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The Acquisition of Africa (1870–1914)

The Nature of International Law

By

Mieke van der Linden



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Preface

This rational idea of a *peaceful*, even if not friendly, thoroughgoing community of all nations on the earth that can come into relations affecting one another is not a philanthropic (ethical) principle but a principle *having to do with rights*. Nature has enclosed them all together within determinate limits (by the spherical shape of the place they live in, a *globus terraqueus*) [Globe of earth and water]. And since possession of the land, on which an inhabitant of the earth can live, can be thought only as possession of a part of a determinate whole, and so as possession of that to which each of them originally has a right, it follows that all nations stand *originally* in a community of land, though not of *rightful* community of possession (*communio*) and so of use of it, or of property in it; instead they stand in a community of possible physical *interaction* (*commercium*), that is, in a thoroughgoing relation of each to all the others of *offering to engage in commerce* with any other, and each has a right to make this attempt without the other being authorized to behave toward it as an enemy because it has made this attempt. – This right, since it has to do with the possible union of all nations with a view to certain universal laws for their possible commerce, can be called *cosmopolitan right* (*ius cosmopolitanicum*).¹

IMMANUEL KANT, 1797

Just as in international law the land-appropriating state could treat the public property (*imperium*) of appropriated colonial territory as leaderless, so it could treat private property (*dominium*) as leaderless. It could ignore native property rights and declare itself to be the sole owner of the land; it could appropriate indigenous chieftains' rights and could do so whether or not that was a true legal succession; it could create private government property, while continuing to recognize certain native use rights; it could initiate public trustee-ownership of the state; and it also could allow native use rights to remain unchanged, and could rule over indigenous peoples through a kind of *dominium eminens* [...].²

CARL SCHMITT, 1950

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- 1 I. Kant, *The Metaphysics of Morals* (ed. and trans. by M. Gregor), Cambridge, 2011, 121.
 - 2 C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (translated and annotated by G.L. Ulmen), New York, 2006, 199. For the German, see C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 2nd ed. Berlin, 1997.

In 1796, the British poet, painter and printmaker William Blake (1757–1827) drew the famous allegory of colonialism named ‘Europe supported by Africa and America.’ The three continents are represented by women, symbolizing the femininity and, thus, the fertility of the soil forming, together with extensive surfaces of water, the globe. Land was depicted as a vital element for human kind. Europe is in the centre of the painting and is decorated with pearls; she is white and beautiful, but indifferent. In contrast, Africa and America wear bracelets on the upper arm – a sign of subjection – and are coloured and servile, but intelligent and caring. Although the three continents are clearly separated and have different hierarchical places, they are all part of one and the same globe – as metaphorically showed by the rope which every continent holds in the hand. This painting together with the fragments from the works of Immanuel Kant (1724–1804) and Carl Schmitt (1888–1985) made me question the justification of colonialism and imperialism, and write this book.

Since the sixteenth century, colonialism and imperialism have led to a confrontation between European and non-European nations. The allegory drawn by Blake shows the liberal view on colonialism, which emphasizes the hierarchy between nations with the Europeans and their norms and values on top of the pyramid. European civilization was exemplary of how the world had to be conceived and organized and would bring order and wealth to every nation. The Europeans were inclined to impose their norms and values and their interpretation of law and order on non-European nations. This resulted in a divided view of the world.

With regard to the constitution of cosmopolitan right in combination with colonialism, Kant addresses the rights which a civilian of the world, a cosmopolitan, has. Under this cosmopolitan right, Kant distinguishes the right to visit and the right to hospitality. Everyone who arrives on foreign territory has

Schmitt contextualizes his argumentation in a preceding passage: ‘A completely different problem from land-appropriation, which proceeded inside Europe in the form of changes in the political sphere regarding a state are with a common legal order of property and economy, was land-appropriation of free colonial soil outside Europe. This soil was free to be occupied, as long as it did not belong to a state in the sense of internal European interstate law. The power of indigenous chieftains over completely uncivilized peoples was not considered to be in the public sphere; native use of the soil was not considered to be private property. One could not speak logically of a legal succession in an *imperium*, not even when a European land-appropriator had concluded treaties with indigenous princes or chieftains and, for whatever motives, considered them to be binding. [...] The land-appropriating state did not need to respect any rights to the soil existing within the appropriated land, unless these rights somehow were connected with the private property of a member of a civilized state belonging to the order of interstate, international law.’ *Ibid.*, 198–199.

the right to visit and has a right to non-hostile behaviour: 'He [the stranger] must not be treated with hostility, so long as he behaves in a peaceable manner in the place he happens to be in.'³ In his later work of 1797, Kant elaborates on this right to hospitality, which has strong parallels to Vitoria's conception of natural law.⁴ As a matter of fact, his right of hospitality can be considered as a right of communication, in which voluntary contact between peoples is the core instance. Cosmopolitan right⁵ rules the relation between States and other nations and between nations themselves and the principle of universal hospitality⁶ motivates these relations, in the context of the spherical world with its limited surface. As a matter of fact, the right to hospitality forms the boundary of colonialism. But where does hospitality stop and does colonialism begin? What are the limits to respect and toleration and which rights and duties are involved in the confrontation between nations? Or, was, according to Schmitt, might right? Were colonialism and imperialism per definition (not) justified? These are the questions with which I was occupied before writing this book. Although I answered the justification question regarding the European civilization mission only in legal terms, I had to involve the political, economic, social and cultural context of colonialism and imperialism – like a legal historian should.

This book is based on a Ph.D-dissertation in law, which was defended at Tilburg University in November 2014. I am grateful to my supervisors, Professor Randall Lesaffer and Professor Willem van Genugten, who guided me on the way to completion of my Ph.D-trajectory.

At this place, I would also like to express my profound gratitude to the directors of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Professor Armin von Bogdandy and, in particular, Professor Anne Peters. Without the Institute's financial support, the English editing of the book had not been possible. As regards my employment in Heidelberg, particular thanks must go to all staff members and visiting fellows of the

3 I. Kant, 'Perpetual Peace: A Philosophical Sketch,' in: H.S. Reiss (ed.), *Kant: Political Writings* (trans. by H.B. Nisbet), Cambridge, 1991, p. 106.

4 F. de Vitoria, *De Indis et de Iure Belli Relectiones* (edited by Ernest Nys and translated by John Pawley Bate), Washington, 1917.

5 'This rational idea of a *peaceful*, even if not friendly, thoroughgoing community of all nations on the earth that can come into relations affecting one another is not a philanthropic (ethical) principle but a principle *having to do with rights*.' I. Kant, *The Metaphysics of Morals* (ed. and trans. by M. Gregor), Cambridge, 2011, p. 121.

6 For a current account of the right to hospitality, see G. Cavallar, *The Rights of Strangers. Theories of International Hospitality*, Aldershot/Burlington, 2002.

Institute whose presence and friendship was invaluable throughout the process of writing.

My sincere admiration goes to Dick Broeren for his meticulous linguistic revision of the draft manuscript.

I am particularly grateful to my sister, Janneke van der Linden, who carefully created the illustration on the cover, which incorporates the main message of the book.

Of course, all the errors and mistakes remain my own. I have attempted to render this study up to date as far as 29 February 2016. This inevitably implies that important later developments could not be covered.

Finally, I would like to thank the publishers for their confidence, patience and impressive spirit of cooperation. I am indebted to the anonymous readers who reviewed my draft manuscript for Brill/Martinus Nijhoff Publishers; their valuable comments and suggestions, which I have largely followed, helped to improve the book. I am particularly grateful to Jennifer Obdam and her team for preparing this publication in their well-known efficient and professional way.

Heidelberg, March 2016

New Imperialism: *Imperium, Dominium* and Responsibility under International Law

1 Introduction

The responsibility of European powers for their past actions as colonizers has not wanted for scholarly attention. The present book contributes to this lively debate by exploring that responsibility under international law. Assuming such responsibility presupposes the violation of international law as it stood at the time of colonization. In the ‘Scramble for Africa’¹ (1870–1914) during the age of New Imperialism, European States and non-State actors mainly used cession and protectorate treaties to acquire territorial sovereignty (*imperium*) and property rights over land (*dominium*). A key question raised in this book is whether in doing so these European parties did or did not systematically violate these treaties. If they did, the question arises whether this violation offers a legal basis to hold former colonizing powers responsible under contemporary international law. To answer these questions, three case studies will be performed. These concern the colonization of Nigeria by Great Britain, of Equatorial Africa by France and of Cameroon by Germany. Performing these case studies essentially entails examining treaty-making practices of European colonial powers and African rulers, and the aim of this inquiry is twofold: to reveal the legal dimensions of colonialism and to explore grounds that could give rise to responsibility for violation of the law during the colonization of Africa.

1 ‘Historians called the period of sudden changes in the political map of Africa in the last two decades of the nineteenth century the period of “the scramble for African territory,” characterized, as it was, by a rapidity of transfer of power of dimensions unprecedented in the history of mankind.’ C.H. Alexandrowicz, ‘The Role of Treaties in the European-African Confrontation in the Nineteenth Century,’ in: A.K. Mensah-Brown (ed.), *African International Legal History* (New York: UNITAR, 1975), 28. The ‘Scramble for Africa’ is the popular word combination to describe the acquisition and partition of Africa. Thomas Pakenham wrote his notorious book *The Scramble for Africa* (1991), giving a historical description of the European colonial venture in Africa. T. Pakenham, *The Scramble for Africa*, new edn (London: Abacus, 2009). For a 19th-century account of the partition, see J.S. Keltie, *The Partition of Africa* (London: Edward Stanford, 1895). The French jurist Henri Brunschwig pointed at the difference in meaning between the English ‘scramble’ and the French ‘course au clocher.’ See H. Brunschwig, ‘Scramble’ et ‘Course au Clocher,’ *Journal of African History*, 12 (1971), 140–141.

This introductory chapter sets the scene by covering preliminary matters. It first provides a brief overview of the temporal and spatial dimensions of New Imperialism (§2). Second, it positions this book in the existing international legal discourse (§3). Third, it explores the central role of the concepts of sovereignty and property (§4). It then addresses the relevance of the book's topic both to legal research and to a broader social context (§5). It then moves on to perform three cases studies and it describes the methodology used (§6). The final section offers an overview of the topics of the remaining chapters (§7).

