"BUT THE ALTERNATIVE IS DESPAIR": EUROPEAN NATIONALISM AND THE MODERNIST RENEWAL OF INTERNATIONAL LAW

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It is truly a complete change in the organization of the Society of Nations. To visualize it requires imagination and hopefulness. But the alternative is despair.

THEODORE S. WOOLSEY,
THE RIGHTS OF MINORITIES UNDER
THE TREATY WITH POLAND[1]

It suffices that this primordial law . . . comes to model itself on *the real movement of nationalities, . . . on this pathos of an elemental force* which arises in the history of peoples, to give birth to a definitive and truer formulation.

ROBERT REDSLOB,
LE PRINCIPE DES NATIONALITÉS[2]

Seton-Watson, . . . an eloquent advocate of the Slav claims . . . , helped me draw up a boundary line between the two nationalities which was much nearer the truth . . . . In this way we tossed about free cities and played ducks and drakes with not a few islands, and we certainly whittled down the territory which both countries claimed . . . . I made a "graph" and a map showing what we had accomplished. There was the city of Fiume and the port of Susak and a little of the adjacent territory. All the rest was assigned. "But this area, Colonel," I explained, "we shall call *Disputanta*, and we shall place it under the administration of the League of Nations for the period of fifteen years. Then we shall end up with a free and fair election, a plebiscite . . . ." The Colonel was enchanted with what he called "a magical solution of all our troubles."

STEPHEN BONSAL,
SUITORS AND SUPPLIANTS:
THE LITTLE NATIONS AT VERSAILLES[3]

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[1] Theodore S. Woolsey, *Editorial Comment: The Rights of Minorities under the Treaty with Poland*, 14 AM. J. INT'L L. 392, 396 (1920).

[2] ROBERT REDSLOB, LE PRINCIPE DES NATIONALITÉS 13 (1931). Unless otherwise noted, all translations are mine.

[3] STEPHEN BONSAL, SUITORS AND SUPPLIANTS: THE LITTLE NATIONS AT VERSAILLES 106 (1946).

Is it not remarkable . . . that the real should have presented itself in the form of that which is *unassimilable* . . . — in the form of the trauma . . . .

. . . [W]e would be led to define the real as the impossible . . . .

JACQUES LACAN,
THE FOUR FUNDAMENTAL CONCEPTS
OF PSYCHO-ANALYSIS[4]

PROLOGUE: FROM POLAND TO PALESTINE: THE PERSISTENCE OF A POLICY PROPOSAL

In the aftermath of World War I, international lawyers embarked on the interpretation and implementation of the "new world order"[5] emerging from the Paris Peace Conference. The Peace Conference had taken as one of its central tasks the reconstruction of Central and Eastern Europe after the collapse of the multinational Hapsburg, Ottoman, Russian, and German Empires in the face of nationalist agitation; at least the first three of these states had provided the region's political framework for centuries. In light of this political context, many international lawyers interpreted the Versailles settlement to call for a legal reconfiguration of European public order in a manner responsive to the nationalist challenge.[6] This Article is devoted to showing that, contrary to some assessments of this period, the way certain interwar texts articulated this reconfiguration inaugurated an intellectual revolution in international legal history.

The concerns of the interwar writers upon whom this Article focuses were limited neither to merely local solutions to specific problems,[7] nor to halting foreshadowings of notions whose mature development would only come in the latter half of the century.[8] Rather,

[4] JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 55, 167 (Alan Sheridan trans., 1978).

[5] *See, e.g.*, FREDERICK C. HICKS, THE NEW WORLD ORDER: INTERNATIONAL ORGANIZATION, INTERNATIONAL LAW, INTERNATIONAL COOPERATION (1920).

[6] As President Woodrow Wilson declared, the "evident principle" of "justice to all peoples and nationalities" ran "through the whole programme." WOODROW WILSON, *The Fourteen Points Address* (1918), *reprinted in* 45 THE PAPERS OF WOODROW WILSON 534, 539 (Arthur S. Link ed., 1984). In this Article, nationalism denotes claims that rights of cultural, historical, or ethnic "nations" may transcend those of "states."

[7] The debate whether one should view the interwar innovations as case-specific remedies or as signs of a more general transformation dates from the period itself. *See, e.g.*, Jacques Fouques-Duparc, *Le Développement de la protection des minorités*, 7 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE [hereinafter R.D.I.L.C.] 509, 519–524 (1926).

[8] Most notably, many argue that post-World War II individual human rights respond better to the same needs addressed by interwar minority rights. *See, e.g.*, HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION 475 (1990) (suggesting that individual human rights can treat the "vast majority," though not all, "'minority' complaints").

these writers bequeathed us the very framework within which we continue to think about international law's relationship to nationalism. Examination of the transformation effected by a particular strand in interwar legal theory and practice sheds critical light on both the implicit assumptions and specific proposals of our current international legal pragmatism. In this Article, I seek to understand the interwar transformation of international law by explicating its underlying framework of assumptions. Such an explication requires a detailed, critical reading of certain interwar texts — for this framework was not always fully apparent to the interwar writers themselves, much less to their post-World War II successors who have continued unreflectively to work within its assumptions.

