the matter' and then discussion would follow, as it was 'for the full Commission to assume responsibility'.[196] And it was the chairman Theodoli's 'conscience' that led him to attach a separate statement that, even if the Bondelzwarts affair appeared to be 'an incident of colonial life such as ha[d] occurred in the past', art 22 of the *LON Covenant* 'ha[d] profoundly and substantially altered colonial law and colonial administration' and that the PMC should 'seek to adapt its colonial experience'.[197] It is to this 'profound alteration', with the PMC being a new international mechanism whose members were injected with a new form of subjectivity and elevated into the orbit of a higher, hegemonic and autonomous international space, that the next Section turns.

B *New Mechanism and New Subjectivity of Its Members*

Among the PMC members, the newness and distinctiveness of their role was highly felt. It was a recurring reference point in the PMC's discussions, a point that served as a legitimacy pull and as a compass on how to handle issues. This newness was set against all other systems of colonial administration, distinct from the colonial because the PMC embodied an international mechanism of supervision, answerable to the public opinion. This was clearly articulated in Van Rees's 1926 note on the PMC's general competence, in which he appealed to this distinction from colonial government, arguing that the PMC acted in accordance with 'essential counsel of wisdom' and did its utmost to 'aid in strengthening the edifice of the League of Nations, which must be profoundly and durably based on

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195 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) 294. This observation echoed the prevalent thinking in laws of war at the time as encapsulated in art 29 of the Lieber Code that '[t]he more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief': 'Instructions for the Government of Armies of the United States in the Field (Lieber Code)', *International Committee of the Red Cross* (Web Page) <https://ihl-databases.icrc.org/ihl/INTRO/110>, archived at <https://perma.cc/YE39-J3GU>.

196 'Enquiry regarding the Bondelzwarts Rebellion of 1922: Discussion on the Report of the Commission to the Council', League of Nations Doc A.19.1923.VI. (n 110) 137.

197 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) appendix ('Statement Made by the Chairman, Marquis Alberto Théodoli') 296. According to Pedersen, Theodoli's statement that the League 'profoundly … altered colonial law' and introduced new principles for the administration of the mandated territories was objected to by Lugard: Pedersen (n 93) 124. Lugard insisted that the requirement to protect the native population was one to which most notably the British Empire subscribed. He was 'intensely proud of Britain's colonial policy and colonial record; he tended to think of the mandates system as a mechanism for generalizing ideals he routinely conflated with British imperial practices': at 125. Actually, whether the principles of art 22 of the *LON Convention* were to apply not only in the mandated territories but also in the colonies of the mandatory power (colonies and mandated territories often neighbouring each other and administratively linked through legislation of the mandatory power: see above nn 82, 144, 163) was answered in Diena's Hague Academy course in the negative. For Diena, it results 'very clearly from the terms' of art 22(1) that the 'new regime will apply only on the territories that were taken away from the defeated empires and not to all the territories that were before the war under the sovereignty of these empires': Diena (n 82) 218–19. Rappard was also of this view, evidenced in his hope that the mandates regime 'may be extended to other, in time and (who knows?), to all colonial areas': Rappard, 'The Practical Working of the Mandates System' (n 184) 223.

public confidence and the force of public opinion'.[198] This resonated with Rappard, who wrote that the PMC, 'an apparently insignificant addition to the original plan … may well prove to be [the League's] boldest innovation', its 'most original, and … most potentially beneficial feature of the whole institution' — exactly because it featured the 'only one point' in which the international character of the system was strengthened, that is, the 'attention of public opinion'.[199] For Lugard too, the 'only means' at the disposal of the League for 'enforcing the execution of the Mandate' are none other than 'publicity and the force of public opinion'.[200]

This public opinion, though, eventually included a rather selective audience, as evidenced in the PMC's final report on the Bondelzwarts rebellion, which, in an effort to strike another delicate equilibrium, remarked that the PMC was 'assured that any criticism of the action of the local administration of South-West Africa which it may feel it its duty to express [sic] … will be shared by … enlightened public opinion, both British and Dutch, in South Africa'.[201]

This explains the somewhat contradictory new subjectivity of the PMC's members: on the one side, feeling imbued with a new role and audience, entrusted with the task of 'international supervision, which must either be genuine and effective or disappear' — to cite again from Van Rees's note[202] — a feeling that got even stronger by the regular references of the PMC's members to its 'prestige'[203] or to the 'full weight of its authority'.[204] On the other side, however, the PMC was cautious never to 'betray the least trace of a desire to supplant' the mandatory powers and through its supervision cause any agitation to the wrong audience, which might lead to 'unexpected … effects in distant countries differing greatly from our own in the nature of their civilisation or the primitive character

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198 *General Competence of the Mandates Commission*, League of Nations Doc C.P.M.511.(1). (n 93) 7–8.

199 Rappard, 'The Practical Working of the Mandates System' (n 184) 207.

200 Lugard, 'The Mandate System and the British Mandates' (n 142) 544.

201 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) 292. The passage was preceded by the PMC expressing its confidence that the mandatory power,

> under the guidance of so distinguished and enlightened a statesman as General Smuts, cannot fail to share to the full the ideals which the Covenant … lays down in regard to the responsibilities assumed under mandate towards backward races, and to support the high standard in the treatment of natives which has ever been the honour of South Africa.

202 *General Competence of the Mandates Commission*, League of Nations Doc C.P.M.511.(1). (n 93) 7.

203 D'Andrade's observation to the draft text of the PMC's report on the Bondelzwarts: 'Enquiry regarding the Bondelzwarts Rebellion of 1922: Discussion on the Report of the Commission to the Council', League of Nations Doc A.19.1923.VI. (n 110) 136.

204 As Rappard reassured the French representative before it, Robert de Caix, former Secretary-General of the French High Commissariat for Syria and Lebanon, in the course of the discussions over the rebellion in Damascus and the Jebel Druse: Permanent Mandates Commission, *Minutes of the Eighth Session (Extraordinary)*, League of Nations Doc C.174.M.65.1926.VI. (n 114) 62. Rappard's reassurance entailed that the PMC would invest with the 'full weight of its authority' de Caix's statement that

> as soon as the inhabitants of Syria and the Lebanon gave proof of their capacity to govern themselves, to exercise in actual fact the sovereignty which was theirs already in law, on that day the part played by the mandatory Power would be completed, without even the necessity of confirming this fact by legal action.

of their populations'.[205] As Van Rees observed during the discussions over the Bondelzwarts rebellion, the PMC 'could not appear to throw doubt … upon the South African report',[206] while Alberto Theodoli cautioned against the 'danger' of the PMC becoming 'a Commission of Enquiry'.[207]

The PMC's members, in their subjectivity, sided with the modernity of the mandatory power, propelled by their belief in modernity's capacity to enforce order, and they only asked, in the PMC's final report, 'whether a preliminary demonstration of the destructive power of aeroplane bombs might not have brought about the submission of the natives'[208] — especially following Major Herbst's remarks that the 'natives were very frightened of aeroplanes'[209] and that the 'moral effect' of the airplane bombardment was 'enormous'.[210]

This siding with modernity in the PMC's subjectivity entailed also a set of temporal obligations on the part of the mandatory power. In the course of the PMC's examination of the French representative over the rebellion in Syria, France's employment of 'black troops' was long discussed, especially in relation to its conformity with art 22 of the *LON Covenant*.[211] As Rappard asked, '[w]as it … in conformity with the spirit of Article 22 … for the guardian to appeal, in order to bring his ward to reason, to soldiers of a lower level of civilisation not only than the guardian himself but also than the ward?'[212] Hence, for the PMC, modernity necessitated clear temporal hierarchies that the mandatory power should not transgress in delivering its civilizing mission. And it was for the PMC to safeguard the observance of these temporal hierarchies, the PMC itself being the embodiment of the newest and most temporally advanced subjectivity.

Thus, the PMC assumed its new supervisory/advisory role seriously, and this primarily meant that it felt that it was its duty to support the mandatory power in forcing modernity and order in the mandated territories. Whether or not this forcing sometimes inevitably entailed 'severity', for the PMC, the priority nevertheless lay in 'taking prompt and effective steps to uphold Government authority' and suppressing rebellions as quickly as possible.[213] The PMC abstained from evaluating the conduct of military operations. Instead, intrigued by 'primitiveness' — as a form of temporal retrograding — the PMC, by referring in its report to the 'special characteristics of the population', channelled the discussion towards the causes of the rebellion, toward investigating, to use its

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205 *General Competence of the Mandates Commission*, League of Nations Doc C.P.M.511.(1). (n 93) 7.

206 Permanent Mandates Commission, *Minutes of the Third Session*, League of Nations Doc A.19.1923.VI. (n 114) 62.

207 'Audition of Major Herbst', League of Nations Doc A.19.1923.VI. (n 125) 114.

208 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) 294.

209 'Audition of Major Herbst', League of Nations Doc A.19.1923.VI. (n 125) 117.