2 New Imperialism

Imperialism, defined generally in the context of this book, concerns the relationship between certain European powers and the lands and peoples they subjugated. In the words of Benjamin Cohen, imperialism is 'any relationship of effective domination or control, political or economic, direct or indirect, of one nation over another.'² This relationship is often referred to in terms of centre-periphery dualism, or the dichotomy of two worlds, namely, the civilized against the uncivilized. It is here that the difference between the notions of imperialism and colonialism appears. Imperialism as the relationship, whether direct or indirect, of superiority, domination or control of one nation over another is mainly driven by political and/or economic considerations. It represents the hierarchical relationship between two nations, encompassing the way one nation exercises power over another, whether through settlement, sovereignty, or indirect mechanisms of control. More abstractly, 'imperialism is a system that splits up collectives and relates some of the parts to each other in relations of *harmony of interest*, and other parts in relations of *disharmony of interest*, or *conflict of interest*.'³ In the second half of the nineteenth century, the notion of imperialism came to be used in a more specific, economic sense, namely, the 'spread and expansion of industrial and commercial capitalism.'⁴ Another definition of imperialism, that of Jürgen Osterhammel, draws a clear line between imperialism and colonialism:

2 B. Cohen, *The Question of Imperialism: The Political Economy of Dominance and Dependence* (London: Macmillan, 1974), 16.

3 J. Galtung, 'A Structural Theory of Imperialism,' *Journal of Peace Research*, 8 (1971), 81.

4 J.T. Gathii, 'Imperialism, Colonialism, and International Law,' *Buffalo Law Review*, 54 (2007), 1013–1014.

Imperialism presupposes the will and the ability of an imperial center to *define* as imperial its own national interests and enforce them worldwide in the anarchy of the international system. Imperialism implies not only *colonial* politics but *international* politics for which colonies are not just ends in themselves, but also pawns in global power games.⁵

Under this definition, colonialism is merely one element of imperialism. Imperialism involves the political and economic superiority, domination or control of one nation over another. Colonialism refers not so much to the relationship between two *nations* as it does to the relationship between a subjugating nation and subjugated *territory*. A key feature of colonialism is the expatriation of citizens of the subjugating nation to the subjugated territory, where these expatriates live as permanent settlers while maintaining political allegiance to their country of origin. More narrowly, in the words of James Thuo Gathii, colonialism signifies the ‘territorial annexation and occupation of non-European territories by European states.’⁶ At the end of the nineteenth century, the colonial venture involved encounters between two sides: native individuals and tribes were pitched against representatives of European States, private individuals, missionaries and trading companies. Although the concepts of imperialism and colonialism do somewhat diverge in meaning, they are sufficiently similar for the purposes of this book to be used synonymously as the direct or indirect domination or control of one nation over another and its territory, mainly motivated by political and/or economic considerations.

In the age of New Imperialism, Africa was one of the main arenas in which the European powers competed for colonial expansion. Even before 1870, European merchants had traded on the coasts of Africa, and European presence in Sub-Saharan Africa goes back to the end of the fifteenth century, when the Portuguese had first set foot ashore. But until the second half of the nineteenth century, the Europeans had mainly settled on African coasts and the African interior had largely been spared European involvement. The British historian George Sanderson gives a clear picture of Africa before 1870: ‘Until the 1870s, “Africa as a whole” had been a purely geographical concept, of no practical relevance to the European politicians and merchants concerned with the continent. Much of Africa still remained what it had been to the first Europeans who circumnavigated it: a series of “coasts” [...] surrounding a vast enigmatic

5 J. Osterhammel, *Colonialism: A Theoretical Overview*, transl. S.L. Frisch (Princeton: Wiener, 1997), 21.

6 Gathii, ‘Imperialism,’ 1014.

blank.⁷ In the second half of the nineteenth century, however, Europe turned its attention to the African interior.

In the scramble for Africa several European powers aspired and competed to seize territory. These included Italy and Spain, but the main actors in this competition were Belgium, France, Germany, Great Britain and Portugal. Their motives were manifold: economic exploitation, protection of European national interests and the imposition of what were considered to be superior Western values. One result of this frenzied rivalry was that in the age of New Imperialism, European powers added almost thirty million square kilometres of African land, approximately twenty percent of world's land mass, to their overseas colonial empires.⁸ The European race for African territory gathered pace after the Conference of Berlin (1884–1885), which triggered a series of events that had a huge impact on the partition of Africa.⁹ Border lines were drawn, territory was divided and whole peoples were uprooted split up and assimilated into European civilization. Each European power had its own means and strategies to realize its targets on the African continent. In many cases, the arrival of the Europeans did not start off with conquest and subordination, but rather with commercial interactions with the native populations and their rulers, based on equality or even on a subordinate position of the Europeans.¹⁰ What ultimately distinguishes New Imperialism from the former period of European colonization are the dominant sentiments of nationalism and protectionism and the ensuing atmosphere of competition in Europe. This amalgam resulted in the scramble for Africa, in which an entire continent was brought under the rule of the European colonizing powers: territorial occupation expanded from

7 G.N. Sanderson, 'The European partition of Africa: Origins and dynamics,' in: J.D. Fage and R. Oliver (eds.), *The Cambridge History of Africa*, vol. vi (Cambridge University Press, 2008), 99. See also R.A. Butlin, *Geographies of Empire. European Empires and Colonies c. 1880–1960* (Cambridge University Press, 2009).

8 For a chronological overview of colonization between 1870 and 1912, see Pakenham, *Scramble of Africa*, 681–694. See also P.K. O'Brien, *Atlas of World History* (Oxford University Press, 1999).

9 See A.A. Boahen, 'Colonialism in Africa: its impact and significance,' in: A.A. Boahen (ed.), *General History of Africa*, vol. vii (London, Paris, Berkeley: Heinemann Educational Books, UNESCO, University of California Press, 1985), 789.

10 J. Fisch, 'Law as a Means and as an End: Some Remarks on the Function of European and non-European Law in the Process of European Expansion,' in: W.J. Mommsen and J.A. De Moor (eds.), *European Expansion and Law* (New York: Berg, 1992), 20. See also R.C.H. Lesaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription,' *European Journal of International Law*, 16 (2005), 25–58 and H.M. Wright (ed.), *The "New Imperialism": Analysis of Late Nineteenth-Century Expansion* (Boston: Heath and Co., 1961).

settlements and trade posts on the coast to the hinterland, the interior of Africa. From an international law perspective, this raises the question of how the legal entitlement to territory was acquired. As is well established in historical and international law literature, by far the most frequently used mode to acquire title to African territory was through the conclusion of treaties.

Between 1880 and 1914 the whole of Africa was divided between rival European powers, leaving only Liberia and Ethiopia independent of foreign rule.¹¹ The speed of the process was unprecedented: most of Africa's landmass and most of its peoples were parcelled out in about ten years after 1880. Although the contest for title to territory had been in full swing before the Conference of Berlin,¹² the Conference is often considered to have acted as a catalyst for the fierce rivalry over African territory. As Malcolm Shaw observes, '[t]he Berlin Conference can be seen as a turning-point in European-African relations. Although the conference did not itself partition Africa, it did involve an institutionalisation of the process of acquiring territory in the African continent.'¹³ Among other legal scholars, Makau wa Mutua is not convinced of the constitutive value of the Conference in the sense of affecting the factual situation. He notes that the Berlin Conference 'only retroactively "ratified" and allocated existing "spheres of influence," and was 'in effect an attempt to seek legal shelter for an illegality already committed.'¹⁴ For Mutua then, the true significance of the Conference is that it concealed the illegal nature of the European colonial venture in Africa. At its close, namely, the Conference accepted a Final Act which in Articles 34 and 35¹⁵ laid down the central provisions on acquisition of territory.

11 For an elaborate historical description of the 'Scramble for Africa,' see J.D. Fage and R. Oliver (eds.), *The Cambridge History of Africa*, vol. vi (Cambridge University Press, 1985) and A.D. Roberts (ed.), *The Cambridge History of Africa*, vol. vii (Cambridge University Press, 1986).

12 For a detailed report on the Conference of Berlin, see S. Förster, W.J. Mommsen and R.E. Robinson (eds.), *Bismarck, Europe, and Africa* (Oxford University Press, 1988). For an assessment of the Berlin Conference, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002), 121–127.

13 M.N. Shaw, 'The Acquisition of Title in Nineteenth Century Africa: Some Thoughts,' in: P.-M. Dupuy, B. Fassbender, M.N. Shaw and K.-P. Sommermann (eds.), *Common Values in International Law. Essays in Honour of Christian Tomuschat* (Kehl: Engel, 2006), 1037.

14 M. wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry,' *Michigan Journal of International Law*, 16 (1994–1995), 1130.

15 Article 34 stated that '[a]ny power which henceforth takes possession of a tract of land on the coasts of the African Continent outside its present possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof addressed to the other Signatory Powers of the present Act, in

Otto von Bismarck (1815–1898), Chancellor of Germany between 1870 and 1890, opened the Conference, in which fourteen States participated,¹⁶ on 15 November 1884. The Conference had not been convened to discuss claims on the sovereignty of the African continent, nor to divide it. Rather, the ostensible primary purpose¹⁷ of the Conference was to find a solution for the brutal subjugation of the Congo and to open up Africa for free trade through European co-operation and harmony.¹⁸ The original conference agenda had not included the introduction of rules for new territorial acquisitions and the discussion of existing agreements and control of the African interior. However, the regulation of the acquisition of African territory turned out to be the critical issue, prompted, initially, by economic interests, because rules had to be formulated to secure and stabilize commercial activities. As none had been invited, no African rulers attended the Conference, but their absence did not prevent the participating States from specifying, in Article 6 of the Final Act, how European civilization would be to the Africans' advantage.

The Final Act stipulated that a State occupying a new territory¹⁹ or establishing a protectorate had to give notice to the other contracting parties and had to make sure that the new territory or protectorate was under 'effective occupation, authority, control, or rule.'²⁰ Although the Final Act, which had been negotiated during the plenary conference sessions, seemed inconclusive and cautious, much had happened behind the scenes in the corridors of the conference. These informal talks outside the conference room heightened tensions between the European colonial powers and increased their sense of urgency

order to enable them, if need be, to make good any claims of their own.' Further, article 35 stated that '[t]he Signatory Powers of the present Act recognize the obligation to ensure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon.'

16 The participating States were Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Portugal, Russia, Spain and Sweden.

17 The Conference had three official claims: the organization of freedom of navigation in the Congo and Niger rivers, the guarantee of freedom of trade in the Congo basin and mouth, and agreeing over the rules concerning the acquisition of new territory. Koskenniemi, *Gentle Civilizer*, 123. See also S.E. Crowe, *The Berlin West African Conference 1884–1885* (London: Longmans, Green and Co., 1942).

18 H.L. Wesseling, *Verdeel en Heers. De Deling van Afrika, 1880–1914* (Amsterdam: Bert Bakker, 2007), 152. For the English version, see H.L. Wesseling, *The European Colonial Empires 1815–1919* (Harlow: Pearson-Longman, 2004).

19 Strictly speaking, the Final Act only ruled the acquisition of new territories on the coast. See Article 34 of the Final Act.

20 Wesseling, *Verdeel en Heers*, 152.

to gain territory. When State officials met at the Conference, the scramble for possession and title was already underway, although it had not yet reached the interior of Africa. But that would prove to be only a matter of time. The occupation and subjection of African territory by European States, based mainly on protectorate treaties with native rulers, was to be completed soon after the Berlin Conference ended.