Consider, for example, the most frequent occasion for twentieth-century international legal policy proposals for remedying nationalist conflict — the problem of Palestine. For one confident international legal editor writing in 1919, law's ability to meet the nationalist challenge would not ultimately be overpowered even by "Jewish nationalism" — already in 1919 considered the "most baffling of the many nationalistic claims now clamoring for recognition."[9] This writer acknowledged that, by recognizing an as yet vaguely defined right to self-determination, international law had opened itself to the "discovery of 'nations crowding to be born' — of the existence of national self-consciousness where unsuspected, and of confused racial situations . . . ."[10] Nevertheless, he asserted, the "unique" difficulty presented by this "baffling" nationalism called for the deployment of the most advanced products of the legal imagination. The more turbulent the "clamoring," the greater the opportunity for international law: "In this age of 'internationalism,'" he therefore proclaimed, "there could hardly be found a more suitable spot for the practical application of the idea of internationalization" than Palestine.[11]

The international community finally heeded the editorial writer a generation after he issued his call. The 1947 international proposal for Palestine, the United Nations General Assembly's "Plan of Partition with Economic Union,"[12] was indeed composed of the most advanced legal techniques refined during the intervening period. The Plan proposed a complex structure for the reorganization of Palestine, an impressive array of seemingly heterogeneous elements.

[9] *See* Philip M. Brown, *Editorial Comment: Jewish Nationalism*, 13 AM. J. INT'L L. 755, 758 (1919).

[10] *Id.* at 755.

[11] *Id.* at 757.

[12] *Resolution Adopted on the Report of the* Ad Hoc *Committee on the Palestinian Question*, G.A. Res. 181(2) U.N. GAOR, 2d Sess., at 131, 132, U.N. Doc. A/519 (1947) [hereinafter *Palestinian Question Resolution*].

These elements may be listed under five basic rubrics:

a) *self-determination*: the Plan called for the establishment of two states, one Arab, one Jewish, thereby implementing the "principle of nationalities," or "objective self-determination";[13] it also mandated a plebiscite after ten years concerning its provisions for Jerusalem, thereby implementing "subjective self-determination";[14]

b) *minority protection guarantees*: members of the Jewish and Arab minorities of each of the new states would be assured basic civil rights as well as religious, educational, and linguistic autonomy;[15]

c) *provisions for individual emigration and citizenship*: during the transitional period, no Jew or Arab would be entitled to emigrate to the state in which she would be part of the minority;[16] during the first year of independence, members of the Jewish and Arab minorities of each state could opt for citizenship in the state in which their ethnic group constituted a majority;[17]

d) *internationalization*: Jerusalem was to be internationalized under a "Special Regime,"[18] subject to the aforementioned plebiscitary review; U.N. representatives would sit on the commission supervising the implementation of the Plan;[19] and

e) *supranational integration*: the "Economic Union of Palestine" would be overseen by a Joint Economic Board made up of three representatives of the two states and three from the U.N. The Union would include a customs union, a joint currency, and common economic programs.[20]

The entire Plan was to be placed permanently under international supervision: the Security Council would retain jurisdiction over all attempts to "alter [the Plan] by force."[21]

The Plan's legal techniques were those that had been set forth in the World War I peace treaties a generation earlier in response to European nationalism;[22] indeed, the Plan may be viewed as a variation on the most complex products of the Versailles system, the comprehensive regimes established to resolve the German-French dispute

[13] For a discussion of the terms "objective" and "subjective" self-determination, see below, p. 1812.

[14] *See Palestinian Question Resolution*, *supra* note 12, pt. III.D, at 150.

[15] *See id.* pt. I.C, chs. 1, 2, at 136–37.

[16] *See id.* pt. I.B(9), at 134–35.

[17] *See id.* pt. I.C, ch. 3 (1), at 138.

[18] *See id.* pt. III, at 146–50.

[19] *See id.* pt. I.B, at 133–36.

[20] *See id.* pt. I.D, at 139–41.

[21] *See id.* at 132.

[22] As noted throughout this Article, many of the ideas and techniques embodied in the Versailles settlement had nineteenth-century precursors; this Article focuses on their systematization by the peace treaties and their interwar interpretation and implementation.

over the Saar and the German-Polish disputes over Danzig, and above all, Upper Silesia. In these regions, too, plebiscites, partition, minority protection, internationalization, supranational integration, and international supervision were united in complex and nuanced regimes. In adopting the Palestine Plan, the international community thus carried forward a program whose detail and whose confidence in a comprehensive international legal and practical response to nationalist strife was inaugurated in 1919; it is a program we international lawyers continue to carry forward today, in our policy proposals from Bosnia to . . . Palestine.

Nonetheless, this persistence of faith in the international legal policy proposal — from Poland to Palestine — should be cause for astonishment. Between 1919 and 1947, the fragility of the various international legal solutions to the problem of European nationalism had gradually become evident. Indeed, some nationalists had denounced the Versailles vision even before the close of the Paris Peace Conference; some of these denunciations strikingly foreshadowed the attacks that became increasingly widespread in the twenties and thirties.[23] Moreover, many of the solutions were seen at the time as tentative, as "experimental," or as I have noted, as specific solutions called for by the exigencies of particular regions.