210 So enormous that for Major Herbst, it was only a 'show of force' that could bring these men to a 'more reasonable frame of mind': 'Memorandum on the Bondelzwarts Rising and Its Suppression by Major Herbst', League of Nations Doc A.19.1923.VI. (n 110) 334.

211 Permanent Mandates Commission, *Minutes of the Eighth Session (Extraordinary)*, League of Nations Doc C.174.M.65.1926.VI. (n 114) 152.

212 Ibid. As Rappard's question continues, '[c]ould it be expected that the educative influence of the mandatory Power would be very happily exercised when it was obliged to act through the intermediary of human beings less developed than those against whom this action was directed?'

213 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) 292, 294.

wording, what the natives' 'grievances which they probably exaggerated and for which they could obtain no redress' were.[214]

C *Intrigued by the Exotic, Keeping an Elitist and Autonomous (Di)Stance*

The PMC was attracted by the exotic and listened to Major Herbst explaining how the natives 'allow grievances to accumulate for a long time … brood over them, magnify them and become obsessed by them; so it is difficult to say, when a rising takes place, what is the exact cause'.[215] It was in order to comprehend this native mentality, to decipher the exotic, to achieve — through the mandatory power's administration — a rational engineering of the native social life and exercise an increasing control over it commensurate with scientific understanding — all distinctive goals of 'high modernism' in Scott's scheme[216] — that the PMC often encouraged and felicitated the mandatory power for its conduct of scientific studies on the native life. Thus, the Spanish member, Leopoldo Palacios,[217] congratulated Belgium for its scientific missions in Ruanda-Urundi. As he remarked, the results of such missions had 'more than a scientific value, being also of a political and practical utility'.[218] Likewise, when Australia presented its annual report on New Guinea, the PMC expressed its vivid interest in receiving 'detailed information regarding the organisation of the native tribes' and welcomed Australia's submission of its government anthropologist's report on ethnographic material and native life and thought.[219]

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214 Ibid 294.

215 'Audition of Major Herbst', League of Nations Doc A.19.1923.VI. (n 125) 117.

216 Scott singles out three elements: (i) 'the aspiration to the administrative ordering of nature and society', an aspiration for which 'high modernism' seems an appropriate term, exemplified among others in the figures of Henri de Saint-Simon and Le Corbusier; (ii) 'the unrestrained use of the power of the modern state as an instrument for achieving these designs'; and (iii) 'a weakened or prostrate civil society that lacks the capacity to resist these plans', and thus the hegemonic, elitist and, for Scott, 'authoritarian' facet of modernism: James C Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998) 88–90.

217 Palacios was a 'social reformer and professor' and the Spanish member of the PMC for the years 1924–39: Pedersen (n 93) xiii.

218 Permanent Mandates Commission, *Minutes of the Seventh Session*, League of Nations Doc C.648.M.237.1925.VI. (n 124) 70. As Palacios continues, the PMC could 'only congratulate the Administration on its initiative'. He further observed that Belgium's policy with regard to scientific missions was a 'result of the Congress on Ethnology and Comparative Religion which had met at Vienna in 1924'. This exchange took place in the context of the PMC examining Belgium's annual report of 1924.

219 Permanent Mandates Commission, *Minutes of the Eleventh Session*, League of Nations Doc C.348.M.122.1927.VI. (1927) 56. In the case of Australia's annual reports on New Guinea, it appears that reference to anthropological studies was a recurrent issue. Thus, in its earlier report of 1924–25, Australia reported that selected officials of its administration would be sent to the University of Sydney to undergo a course of training in anthropology under professor Radcliffe Brown before taking up their permanent appointments, while the Commonwealth government also contributed £1000 per annum toward the maintenance of the Chair of Anthropology that had recently been established at the University of Sydney: Permanent Mandates Commission, *Minutes of the Ninth Session*, League of Nations Doc C.405.M.144.1926.VI. (1926) 18, 22. During the examination of Australia's annual report for 1928–29, its representative before the PMC explained eloquently that

This was the new international law of pragmatism based on social sciences, as advanced by Anghie,[220] and triggered by the exotic. The PMC instantiated the League of Nation's 'epistemic and cosmological foundations' on modernist presuppositions,[221] whereby the (economic) development of the mandated territories was 'reconceptualized as a modernist enterprise of harnessing knowledge to intervene in native societies'.[222] And this modernist enterprise was now under the supervision of this newly created higher space of impartiality, disinterestedness and wisdom,[223] whose members were selected 'for personal merit and competence'[224] and on whose 'virtues of zeal, competence, tact and so forth' 'it would be unduly pedantic to enlarge', an elite of individuals 'singularly independent'[225] and autonomous — in other words, the PMC.[226]

Thus, and in view of the PMC's siding with the mandatory power, its modernity, its capacity to enforce order and its economic progress and temporal advancement, it is not accidental that the PMC channelled its supervision and devoted a large part of its examination of the Bondelzwarts rebellion not on the military operations but rather on the causes that led to the rising. In this way, the PMC, intrigued by the exotic 'special characteristics of the population',[227] could better comprehend the native mind and context in which rebellions arose, and thus supervise the mandatory power by advising it on how best to reform its policy.

> [p]rimarily … the mandatory Power is fully seized of the necessity for staffing the Administration with officials who can acquire by training and experience a sympathetic understanding of the psychology of the natives, as it is realised that officials cannot be expected to succeed in furthering a programme of native welfare unless they are able to 'think black'.

Permanent Mandates Commission, *Minutes of the Eighteenth Session*, League of Nations Doc C.366.M.154.1930.VI. (n 165) 45. Thus, the gathering of 'exhaustive data' and the development of new systems of research were means to achieve in the most effective way the economic development of New Guinea, which was 'vitally necessary if the natives are to be raised in the plane of civilisation': at 45–6. Australia's administration aimed 'gradually to get the natives to appreciate the value of their labour and understand their obligations to employers' and to foster agriculture as the 'basic foundation for healthy industrious village life', given that the 'New Guinea natives [were] indifferent agriculturists, and the difficulty of instilling the principles of cultivation of the soil in the minds of natives of the mentality of those in New Guinea [was] a prodigious task': at 46.

220 Anghie, 'Colonialism and the Birth of International Institutions' (n 60) 539; Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 19) 152–3; Tzouvala (n 140) 106–7.

221 Allan (n 185) 224.

222 Ibid 27.

223 Wright, *Mandates under the League of Nations* (n 2) 585–7.

224 Lugard, 'The Mandate System and the British Mandates' (n 142) 541.

225 Rappard, 'The Practical Working of the Mandates System' (n 184) 222.

226 This new coupling of both scientific knowledge, as triggered by the exotic, and the necessity of supervision by an elite and autonomous body of its administrative application on site could also be read within Quinn Slobodian's scheme of neoliberal legal interventionism. The latter is based exactly on the premise that ultimately the world is not wholly knowable through graphs and numbers, and hence the end of the empire should go in tandem with the development of legal structures of modern planning. Rappard was one of the main protagonists in the neoliberal group of Slobodian's 'globalists', and Ludwig von Mises, another prominent member of the group, was envisioning a world organised by the international division of labour, indifferent to nationality: Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018) 72, 92–9, 106.

227 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) 294.

The PMC devoted the largest part of its report on the 'first cause of the trouble',[228] which was connected to the following three facts. First, a dog tax was imposed at a flat rate for 'whites and blacks, which must have been … quite prohibitive for the latter'.[229] Extensive prosecutions followed, and since the natives could not pay the tax or fine, 'they had to work for the whites … who … could not pay cash to their labourers'.[230] Second, '[t]he Vagrancy Law of 1920 … made any native wandering … liable to arrest if he could not prove legal ownership of … cattle or … small stock', and '[t]he magistrate was authorised, in lieu of the punishment prescribed, to adjudge the accused to a term of service on public works or to employment under any municipality or private person'.[231] Third, a 1921 decree required both whites and natives to pay for branding irons, the purchase of which was compulsory, and while the whites actually received their branding irons, those bought by the natives were kept by the administration.[232]

It was the natives' resistance against these measures that the mandatory interpreted as a 'declaration of war',[233] necessitating the imposition of 'prompt and effective' order as quickly as possible,[234] delivered by the bombardment of the natives with airplanes that, in the words of Major Herbst, 'considerably enhanced' the 'prestige of the Administration' and 'materially shortened' costly military operations.[235] Thus, an inquiry into the Bondelzwarts rebellion, where one might have expected an examination conducted with the laws of war vocabulary, at least on whether the mandatory power respected the obligation of non-bombardment of undefended villages,[236] ended up as an investigation into the intricate nexus between taxation, labour, native resistance and rebellion.

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228 Ibid. Except for para 9 on the 'second and more immediate cause of the rising', which appeared to the majority of the PMC to have arisen from the fact that the administrator dispatched police officers, and not senior officers of the administrator, as messengers to the Bondelzwarts.

229 Ibid 293.

230 Ibid.

231 Ibid.

232 Ibid.

233 'Audition of Major Herbst', League of Nations Doc A.19.1923.VI. (n 125) 122.