3 New Imperialism in International Legal Discourse

The central theme of this book is the legality of New Imperialism, more specifically of the colonization of Africa under international law. Although there is a wealth of academic literature on the history of international law,²¹ little of it engages the legal dimensions and implications of colonialism in general, and of Africa's colonization in particular. Moreover, when international legal scholars do address colonialism, their discussions mostly culminate in moral and political claims.²² There are, however, exceptions. In his *Imperialism, Sovereignty and the Making of International Law* (2005), Antony Anghie presents a comprehensive analysis of the legal nature of colonialism and its impact on international law.²³ He argues that colonialism was central to the constitution of international law, because 'many of the basic doctrines of international law – including, most importantly, sovereignty – were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in their colonial confrontation.'²⁴ Anghie appraises the relationship between international law and colonialism through the lens

21 For an extensive overview of the academic debate, see Koskenniemi, *Gentle Civilizer*.

22 On this problem, see M. Koskenniemi, 'Why History of International Law Today?' *Rechtsgeschichte*, 4 (2004), 65.

23 He is considered to be one of the scholars within the school of Third World Approaches on International Law (TWAIL). See M. wa Mutua, 'What is TWAIL?' *American Society of International Law Proceedings*, 94 (2000), 31. See also A. Anghie, 'What is TWAIL: Comment,' *American Society of International Law Proceedings*, 94 (2000), 39–40; J.T. Gathii, 'Africa,' in: B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 407–428 and O.C. Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective,' *Osgoode Hall Law Journal*, 43 (2005), 171–191.

24 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005), 3. For a more recent version and application to a concrete situation of his argument, see A. Anghie, 'On Critique and the Other,' in: A. Orford (ed.), *International Law and Its Others* (Cambridge University Press, 2006), 389–400. See also A. Anghie,

of the civilizing mission, which he defines as ‘the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe.’²⁵ He continues his argument by stating that international law is based on this division between the civilized and uncivilized world, a division he terms ‘cultural difference.’²⁶ According to Anghie, colonialism in the sense of this cultural difference was constitutive of the development of international law and still persists in current international legal discourse: ‘Colonialism, then, far from being peripheral to the discipline of international law, is central to its formation. It was only because of colonialism that international law became universal; and the dynamic of difference, the civilising mission, that produced this result, continues into the present.’²⁷ Anghie is right in arguing that colonialism, more specifically New Imperialism, had a constitutive influence on international law and its development in the twentieth century. The theoretical framework and fundamental concepts of international law – such as sovereignty, self-determination and humanitarian intervention – have indeed been shaped by this practice of territorial expansion.

Anghie offers a further argument. He asserts that universal international law did not just come into being because it was imposed by Europeans: it also sprang from the confrontation with nations living in the peripheral part of the world.²⁸ According to Anghie, cultural difference was and is a catalyst in the development of doctrines of international law, in particular doctrinal views on sovereignty. Anghie argues that sovereignty in the European sense of the notion was developed and adapted in the course of the collision of European States with non-European political entities: ‘[S]overeignty was improvised out of the colonial encounter, and adopted unique forms which differed from and destabilized notions of European sovereignty. As a consequence, Third World

‘Europe and International Law’s Colonial Present,’ *Baltic Yearbook of International Law*, 6 (2006), 79–84.

25 Anghie, *Imperialism*, 3.

26 *Ibid.*

27 A. Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities,’ *Third World Quarterly*, 27 (2006), 742. See also A.G. Forji, ‘International Law, the Civilizing Mission and the Ambivalence of Development in Africa: Conceptual Underpinnings,’ *Journal of African and International Law*, 6 (2013), 191–225.

28 Anghie defines his ‘dynamic of difference’ as ‘the endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society.’ Anghie, *Imperialism*, 4.

sovereignty is distinctive, and rendered uniquely vulnerable and dependent by international law.²⁹ The universalization of international law was indeed not a one-dimensional occurrence: the nature and features of international law were also influenced and shaped by the confrontation between the European and non-European worlds. In sum, the European colonial venture in the age of New Imperialism both imposed and created international law.³⁰

However, this doctrinal approach to international law is only one side of the story. The complementary and constitutive role of international legal *practice* – i.e., international law on the ground or international law in action – is quite substantial too. In disregarding the practical use of international law, the work of many legal scholars remains Euro-centric and implicitly upholds a traditional concept of sovereignty. This Euro-centrism originated in nineteenth-century international legal doctrine, was adopted by legal scholars writing on international law at the time, and echoes in present-day scholarship. Such contemporary international legal scholars as Matthew Craven,³¹ James Crawford,³² Wilhelm Grewe,³³ Marcelo Kohen,³⁴ Martti Koskenniemi,³⁵ and Malcolm N. Shaw³⁶ base their arguments first and foremost on doctrine, and they do not pay much attention to international legal practice. As these and other authors mainly read nineteenth-century international legal doctrine, which is almost exclusively Western in orientation, they implicitly perpetuate the older dualist

29 *Ibid.*, 6.

30 Arnulf Becker Lorca argues that nineteenth-century international law has not been imposed on the non-European world, but has been appropriated and developed by jurists from these areas. A. Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation,' *Harvard International Law Journal*, 51 (2010), 475–552.

31 M. Craven, 'The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law,' in: L. Nuzzo and M. Vec (eds.), *Constructing International Law. The Birth of a Discipline* (Frankfurt am Main: Klostermann, 2012), 363–402 and M. Craven, 'Colonialism and Domination,' in: B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 862–889.

32 J. Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) and J. Crawford, *The Creation of States in International Law* (Oxford University Press, 2006).

33 W.G. Grewe, *The Epochs of International Law* (Berlin, New York: De Gruyter, 2000).

34 M.G. Kohen, *Possession contestée et souveraineté territoriale* (Paris: Presses Universitaires de France, 1997).

35 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Co., 1989) and Koskenniemi, *Gentle Civilizer*.

36 M.N. Shaw, *Title to Territory in Africa* (Oxford: Clarendon Press, 1986); M.N. Shaw (ed.), *Title to Territory* (Aldershot: Ashgate Dartmouth, 2005) and M.N. Shaw, *International Law*, 6th edn (Cambridge University Press, 2008).

understanding of the international legal order. Although they explicitly address Euro-centrism and even suggest correctives to it, they do so in an unsatisfactory manner. Moreover, its implied Euro-centrism goes hand in hand with ‘legal exotism,’³⁷ which can be defined as construing a non-European legal world using European rhetoric. While discussing European colonization within the international legal framework, the authors referred to (and others) generally pay scant attention to a non-European perspective on colonization. They maintain a dualistic approach to international law in, for example, separating the European from the non-European, the civilized from the uncivilized, and positivism from natural law. On the one hand, much modern-day literature on the history of international law implies or assumes that there was a civilized world in which the interactions between the members of the family of civilized nations were regulated by international law. In later nineteenth-century doctrine this family was not only considered to comprise the nations of Europe and (Northern) America, but also the – by that time – civilized territories of the Ottoman Empire, Japan, China, Siam and Persia. On the other hand, beyond these boundaries there was an uncivilized world where a legal order was thought to be lacking and where international law was allegedly not applied. As will be argued, this construed dichotomy of the civilized versus uncivilized world mainly existed in international legal doctrine and less so in legal practice.

The role of Euro-centrism in present-day international law has been recognized by the twentieth-century Dutch jurist Jan Verzijl: ‘Now there is one truth that is not open to denial or even to doubt, namely, that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin.’³⁸ Koskenniemi defines this Euro-centric nature of international law as follows: ‘European stories, myths and metaphors continue to set the conditions for understanding international law’s past as it does for outlining its futures. [...] Europe served as the origin, engine and *telos* of historical knowledge.’³⁹ International legal doctrine, then, is founded on the idea of a

37 See T. Ruskola, *Legal Orientalism. China, the United States, and Modern Law* (Cambridge, Mass.: Harvard University Press, 2013).

38 J.H.W. Verzijl, *International Law in Historical Perspective* (Leyden: Sijthoff, 1968), 435–436.

39 M. Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism,’ *Rechtsgeschichte*, 19 (2011), 155 and 158. Wilhelm Grewe argued that the universalization of European international law started already before the end of the nineteenth century: W.G. Grewe, ‘Vom europäischen zum universellen Völkerrecht. Zur Frage der Revision des

self-contained and superior Europe. To this very day, the scramble for Africa is commonly accepted as being in accordance with international law as it stood at the end of the nineteenth century. The common view is that the scramble was morally objectionable but legally sound.⁴⁰

Similarly, international legal scholars have mostly not probed the historical context in which New Imperialism unfolded and in which international law was applied and developed, and this makes their theory vulnerable to anachronisms. In the reality of nineteenth-century international law, the perceived division between civilized and uncivilized worlds was not a clear-cut one, and there is even firm evidence that it was entirely absent. The non-European world was not a legal vacuum and international law was applied there for pragmatic reasons. This is evident from treaties having been negotiated and concluded between European and non-European nations throughout many centuries of colonization, in particular during the last three decades of the 1800s. These mutual relationships, in which respect for the rights and properties of all contracting parties was often explicitly expressed, were based on and governed by the same international law regime that was in force in the civilized, European world. These treaties mostly covered economic issues and they benefited all contracting parties. Moreover, the African populations, which were represented by their rulers during the negotiations, were considered political entities. In practice, the native rulers had the power to cede sovereign rights over their territories and that power conferred 'sovereign' rights on them, as, according to a general principle of law, *'nemo plus iuris (ad alium) transferre potest quam*

"europazentrischen" Bildes des Völkerrechtsgeschichte,' *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 42 (1982), 449–479. Some legal scholars state that this 'discursive process of simultaneous inclusion and exclusion' was a phenomenon already present long before the seventeenth-century emergence of modern international law. See S.N. Grovogui, *Sovereigns, Quasi Sovereigns, and Africans. Race and Self-Determination in International Law* (Minneapolis, London: University of Minnesota Press, 1996), 65. For a detailed reading on the Euro-centric character of international law, see R.P. Anand, *New States and International Law* (New Delhi: Vikas Publishing House, 1972), 8–11; A. Becker Lorca, 'Eurocentrism in the History of International Law,' in: B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 1034–1057; S.N. Grovogui, *Beyond Eurocentrism and Anarchy. Memories of International Order and Institutions* (New York: Palgrave Macmillan, 2006); Y. Onuma, 'Appendix: Eurocentrism in the History of International Law,' in: Y. Onuma (ed.), *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 371–386 and B. Rajagopal, *International Law from Below* (Cambridge University Press, 2013), Chapters 1 and 2.

40 See Grovogui, *Beyond Eurocentrism and Anarchy*, 39.

ipse habet (no one can transfer more rights (to another) than he himself has). This example shows that the historical context of New Imperialism is vital to evaluating the position and role of international law, but until recently, international legal doctrine hardly paid any attention to this factual background of international law.