Finally, one particular challenge to the delicate interwar regime brought its destruction. The Nazis had inscribed the principle of self-determination in their first party platform.[24] In the thirties, Nazis and their sympathizers in various regions of Europe agitated for the unification of all German-speaking peoples. And in 1939, Germany finally destroyed the interwar European system by an act that struck at the heart of the system intended to provide "justice to all peoples and nationalities."[25] On August 31, German troops wearing civilian clothes attacked a radio station on the German side of the Upper Silesian partition border, broadcast an announcement that the station was in Polish hands, and left behind a dead German concentration camp inmate dressed in Polish army uniform. The Germans used this incident as the immediate pretext for their invasion of Poland.[26] World War II thus began with an act that quite literally confounded

[23] I am thinking, in particular, of Italian nationalists' defiance of the Allies' plan for Fiume. *See* MICHAEL A. LEDEEN, THE FIRST DUCE: D'ANNUNZIO AT FIUME *passim* (1977).

[24] *See* ALFRED COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINATION 93 (1969).

[25] Wilson, *supra* note 6, at 539.

[26] *See* LEONARD MOSLEY, ON BORROWED TIME: HOW WORLD WAR II BEGAN 430–34 (1969). To complicate matters even further, the murdered inmate was a German Upper Silesian who had fought on the Polish side during civil unrest in the region in 1921. *See* DONALD C. WATT, HOW WAR CAME: THE IMMEDIATE ORIGINS OF THE SECOND WORD WAR, 1938-1939, at 532 (1989).

the Versailles system's attempt to subtly balance the aspirations and identities of the national groups of central Europe.

The Palestine Plan, composed just two years after the end of the war begun in Upper Silesia, reaffirmed the international community's faith in the underlying assumptions and the programmatic detail of the interwar effort to resolve nationalist conflict. The committee that presented the 1947 Plan to the U.N. took the legitimacy of the international policy proposal so much for granted that it did not even think it necessary to present the legal arguments justifying the competence of the U.N. to legislate such a solution.[27] Two years after World War II, a majority[28] of the international community thus manifested its now seemingly unconscious faith in the approach that had reached its zenith, and its nadir, in European venues like Upper Silesia. The notion that complex policy proposals were the best way of responding to nationalism, *that, indeed, avant-garde "internationalization" and passionate nationalist "clamoring" were natural "allies,"*[29] had passed from the controversial and tentative into the self-evident, unreflective basis for pragmatic problem-solving.

And yet this notion and the importance of its underlying conceptual framework for both the interwar period and subsequent international legal history have never been fully explicated. As I have noted, some commentators, both during the interwar period and afterwards, saw the various elements of the peace treaties' treatment of nationalism simply as responses called forth by specific problems; others, more recently, have tried to reduce the various elements to particular manifestations of a common rational core, an underlying "right to autonomy."[30] Neither a pragmatic fatalism nor a rationalist optimism, however, captures the complexity or historical specificity of the strand of interwar writing I examine here. Rather, this strand was marked by its implicit affirmation of a paradoxical "alliance"[31] between turbulent nationalist passion and a newly autonomous international law — an affirmation that I call "international legal modernism" in order to stress its kinship with an array of early twentieth-century movements for cultural renewal in other domains.[32]

[27] *See Report to the General Assembly by the United Nations Special Committee on Palestine*, U.N. GAOR, 2d Sess., Supp. No. 11, at 42, U.N. Doc. A/364 (1947).

[28] The majority committee's seemingly unreflective faith was fiercely contested on international legal grounds by a dissenting committee composed predominantly of Moslem states. *See Report of Sub-Committee 2 to the Ad Hoc Committee on the Palestinian Question*, U.N. GAOR, 2d Sess., at 5, U.N. Doc. A/AC.14/32 (1947).

[29] *See* REDSLOB, *supra* note 2, at 35 (emphasis added); *see also infra* pp. 1804–06 (discussing the "alliance" between high-cultural innovation and "primitivism" in fields other than law).

[30] HANNUM, *supra* note 8, at 468–77.

[31] REDSLOB, *supra* note 2, at 35.

[32] My use of the term "international legal modernism" differs considerably from others' use of the term. *See infra* note 59.

The writers I examine here are not necessarily the ones whose names have remained the most familiar from the interwar period. Nevertheless, they invented the conceptual framework that continues to shape international law's relationship to nationalism. The innovative theoretical framework that implicitly informs their writings has been obscured for us by the grand theoretical works offered during the interwar period by many better-known writers. These more familiar works, whose range can be traced through the interwar volumes of the *Recueil des Cours* of the Hague Academy of International Law, have contributed to the notion that interwar legal writing is dated, irrelevant, and of interest only to historians. Indeed, one will not find the theoretical framework that underlay the interwar or post-World War II international responses to nationalism in such characteristic interwar responses to the traditional problem of the "foundations of international law" as neo-naturalism or inquiries into the rights and duties of states.[33] Rather, one can only find this framework through an explication of the assumptions of the kind of interwar texts I study here — those of judges, theorists, practitioners — that implicitly treated the problem of nationalism as the focal point for a particular vision of a "new international law." These texts bypassed the key traditional question of international law — the basis of sovereign obligation — in favor of reflections on the new "alliance" between autonomous law and vital nationalism.