234 'Report on the Bondelzwarts Rebellion', League of Nations Doc A.19.1923.VI. (n 110) 294.

235 'Memorandum on the Bondelzwarts Rising and Its Suppression by Major Herbst', League of Nations Doc A.19.1923.VI. (n 110) 331, 334. As explained in the memorandum submitted by Major Herbst to the PMC.

236 According to art 25 of the *Laws and Customs of War on Land (Hague, IV)*, '[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited': *Convention respecting the Laws and Customs of War on Land*, signed 18 October 1907, 1 Bevans 631 (entered into force 26 January 1910) art 25. Of course, this obligation of South Africa becomes complicated given that it gained full sovereignty from Britain in 1931. However, Britain had signed and ratified the Convention. The question of whether laws of war applied in colonial and mandated territories is an even more intricate one and exceeds the scope of this article. However, it can be noted that d'Andrade, in the context of the examination of the French representative for the rebellion in Syria, noted that the 'Commission in a similar case had already decided against [the use of airplanes] in the case of non-fortified villages' and that the mandatory power might use them 'in order to impress the natives but there was a risk that a bombardment by aeroplane might claim victims among the women and children': Permanent Mandates Commission, *Minutes of the Eighth Session (Extraordinary)*, League of Nations Doc C.174.M.65.1926.VI. (n 114) 148. However, such a clear-cut condemnation of the use of airplanes by the Union of South Africa on the Bondelzwarts does not appear in the PMC's report.

In a reversal of usual legal liberal disregard for economic and material factors, the Bondelzwarts rebellion demonstrates how implicated were labour and warfare. In fact, as Mark Neocleous notes, the '[r]efusal to pay taxes was … one of the most common forms of resistance, and understood by the colonial state as rebellion … [A]s rebellion, it was seen as a form of warfare' and subject to airpower, and '[t]ribes were thus bombed for their refusal to pay taxes'.[237] It is instructive here to refer to Lugard's views on taxation as an implicitly civilising factor. As he writes with regard to Africa in his book,

> slavery, forced labour, and all other forms of exactions from the peasantry can be declared illegal without reducing the ruling classes to poverty. The freed slave, on his part, renders to the state a small and fixed proportion of the profits of his industry. The tax may thus … be regarded as promoting the recognition of individual responsibility, which is inseparable from liberty, but is destroyed by … slavery.[238]

And so, to resist such a mutually beneficial replacement of slavery with taxation, with taxation promoting liberty and individual responsibility, cannot but be interpreted as a defiance of order and civilisation. In the words of Lugard, if the maintenance of law and order is collectively defied, then it is for 'armed force to compel obedience', as it is only 'inherent in the right to govern'.[239]

In an unexpected twist, in *GL Solis* of the US–Mexico GCC, Mexico substantiated its claim of non-responsibility for the taking of cattle by revolutionary forces by referring to *Home Frontier and Foreign Missionary Society of the United Brethren in Christ*, a case decided under a 1910 arbitral agreement between the US and Great Britain.[240] That case had been brought by the US against Britain and concerned a claim sustained by an American religious body during a native rebellion in 1898 in the British protectorate of Sierra Leone. The revolt had been against the imposition of a 'hut tax'.[241] To cite from the decision, '[t]he rising was quickly suppressed, and law and order enforced with firmness and promptitude', the hut tax was 'in accordance … with general usage in colonial administration', and there had been nothing to suggest that any 'difficulty' caused by the tax would be 'more serious than is usual and inevitable in a semi-barbarous and only partially colonized protectorate'.[242] Thus, the concluding observation — and the one that Mexico relied upon — states that

> [i]t is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation

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237 Mark Neocleous, *War Power, Police Power* (Edinburgh University Press, 2014) 147.

238 Lugard, *The Dual Mandate in British Tropical Africa* (n 186) 233. As Lugard adds, '[i]t was by this means that in Nigeria we sought a solution of the difficulties attendant on the abolition of the legal status of slavery, and to support the ruling classes while protecting the peasantry'.

239 Ibid 578–9. This is especially so since the maintenance of law and order depends in every country on the power of coercion by force, and '[i]n Africa you are dealing with tribes who, as a general rule, regard force as the sole arbiter, who are combative, and value life very lightly indeed': at 579.

240 *GL Solis (United States v Mexico)* (1928) 4 RIAA 358, 361 ('*Solis*'), citing *Home Frontier and Foreign Missionary Society of the United Brethren in Chris (United States v Great Britain)* (1920) 4 RIAA 42 ('*Home Missionary Society*').

241 *Home Missionary Society* (n 240) 43.

242 Ibid.

> of its authority, where it is itself guilty of … no negligence in suppressing insurrection.[243]

And it is thus with this crossing in mind that the next Part turns to the two decisions of the SCC.

V THE US–MEXICO SCC AS A MODERNIST(?) STRUCTURE OF DISCIPLINE OVER THE MEXICAN REVOLUTIONS

This Part examines to what extent the US–Mexico SCC can equally be perceived to function like a modernist structure of discipline over the Mexican revolutions: whether the SCC featured the five modernist facets of being (i) a new mechanism whose members felt imbued with a new form of subjectivity; (ii) elitist and autonomous; (iii) polyphonous in its internal workings; (iv) intrigued by the subaltern, the temporally alien; and (v) prompted by violence.

This last facet is quite uncontroversially evidenced already by the title of the SCC's founding convention[244] and how exactly Mexico's revolutionary violence triggered the coming into force of the SCC as a structure of discipline was addressed in Part III. Suffice it here to emphasise, though, that the modernist facet of violence was prominent in that the conclusion of the SCC was a condition for Mexico's recognition by the US and the resumption of diplomatic relations.[245] It is in this light that art II's reference to equity and Mexico's '*ex gratia* feel[ing]

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243 Ibid 44. This part of the decision was favourable for Mexico in *Solis*, even if Mexico was less successful in other decisions of the GCC with regard to activities of Victoriano Huerta's government, as was mentioned above in Part III(B). The favourable outcome was only partial for Mexico, given that the claims in *Solis* concerned two items: one for cattle alleged to have been taken by the revolutionary forces of Adolfo de la Huerta, and the other one by the Mexican federal forces. Mexico relied on, along with other similar awards, the decision in *Home Missionary Society* successfully for the first one. With regard to the second, the claim was accepted against Mexico, given that acts of soldiers engage the state's direct responsibility. For this last part, the GCC relied on its earlier decision in *Thomas H Youmans (United States v Mexico)* (1926) 4 RIAA 11 ('*Youmans*'): *Solis* (n 240) 363. It is interesting that in *Youmans*, Mexico attempted to bring in the exception for acts of soldiers outside their competency or exceeding their powers by invoking extracts of the Mexican government's brief in the course of a discussion of a subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law: *Youmans* (n 243) 115–16 [13].

244 *Special Claims Convention* (n 108), reproduced in the UN Reports of International Arbitral Awards as *Special Claims Convention for the Settlement of Claims of American Citizens Arising from Revolutionary Acts in Mexico from November 20, 1910, to May 31, 1920* (1951) 4 RIAA 779 ('*Special Claims Convention — RIAA*').

245 Feller (n 12) 22–3. According to a short report of *The New York Times*, the *Special Claims Convention* was

> one of the two conventions negotiated by former Ambassador Warren and Judge John Barton Payne, who were sent to Mexico City in 1923 for the negotiations, which not only resulted in these conventions but obtained what were regarded by the American Government as satisfactory assurances on which it based its recognition of the Obregon government.

'Claims Come under 1910 Convention', *The New York Times* (New York, 9 February 1926) 10.

morally bound to make full indemnification' should be read.[246] Nevertheless, art II, rather than completely setting aside international law, involved the thornier issue of the extent to which international law continues to be relevant for determining certain questions.[247] What the tying of the conclusion of the SCC with Mexico's recognition and the reference to equity in art II certainly explain though is the observation by Edwin Borchard that

> [b]y treaty, diplomatic arrangement or arbitral convention the Latin-American States and certain others among the weaker countries have at times been compelled

246 *Special Claims Convention* (n 108) art II. According to art II, each commissioner 'shall make and subscribe a solemn declaration stating that he will carefully and impartially examine and decide, according to the best of his judgment and in accordance with the principles of justice and equity, all claims presented for decision', and Mexico 'wishes that her responsibility shall not be fixed according to the generally accepted rules and principles of international law, but *ex gratia* feels morally bound to make full indemnification', agreeing that 'it will be sufficient that it be established that the alleged loss or damage … was due to any of the causes enumerated in Article III'.