Euro-centrism and only a moderate historical awareness characterize the academic debate on colonialism and international law. Moreover, as international legal scholars tend to think within the framework of nineteenth-century legal doctrine, they are generally not given to assessing it. This is particularly clear in the conception and understanding of the territorial State. One of the constitutive requirements for statehood, the possession of territory, is a product of nineteenth-century international legal doctrine. On the basis of this premise, African political entities were denied statehood. As a result, African polities not being considered territorial States, they did not possess sovereignty in the eyes of the colonizing States. And because political bodies in Africa were not recognized as sovereign States, they were excluded from membership of the family of civilized nations. International legal doctrine – past and present – accepts this as a given. However, treaty-making practices between Europeans and Africans show that these presumptions are tenuous. Until fairly recently, legal personality was denied to African political entities,⁴¹ even though this has been a key issue in international legal doctrine.⁴² However, this problem of legal personality was a non-issue in international legal practice, where international law *did* apply to African political entities. By upholding traditional European conceptualizations of this type, international legal doctrine is bound to a Euro-centric perspective, uses a limited and arbitrary vocabulary, and is caught in a nineteenth-century paradigm.

The overall objection to be raised to the work of past and present international legal scholarship is that in general its scope is too narrowly restricted to international legal doctrine. This means that its elaborate arguments are out of touch with reality. This scholarship tends to disregard the historical context in which international law played a determinative role in the day-to-day lives of people inhabiting colonized territories. The abstract⁴³ and theoretical elements of late nineteenth-century international law are remarkably

41 See C.H. Alexandrowicz, 'Doctrinal Aspects of the Universality of the Law of Nations,' *British Yearbook of International Law*, 37 (1961), 508. See also Onuma, 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective,' *Journal of the History of International Law*, 2 (2000), 46.

42 See Anghie, *Imperialism*, 94.

43 See, for example, *ibid.*, 64–65.

sophisticated, but doctrinal argumentation lacks concreteness: international legal practice – i.e., treaties being concluded between Europeans and Africans – has little or no place in it. Positivists such as John Westlake (1828–1913) were blind for international law in its practical application. They adopted a theoretical and formal approach to international law by which the political argument gained the upper hand at the expense of law in action.⁴⁴ International legal doctrine of especially the second half of the nineteenth century eventually comes down as ideological and neglected the reality.

In legal scholarship, the nineteenth century has often been described as the age of positivism. The term is not entirely accurate since but few leading international jurists – notwithstanding their manifest leaning towards positivism – culled all strands of natural law from their work. What does mark nineteenth-century mainstream positivists is their close association with the sovereign State and the limited scope of international law as the law governing relations between sovereign States. They based their claims on two fundamental assumptions: (1) valid international law consists only of rules that have been accepted by States (voluntarism); and (2) all rules to which a State has consented bind it (consensualism).⁴⁵ By assuming consensualism, positivists evaded the question whether these rules were in accordance with natural or divine law. According to positivists, the sovereign State was the foundation of the entire legal system, and their aim was to build a systematic framework of international law based on this premise.⁴⁶ Positivism maintained that law was the creation of sovereign will and that law was administered and enforced by sovereigns as the highest authorities. Sovereigns could only be bound by the terms to which they had agreed. For positivists the rules of international law were not vested in general ideas of morality and justice, but were discovered by studying the behaviour of states and of its institutions, and the laws states create.⁴⁷ The central issue, on which natural law jurists and legal positivists

44 See Craven, 'Invention of a Tradition,' 367. See also Craven, 'Colonialism and Domination.'

45 R.C.H. Lesaffer, *European Legal History* (Cambridge University Press, 2009), 437.

46 A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,' *Harvard International Law Journal*, 40 (1999), 13.

47 Anghie, *Imperialism*, 43. In this light, Alexandrowicz asks 'whether the positivist European reality was reconcilable with the idea of universalism of the law of nations which drew its legal source from the declining concept of natural law but had a reality of its own.' He answers this question by arguing that the 'family of nations could not have been reduced from universality to a regional framework by a change of doctrine [from naturalism to positivism]. Admission of new states was and is possible only in relation to entities which came newly into being. It cannot comprise those of them which existed long before and drew their legal status from a law of civilized nations in mutual intercourse whose

differed in thought most clearly, was the creation and enforcement of law on the international level.⁴⁸ Could a sovereign State be subjected to legal norms?

The mainstream Euro-centric perspective of the later nineteenth century, which was developed by contemporary legal doctrine dominated by positivism, gives the political argument priority over the legal, and the civilizing mission initiated by politics became entrenched in legal doctrine. This Euro-centrism, together with a deficiency in historical awareness and critical stance in current international legal doctrine, obfuscates the real nature of international law as a legacy of the age of New Imperialism. In this particular era however, international law was applied and used in encounters between Europeans and Africans, that is, between political entities as well as between human beings, and this implies that in practice there was no strict or absolute separation between a civilized and an uncivilized world. Positivists constructed a dualism in international law which resulted in a fiction that justified the European colonial venture. Beyond that fiction, however, there was the real world in which international law did have a place. Nevertheless, this legal fiction was adopted by twentieth-century international legal scholars and it infuses international legal doctrine still.

In the scholarly discussion about the legacy of New Imperialism in international law an empirical perspective has emerged. Whereas many international legal scholars have concentrated on nineteenth-century legal doctrine and frame their ideas within the traditional dualist world view, the Austro-Hungarian, later British legal historian Charles Alexandrowicz (1902–1975)⁴⁹ has taken a different perspective: he has taken international law in practice into consideration and has researched the practice of negotiating and concluding treaties between Europeans and Africans. In *The European-African Confrontation* (1973),⁵⁰ he looks at international law from a bottom-up perspective instead of pursuing a top-down approach. Koskenniemi observes that ‘Alexandrowicz’ work constituted a first opening for the treatment of non-Europeans as independent agents in international law, even as he, too, surveyed them through

universality had been an undisputable reality.’ Alexandrowicz, ‘Doctrinal Aspects,’ 506 and 515. For a 19th century perspective, see J. Westlake, *Chapters on the Principles of International Law* (Cambridge University Press, 1894), 112.

48 See, for example, G.G. Fitzmaurice, ‘The Foundations of the Authority of International Law and the Problem of Enforcement,’ *Modern Law Review*, 19 (1956), 1–18.

49 On Alexandrowicz, see W.A. Steiner, ‘Charles Henry Alexandrowicz 1902–1975,’ *British Yearbook of International Law*, 47 (1975), 269–271.

50 C.H. Alexandrowicz, *The European-African Confrontation. A Study in Treaty Making* (Leyden: Sijthoff, 1973).

the lens of European concepts of (universal) natural law.⁵¹ Alexandrowicz is considered an authority on the encounter between Europeans and Africans and the treaty relations that were established before and during the nineteenth century. His *European-African Confrontation* is the first, and to date only, elaborative analysis of treaty practice between Europeans and Africans that examines Africa's partition by and subjection to European States in terms of international law. Although Alexandrowicz highlights the practical use of international law in the age of New Imperialism, his work is mainly descriptive. He gives many examples of treaties concluded between various European powers and African rulers, but he does not compare and evaluate these different treaties. Although Alexandrowicz has a profound understanding of the practice of concluding and wording treaties, his work lacks conceptualization, evaluation and theoretical underpinning. For example, he does not discuss the consequences of treaty practice between Europeans and Africans, nor does he make an impact assessment of the rights of the parties involved. In addition, Alexandrowicz refrains from drawing conclusions from what happened back then for present-day international law. Moreover, Alexandrowicz has a Eurocentric idea of colonization and the conclusion of treaties between Europeans and Africans;⁵² for him too, European norms and values are the standard in and beyond European jurisdictions.⁵³

By relying on opposite approaches to revealing the history of international law, this study seeks a middle ground between the views of Anghie and Alexandrowicz. Although Anghie is right in observing that the idea of cultural difference as a product of imperialism was constitutive of international law and that international law was not just forced upon non-Europeans, he pays scant attention to international law in practice. Almost as if to restore the balance, Alexandrowicz primarily addresses the practicalities of international law. He does not engage in serious reflection on treaty-making between Europeans and Africans. In this regard, however, it is not only the work of

51 Koskenniemi, 'Histories of International Law,' 163–164. 'C.H. Alexandrowicz had advanced the view that the relations between the Europeans and the Islamic and East Indian communities had in fact, until the nineteenth century, been based on a widespread network of reciprocal treaty relations and that it had not been until the nineteenth century when, owing to the rise of "positivism", Europeans had begun to impose their behavioural standards on others.' *Ibid.*

52 See C.G. Roelofsen, 'Treaties between European and Non-European Powers in Early Modern and Modern Times (16th-20th Centuries) – Some Remarks on their Perception and Interpretation,' in: T. Maruhn and H. Steiger (eds.), *Universality and Continuity in International Law* (The Hague: Eleven, 2011), 409–417.

53 See Grovogui, *Sovereigns, Quasi Sovereigns, and Africans*, 46.

Alexandrowicz and Anghie but international legal literature as a whole that falls short of the mark. In the discourse on the legacy and legality of the acquisition and partition of African territory by European States at the end of the nineteenth century, authors emphasize either nineteenth-century international legal doctrine or practice – there is no synthesis of the two.

It is one of the peculiarities of international law in the age of New Imperialism that the dualist world view on which it was predicated did not exist in reality. Doctrine teemed with unnecessary categorizations, introduced complex theories and was often in contradiction with what happened in reality. Historical reality is multifaceted and theory is just a partial reflection of factual developments.⁵⁴ More fundamentally, New Imperialism evokes the question of what the nature of international law was in the nineteenth century: was it a man-made construct imposed through deduction, a product of the encounters between nations applied inductively, or perhaps both? Although the need for theoretical conceptualization is evident in that it can help explain what happens in reality, it should not be inflated beyond usefulness. Neither theory nor practice has a particularly valuable claim to balanced truthfulness without the other. Future challenges for both international legal scholars and practitioners lie precisely here, in that they will have to move beyond this deadlock on how to reconstruct, interpret and assess international law and its history. In this respect, the Euro-centric nature of international law should not obscure the writing on the history of international law. This book offers a way out of the impasse on the nature of international law by arguing that the relations between European and African polities of the nineteenth-century fell within the domain of international law and that its basis was first and foremost customary, namely the customary law of treaties. This claim will be based on the analysis and evaluation of the cession and protectorate treaties concluded between European States and African rulers in the age of New Imperialism. In the centuries before the scramble for Africa, an extensive practice of treaty-making between Europeans and Africans developed, and neither side had reason to doubt the binding force of the treaties thus concluded. As will become apparent, the implication of this extensive practice is that Lassa Oppenheim's argument that the Europeans only had to treat African natives on the basis of 'discretion, and not International Law' has to be rejected. The same is true for Westlake's view that '[t]he moral rights of all outside the international society against the several members of that society remain intact, though they have

54 M. Senn, 'The Methodological Debates in German-Speaking Europe (1960–1990),' in: A. Musson and C. Stebbings (eds.), *Making Legal History. Approaches and Methodologies* (Cambridge University Press, 2012), 116.

not and scarcely could have been converted into legal rights.⁵⁵ The European-African confrontation did not happen in a legal vacuum.