This Article explores the assumptions of the interwar theoretical framework and demonstrates how those assumptions informed interwar interpretations of the Versailles response to nationalism that culminated in the comprehensive programs for the Saar, Danzig, and Upper Silesia. I begin, in Part I, with a discussion of the theoretical displacement of the traditional problems of international law by reflections on the new "alliance"; I argue that this reshaping of international law can be usefully understood as a form of early twentieth-century "modernism." After this general discussion, Parts II and III examine particular responses to the nationalist challenge — the creation of national states, the plebiscite principle, minority protection, and reciprocal emigration. In these sections, I focus on texts that describe the *inauguration* of the Versailles system in a manner richly suggestive of general conceptions of the effect of nationalism on the "new international law." I also show that, although these texts share certain fundamental assumptions, they nonetheless display several competing understandings of national identity and of the new role of international authority. Finally, in Part IV, I turn to the most elaborate products of the system, the regimes for the Saar, Danzig, and

[33] *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 157 n.72 (1989).

Upper Silesia. In the light of the preceding sections, Part IV shows why these three comprehensive regimes could be viewed as the highest achievements of the interwar effort — and hence why they continue to serve as models for international legal policy proposals. In analyzing the texts that articulated the intellectual break marked by the Versailles system, I hope to reawaken a sense of wonder at that moment in international legal history when the problem of nationalism came to be perceived as a primal "clamoring" to which one should respond with a sophisticated and heterogeneously composed "Plan."

I. International Law and the Theory of Nationalism

A. Beyond Statist Positivism and Liberal Nationalism: The Modernist Break

If limited to Wilsonian texts, one would assume that any post-World War I transformation of international law must have involved a straightforward replacement of the foundational principle of the public order of Central Europe. Merely inherited political forms — the Hapsburg, Ottoman, Russian, and German Empires — would have been replaced by rational and democratic forms — "peoples and nationalities." The intellectual revolution I describe, however, went beyond merely replacing one founding principle with another. Rather, it transformed the very relationship of international law to its "foundations." In order to understand this transformation, we must review the interwar writers' view of their nineteenth-century predecessors — a view we need not accept as historically accurate, but which strongly influenced the self-understanding of those interwar legal writers who focused on the problem of nationalism.

These new lawyers' conceptual task was set for them by their rejection of what they perceived as two legacies of the nineteenth century: statist positivism, on the one hand, and liberal nationalism, on the other. They viewed the mainstream of pre-war international law as governed by a statist positivism that considered the sovereign state international law's foundational unit. Under this positivist view, international law derived its authority from the consent of states and addressed itself to issues that arose in interstate relations.[34] The state's foundational role meant that groups not organized into states were denied any formal international legal status.[35] In this conception,

[34] For a brief summary of this interwar understanding of "classical international law," see, for example, Georges Scelle, *Règles générales du droit de la paix*, 46 Recueil des Cours de l'Academie du Droit International [hereinafter R.C.A.D.I.] 327, 331–32 (1933).

[35] Fouques-Duparc, quoting Bluntschli, wrote, "'The principle of nationalities only has capital importance in politics, not in public law.' National minorities did not enter into international law because they had no juridical existence. 'Without a State, no nation.'" Jacques Fouques-Duparc, La Protection des minorités de race, de langue, et de religion 8 (1922) (quoting Johann C. Bluntschli, Théorie général de l'Etat 74 (1868) and Droit international codifié (1868)).

only the "state" provided a clear, identifiable reality upon which to ground a truly "scientific"[36] international law. For many interwar writers, the pre-war view of international relations was one of a "fundamentally anarchic interstate society resulting from the competition of innately free, equal, and identical state authorities."[37]

The nineteenth century, however, was also seen as the source of a rival vision that identified a different entity as the proper foundation of international law — the "nation" or "people," understood in a variety of historical, racial, linguistic, and democratic senses.[38] The partisans of the "nation" denied the statist positivists' charge that the concept was "vague and disintegrating";[39] on the contrary, they argued that international law could be firmly established only by granting nationalist claims for cultural and political independence. The underlying assumptions of this "principle of nationalities" lay in that synthesis of Enlightenment and Romantic ideals that has been called "liberal nationalism."[40] A brief review of this theory is necessary for a full understanding of the challenges faced by the writers of the interwar period — for it was precisely their loss of faith in liberal nationalism, as well as in statist positivism, that so complicated their effort to give nationalism a place in the new international law.