247 Indicative of this is the relevant discussion in the *Georges Pinson* decision under the French–Mexican Claims Commission (13 April 1928 – 24 June 1929), constituted under the *Convention for the Settlement of Claims Arising from Losses and Damage Inflicted on French Citizens or Persons under French Protection by Reason of Revolutionary Acts Occurring in Mexico between November 20, 1910, and May 31, 1920, Inclusive*, France–Mexico, signed 25 September 1924, 79 LNTS 417 (entered into force 29 December 1924) ('*Convention between France and Mexico*'): see *Georges Pinson (France v Mexico) (Decisions)* (1928) 5 RIAA 327 ('*Pinson*'). The Convention with France was similar in its terms to the one with the US (see Feller (n 12) 158), and its art 2 likewise stipulates that every commissioner will make a solemn declaration to carefully examine and impartially judge, according to the principles of equity all claims presented, given that Mexico wills ('a la volonté') to ex gratia make up for the damages caused ('réparer gracieusement') and to not see her responsibility established according to the general principles of international law: *Convention between France and Mexico* (n 247) art 2. The presiding Commissioner Verzijl, who wrote the *Pinson* decision, in his conclusions on the role of equity in the application of the Convention and the relations between equity and international law, held that the role of equity was to extend Mexico's international responsibility to all those cases where it was controversial whether a rule of positive international law existed, and especially so for damages caused in the case of insurrections, riots and civil wars: *Pinson* (n 247) 352–4. For the rest, the Commission, as a general rule, had the duty to examine the controversial questions from the point of view of positive international law, without being able to simply invoke reasons of equity as grounds for its findings: at 354. What this division between equity and international law seemed to imply was more evident in Verzijl's conclusions on how to interpret art 3 on the classification of forces, whereby it was stated that five general principles of interpretation are applicable, according to the fourth of which every international convention should be deemed to tacitly refer to common international law for all the questions that the convention itself does not regulate differently: at 422. Consequently, art 3 is to be considered together with the tacit supposition of the recognition of the principle of international law, according to which a state that grants its nationals compensation for losses and damages caused by insurrectional movements must grant at least the same compensation to aliens who find themselves in equal or analogous conditions.

> by the nations of Europe to assume a heavy liability, beyond that required by the strict rules of law, for injuries sustained by aliens during war.[248]

Article III of the *Special Claims Convention* enumerated the forces for whose acts claims could be advanced.[249] The first of the two cases that comprised the work of the SCC was *Cornelia J Pringle (Santa Isabel Claims)* ('*Santa Isabel*'), decided in April 1926 in favour of Mexico through the concurring opinions of the Mexican commissioner Fernando González Roa and the presiding commissioner

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248 Edwin M Borchard, 'Private Pecuniary Claims Arising Out of War' (1915) 9(1) *American Journal of International Law* 113, 145. Borchard cites a series of arbitrations in this regard, for instance, the claims by many European countries against Chile arising out of her war of 1879–83 with Bolivia and Peru, the 1873 claims conventions between Italy and Uruguay, the 1858 convention between Sardinia and Argentina, the 1862 convention between Great Britain–France and Uruguay, the 1894 convention between Great Britain and Nicaragua and others: at 145 n 113. This is in line with Lionel Summers, who observes that '[e]ven though the Mexican revolution was one of the great catalytic agencies for change, its more immediate result as far as Mexico was concerned was to impose a whole series of arbitrations to decide claims based on revolutionary damages', while stating, however, that Mexico 'was eager to make concessions to obtain recognition': Lionel M Summers, 'Arbitration and Latin America' (1972) 3(1) *California Western International Law Journal* 1, 11, 11 n 35. Borchard was the principal commentator in the majority of the decisions of the Mexican claims commissions. According to the arrangement of the publication of the decisions in the UN Reports of International Arbitral Awards, each decision is preceded by singling out the main questions addressed, along with references to commentaries in journals. Borchard's notes in the *American Journal of International Law* are the most common reference. It is telling that Borchard belonged to ASIL's traditional school, as opposed to the group of reformers amongst whom Wright figured prominently. As cited in Shinohara, for Borchard 'the process of romancing international law, began in 1914, has uninterruptedly continued, and abdication of legal thinking is an incident of it'. Borchard referred to the reformers' views as the 'evangelism of new order' and argued that it was a mistake to

> conclude that the system of international relations before 1914 constituted 'international anarchy' … The traditional methods of conciliation, mediation, arbitration, and of the Hague Conferences had made an important contribution. 'They were less ambitious than the "new" school and, I venture to believe, more practical.'

Shinohara (n 7) 125–6, quoting Edwin M Borchard, 'The "Enforcement" of Peace by "Sanctions"' (1933) 27(3) *American Journal of International Law* 518.

249 *Special Claims Convention* (n 108) art III. Article III reads in full:

> The claims which the Commission shall examine and decide are those which arose during the revolutions and disturbed conditions which existed in Mexico covering the period from November 20, 1910, to May 31, 1920, inclusive, and were due to any act by the following forces:
>
> (1) By forces of a Government *de jure* or *de facto*.
>
> (2) By revolutionary forces as a result of the triumph of whose cause governments *de facto* or *de jure* have been established, or by revolutionary forces opposed to them.
>
> (3) By forces arising from the disjunction of the forces mentioned in the next preceding paragraph up to the time when the government *de jure* established itself as a result of a particular revolution.
>
> (4) By federal forces that were disbanded, and
>
> (5) By mutinies or mobs, or insurrectionary forces other than those referred to under subdivisions (2), (3) and (4) above, or by bandits, provided in any case it be established that the appropriate authorities omitted to take reasonable measures to suppress insurrectionists, mobs or bandits, or treated them with lenity or were in fault in other particulars.

Rodrigo Octavio, and against the strong opposition of the US commissioner Ernest Perry.[250] It concerned the murder of employees of the Cusi mining company near Santa Isabel by a band of armed men, allegedly forces belonging to Pancho Villa. The decision raised strong sentiments of anger in the US press at the time and nearly caused the disruption of the SCC, marking the 'beginning of a series of unfortunate disagreements' that seriously hampered its work.[251] The SCC reconvened only after a lapse of five years, in February 1931.[252] It was then that the second case, the *Russell* claim, was decided in favour of Mexico through the concurring opinions of the new presiding commissioner, Horacio Alfaro, and the Mexican commissioner Roa against the vigorous dissent of the US commissioner, Fred Nielsen. The case concerned the robbery and murder of Hubert Russell, manager of a ranch owned by the McCaughan investment company, by two men allegedly belonging to forces under the command of Orozco.[253]

Part III argued that the SCC functioned as an international legal structure of discipline, whereby order was found in the conjunction of state responsibility with the criteria of statehood/belligerency/insurgency, the latter providing the legal vocabulary to gauge the character of the revolutionary movement in question. The economic direction, then, was in that the SCC operated with a view to provide 'increased stability and security for the merchants and investors who made up the bulk of aliens … [seeking to] guarantee business as usual'.[254] How the SCC featured the modernist facets is what follows.

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250 *Santa Isabel* (n 109) 783.

251 Feller (n 12) 64, 167. According to *The New York Times* on 28 April 1926, '[i]f outrages committed by Villistas and other insurgents against the Carranza and Obregon governments are to be considered as the acts of bandits for which those Governments were not responsible, the Special Claims Commission might as well be adjourned': 'The Santa Ysabel Claims', *The New York Times* (New York, 28 April 1926) 24. The US filed a motion for a rehearing, which was accepted by the presiding commissioner as a reservation, and this decision would 'afford the American State Department an opportunity to use its influence with the Mexican government'. The Mexican president Calles 'may be reasoned with, and on a rehearing of the Santa Ysabel case it may yet be decided that the commission has jurisdiction'. In an earlier *The New York Times* report on the case, the US agent Colonel Anderson is cited as declaring that the US regarded the *Santa Isabel* case as of 'first importance from every standpoint', and that Mexico's contention to be held responsible only for the three revolutions as a result of which the Madero, Carranza and Obregon governments came into power, thus denying responsibility by other revolutionary movements like those led by Villa or Zapata, 'in effect negatives the entire convention': LC Speers, 'Declares Mexico Repudiates Claims', *The New York Times* (New York, 9 February 1926) 10.

252 The presiding commissioner in *Santa Isabel* resigned in July 1926 for reasons of health, and the dissatisfaction in the US resulted in several years passing before a successor to Rodrigo Octavio was named. Reaching its expiration date, the commission was extended for two years by a convention signed on 17 August 1929. Horacio Alfaro was subsequently designated as the presiding commissioner: Feller (n 12) 65–6. See also *Special Claims Convention — RIAA* (n 244) 773.

253 *Russell* (n 109) 806.

254 Greenman, 'The Secret History of Successful Rebellions in the Law of State Responsibility' (n 135).

A *Polyphonous in Its Internal Workings but Striving for an Impartial and Autonomous Stance*

Admittedly, 'impartiality and autonomy' is precisely what is expected from an international arbitral tribunal. As Borchard writes, '[i]nternational arbitration is aided … by impartial decisions' that promote objectivity.[255] And so he commends the changed practice within the GCC of not designating their nationality and simply referring to the American and Mexican members as 'commissioners', 'for as judges they should be deemed properly to cast aside any national bias, implicit in the old characterization'.[256] Impartiality being an ideal to strive towards, the SCC in its internal workings rather tilted to an avowed polyphony and a national bias-inclined, subjectivised reality. Even if diverging interpretations of the law and constructions of facts are intrinsic in legal argumentation, the commissioners' debates in the two cases revealed new dimensions of such divergences, accentuated by virtue of their writing style.