Based on the civilization argument, the nineteenth-century positivist perspectives on the scramble for Africa and the justification of the colonial venture introduced and cultivated the discriminatory character of international law.⁵⁶ European powers developed normative ideas which reflected their superiority ‘with the clear purpose to provide themselves with a legal and humanitarian “cover” to pursue ruthlessly their own advantages outside the Western hemisphere.’⁵⁷ This arbitrary nature of international law has to be revealed and recognized, because, to use the words of Andrew Fitzmaurice, ‘humanitarian sentiment too often collapsed back into an apology for empire.’⁵⁸ This recognition is needed to give colonialism a place in the history of international law: international law must be reconciled with its past. In order to progress, international legal doctrine should become aware of its nineteenth-century burden.⁵⁹

4 *Dominium and Imperium*

As Stuart Elden argues in his work *The Birth of Territory* (2013), Rousseau was one of the first to recognize the dual aspect of land property and State territory.⁶⁰ ‘Individuals can lay claim to particular sites, which can be within the larger territory of the polity.’⁶¹ Rousseau described the two-fold relation as follows: ‘the soil as both public territory and the patrimony of private

55 L. Oppenheim, *International Law: A Treatise*, 2nd edn (London: Longmans, Green and Co., 1912), 34–35 and J. Westlake, *Chapters on the Principles of International Law* (Cambridge University Press, 1894), 140. Anghie referred to them both to support his argument: Anghie, *Imperialism*, 81.

56 See D. Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion,’ *Nordic Journal of International Law*, 65 (1996), 388.

57 M. Schulz, ‘Defenders of the Right? Diplomatic Practice and International Law in the 19th Century: An Historian’s Perspective,’ in: L. Nuzzo and M. Vec (eds.), *Constructing International Law. The Birth of a Discipline* (Frankfurt am Main: Klostermann, 2012), 275.

58 A. Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge University Press, 2014), 334. ‘The critiques of empire that were least prone to collapsing into imperial apology were those based not so much on a sense of common humanity, but upon self-interest – that is, upon the problem of liberty at home.’ *Ibid.*

59 See Kennedy, ‘International Law and the Nineteenth Century,’ 416. Koskenniemi proposes four ways of doing away with Euro-centrism in international law: Koskenniemi, ‘Histories of International Law,’ 171–175.

60 S. Elden, *The Birth of Territory* (Chicago, London: University of Chicago Press, 2013), 329.

61 *Ibid.*

individuals.⁶² Consequently, the sovereign and private individuals can have different claims and rights to the same land.⁶³ Rousseau asserted that '[i]t is intelligible how individuals' combined and contiguous pieces of ground become the public territory, and how the right of sovereignty, extending from subjects to the land they occupy, becomes at once real and personal.'⁶⁴ Elden summarizes Rousseau's thoughts on territory and property as follows: 'To be in the territory is to be subject to sovereignty; you are subject to sovereignty while in the territory, and not beyond; and territory is the space within which sovereignty is exercised over territory: territory is that over which sovereignty is exercised.'⁶⁵ These thoughts on the relation between property and sovereignty, more specifically *dominium* and *imperium*, form the conceptual foundation of this book.

As has already been mentioned, concluding cession treaties and establishing protectorates by treaty were the most frequently used modes of acquisition in the European struggle for African territory. The contracting parties were African rulers and European States, and the object of transfer of these treaties were full or partial sovereignty rights over the territories concerned. Under current international law, the acquisition of territory is mainly understood in terms of the establishment of public sovereignty over territory, which concerns the vertical relationship between a sovereign state and its subjects. These legislative, administrative and jurisdictional rights to territory were counterbalanced by claims to territory of another nature, namely, private rights to property of land. These rights originate in the horizontal relations between individuals and are recognized both nationally and internationally. The European acquisition and partition of Africa by treaty undermined this distinction and balance between rights related to sovereignty and property, more specifically *imperium* and *dominium*. For the purpose of this book – the assessment of the legality of Africa's colonization – *imperium*, *dominium* and the relation between these two concepts constitute both the theoretical framework and the evaluation criteria. The concepts of sovereignty and property are fundamental regulatory principles in almost every human society, and their application depends on the spatial, temporal and human context in which they have to function.

62 Rousseau in his 'The State of War,' published in J.-J. Rousseau, *The Social Contract and Other Later Political Writings*, ed by Victor Gourevitch, 10th edn (Cambridge University Press, 2010), 176. See also C. Miéville, *Between Equal Rights. A Marxist Theory of International Law* (Leiden, Boston: Brill, 2005), Chapter 6.

63 *Ibid.*, 56.

64 *Ibid.*, 55.

65 Elden, *Birth of Territory*, 329.

The European construct of the State is just one way to apply and express sovereignty and property. As will be argued, the European-African confrontation at the end of the nineteenth-century showed the theoretical and practical limits of the concept of the State, and this confrontation marked the onset of the decline of the State. As the scramble for Africa cannot be understood on the basis of the State-centric model this study uses the concepts of property and sovereignty, which exist independently of the State, to interpret the acquisition and partition of Africa by European powers in the last two decades of the nineteenth century.

This interpretation takes the treaties between the Europeans and Africans as its point of departure. In studying colonial treaties, Paul Patton points to both the astonishing cross-cultural cooperation and the vast cultural and conceptual differences that generally accompany such treaties:

On the one hand, the fact that agreements were made at all demonstrated a capacity for extraordinary cross-cultural cooperation involving mutual recognition, reciprocity, and genuine agreement that served the different interests of the parties involved. On the other hand, the cross-cultural dimension of early colonial treaty making raises questions about the conditions, meaning, and consequences of the various agreements. Vastly different conceptions of land made it difficult for native peoples to appreciate, at least initially, what was implied by European conceptions of property. Similar difference between the kinds of authority, rule, and sovereignty claimed by European powers and the conceptions of authority and government among native peoples. Negotiating agreements across vast cultural differences left considerable scope for mutual incomprehension with regard to precisely what was being agreed, as well as scope for unilateral imposition of meaning and consequences onto ceremonies that were in reality far more ambiguous.⁶⁶

Instead of considering the validity of these treaties, the emphasis will be on what happened after they had been concluded, i.e., the extent to which they were observed. Both nineteenth-century international legal doctrine and practice will be discussed when considering the interpretation and execution of the treaties concluded between Europeans and Africans. Studies such as those

66 P. Patton, 'The "Lessons of History". The Ideal of Treaty in Settler Colonial Societies,' in: S. Belmessous (ed.), *Empire by Treaty. Negotiating European Expansion, 1600–1900* (New York: Oxford University Press, 2015), 245.

of Alexandrowicz and Hermann Hesse⁶⁷ show that in these treaties the distinction between public sovereignty (*imperium*) and private property (*dominium*) was strictly observed. Often, the treaties stipulated explicitly that transfer of sovereignty would not affect the private legal rights of natives in territory over which the sovereignty was transferred to a European power. However, this distinction between sovereignty and property was not strictly upheld in the interpretation and execution of the treaties.⁶⁸ It is commonly accepted in literature that these delineations were not always respected by the colonizing powers and that the transfer of sovereignty often implied the apprehension of native property rights over land too. In other words, sovereignty transfer was used to usurp private property rights.

Nevertheless, there are but few in-depth studies on how such treaty were negotiated, concluded and implemented. What remains to be assessed is whether the extension of sovereignty rights to private property rights was sporadic or systematic, and whether that extension was or became part of a conscious strategy of colonization. What also must be assessed is to what extent the practice of acquiring territorial sovereignty including the appropriation of privately held land accorded with the treaties and with international law. The legality of the extension of sovereignty to include property needs to be assessed in the light of the object and nature of the treaties and the signatories, and this will involve examining the status of native rulers in their relation to European States under international law. Were these rulers capable of transferring sovereignty rights over territory to European States? In other words, were these rulers sovereign?

The main questions with which this book is concerned are the following. Did the European colonial powers acquire private property rights to land along with territorial sovereignty by concluding cession and protectorate treaties with African rulers in the age of New Imperialism (1870–1914)? Did the European colonial powers comply with their treaty obligations and, more generally, their international legal obligations? And, if treaties and/or international law were violated, what legal consequences did these violations have and which remedies were and are available under the treaties concerned and under international law? In attempting to answer these questions, this book makes an important distinction between the narrow interpretation of international law as it governs relations between the members of the family of civilized nations

67 Alexandrowicz, *European – African Confrontation* and H. Hesse, *Die Landfrage und die Frage der Rechtsgültigkeit der Konzessionen in Süd-West Afrika* (Jena: Costenoble, 1906).

68 C. Salomon, *L'Occupation des Territoires sans Maître. Etude de droit international* (Paris: Giard, 1889), 199–200.

and the broader understanding of international law, i.e., the law of nations, the law governing relations between nations irrespective of their perceived status as civilized nations.

5 Legal and Social Relevance

From 31 August to 8 September 2001, the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) was held in Durban, South Africa under the auspices of the United Nations. The main theme of the conference was reparations for grave human rights violations committed in the past. Two issues were at stake, namely the legacy of slavery and the exploitation and degradation of native populations in the colonial era.⁶⁹ Although these wrongs reach far back into history, their impact endures. Most former colonies 'remain severely disadvantaged in the current world order.'⁷⁰ In other words, the issue of reparations is not just about compensating for past wrongs: it addresses current global inequalities as the effects of these past wrongs persist and directly affect the present. As Theo van Boven argues, '[t]he struggle against racism and racial discrimination is beset by diverging and competing interests of different groups, by deeply rooted historical wrongs and injustices, by denials of responsibility, by traditional patterns of domination ingrained in various cultures and religions.'⁷¹

The closing Declaration of the WCAR contains statements expressing remorse, but it does not acknowledge responsibility of former colonial States or provide for remedies. During the discussions on reparations for colonization, the participating nations formed into two opposing blocks: one consisting of European States and the United States and the other of the African States, supported by Asia, Latin America, and the Caribbean. Several African States called for reparations for having been colonized in the past and on the issue of slavery even accused the European States of crimes against humanity. Theo van Boven's characterization of the conference is worth quoting in some detail:

69 G. Ulrich, 'Introduction: Human Rights with a View to History,' in: G. Ulrich and L. Krabbe Boserup (eds.), *Human Rights in Development. Reparations: Redressing Past Wrongs* (The Hague, London, New York: Kluwer Law International, 2003), 1.

70 *Ibid.*

71 T. van Boven, 'World Conference Against Racism: An Historic Event?' *Netherlands Quarterly of Human Rights*, 19 (2001), 379.