Liberal nationalism demanded that national identity replace state power as the fundamental principle of European public order:

[36] *See, e.g.*, Guido Padelletti, *L'Alsace et La Lorraine, et le droit des gens*, 3 R.D.I.L.C. 464 (1871). Padelletti criticizes the "*impuissance*" of the principle of nationalities to resolve international conflicts, *id.* at 478, and the "vague and disintegrating" quality of the plebiscite principle, *id.* at 491. He argues that "international legal science" is going down a "false road . . . when it wants to substitute for the concrete idea of the State . . . and its rights, an idea profoundly rooted in modern juridical consciousness, the other notion, vague and filled with contradictions and misunderstandings, of the nation and the liberty of peoples." *Id.* at 493. Padelletti concludes that "[t]he only really scientific principle on which international law can be solidly established is the principle of the liberty, independence, sovereignty, and, thereby, the responsibility, of the State." *Id.* at 495.

[37] Scelle, *supra* note 34, at 332.

[38] This conception was particularly associated with the Italian school. *See, e.g.*, Enrico Catellani, *Les Maîtres de l'école italienne du droit international au XIXème siècle*, 46 R.C.A.D.I. 705, 709–39 (1933).

[39] Padelletti, *supra* note 36, at 491; *see also* Fouques-Duparc, *supra* note 35, at 7–8 ("It will be necessary, said Thiers, to place the nationalities of Europe before a tribunal of revision! . . . See what a chaos this unhappy Europe will become." (quoting *Discours de Thiers au Corps Législatif* (Mar. 14, 1867)).

[40] *See generally* Carlton J.H. Hayes, The Historical Evolution of Modern Nationalism 120–63 (1931) (discussing liberal nationalism).

> [It] assumed that each nationality should be a political unit under an independent constitutional government which would put an end to despotism, aristocracy, and ecclesiastical influence, and assure to every citizen the broadest practicable exercise of personal liberty, political, economic, religious and educational. . . . [It] assumed, moreover, that each liberal national state in serving its true interests and those of its citizens would be serving the true interests of humanity at large and that "true interests" could best be served by national policies of free-trade, anti-militarism, anti-imperialism, and international co-operation and peace.[41]

The recognition of nationalism was thus the prerequisite to an order marked by peace and liberty.

World War I occasioned both the triumph and decline of liberal nationalism as a basis for international law. Wilson's program for the postwar world depended on the assumption that the principle of nationalities could replace decadent, violent power-politics with simple, pacific, and rational first principles.[42] As one writer stated:

> [T]he Principle of Nationalities . . . claims not only to do without the principles of high diplomacy elaborated for centuries by international law, but also to oppose itself to them as truth to error, as a truth newly revealed to a mass of maleficent errors.[43]

Many interwar lawyers, too, interpreted World War I to signify the need to reject the thesis of the fundamental nature of sovereign units.[44] For these writers, the War taught that international law could only persist in its failure to come to grips with nationalism at apocalyptic cost. As one writer warned, the word "nationality has caused more destruction than powder and gas."[45] Another writer referred to nationalism as one of the "activating forces [*puissances génératrices*]"

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[41] *Id.* at 159; *see also* FOUQUES-DUPARC, *supra* note 35, at 7 (noting that the principle of nationalities was seen in the nineteenth century as a "universal remedy" to all "national problems," and that its implementation would bring peace to Europe).

[42] In *The Fourteen Points*, President Wilson called for the implementation of the principle of nationalities for the establishment of the new frontiers of France, Italy, and the Balkan States, the creation of Poland, and the reorganization of the Ottoman and Hapsburg Empires. *See* Wilson, *supra* note 6, at 537–39.

[43] RENÉ JOHANNET, LE PRINCIPE DES NATIONALITÉS 281 (1925).

[44] For example, one commentator declared:

> To the "anarchy of Sovereignties," an anarchy allowed, indeed, by public law since the formation of modern States and whose most disastrous consequence was the "unlimited right of war," the Covenant of the League of Nations substitutes an international organization which, without abolishing individual sovereignties, limits the exercise of their freedom by justice.

HENRI COURSIER, LE STATUT INTERNATIONAL DU TERRITOIRE DE LA SARRE 5 (1925).

[45] René Johannet, *Préface* to LOUIS LE FUR, RACES, NATIONALITÉS, ÉTATS at iii (1922).

of the War,[46] although he also proclaimed that nationalism was the principle that had "inspired the Peace Treaties."[47]

Here, however, lay the problem: for in viewing nationalism as a potentially destructive "*puissance*," an agent of devastation unleashed by the War, the new international lawyers could not simply propose nationalism as the foundation of a stable legal system. "Peoples and nationalities" were viewed as seething cauldrons of unpredictable forces and passions, rather than as sources of simple and rational first principles. Yet while the new international lawyers agreed with the old opponents of the principle of nationalities about the explosive potential of nationalism, they also agreed with its supporters that nationalism was the key to any international legal order. However, because they were unable to accept the Wilsonian confidence that the new principles could be translated directly into legal form, they could not simply reverse the positivist view that the state must take legal precedence over the nation.