1 *The Santa Isabel Claims*

In the case of *Santa Isabel*, the divergences focused primarily on whether the Villa forces were 'bandits' — and as such fell under art III(5) of the *Special Claims Convention*, engaging the responsibility of Mexico only in the case of negligence — or 'revolutionists' — and as such fell under art III(2), engaging Mexico's direct responsibility.[257] The decision was written by the presiding commissioner, the Brazilian Octavio, lawyer, Brazil's diplomatic representative at the LON, member of several arbitration commissions and who had also given a course at the Hague Academy.[258] In his decision for the SCC, Villa's forces were bandits in January 1916 when the events occurred, as evidenced by a 1916 decree of the then de facto Carranza government (also recognised by the US) that referred to Villa as a 'reactionary petty chieftain' and 'outlaw', as well as a communication by the US President Woodrow Wilson justifying the US's 1916 punitive expedition into Mexico under an agreement with Venustiano Carranza 'for the sole purpose of capturing the bandit Villa'.[259] The reason for focusing on 1916 for the characterisation of Villa was because Villa's

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255 Edwin M Borchard, 'Decisions of the Claims Commissions, United States and Mexico' (1926) 20(3) *American Journal of International Law* 536, 542.

256 Ibid.

257 *Santa Isabel* (n 109).

258 Rodrigo Octavio, 'Les sauvages Américains devant de droit' [The Savage American before the Law] (1930) 31 *Recueil des cours de l'Académie de droit international de La Haye* 177. According to the biographical note preceding the course, Octavio was Brazil's plenipotentiary delegate at the conference of maritime law in Brussels and the Peace conference in Paris; signatory of the *Treaty of Versailles*; president of the Brazilian delegation in the 1st Assembly of the LON; president of the arbitration commissions between Mexico and the US, Mexico and France, and Mexico and Germany; as well as associate of the IDI: at 179. Despite the alienation that its title provokes to contemporary readers, the course concludes with asking whether 'calling the Indians to civilisation' really benefits them, and replying that in this 'ardour' to civilise the Indian, one can distinguish a 'movement of unconscious egoism of the urban man to increase, in view of the common evil, his part of consolation, while increasing the number of unhappy' (in the original French, 'un movement d'égoïsme inconscient de l'homme des villes pour augmenter, en face du mal commun, sa part de consolation, en accroissant le nombre des malheureux'): at 289.

259 *Santa Isabel* (n 109) 787–8.

> turbulent activities in Mexico extended over a protracted period … in the course of which Villa appears according to the time and the circumstances … now as a bandit or as a guerrilla, or else as a revolutionary and a General in command of forces.[260]

This finding met the strong dissent of the US commissioner, Perry, for whom '[t]he fact that Villa forces acted like bandits did not prevent them from also being revolutionists'.[261] As he argued, 'not infrequently revolutionists succeed through efforts that are not far from banditry', and

> [d]uring at least a portion of the revolutionary period Villa was Carranza's Chief of the Army of the North. Later he deserted the Carranza … and became the leader of the Conventionist forces. Villa had … a plan of government … organized a Cabinet and … [governed] over a large portion of the territory of Mexico by collecting custom duties and other taxes.[262]

He cited a decision of the GCC that held for the de la Huerta revolt that 'call it … a rebellion or a revolution what you will — [it] assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration'.[263] Thus, the US commissioner found as 'controlling' factors the magnitude of Villa's forces and relied on the criteria of statehood/belligerency/insurgency in order to classify Villa as falling under the 'revolutionary forces' of art III(2) of the *Special Claims Convention*.[264] For Perry, the presiding commissioner's temporal divisions and alternate characterisation of Villa as bandit or revolutionary failed in the 'absence of a citation to some international authority' and showed 'how far [he] has departed from the opinion of other International Jurists' in not following the reasoning of the GCC, leading to results rather 'repugnant to the well established rules among civilized nations'.[265]

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260 Ibid 785–6.

261 Ibid 798.

262 Ibid 797. This emphasis on the element of government can also be read in conjunction with Parfitt's process of 'international legal reproduction', whereby state sovereignty is a plastic and conditional form of subjectivity, contingent upon a changeable redeployment of the criteria of statehood, amid which government is the most important component — government, as the apparatus whose role is to protect a specific set of individual rights associated with the 'rule of law', eg personal security, private property, freedom of travel etc: Parfitt (n 140) 7, 13–14.

263 *Santa Isabel* (n 109) 798, quoting *Home Insurance Company (United States v Mexico)* (1926) 4 RIAA 48, 52. *Home Insurance Company* came within the jurisdictional scope of the GCC, given that the claim arose out of events occurring in November 1923, and thus was outside the scope of the SCC (November 1910 to May 1920), as the decision noted: at 52–3.

264 *Santa Isabel* (n 109) 797.

265 Ibid 799–802. Another instance of 'far departure' by the presiding commissioner that attracted the strong dissent of Perry was in the difficulty of reconciling 'the mandatory and unequivocal terms of the Treaty with the highly technical and specious reasoning of the Presiding Commissioner's opinion'. And

> [n]o better way exists to ascertain how far the Presiding Commissioner has departed from the plain provisions of the Treaty than by setting forth extracts from the Presiding Commissioner's opinion in the first column and extracts from the Convention Agreement in the second column.

Thus, the first column starts with 'this question is a very delicate one because the assailants and murderers of the Americans are considered as Villistas', and the second column responds with 'the commissioners as named shall meet at Mexico City within six months after the exchange': at 800.

2 *The Russell Case*

Polyphonic divergence at the *Russell* case was more striking, arousing, in Feller's words, an 'extraordinary passion' in the commissioners.[266] The composition of the SCC had changed with a new presiding commissioner, Horacio Alfaro of Panama, and a new US commissioner, Nielsen — serving also at the GCC — while the Mexican commissioner remained the same, Roa.[267] Each commissioner rendered a separate opinion, followed by the presiding commissioner's decision disallowing the claim, with Roa concurring and Nielsen filing a dissenting opinion. Roa followed up with 'supplementary observations', which attracted Nielsen's 'comments'[268] — an exchange that probably came to an end due to the expiration of the SCC's duration.[269]

At issue was the status of Orozco's forces and whether they fell under the second part of art III(2) of the *Special Claims Convention*.[270] The controversy centred on whether 'them' referred to both 'forces' and 'governments' in the first part — as supported by the English version — or rather only to 'forces', in line with the Spanish version of 'them' as '*aquellas*', which is feminine and thus can only accord with the equally feminine '*fuerzas*' and not with 'governments'.[271] Resolving this controversy through the appropriate 'grammatical construction' served as the axis around which revolved legal arguments on equity, interpretation principles, definitions of 'revolution' and the contest of which sources were authoritative.[272] Thus, the explosive force of a vexed 'inflection of a pronoun'[273] unwound heated exchanges of legal argumentation, revealing both the legal background and worldview of the commissioners, as well as the already — in 1931 — expanded field of international law. And these exchanges unfolded in a fashion

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266 Feller (n 12) 66.

267 Ibid 44–5. Roa had also been Mexico's chief negotiator of both the SCC and GCC claims conventions: at 23.

268 *Russell* (n 109) 914. *Russell* starts with the opinion of Nielsen at 806, followed by Roa's opinion at 841, then Alfaro's opinion at 876 and his decision at 878, Nielsen's dissenting opinion at 878, Roa's supplementary observations at 892 and Nielsen's comments on the supplementary observations at 912.

269 Three days after the filing of Nielsen's comments, the SCC expired. In particular, Nielsen's 'Comments of American Commissioner on "Supplementary Observations by the Mexican Commissioner, Fernando González Roa, in Regard to the Decision in the Russell Case"' were dated 14 August 1931: *Russell* (n 109) 912. The *Convention between the United States and Mexico Extending Duration of the Special Claims Commission Provided for in the Convention of September 10, 1923*, signed 17 August 1929, 9 Bevans 963 (entered into force 29 October 1929) was ratified by both the US and Mexico in September and October 1929 respectively. The Convention is reproduced in *Russell*: *Russell* (n 109) 919. According to art I, the extension was granted for a time 'not exceeding two years from August 17, 1929' and thus expired on 17 August 1931, three days after Nielsen's submission.

270 Article III(2) in full reads: 'By revolutionary forces as a result of the triumph of whose cause governments *de facto* or *de jure* have been established, or by revolutionary forces opposed to them.'

271 *Russell* (n 109) 818.