Western countries, in particular those with well-known past records and roles in this [slavery, slave-trade and colonial rule, MvdL] regard, were most reluctant to acknowledge present-day responsibility for suffering and evils inflicted in the past. They feared financial claims and wished to avoid at any price that language be used that might legally substantiate such claims. Thus, subtle and hair-splitting distinctions were made between ‘expressing remorse’ or ‘presenting apologies,’ it being felt by legalistic minds that the latter term might open the door for compensatory demands.⁷²

Clearly, former colonial States persist in their reluctance to take responsibility for their past actions. These reservations come to the fore in a central provision of the concluding Declaration, Paragraph 14, which determines that the participating States

recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its recurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today.

The conference participants recognize that colonialism has caused a great deal of distress to native populations and that it has to be prevented in future. The signatories also express regret at the enduring social and economic inequalities throughout the world as a consequence of colonization.⁷³ However, no responsibility for colonization as a wrongful act was taken or apportioned, no remedies were considered, and although the conference was a step towards redressing historical wrongs,⁷⁴ many questions were left unanswered. Had colonization in itself been illegal? Are there grounds in contemporary law to

⁷² *Ibid.*, 380.

⁷³ See *ibid.*

⁷⁴ Theo van Boven underwrites that the Conference realized its ‘underlying spirit’: ‘remembering the crimes or wrongs of the past, wherever and whenever they occurred, unequivocally condemning its racist tragedies and telling the truth about history are essential

held former colonial powers responsible for their acts of colonization? Who is responsible for past wrongs and in what way? What forms of relationship can be attributed to subsequent generations of native populations which suffered colonial wrongs, and what degree of responsibility can be attributed to present-day States? Do recognition of wrongs and expressions of regret suffice or are attribution of liability and reparations called for? This study addresses these unanswered questions and aims to invigorate the stalemated 'Durban debate' on colonization and responsibility.

This study seeks to fill a lacuna in previous research, that of the absence of a systematic study of the execution and interpretation of treaties concluded between European States and African political entities. In doing so, the study situates itself within the broader field of the place of colonialism in the history of international law. Following a survey of previous scholarly work on New Imperialism, it will be shown that while some authors, notably Antony Anghie,⁷⁵ explain that colonization and the idea of cultural difference (developed to defend colonialism) were constitutive features of the international legal order and still exert their influence today, these works do not pay sufficient attention to nineteenth-century legal practice. What will also be identified is a paucity of critical reflection on the empirical material in previous studies on nineteenth-century treaty-making. The study adopts a critical approach to the pervasive Euro-centrism⁷⁶ of international legal scholarship,⁷⁷ but it is also critical of exaggerated, post-structuralist scholarship on colonialism. It seeks to steer a course between the extremes of practice without theoretical embeddedness⁷⁸ and purely scholarly discourse.

The book considers the scholarly debate about both the place of colonialism in the history of international law and the importance of international legal history in the analysis of today's international legal order. Not only does it conduct a thorough analysis of primary historical sources, it also places its findings in the context of the most influential works on the history of international law. The place of history in international law, with an emphasis on

elements for international reconciliation and the creation of societies based on justice, equality and solidarity' *Ibid.*

75 Anghie, *Imperialism*.

76 Becker Lorca, 'Eurocentrism in the History of International Law'; Koskenniemi, 'Histories of International Law'; N. Onuf, 'Eurocentrism and Civilization,' *Journal of the History of International Law*, 6 (2004), 37–41 and Onuma, 'Appendix.'

77 See, for example, Craven, 'Invention of a Tradition'; Crawford, *Creation of States*; Grewe, *Epochs of International Law*; Kohen, *Possession*; Koskenniemi, *Gentle Civilizer* and Shaw, *Title to Territory*.

78 Alexandrowicz, *European-African Confrontation*.

the relations between Europe and Africa, is analysed with reference to critical perspectives – according to which the European origins of international law make this law's claim to universality unfounded – as well as other works which characterize international law as a 'law of encounter.' Rather than following one of these approaches, the study analyses both the imperial legal theories of the nineteenth century and customary law as it evolved from legal practice, and characterizes the latter as being more inclusive than the former.

While the analysis offered in this book does point out the African contribution to international law that lies in treaties concluded between European States and African political entities, it does not stop there. It also and specifically explains that European courts misinterpreted these treaties in order to justify colonial expansion. This feature gives the study a unique angle: it moves beyond the negotiation and conclusion of these treaties to explore their interpretation and implementation.

Whereas most authors zoom in on the intellectual history of international law in relation to colonization and imperialism and often show a fairly instrumental concern for the topic – as part of the wider debate on the Western origins of international law – the present study takes a genuinely historical approach and specifically explores legal practices. In doing so, it bridges the doctrinal divide between public and private law – the *imperium* versus *dominium* dichotomy – to analyse realities on the ground in their entirety. As a result, the study pioneers research into the actual legal processes of colonization and the Euro-African encounters, a type of research that has not been pursued in any depth since that of Alexandrowicz in the 1950s to 1970s. Complementing Alexandrowicz' original contribution, the comparative approach offered in this book provides a deeper analysis of the use of international law in imperial policy. By studying practice to such an extent, the book delves deeper into the issue of the use of international law for the colonization of Africa than most earlier studies have done, and it aims to challenge some of the general claims which have been made on the basis of the study of doctrinal writings alone.

The topic of the book is central to present-day international law. Steering away from overly moralising and political appeals, the study approaches the topic in a contextualized if rather sober and juridical manner. In this, the study is quite unlike most contemporary scholarship on colonialism, which is predominantly critical and deconstructivist, generally paying less attention to the primary material and more to the overtones and subtext of the debates. This project offers a straightforward legal analysis against the yardstick of international law as it stood in the age of New Imperialism.

The contribution of the book to the study of international law lies mainly in the detailed analysis of treaty practice of three main European powers and

of African rulers. Additionally, the study offers a creative solution to the problems which arise from the friction between its two main conclusions, namely (1) that the acquisition of African territory in the context of New Imperialism was illegal according to the law in force at the time, and (2) that international legal responsibility does not result from this illegality, because the passage of time makes it impossible to determine the injured and the responsible parties respectively. The solution which the study proposes lies in recognizing the illegality of New Imperialism. Such recognition could be a step towards eliminating the continuing influence on international law of the dichotomies brought about by nineteenth-century international legal theory. The two suggestions put forward in this study are wholly feasible: the International Court of Justice should give an advisory opinion and the past illegality should be addressed in academic discussions and domestic and international case law.

Moreover, the book argues that the European powers' strategy of confounding informal with formal empire was illegal. It offers important empirical proof to refute the all too readily accepted orthodoxy of the institution of 'colonial protectorate' by placing the term against the background of its actual political use.

Finally, the study offers compelling arguments about the consequences of the illegality of European colonization, both from a doctrinal and from a practical perspective, and it makes a valuable contribution to the current debate on Western accountability for the colonization of Africa. It is an original and well-founded contribution to a topical debate that engages many historians of international law and international lawyers. Its sound historical approach yields a wealth of new empirical materials and persuasively challenges a number of leading opinions.

6 Methodology and Case Studies

From a methodological perspective, this study is divided into three parts. The first part addresses the theoretical framework of the study by discussing the concepts of *dominium* (Chapter 2) and *imperium* (Chapter 3) and the modes of acquisition of and titles to territory (Chapter 4). The identification and understanding of this theoretical framework is based on nineteenth-century international legal doctrine. This part, in other words, reconstructs the colonization of Africa and international law as they were conceived by contemporary legal doctrine. African points of view are added as much as possible. These perspectives are extracted from reports drawn up by colonial authorities, case law, writings of African legal scholars and correspondence between African

natives and the colonizing powers. It is hoped that including African perspectives will help to avoid the Euro-centric viewpoint and to enable a balanced and non-biased debate on the responsibility of former colonial States for their historical wrongs.

The second part examines the question whether the colonization of Africa was legal by nineteenth-century legal standards, and this exploration will involve reconstructing the law as it was applied in the age of New Imperialism.

The third part of the book addresses the implications of conclusion arrived at in the second part that the colonization of Africa was illegal. Once this illegality has been established, two issues arise, that of attributing responsibility and of providing remedies to redress these wrongs. This third part relies on an analysis and evaluation of current international legal doctrine and practice. It discusses what the relevance of the illegal nature of Africa's colonization can be in the present-day international legal order. The responsibility issue is addressed on the basis of established international legal doctrine and the application of international law by international tribunals. The issue of providing remedies is addressed by examining the provisions in the European-African treaties on remedies in case of non-compliance, available case law and the possibilities that current international legal instruments and institutions offer.

As mentioned, the second part of the study involves reconstructing a particular historical reality. Recording international legal history accurately, consistently and reliably is crucial, because it may reveal the biased nature of international law as it evolved in earlier times and help present-day and future researchers to sidestep this inclination. Imperialism hinges on social, economic, legal and cultural ideas about 'non-civilized' peoples, and the concept of imperialism continues to be used in this sense. Nowhere is this more evident than in the present-day understanding of territorial sovereignty. As a result of a biased definition, an 'imperialist' concept of territorial sovereignty still imposes itself on a wide array of topics, including humanitarian intervention and the universal application of human rights.⁷⁹ Imperialism operates in tandem with international law. Anghie argues that the use of international law to further imperial policies is one of New Imperialism's persistent features: 'The civilizing mission, the dynamic of difference, continues now in this globalized, terror-ridden world, as international law seeks to transform the internal characteristics of societies, a task which is endless, for each act of bridging generates resistance, reveals further differences that must in turn be addressed by new doctrines and institutions.'⁸⁰ The imperialist nature of international

79 Anghie, 'Evolution of International Law,' 739–753.

80 *Ibid.*, 751.

law is apparent in mainstream scholarly works on international law. As will be shown, international legal history finds itself on the edge of describing and assessing the past, which is to say that it is simultaneously objective and subjective. The question on the use of anachronisms is where lawyer and historian oppose each other.

To answer the question whether international law was violated when European powers acquired and partitioned Africa at the end of the nineteenth century, international law in the age of New Imperialism must first be reconstructed, and it must then be interpreted within its historical context. This process of reconstruction and interpretation involves both the internal and external history of international law: internal developments within international law, its institutions and its profession will be examined, as will external factors which exerted influence on these developments. This process of reconstruction and interpretation relies entirely on the availability of sources of the various time periods. The social, political and economic context of these sources plays an essential role in trying to properly understand both the law of nations and international law, because 'any legal rule must, by its very nature, have a reality beyond its theoretical domain.'⁸¹ In this study international law is used as broadly and objectively as possible in accordance with Randall Lesaffer's definition of international law as a historical concept: international law is 'the law regulating the relations between political entities that do not recognize a higher power.'⁸²

Attempts to interpret nineteenth-century legal sources will lead to a discussion of anachronisms and the position of historians and legal scholars in their debate. Regarding anachronisms, history and international law are inextricably and necessarily connected.⁸³ Lapse of time confronts legal theorists and practitioners with two interrelated problems, that of providing evidence

81 C. Stebbings, 'Benefits and Barriers: The Making of Victorian Legal History,' in: A. Musson and C. Stebbings (eds.), *Making Legal History. Approaches and Methodologies* (Cambridge University Press, 2012), 87.