The interwar lawyers who focused on nationalism responded to this challenge by bypassing the dichotomy between statist positivism and liberal nationalism in favor of a simultaneous affirmation of the autonomy of international law and an openness to the vital forces of nationalism. They attempted to rejuvenate law by opening it up to the vital energy of nationalism, while reshaping nationalism by endowing it with legal form; the new international law would thereby be both more vital and more sophisticated than its statist positivist predecessor. Paradoxically, international law would be founded on nationalist "*puissance*" and yet stand in opposition to it. The new law would emerge from novel juxtapositions of the "scientific" and the "vulgar," legal reason and nationalist "*puissance*," drawing its inspiration from both the "peasant" and the "jurist."[48]

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[46] REDSLOB, *supra* note 2, at 36.

[47] *Id.*; *see* Robert Redslob, *The Problem of Nationalities*, 17 TRANSACTIONS OF THE GROTIUS SOCIETY 21, 21 (1932).

[48] A series of debates in the Institut de Droit International concerning the drafting of a "Declaration of the Rights and Duties of Nations" illustrates the nature of the intellectual challenge posed by this new openness towards explosive nationalism, on the one hand, and the development of sophisticated legal innovation, on the other. A debate emerged between those who argued that the Declaration should be "scientifically" formulated, in accordance with its purpose as the embodiment of the most advanced ideas of international legal thought, *see* 1921 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 213 [hereinafter ANNUAIRE] (statement of Nicolas-Socrate Politis), and those who argued that the Declaration was to be a "monument destined to strike the masses" and should therefore avoid technical legal discussions, *see id.* at 205 (statement of Albert de Lapradelle). This debate between "science" and "*vulgarisation*," *id.* at 214 (quoting Alejandro Alvarez), appeared to find resolution in a composite phrase: "In a felicitous formulation, M. Niemeyer explained that the commission should think as a 'jurist', speak as a 'peasant' [*penser en 'jurist', parler en 'paysan'*]." Albert de Lapradelle, *Avant-Projet de Rapport*, 1925 ANNUAIRE 238, 240. This elegant phrase should perhaps be better understood more as fixing the new lawyers' task — that is, thinking through the relationship between the

Viewed in cultural historical context, these new international lawyers constructed and operated within what may be called an international legal "matrix of modernism."[49] As I have argued more fully elsewhere,[50] these interwar writers employed a strategy for the renewal of their discipline that strongly resembled that of their "high modernist"[51] contemporaries in other disciplines. High modernists

new welcome accorded to popular forces and the new emphasis on legal sophistication — than as achieving it.

Article 4 of the draft Declaration drawn up by Prof. de Lapradelle of the University of Paris declared that henceforth war would be illegal except in two cases: "In a society of States, war can only be the sanction, in internal affairs, of the separatist will of a people, in external affairs, of a decision of international justice." Albert de Lapradelle, Declaration des droits et devoirs des nations, art. 4, *in* 1925 ANNUAIRE at 238, 239. The article thus denied states the right to go to war, that most sacred of traditional sovereign prerogatives; it bestowed that prerogative on two new actors on the international scene, the armed force of the international legal community, on the one hand, and that of separatist nationalism, on the other. Article 4 thus epitomized the twofold expansion of international law: "upwards" toward the international community, "downwards" toward the "nation" or "people."

The innovations of the Declaration aroused strong disagreements from traditionalists. One member of the institute denounced them as "dangerous" and "revolutionary," 1921 ANNUAIRE 215; another member objected to the use of the term "nation" as "subjective" in comparison with the determinable and "objective" term "state," *id.* at 211. These two objections reflect concerns with the effect that the Declaration would have on the two milieux into which the new international law would expand — the popular forces embodied in the "peasants" and the sophisticated group of advanced new "jurists." For its critics, the new international law would incite the former to uncontrollable violence, while depriving the latter of any legitimate jurisprudential foundation.

[49] I borrow the term from SANFORD SCHWARTZ, THE MATRIX OF MODERNISM: POUND, ELIOT AND EARLY TWENTIETH-CENTURY THOUGHT (1985).

[50] *See* Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992).

[51] I refer to the distinction between high modernism and the avant-garde as discussed by such writers as Peter Burger and Andreas Huyssen. *See* Jochen Shulte-Sasse, *Foreword* to PETER BURGER, THEORY OF THE AVANT GARDE at vii–xlvii (Michael Shaw trans., 1984); ANDREAS HUYSSEN, AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM 160–77 (1986). Many modernists sought to dismantle the ossified culture of the nineteenth century by drawing on the energy of the so-called "primitive" sources of cultural energy. *See* J.C. Middleton, *The Rise of Primitivism and its Relevance to the Poetry of Expressionism and Dada*, *in* THE DISCONTINUOUS TRADITION 182, 183 (P.F. Ganz ed., 1971) (stating that "[p]rimitivism was an active force in experiments which challenged the venerable view of art" as representation). *See generally* ROBERT GOLDWATER, PRIMITIVISM IN MODERN ART at xxi–xxv (1938) (discussing the role of primitivism as it relates to twentieth-century art). At the same time, high modernists developed new "methods" specific to particular cultural media to create unified cultural masterpieces out of what they viewed as chaotic, newly discovered cultural energies. *See, e.g.*, T.S. ELIOT, *Ulysses, Order, and Myth* (1923), *in* SELECTED PROSE OF T.S. ELIOT 175, 177–78 (Frank Kermode ed., 1975) (discussing the relationship between the disjunctive elements and the unifying structure of Joyce's *Ulysses*). Such new "methods," which "ha[d] the importance of scientific discover[ies]" for the advancement of the cultural medium in question, *id.* at 177, heightened the autonomy of high cultural domains and served to defend high modernists against the charge that they were "prophet[s] of chaos" who were unleashing a "flood

welcomed the revolutionary impulses that were dissolving traditional limits on creativity, yet sought to incorporate those new impulses in sophisticated cultural works that embodied the most advanced techniques of high culture.[52] It is in this sense that the interwar critique of statist positivism may be viewed as an instance of the general "revolt against positivism"[53] that characterized the period from 1890 to 1930.