272 Ibid.

273 To use the wording of the presiding commissioner: ibid 892.

much recognisable to contemporary international lawyers — even if by setting aside slightly their colourful writing style and Nielsen's patronising tone.[274]

Looking closer at Nielsen's worldview as evinced in his argumentation, for Nielsen, it was the parties' intention that necessitated a 'liberal and comprehensive interpretation' beyond the 'grammatical construction'.[275] He grounded this by drawing selectively from the SCC and GCC's negotiating histories by referring to a 1921 memorandum,[276] Emer de Vattel's emphasis on the parties' intent as the object of interpretation and John Bassett Moore's *A Digest of International Law*.[277] For equity, he referred to the relevant Venezuelan arbitrations, the provisions of the *Statute of the Permanent Court of International Justice* and the *Treaty concerning the Archipelago of Spitsbergen*.[278] He cited the US Supreme Court in order to stress that courts should avoid judicial rewriting.[279] For Nielsen, 'revolution' and 'insurrection' had no concise legal definitions but were 'used interchangeably'.[280] He referred to William Edward Hall's *A Treatise on International Law* for the criteria of belligerency[281] and argued that a controlling factor was the magnitude of Orozco's revolutionary movement, which was, comparably to the US civil war,[282] supported by an 'organized, disciplined army'[283] and a 'formidable' revolutionary movement whose exclusion from the

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274 For instance, in the following passage where Nielsen argued that even if '[j]udicial tribunals, domestic and international, as well as diplomats, have properly allowed themselves considerable latitude in resorting to material for interpretation where interpretation was required', the 'Mexican agent … seems to go somewhat far afield. No authority was cited for the use of such material': ibid 824. The material in question was a note of 17 April 1912 sent by the Mexican Minister of Foreign Affairs to the American Ambassador in Mexico City, the opinion of a member of the SCC in the *Santa Isabel* cases and a public address delivered in the US by one of the commissioners: at 823–4.

275 Ibid 823.

276 Ibid. This memorandum was earlier than the so-called 'Bucareli' conference of 1923, which led to the final version of the SCC and the GCC Conventions and at which Roa was the main negotiator for Mexico and Charles Beecher Warren for the US: Feller (n 12) 23. However, the 1921 memorandum was arguably more favourable for Nielsen's position, given that it stated rather unequivocally that the SCC would not be a reciprocal treaty but one that would have 'the sole end of making reparation for the injuries caused in Mexico to American interests', 'to prove the good will' of Mexico and 'its desire to satisfy all just demands … in a simple spirit of equity — this criterion being the broadest and most favorable to the claimants': *Russell* (n 109) 823.

277 Ibid 817, citing John Bassett Moore, *A Digest of International Law* (Government Printing Office, 1906) vol 5, 249.

278 *Russell* (n 109) 829, citing *Treaty concerning the Archipelago of Spitsbergen*, signed 9 February 1920, 2 LNTS 7 (entered into force 14 August 1925).

279 *Russell* (n 109) 826. Nielsen also cited an excerpt of the *British Counter* case in the Alaskan Boundary Arbitration under a 1903 treaty between the US and Great Britain.

280 Ibid 827.

281 Ibid 824, citing William Edward Hall, *A Treatise on International Law* (Clarendon Press, 7th ed, 1917).

282 *Russell* (n 109) 824.

283 Ibid 816. As he further specifies, the army consisted of

> over ten thousand men in the Northern part of Mexico, and thirty thousand or forty thousand in the remainder of the country … it had one entire state unanimously attached to the revolution and a constitutional government in favor of the revolution; and … it was by appropriate authorities regularly administering civil and criminal jurisprudence, and discharging legislative functions.

scope of art III(2) of the *Special Claims Convention* would 'not be a reasonable interpretation'.[284]

Quite expectedly to the contrary, Roa stressed Russell's imprudence and cited the 1900 IDI resolution.[285] He defined equity according to *Bouvier's Law Dictionary and Concise Encyclopedia* as 'equal justice between the contradicting parties' and referred to relevant cases in the Italian–Venezuelan Claims Commission and Alejandro Alvarez's writings.[286] Regarding the SCC's negotiation history, he stressed that later developments superseded the 1921 memorandum: 'Mexico never contemplated that any responsibility would be demanded of her for the acts of unsuccessful revolutionists'; it was the US that 'asked for' art III(2), while Mexico then demanded that art III(5) exclude insurrectionary forces.[287] For Roa, Orozco was an unsuccessful rebel, a finding supported by the 'authority of foreign historians … [and] publicists as proof of impartiality', and thus fell neither under art III(2) nor art III(5).[288] Equity did not require payment for insurrectionaries, and he cited case law from the British–Venezuelan, the Dominican and the Nicaraguan Claims Commissions, along with a decision of the German–Mexican Claims Commission that contained an identical art III and declared that damages caused by Orozco forces were not indemnifiable.[289] Roa remarked that this was in line with the US's response to the 1930 LON codification conference, according to which 'paying for rebels is contrary to the practice of the United States'.[290] Given the diverging English and

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284 Ibid 820.

285 Ibid 854–5. Roa referred to the IDI resolution on the 'Regulation of the Responsibility of States in the Event of Damages Caused to Aliens in the Case of Riots, Insurrection or Civil Wars' and in particular art 3, which states that the

> obligation of compensation disappears, when the affected persons are themselves the cause of the event which brought about the damage. In particular, there is not an obligation to compensate those who enter the country in contravention of an order of expulsion, or those who go in a country or want to engage there in commerce or industry [('ou veulent s'y livrer au commerce ou à l'industrie')], while they know or ought to have known that unrest [('troubles')] have broken out, neither those who establish themselves or reside in areas presenting no security due to the presence of savage tribes, except for the cases where the government of the country has given to the immigrants particular assurances.

For the original text in French, see *Réglement sur la responsabilité* (n 88). He also supported his argument by reference to the work of the 'illustrious' Argentine lawyer, Pedesta Costa: *Russell* (n 109) 854.

286 *Russell* (n 109) 856.

287 Ibid 857.

288 Ibid 865. As Roa argued, Orozco 'was an unsuccessful rebel … [who] occupied only the Capital of one State of the twenty-eight of the Republic and was defeated'. Moreover, the Madero government to which Orozco was opposed was 'established by virtue of a perfect election' and thus neither de facto nor de jure — so that also from that aspect, the requirements of art III(2) were not satisfied. He cited Hyde's *International Law* in support: at 863.

289 *Russell* (n 109) 860–1. He argued that sovereignty is indivisible and cited Paul Pradier Foderé, Hugo Grotius and Jean-Jacques Rousseau; he remarked that '[o]nly the countries inhabited by gregarian tribes are apt to have several leaders' and that 'local governments are not Governments': at 861–2.

290 Ibid 864. As Roa cites in his opinion, according to the American Answer of 22 May 1929 to the Society of Nations regarding the basis of discussion for the Hague Conference on Codification:

Spanish versions of the *Special Claims Convention*, Roa referred to the PCIJ's *Mavrommatis Palestine Concessions* ('*Mavrommatis*') case, ruling in favour of the 'more limited interpretation'; *SS 'Lotus'* on the 'least binding effect upon the States'; and *Territorial Jurisdiction of the International Commission of the River Oder* on an interpretation 'most favorable to the freedom of states'.[291] Turning to 'revolutionary forces', for Roa, the distinguishing criterion was 'of three species: grammatical, legal and historical'.[292] Webster's dictionary was employed for the grammatical species, which stresses success in the definition of revolution, a reading confirmed by international legal publicists like Carlos Wiesse and Andre Decencière-Ferrancière.[293] By contrast, 'unimpeachable authorities' show that insurrection has a more general meaning; Roa cites John Bouvier, Carlos Calvo and art 149 of the Lieber Code.[294] Lest he be reproved for resorting to dictionaries, Roa opines that 'the authorities of language are a great value', as demonstrated by Moore's *International Adjudications: Ancient and Modern, History and Documents*, wherein Moore 'abundantly' refers to dictionaries[295] — and Moore's collection was cited extensively in both the SCC and the GCC.

Thus, the polyphonic and colourful divergences among the commissioners[296] were articulated in lengthy exchanges and counter-exchanges but kept within the requirements of an 'impartial and autonomous' legal language.[297] And from the sources on which Nielsen and Roa drew, one discerns the modernist sense of transition and reconstruction in the international legal landscape. Nielsen's references appear rooted in the international law of Root and Scott that favoured arbitration — and judicial adjudication precisely as deriving therefrom.

> 'Les Commissaires estiment que les Etats-Unis ne peuvent être tenus pour responsables de dommages causés par les actes de rebelles sur lesquels ils ne pouvaient exercer de contrôle et dont ils n'étaient pas en mesure d'empêcher les actes'. American and British Claims Commission; *Traité du 8 mai 1871*, Moore's Arb 2985.