82 R.C.H. Lesaffer, 'International Law and Its History: The Story of an Unrequited Love,' in: M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (Leiden, Boston: Martinus Nijhoff, 2007), 32. See also Miéville, *Between Equal Rights*, Chapter 6; H. Steiger, 'From the International Law of Christianity to the International Law of the World Citizen: Reflections on the Formation of the Epochs of the History of International Law,' *Journal of the History of International Law*, 3 (2001), 180–193 and H. Steiger, 'Universality and Continuity in International Public Law?' in: T. Maruhn and H. Steiger (eds.), *Universality and Continuity in International Law* (The Hague: Eleven, 2011), 13–43.

83 See R.C.H. Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law,' *British Yearbook of International Law*, 73 (2002), 103–139.

of causal relations and that of the legitimacy of counterfactual reasoning in determining how the present might have looked like if that original illegal act had not taken place. Both causality and counterfactuals become increasingly indeterminate and complex in the course of time because of the changing circumstances under the influence of internal and external intervening factors. Increasing remoteness of historical wrongful acts runs parallel to an increasing complexity in establishing a claim for responsibility. When it comes to determining the factual situation, this remoteness and complexity make historical awareness a preliminary requirement for lawyers. Especially in the field of international law, a thorough knowledge of historical developments is indispensable to understanding and handling problems and conflicts. Conflicts often smoulder for years and sometimes even decades or centuries before they erupt. These disputes often have remote origins and intensify over time before they become legal conflicts that are eventually brought before an international court or tribunal.⁸⁴ In his study of the historical evolution of the theory and practice of occupation Fitzmaurice affirms the importance of a proper understanding of the history of international law. He asserts that '[u]nderstanding the history of occupation is [...] central to the politics of empire and hegemony in the present. Rather than continuing in a state of imperial denial, the politics of empire today can be illuminated by paying closer attention to the legal and political vocabularies of the past.'⁸⁵

Recognizing the significance and consequentiality of historical inquiry in international law is a fundamental issue. It should be noted, however, that jurists must always be aware of and avoid the fallacy of presentism:⁸⁶ the anachronistic application of present-day norms and values to the interpretation and evaluation of past actions. Although anachronism should be avoided, interpretation and determination of facts in the past should not.⁸⁷ Although the past may indeed be a source of present-day obligations for international legal historians, as Koskenniemi and Anne Orford argue,⁸⁸ this does not mean

84 See Kohen, *Possession*, 183–200.

85 Fitzmaurice, *Sovereignty, Property and Empire*, 32.

86 See T. Govier and W. Verwoerd, 'The Promise and Pitfalls of Apology,' *Journal of Social Philosophy*, 33 (2002), 67. See also A. De Baets, 'Historical Imprescriptibility,' *Storia della Storiografia*, 59–60 (2011), 145; P. Burke, 'Triumphs and Poverties of Anachronism,' *Scientia Poetica*, 10 (2006), 291–292 and 298; D.H. Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (New York: Harper, 1970), 132–142 and H. Ritter, 'Anachronism,' in: D. Woolf (ed.), *A Global Encyclopedia of Historical Writing* (New York: Garland, 1998), 30–31.

87 See De Baets, 'Historical Imprescriptibility,' 146.

88 M. Koskenniemi, 'Vitoria and Us. Thoughts on Critical Histories of International Law,' *Rechtsgeschichte*, 22 (2014), 119–138 and A. Orford, 'The Past as Law or History? The

that anachronisms must inevitably or necessarily be evoked. Past actions have to be assessed by the standards as they stood at the time: historical wrongs can only be wrong because and if they were deemed to be wrong at the time. This is true for historians and legal scholars alike. Here, Lesaffer proposes a reflective evolutionary history solution, which offers a clear view of the historical understanding of international law and its relevance for present-day international legal discourse: 'Evolutional history is commendable, as long as the distinct phases of these evolutions are first studied in their own right and for their own sake. Only after having done that will it be possible to construct an evolutional theory that truly moves from past to present and to ensure that explanations are derived from the past and not dictated by the present.'⁸⁹ In other words, historical reality first has to be observed and understood in its own time and on the basis of contemporary texts and contexts. The next step – and it must be the next step, not the first – is to write an evolutionary history. Lesaffer, in other words, acknowledges the stance of Orford and Koskeniemi in the sense that the history of international law should be written on the basis of detailed and demarcated temporal and spatial contexts in which the law came into being and evolved. It is only after these compartments have been established that the evolutionary history of international law can be told. The crucial difference in Lesaffer's argument, however, is that he rejects the use of anachronisms and warns against a functional approach in writing international legal historiography.⁹⁰

Are anachronisms indispensable to writing the history of international law? They are not and it is only proper that they are not. Those who support the idea that anachronisms are necessary in writing international legal historiography confuse the internal and external dimension of such an endeavor. The internal dimension concerns the *Vorverständnis* of the author: legal historians cannot abandon their own context. This underlines the fictitious nature of Rawls's veil of ignorance. Writing the history of international law then is inherently subjective and selective: legal historians living in their own time and space reflect on the history of international law and make personal choices in structuring and conducting their research. Legal historians need to be constantly alert to their own *Vorverständnis* and should always account for the choices they make in writing international legal history. This hazard of *Vorverständnis* also

Relevance of Imperialism for Modern International Law,' in: M. Toufayan, E. Tourme Jouanet and H. Ruiz Fabri (eds.), *International Law and New Approaches to the Third World: Between Repetition and Renewal* (Paris: Société de législation comparée, 2013), 97–118.

89 Lesaffer, 'International Law and Its History,' 40.

90 *Ibid.*, 34–35.

means that the interpretation of international law is always mediated. Legal historians do not have immediate access to facts: they can only know the facts through statements about them. These limits should not stop academics from writing the history of international law. As long as they are conscious of their inevitable personal bias and reflect on it, they can write an accountable history of international law.

The external dimension of writing international legal history concerns reconstructing and evaluating international law. It is here that the problem of anachronisms comes manifest. Past actions have to be assessed by the standards that applied at the time: as observed earlier, historical wrongs can only be wrong because and if they were deemed to be wrong at the time. This does not mean, however, that the history of international law is a static given. International law is indeed a product of its time, but it has changed and evolved with time. The history of international law is both nature and nurture. It is also a chain of events. Each of these events stands on its own and has to be interpreted as such, but these separate events are also inextricably connected to what happened before and after the event. These events can only be understood and valued in relation to each other: past, present and future temporal and spatial contexts – demarcated by context-changing occurrences – form a chain. The distinctive compartments of the history of international law are, to use the words of Ian Hunter, ‘windows of communication.’⁹¹ Those who insist on the necessity of using anachronisms to write the history of international law build their argument on the first dimension, while the issue of anachronism only appears in the second dimension. Making a clear distinction between the internal and external dimensions of writing the history of international law shows that anachronisms are in fact not necessary to write an accurate, consistent and reliable history of international law.

If the writing of history of international law is based on moderate contextualism – the history of international law is both static and dynamic and comprises continuity and disruption – and on self-reflection – authors should be aware of their determination in time and space and should account for the choices they make in writing about their subject – and if the separateness of the external and internal dimensions of international legal historiography is respected, there are no obstacles to a fruitful co-operation between historians and jurists in writing the history of international law. As long as a moderate and anachronism-free contextualist approach is adopted and authors

91 I. Hunter, ‘Global Justice and Regional Metaphysics. On the Critical History of the Law of Nature and Nations,’ in: S. Dorsett and I. Hunter (eds.), *Law and Politics in British Colonial Thought. Transpositions of Empire* (New York: Palgrave, 2010), 25.

are aware of and define their personal situatedness, jurists and historians can join forces in a joint venture to write the history of international law.

Yet these general observations on how to write the history of international law have to be operationalized. This study examines and assesses the legal strategies of Britain, France, and Germany in their colonization of Africa in the age of New Imperialism in the light of the international law as it applied at the time. To establish the historical reality of the European colonization of Africa, three case studies will be performed. Colonial Nigeria, Equatorial Africa and Cameroon have been selected for a comparative study that offers an analysis of the cession and protectorate treaties concluded between the British, French and German colonial powers and the African rulers in this tropical part of the African continent between 1870 and 1914. These case studies will depict the historical context in which the treaties concerned were negotiated, concluded and implemented. Put differently, the case studies address the question whether the intentions, the text, the interpretation and the implementation of these treaties were consistent.

The three African territories mentioned above have been chosen because Britain, France and Germany collided in central Africa in the last three decades of the nineteenth century. This makes these case studies representative of European practices, as these major European powers, more than any others, made their influence felt in the formation and interpretation of international law at the time. Moreover, all three areas have a history of slave trade, because of their position along the West coast of the African continent. After the slave trade had been abolished in the beginning of the nineteenth century, the trading colonists were forced to seek alternative trade commodities, and this drove them into the *Hinterland*. Furthermore, the area's fertile soil and population density make research even more relevant, because these features imply that trade played a central role in this part of Africa. And trade is closely tied up with the interests of people(s), companies and states, both nationally and internationally.

The primary sources are available in the national archives of the States in question, but also in private collections, which are often maintained by libraries. The actions of Britain in Nigeria, France in Equatorial Africa and Germany in Cameroon are established on the basis of a variety of sources: case law produced by colonial courts, both in Africa and Europe, in the last two decades of the nineteenth century; the official treaties between European States and African rulers; private agreements concluded between Europeans, often tradesmen, and Africans on trade and exploitation; legislative acts; governmental communications both between European statesmen through the Colonial and Foreign Offices and between the European authorities and

the authorities in the colonies; reports of the debates of European parliaments; journals; pamphlets; and reports of tradesmen, missionaries, adventurers. The centre of gravity of the three case studies to be presented in this book is the cession and protectorate treaties concluded between the European States and African rulers. The texts of these treaties together with the reconstruction of the nineteenth-century context of colonization form the foundation for the assessment of the legality of Africa's acquisition and partition by European States. This assessment includes perspectives of nineteenth-century international legal scholarship. Combined, these sources and perspectives will be instrumental in addressing the questions central to this study: were African natives' property rights respected, were native rulers' sovereignty rights upheld, were treaty obligations met and was international law observed?