Thus, on the one hand, the constraints of the stable legal order grounded in sovereignty were rejected in favor of an autonomous, "experimental"[54] exploration of specifically legal international techniques, doctrines, and institutions. On the other hand, the optimistic confidence in the pacific dynamism of the "nation" was replaced with an anxious fascination with nationalism — the latter seen as the turbulent source of passion that was crucial to the revitalization of European public order. Borrowing a term from the cultural history of the early twentieth century, I view the interwar lawyers' attitude to nationalism as marked by a similar mixture of desire and terror that marked other cultural modernists' attitudes toward a host of so-called "primitive" sources of cultural energy.[55]

of Dadaism." *Id.* at 175. Because high modernists viewed the "primitive" as resistant to traditional forms of representation, *see, e.g.*, GOLDWATER, *supra*, at 8; WASSILY KANDINSKY, CONCERNING THE SPIRITUAL IN ART 46–52 (M.T.H. Sadler trans., 1977), the "primitivist" turn could operate in tandem with the desire to simultaneously preserve and revolutionize autonomous, technically sophisticated, high cultural domains. By contrast, the avant-garde, of whom the Dadaists are the best known example, sought to destroy the institutional autonomy of high culture, seeking instead to revolutionize society on the basis of the energy they discovered through advanced creative experience. *See* BURGER, *supra*, at 35–82. Of course, this clear differentiation is of heuristic value only. In the case of any particular cultural movement in the first decades of the twentieth century, one can find both "high modernist" and "avant-garde" elements.

[52] *See, e.g.*, DANIEL-HENRY KAHNWEILER, MES GALÉRIES ET MES PEINTRES: ENTRETIENS AVEC FRANCIS CRÉMIEUX 55–56 (1961) ("There was also this large painting . . . which has since been called 'Les Demoiselles d'Avignon' and which constitutes the point of departure for Cubism. . . . The painting . . . appeared to everyone as something insane or monstrous. . . . [The right half of the canvas] is really the point of departure of a new art.").

[53] HENRY S. HUGHES, CONSCIOUSNESS AND SOCIETY: THE REORIENTATION OF EUROPEAN SOCIAL THOUGHT 1890-1935, at 33–66 (1958).

[54] *See infra* Part IV.

[55] *See* GOLDWATER, *supra* note 51, at xix–xxv; Middleton, *supra* note 51, at 182–83. Of course, the "primitive" should be viewed as a projection of certain characteristic Western fantasies; one should not presume any relationship between European "primitivism" and the cultures upon which it purportedly drew. Indeed, this imaginary quality of modernism's construction of the "primitive" is highlighted by this Article's demonstration that the attitudes found in one domain of high modernist culture — international law — towards *European* nationalism were strikingly similar to other modernists' attitudes towards non-European cultures. For a technical discussion of the relationship between non-European art and Western artists' use of that art as "primitive" inspiration, see GOLDWATER, *supra* note 51, at 250–71.

The new international law would therefore constitute a paradoxical "alliance"[56] of the "experimental" and the "primitive" against the construct that formerly constituted international law's foundation: the state. In the apt words of one commentator, the new international law would be a "double law,"[57] a juxtaposition of a new status for nations and a new autonomy for the international community: "in short, a double restriction for the authority of the state."[58] The paradox of the modernist renewal of international law lay in its assertion of the simultaneous cooperation and opposition between the two poles of this "double" departure. The most acute modernists, in law as elsewhere, did not seek a tepid synthesis or balance of the "primitive" and the "experimental," but rather, viewed the juxtaposition of the two as the key to the strength of cultural works.[59]

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[56] REDSLOB, *supra* note 2, at 35; *see infra* at pp. 1809–11; *cf.* Middleton, *supra* note 51, at 194 ("The alliance of primitivism and abstraction is one of the most copiously documented facts of the [modernist] period . . . .").

[57] JEAN LUCIEN-BRUN, LE PROBLÈME DES MINORITÉS DEVANT LE DROIT INTERNATIONAL 47 (1923).

[58] *Id.*

[59] Bartók, for example, wrote:

> [I]t is a noteworthy fact that artistic perfection can only be achieved by one of the two extremes: on the one hand by peasant folk in the mass, completely devoid of the culture of the town-dweller, on the other by creative power of an individual genius. The creative impulse of anyone who has the misfortune to be born between these two extremes leads only to barren, pointless and misshapen works.