The cited 1871 treaty is the one on the basis of which the so-called Alabama claims, following the US civil war, were arbitrated. The success of the Alabama claims sealed the popularity of arbitration as a successful mechanism for settling international disputes, a success that led to the First Hague Peace Conference, through which the PCA was established: Shinohara (n 7) 13. Interestingly, the US 1929 answer to the LON, in order to further substantiate the non-responsibility for rebels, also cites *Prats (Mexico v United States)* (1876) XXIX RIAA 187, arbitrated under the 1868 US–Mexico Mixed Claims Commission. In that case, involving again incidents in relation to the US civil war, the American Commissioner argued that '[n]onresponsibility on the part of the United States for injuries by the Confederate enemy … to aliens … resulted from the fact of belligerency itself', irrespective of recognition: at 191 (emphasis omitted).

291 *Russell* (n 109) 867, 869, citing *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2; *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10; *Territorial Jurisdiction of the International Commission of the River Oder* [1929] PCIJ (ser A) No 16. It is noted that the PCIJ's *Mavrommatis* decision cited by Roa is the judgment of 30 August 1924 (A02) and not the one of 26 March 1925 (A05).

292 *Russell* (n 109) 870.

293 Ibid 870–1.

294 Ibid 871.

295 Ibid 858.

296 The opinion of the presiding commissioner was rather short and, in broad lines, concurring with the Mexican commissioner: ibid 876–8.

297 The restraints imposed by the demands of legal language, arguably justifying Koskenniemi's thesis that the 'ideology of international adjudication was not constituted of a blind faith in rules' but 'relied, instead, in the "reasonableness and good temper" of men participating in negotiation and arbitration': Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' (n 4) 151.

For Nielsen, 'international arbitration conducted by what may be called judicial methods', inaugurated by the 1794 US–Britain *Jay Treaty*, was where the 'best future hope' of international law lay, and this contrary to codification, of which '[w]e hear considerable at the present time', though he was 'not entirely sure … what it mean[t]'.[298] Roa proved knowledgeable of the case law of the several claims commissions with Latin American countries and their nuances.[299] But Roa also appeared more up-to-date with the LON's codification work and the PCIJ's jurisprudence. Moreover, he seemed well-versed on what was considered a credible authority, and, at the crucial points, he substantiated his arguments not with Latin American but with French and American authors — and likewise in his use of dictionaries, especially Bouvier's.[300]

B *New(?) Mechanism, New Subjectivity of Its Members, Intrigued by the Subaltern*

It is precisely because the SCC was entrenched in the lineage of arbitration and claims commissions between the US and European states on the one hand, and the newly independent Latin American states on the other hand — the 'younger States south of the Rio Grande', in Nielsen's words[301] — that the SCC's newness is followed by a question mark. As Scott remarked in the *AJIL* editorial that triggered the PMC–SCC juxtaposition, it was reassuringly 'encouraging … that the recent claims convention [was] in accordance with the first' that the US ever concluded, the 1794 *Jay Treaty*.[302] Already before the SCC, it is telling that the first countries to avail themselves of the PCA were the US and Mexico.[303] Indeed, the PCA's first case was the 1902 *Pious Fund of the Californias*, which, quite ironically,

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298 Fred K Nielsen, 'Progress in Settlement of International Disputes by Judicial Methods' (1930) 16(4) *American Bar Association Journal* 229, 230, 232. As Nielsen continues, codification

> seems however to connote not only an attempt to compile, so to speak, certain general rules of law that have often been stated in the past, but to formulate and to retouch rules. There may be much value in such an undertaking, but surely we have some reasonably well defined rules of law at the present time. If we have not, one may wonder how arbitration tribunals have decided a great number of cases throughout the world since 1794.

at 232. Thus, the 'best future hope' for Nielsen lies in the 'opinions of real international courts as contributions to the clarification, expansion and development of international law'. These passages are eloquent enough, whereas it is telling that in his article, Nielsen does not even mention the LON explicitly.

299 Attesting to this are his references to Jackson Ralston, who served as the US Umpire in the Venezuelan arbitrations, against the doctrine of imposing obligations to Latin American countries (in contemplation of the terms of an equity convention) for acts of unsuccessful rebels. Roa cites an excerpt written by Ralston whereby the latter recounts his personal experience as the Umpire of the Italian–Venezuelan Mixed Claims Commission and an incident with the Italian commissioner who 'looked at the subject from what seemed to [him] … a rather crude point of view'. The Italian commissioner said that 'Venezuela ought to be held responsible for all these acts'; Ralston asked why, and he replied, '[b]ecause Venezuela is a bad child and ought to be whipped': *Russell* (n 109) 865.

300 Bouvier's dictionary is regarded as embedded in a long tradition in the US legal community.

301 Fred K Nielsen, 'Insurgency and Maritime Law' (1937) 31 *American Society of International Law Proceedings* 144, 145.

302 Scott, 'The Settlement of Outstanding Claims between Mexico and the United States' (n 3) 317.

303 Walter S Penfield and Jackson H Ralston, 'The Attitude of American Countries toward Arbitration and the Peaceful Settlement of International Disputes' (1915) 9 *American Society of International Law Proceedings* 40, 48.

in a brief decision, unanimously upheld a previous award rendered under the 1868 US–Mexico claims convention.[304]

Whether or not there was a new subjectivity to the SCC members, whether or not they considered themselves harbingers of modernity, endowed with a 'sense of justice and [a] spirit or "calling" in defence of private rights against [unruly] government[s]'[305] and as such intrigued by the subaltern, the temporally alien, these things were certainly true of Nielsen, who not only wrote 'exhaustive' dissenting opinions[306] but was also a prolific writer.[307] Nielsen had an unwavering faith in arbitration as the distinctive US contribution to peace — and this against many other 'varieties of covenants and resolutions'.[308] It was arbitration that could 'maintain the so-called international standards'.[309] What international standards entailed, for Nielsen, was exemplified in the 'great Supreme Law of the forty-eight commonwealths', in 'constitutional guarantees which stand in the way of confiscation of property rights'.[310] He pointed to the 1933 Montevideo *Convention on the Rights and Duties of States* as a 'joint contribution to civilization' — by the US and Latin American states — as a way to promote 'friendly and profitable international relationships' and 'protect useful foreign investments and activities of those engaged in international trade and commerce'.[311] For Nielsen, confiscation of property was 'contrary to the legal and the moral sense of the world',[312] and it was only an 'enlightened, independent, honourable judiciary' that could rectify such wrongs; thus, a 'government's failure to maintain' such a judiciary simply 'mocks the development of a civilization worthy of the name'.[313]

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304 *Pious Fund of the Californias (United States v Mexico) (Award)* (Permanent Court of Arbitration, 14 October 1902). In this brief decision, the PCA unanimously pronounced that the 'said claim of the United States … [was] governed by the principle of *res judicata* by virtue of the arbitral award of Sir Edward Thornton of November 11, 1875': at 3 [1]. There were five arbitrators: Henning Matzen, Sir Edward Fry, M de Martens, TMC Asser and AF de Savornin Lohman. The award was for the benefit of the Archbishop of San Francisco and of the Bishop of Monterey, requiring Mexico to pay to the US in perpetuity (!) the annuity of $43,050.99 Mexican dollars. As Walter Penfield and Ralston wrote on the case, '[c]redit is due to Mexico in unhesitatingly accepting the award of the tribunal and in promptly complying with the terms of the decision': Penfield and Ralston (n 303) 49.

305 Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' (n 4) 151. The 'unruly' and the plural in government(s) are my addition and modification to Koskenniemi's phrase.

306 Edwin M Borchard, 'Important Decisions of the Mixed Claims Commission: United States and Mexico' (1927) 21(3) *American Journal of International Law* 516, 519, referring to Nielsen's 'exhaustive dissenting opinion' in the GCC case of *Teodoro García and MA Garza (Mexico v United States)* (1926) 4 RIAA 119. This was also true in the *Russell* case: see *Russell* (n 109) 878.

307 Fred Kenelm Nielsen, *International Law Applied to Reclamations: Mainly in Cases between the United States and Mexico* (John Byrne & Company, 1933); Fred K Nielsen, *American–Turkish Claims Settlement: Under the Agreement of December 24, 1923, and Supplemental Agreements between the United States and Turkey* (Government Printing Office, 1937); Fred K Nielsen, *American and British Claims Arbitration: Under Special Agreement Concluded between the United States and Great Britain August 18, 1910* (Government Printing Office, 1926).

308 Fred K Nielsen, 'International Reclamations' (1949) 28(3) *Nebraska Law Review* 357, 369.

309 Ibid 364.

310 Ibid.

311 Ibid 364–5.

312 Nielsen, 'Progress in Settlement of International Disputes by Judicial Methods' (n 298) 230.

313 Fred K Nielsen, 'Contribution of the American Judiciary to the Maintenance of International Law' (1936) 15(2) *Nebraska Law Bulletin* 127, 141.

Such unequivocal views by one of the most prominent and active US arbitrators,[314] whose impact in shaping arbitration decisions was undeniable,[315] cannot but corroborate Philip Jessup's remark that '[t]he history of the development of the international law on the responsibility of states for injuries to aliens is thus an aspect of the history of "imperialism", or "dollar diplomacy"'[316] — as the latter unfolded through the long series of arbitrations since the 19th century, which 'were almost all cases of injury to a private alien travelling or doing business in non-European or non-United States territory'.[317]

Hence we see the interrelation of a not-that-new international legal mechanism of discipline, whose dominant member nevertheless felt strongly the calling of modernity and civilisation, demonstrating a 'determined "benevolence"' that stems from his modernist subjectivity, to also bring along the others, the temporally alien, the less 'enlightened' and economically advanced.

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314 Nielsen was not only a member of the US–Mexico GCC and SCC but also the negotiator for a treaty with Turkey on international claims, senior counsel for the arbitrations with Great Britain and Holland, as well as arbitrator in the American–Egyptian arbitration of 1931. See his biographical note: ibid 127. Moreover, Scott, in an *AJIL* editorial note on Nielsen, refers to his service as representative of the US at the 1919 Paris Peace Conference in charge of matters relating to 'claims against enemy governments, and the protection of property in enemy countries' while he was also a representative of the US 'on the commission at Paris which drafted an international treaty relative to sovereignty over the Spitzbergen Archipelago': James Brown Scott, 'The Solicitor for the State Department' (1923) 17(2) *American Journal of International Law* 307, 307. Not least, Nielsen was also a member of ASIL and a member of its Executive Council: at 308.

315 For instance, Nielsen was one of the commissioners in the GCC case of *LFH Neer*, a regular starting point for the definition of 'denial of justice', and Nielsen is — again — (in)famous for his separate opinion in the case, arguing that it was 'useful and proper to apply the term denial of justice in a broader sense than that of a designation solely of a wrongful act on the part of the judicial branch of the government': *LFH Neer (United States v Mexico)* (1926) 4 RIAA 60, 64 ('*Neer*'). For the contemporary resonance in international investment arbitration, see Mavluda Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct' (2012) 61(1) *International and Comparative Law Quarterly* 223.

316 Philip C Jessup, *A Modern Law of Nations: An Introduction* (Macmillan Company, 1948) 96.

317 Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' (n 4) 148. Thus, Benedict Kingsbury remarks that the

> arbitrations of claims concerning losses to private individuals pursuant to the Britain–US *Jay Treaty* 1794, and of inter-state claims of the United States against Britain in the *Alabama* award of 1872, were by the late nineteenth century espoused as emblematic of the increasing possibilities of bilateral and multilateral arbitration.

Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 203, 205. Nielsen's views and stance certainly also provide some hints as to why Nielsen in July 1931 had been characterised by Mexico as 'persona non grata', and his impending resignation, according to the press of the time, 'removed an obstacle … which threatened the success of future negotiations between the United States and Mexico': 'Nielson Quits Board of Mexican Claims', *The New York Times* (New York, 28 July 1931) 4.

VI CONCLUSION

This article started with the odd juxtaposition of two editorial notes in the 1924 *AJIL* issue. Odd, because under mainstream textbook criteria, the Bondelzwarts rebellion and the Mexican revolutions would not cross, falling under completely separate rubrics. The Bondelzwarts — if a reference were granted at all, and if the PMC itself was to be viewed as a legal mechanism in the first place[318] — would fall under the rubric of international law's institutional maturation, following the line that leads from the LON to the UN. The SCC would fall under that of international law's judicial maturation, of the line that leads from the arbitration of the 19th century to the PCIJ to the ICJ to the current proliferation of courts and tribunals that finally attests that 'international law is really law'.[319]

My purpose here, however, was to sideline this surface oddity and read the juxtaposition of the PMC/Bondelzwarts rebellion and the SCC/Mexican revolutions to function as an international legal homology, in that an abstract structure was disengaged and seen to be at work in both. This is the abstract structure of the normalisation of the unruly subject (the Bondelzwarts rebellion, the Mexican revolutions) and consists of two elements: order as the trigger for the normative development of international law, and the economic as directing how order is normatively developed. This structure of normalisation was steeped into modernism — both international legal modernism, as it encapsulates the sense of reconstruction and transition that pervaded the interwar international law, and also cultural modernism, in that the PMC and the SCC featured throughout their normalising function the five modernist facets.

Sidelining the oddity of the juxtaposition and disengaging the abstract structure of normalisation in both, I read the PMC and the SCC as distinct Foucauldian technologies of power. And I read this by looking closely into the archives of the PMC and the exchanges of the SCC commissioners and by investigating their members, their mindset as evidenced in their writings and their professional trajectories.

This close reading — with much attention to detail, I admit — visualised not only order but also the preponderance of economic concerns in both the PMC and the SCC. The PMC was much concerned to facilitate international capital flows

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318 According to art 22 of the *LON Covenant*, the PMC had an advisory function to the LON Council. It issued recommendations that were non-binding, if one were to employ the classic legal criterion. However, such a textbook understanding has been forcefully refuted by critical legal scholars. Anghie elaborates on why and how the PMC saw its function in legalistic terms: Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 19) 151. Tzouvala also singles out legalism as one of the three aspects of the work of the PMC that merit attention: Tzouvala (n 140) 105. See above n 114 on the views of Rappard, for whom '[t]he Commission had always maintained that its task was of a judiciary kind'.

319 I owe the consideration of the extent that judicial discourse still dominates the international legal discipline to Fuad Zarbiyev. In his piece 'On Judge-Centeredness of the International Legal Self' (on file with the author), he highlights the 'privileged status' that '[t]he judicial representation of international law enjoys … in international legal discourse' and points to the series of epistemic and distributional consequences that follow and need to be problematised: Fuad Zarbiyev, 'On the Judge-Centeredness of the International Legal Self' (2021) 32 *European Journal of International Law* (forthcoming). The fact that the PMC was for so long off the radar of international legal scholarship, arguably because of its non-binding, non-straightforwardly judicial character (as opposed to the PCIJ, for instance), could as well be such an epistemic consequence of the excessive attention paid to courts and tribunals as the only sites of real legal activity.

into the mandated territories. In the SCC, the US commissioners did not shy away from writing in their arbitral opinions that US investments in Mexican mining and ranching prevented the 'want and starvation' of the Mexican people.[320] For the US commissioner Nielsen, confiscation of property was an international legal wrong,[321] and, to this day, in bilateral investment treaty arbitration on denial of justice, it is his separate opinion in the GCC case *LFH Neer* that is cited, and not the GCC award.[322]

For Foucauldian technologies of power, the focus is on the *tekhnē*, that is, the practical rationality governed by a conscious goal.[323] The economic direction in the PMC and the SCC appeared to function as precisely such a practical rationality. Whether or not this *tekhnē* can be extrapolated to be at work to this day, at least recently published international legal scholarship argues so — and this is an argument that is forcefully substantiated.[324]

Modernism, ultimately, is neither about mannerisms nor about time, but about visualisation — about centring on the PMC, decentring it with the SCC, about bringing forth our historical archive and rearranging it into new configurations like a cubist painting. This is not in order to discover hidden historical material[325] but to force a new visuality: a visuality forced and motivated by questions of the present, the actual moment;[326] of financial crisis, pandemic, climate emergency; of post-West hegemony. And equipped with this new visuality, we can better grasp our very present conjuncture, comprehend the forces that led to and sustain it, and reflect on more social futures.[327]

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320 *Santa Isabel* (n 109) 799.

321 Nielsen, 'Progress in Settlement of International Disputes by Judicial Methods' (n 298) 230.

322 See, eg, Sattorova (n 315) 224 n 1. Also, in the *Chevron* award, the tribunal, in order to define denial of justice, turned to a 1932 article by Gerald Fitzmaurice on the meaning of the term, along with four other investment awards: *Chevron Corporation v Ecuador (Second Partial Award on Track II)* (Permanent Court of Arbitration, Case No 2009-23, 30 August 2018) [8.37] ('*Chevron*'). In this article, Fitzmaurice relied on Nielsen's separate opinion in the *Neer* case in order to substantiate as a denial of justice the failure of domestic law to conform to the international legal standards: GG Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 *British Year Book of International Law* 93, 95, 102. Of course, Nielsen defined international legal standards by a 'useful analogy' to US constitutional guarantees that stand in the way of confiscation of property rights — in a much telling circularity: Nielsen, 'International Reclamations' (n 308) 364.

323 Michel Foucault, *Power*, ed James D Faubion, tr Robert Hurley et al (New Press, 2000) 364.

324 See Tzouvala (n 140); Parfitt (n 140).

325 After all, the preoccupation with economic considerations is pretty evident in, for instance, Rappard, *Post-War Efforts for Freer Trade* (n 141); Lugard, 'The Mandate System and the British Mandates' (n 142); Nielsen, 'International Reclamations' (n 308).

326 As Foucault writes, for him the starting question is 'what are we and what are we today? What is this instant that is ours? Therefore … it is a history that starts off from this present day actuality': Michel Foucault, *The Politics of Truth*, ed Sylvère Lotringer and Lysa Hochroth (Semiotext(e), 1997) 158.

327 Stuart Hall, *Essential Essays*, ed David Morley (Duke University Press, 2019) vol 2, 312.