BELA BARTÓK, *The Relation of Folk Song to the Development of the Art Music of our Time*, *in* BELA BARTÓK ESSAYS 320, 322 (Benjamin Suchoff ed., 1976). For Bartók, the two "extremes" pertinent to his work were peasant music and advanced atonal experimentalism, "apparently opposite tendenc[ies]." *Id.* at 323. Yet he advocated their productive juxtaposition in a single work. In works constructed out of such a juxtaposition of the "extremes," "the *opposition of the two tendencies reveals more clearly the individual properties of each*, while the effect of the whole becomes all the more powerful." *Id.* at 324 (emphasis added); *see also* Stephen Bronner & D. Emily Hicks, *Expressionist Painting and the Aesthetic Dimension*, *in* PASSION AND REBELLION: THE EXPRESSIONIST HERITAGE 237, 242 (Stephen Bronner & Douglas Kellner eds., 1983) ("[T]o juxtapose the premodern to the modern . . . itself became a hallmark of 'modernism.'").

The definition of international legal modernism offered here, which focuses on the paradoxical "primitivist/experimentalist" "alliance," departs quite markedly from others' use of the term. *See, e.g.*, RICHARD FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 41–47 (1970) (describing "modernism" as requiring international law to take into account political context); QUINCY WRIGHT, THE STUDY OF INTERNATIONAL RELATIONS 228–34 (1955) (describing "modernism" as combining "Medieval and Renaissance conceptions of natural law with new conceptions of international organization"). I believe that, by situating international legal modernism historically as one version of the general phenomenon of cultural modernism, one arrives at a deeper and more critical understanding of twentieth-century international law and legal theory. For my attempt to reinterpret the work of Hans Kelsen as motivated in part by modernist concerns in the sense given to that term in this Article, see Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 HARV. INT'L L.J. 353, 362–69, 375–79 (1992).

This paradoxical discourse distinguishes the inquiries of writers I discuss here from the concerns of other interwar writers who rejected statist positivism. For example, some theoretical works of the interwar period sought to replace the statist positivist foundation of international law with a foundation that they considered to be indisputably and uniquely "real": the individual. One writer, for example, argued for the demystification of international law in these terms:

> Behind the vain fiction of the State, there is only one real personality: that of the individual. . . .
>
> If the State is a pure abstraction, the international community, as it has been conceived hitherto, . . . is an even greater abstraction: an immense sum of fictions.[60]

This passage would replace the "metaphysical"[61] conception of the sovereign state with a functional definition: "those who are invested with the powers necessary for managing collective interests."[62] This writer would "reconstruct[] international law"[63] by taking the "one real personality," the individual, as its basis, and by viewing relations between individuals as its chief concern.

The texts I discuss below, however, were not seeking a "real" basis of international law that would replace the state as its ultimate foundational principle. If they had been, they would have focused on questions such as: should the nation be considered one more "fiction" that should be debunked in favor of the "one reality," the individual? Or, should the nation be viewed as the "reality" that should replace the "vain fiction" of the state? These texts are not concerned with providing definitive answers to such questions. Rather, the "nation" appears in the interwar writing I will analyze here as an intermediate category, between the fictional and the real, between state and individual: enigmatic, composite, transitional, and demanding interpretation. To be sure, in responding to the demands of this crucial enigma, interwar interpreters sought to assign to it a determinate role in the system. A close analysis of their texts shows, however, that each such determination remained provisional, due to the ambivalence of the interwar conception of the nation.[64] Texts that took the de-

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[60] Nicolas-Socrate Politis, *Le Problème des limitations de la souveraineté et de la théorie de l'abus des droits dans les rapports internationaux*, 6 R.C.A.D.I. 1, 6 (1925).

[61] *Id.*

[62] *Id.*

[63] *Id.* at 5–6.

[64] An unusually systematic response to this conundrum was offered by one commentator who sought to comprehend both the state and national minority groups in terms of the civil law concept of "moral personality": "this being which, though existing only in human thought, is not a fiction, but only an abstraction, as real as the existence of a point on a line." LUCIEN-BRUN, *supra* note 57, at 105. This theory would place the state, the minority groups, and

mands of this enigma as their preeminent concern had to dispense with any "real" foundation for international law; they created a way of discussing international law's relationship to its most rudimentary elements that was different from the relationship of a high-cultural construct to an axiomatic and "real" "basis."

This Article's method, a close analysis of a set of interwar texts, grows out of the paradoxical nature of modernist discourse and the dynamic principle inspiring it. A simple statement of the structure of modernist discourse, such as the one just offered, necessarily fails to do justice to it. The "double" move against statist positivism should not be understood as a logical thesis but as a paradoxical cultural construct that took a variety of forms in different texts. The various arguments — whether for the system as a whole or for different elements within the system — stressed this "double" movement in different ways. Moreover, although all the writers I discuss displaced the nation/state dichotomy by the modernist "alliance," they did not always maintain this displacement throughout their writings on international law. Rather, they sometimes persisted with more traditional discussions in the same or other texts. The ways in which autonomous law and "primitive" nationalism may be viewed as both opposed and yet crucial to one another can thus emerge only through close critical readings of particular texts.