7 Plan

These questions will be addressed as follows. Chapter 2 addresses the legal nature and dimensions of the concept of property, more specifically that of private landownership. The central question in this chapter is what the right to property of land (*dominium*) entailed from the European and African perspectives within the spatial and temporal context of the age of New Imperialism. Chapter 3 addresses the significance of the legal concept of territorial sovereignty (*imperium*) in the late nineteenth and early twentieth centuries from the European, African and international perspectives. Chapter 4 deals with the acquisition of and entitlement to territory from a nineteenth-century perspective in order to assess the theoretical and practical aspects of the notion of territory within the context of New Imperialism, more specifically the encounter between European States and African political entities. It will transpire that cession and protectorate treaties were vital to the efforts of European colonial powers to gain control over African territory.

The second part of the book addresses the application of international law by analysing the treaty practices between Britain, France and Germany on the one hand and African rulers in Nigeria, Equatorial Africa and Cameroon on the other hand. Three separate chapters (Chapters 5, 6 and 7) examine *imperium* and *dominium* and their relation in the context of the European colonization of Africa at the end of the nineteenth century. These chapters explore how the concepts of *dominium* and *imperium* appeared in the treaties between the European States and the African rulers, and whether the institutions of territorial sovereignty and/or landownership were used accurately and consistently. In analysing cession and protectorate treaties, these chapters probe the treaty

provisions on the transfer of territorial sovereignty and private property of land as well as the contractual and non-contractual remedies which could be invoked if and when treaty obligations were breached.

Chapter 8 evaluates the findings of the treaty-making practices analysed in the three previous chapters. As sources of international law, these treaties had to be observed by the contracting parties. The chapter considers whether the cession and protectorate treaties, and by extension international law, were violated. In this light, the main issue is whether the European States were obliged to comply with the cession and protectorate treaties, or whether they were free to break their promises, based on the civilization argument and the unequal status between contracting parties. In short, did European State powers have to comply with the treaties they concluded with African rulers on legal grounds as well as on moral grounds?

The third part of the book is mainly concerned with the implications of the finding that Africa's colonization was indeed illegal. As has been observed, this issue was of central importance in the Durban debate and the doctrine of inter-temporal rule plays an essential role in exploring it. Chapter 9 addresses the following questions. Can responsibility for a historical wrongful act, more specifically the colonization of Africa, be established? If so, which remedies do the cession and protectorate treaties, nineteenth-century international law and current international law recognize?

Chapter 10 summarizes the claims and main arguments presented in this book and concludes with some final remarks on the legacy of New Imperialism in international law.

Dominium

Property rights, more specifically titles to land or land ownership, were an essential constituent of the European acquisition and partition of Africa in the late nineteenth century. Often they had a prominent place in the cession and protectorate treaties concluded between European States and African rulers, and transferring sovereign rights over territory impacted on existing property rights to the land. Before discussing the appearance of property rights in these treaties, the concept of land ownership – *dominium* – will be addressed, both from a European and from an African perspective. Section 1 describes the theoretical framework and the premises that support the evaluation of the meaning of property rights to land. Next, property rights to land will be discussed more extensively from the European perspective and the African conception of property rights in the age of New Imperialism (§2). The chapter concludes with a summary of the main argument (§3).

1 Property Rights: Theoretical Premises

Proprietary rights come in a variety of types and forms, and those most relevant to this book will be discussed here. Today, the right to property has lost its absolute character. Property is a complex, organizing concept, and it is found in most legal systems.¹ Although the concept of property varies in content and form from one system to the other, depending on the given social, cultural, political and economic context, some of its features are universal. Trespassory rules and the ownership spectrum are considered fundamental in all world societies. Property is both a social² and a legal institution. Here, however, the emphasis, however, will be on property as a legal institution and its position in the vertical relationship between sovereigns and their subjects. While in

1 A right to property indicates a legal relationship and not a thing: 'It is to be observed that in common speech in the phrase the object of a man's property, the words the object of are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words a man's property perform the office of the whole.' J. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by E. Harrison (Oxford: Blackwell, 1948), 337 (Chapter XVI, Section 26).

2 J.W. Singer and J.M. Beer mann, 'The Social Origins of Property,' *Canadian Journal of Law and Jurisprudence*, 6 (1993), 218.

the civil law tradition ownership as the most comprehensive property right is based on the Roman law notion of *dominium*, the parallel between *dominium* in Roman law and ownership in modern law must be put into perspective, because property is determined by the temporal and spatial context in which it functions.

Property does not coincide with and is therefore not equal to, nor the same as, ownership.³ Property is a broad concept, of which ownership is a subcategory. Property comprises a wide range of forms of ownership and possession, also referred to as titles, irrespective of whether these titles are absolute or relative. The right of ownership is the most comprehensive right a person can have in an object and it only stops where the rights of another person begin: 'ownership rights can be limited only to prevent harm to other people.'⁴ Consequently, ownership cannot be considered to be equal to possession. These notions and their differences already existed in Roman law in the Late Republic (264–227 BC).⁵ The Roman lawyer Ulpian would later observe that ownership had nothing in common with possession.⁶ Possession is the factual or physical holding of an object complemented by the *bona fides* belief of the possessor that he is the owner.⁷ Ownership, in contrast, comprises the all-comprehensive power and right over a thing. Although the possessor holds an object materially and mentally,⁸ it is the owner who has the most extensive rights. Put differently, possession is a material institution, ownership an immaterial institution. Ownership concerns the question whether the relation between the individual and the object has been constituted in such a way that the law confers rights

3 See J.W. Singer, *Entitlement. The Paradox of Property* (New Haven, London: Yale University Press, 2000), 6–9. Singer argues that property law establishes the minimum conditions for social interaction between individuals: '[P]roperty law both responds to and shapes social relations by norms and rules that take into account the systemic effects of alternative entitlement structures. Paradoxically, property is both an individual entitlement and a social system.' *Ibid.*, 14.

4 *Ibid.*, 30.

5 See A. Watson, *The Law of Property in the Later Roman Republic* (Oxford: Clarendon Press, 1968).

6 D.41.2.12.1 (Ulpian): '*nihil commune habet proprietates cum possessione*.' See also R.A. Epstein, 'Possession as the Root of Title,' *Georgia Law Review*, 13 (1978–1979), 1221–1243.

7 Possession served as an alternative praetorian protection for those who were not able to prove ownership.

8 In contrast to the holder, who only holds and object materially. See A. Borkowski and P. du Plessis, *Textbook on Roman Law* (Oxford University Press, 2005), 164; B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1975), 105ff; and T.G. Watkin, *An Historical Introduction to Modern Civil Law* (Aldershot: Ashgate, 1999), 229ff.

on the entitled person: ownership is pre-eminently a right. Often the owner of an object is also its possessor, but this need not always be the case. The owner of an object is the person whose determination of how to use the object is deemed to be decisive and final.

The fundamental presumption concerning property rights is that they can, and do, exist independently from the State.⁹ The State as a political organization is not a constitutive condition for creating property rights; in every other political entity *Mein und Dein* also naturally emerges in mankind's quest for self-preservation and inevitably leads to conflicts, and these conflicts must be either prevented or settled. Regulation of property claims between persons or groups of persons must be initiated and guaranteed by an institution that has been so authorized by the members of the political entity concerned, regardless of whether this entity is, for example, a State, a tribe, a clan or a caste.¹⁰ Property rights precede the territorial State: rules on the allocation of scarce resources and the protection of property were already known in ancient times and varied from place to place and from society to society.¹¹ In essence, property and rights related to property are a reaction to scarcity and are necessary to avoid and settle conflicts. As observed above, the evolution of property as a legal institution is dependent on its temporal and spatial context.¹² Property endows the owner with the rights of possession, use and disposition.¹³ Property rights are formalized powers to rule over objects. In general, property law, as the controlling instrument of the State, grants and limits such powers.¹⁴ In the course of the evolution of property rights, many classifications and related concepts and definitions have emerged.

9 U. Mattei, *Basic Principles of Property Law* (Westport, London: Greenwood Press, 2000), 4.

10 *Ibid.*, 3. In this respect, Mattei refers to the work of Paul Bohannan, *We, the Alien: An Introduction to Cultural Anthropology* (Long Grove: Waveland Press, 1991), 16. See also B. McFarlane, N. Hopkins, and S. Nield, *Land Law. Text, Cases, and Materials* (Oxford University Press, 2009), 32.

11 Singer, *Entitlement*, 174.

12 Boudewijn Bouckaert argues that the evolution of a legal tradition such as property is divided into three phases, namely, the customary phase, the casuistic phase and the conceptual phase. B. Bouckaert, 'What is Property?' *Harvard Journal of Law and Public Policy*, 13 (1990), 778–789.

13 R.A. Epstein, 'Property and Necessity,' *Harvard Journal of Law and Public Policy*, 13 (1990), 3.

14 Mattei, *Basic Principles of Property Law*, 3. See J.H.M. van Erp and B. Akkermans (eds.), *Cases, Materials and Text on Property Law* (Oxford, Portland: Hart, 2012), 65 and 73; and Singer, *Entitlement*, 3.

The right to property concerns the relation between a subject and an object, but it also regulates relationships between persons concerning items of property relationships. Property rights involve and create relationships between people: 'Ownership powers of control and transmission all involve capacity to create relations with others by virtue of a person's ownership of something.'¹⁵ This insight became stronger in the nineteenth century and ran parallel to the emerging popularity of the bundle theory of property.¹⁶ This definition also clarifies the distinction between the institution of ownership and ownership rights. For ownership to arise, conditions for creating title¹⁷ to an object must be formulated, as must property limitation rules, expropriation rules and appropriation rules.¹⁸

The final concept that requires clarification is that of 'title' to objects. 'Title' refers to the conditions that must be met before a person can rely on trespassory rules to effectuate the protection of (their right to) an object. Title too is a regulatory concept, devised by a public authority in order to streamline transactions between persons. 'In the interest of determinacy and public order, a property institution may designate as sufficient conditions of title long possession of something over which ownership interest is claimed or long use as to a non-ownership proprietary interest.'¹⁹ The concept of title is often used as a synonym for ownership, but these concepts are not always clearly distinguished, especially not in common law jurisdictions.²⁰ Title conditions, however, as well as trespassory rules and ownership interests are necessarily inextricable features of any system regulating property law relationships. What

15 J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996), 67.

16 The bundle theory implies that rights to a property can best be conceived of as a bundle of individual rights and legal interests which together constitute that property. According to the traditional understanding of the bundle theory, the rights accompanying ownership were the right to use, the right to exclusion, the right to compensation, the rights to destroy, waste, or modify, the right to income, the absence of time limits, the liability to execution and the power to transfer. See A.M. Honoré, 'Ownership,' in: A.G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford University Press, 1962), 107–147.

17 'On the one hand, it [entitlement] describes a strong claim to a particular legal rights; one who is entitled has a right to be granted title or given the benefit of a particular right. [...] On the other hand, the word suggests that such rights are defeasible by political action in the public interest, that they may conflict with one another, and that the rules in force must adjust the meaning of particular entitlements in light of their effects on other entitlement holders.' Singer, *Entitlement*, 92.

18 Harris, *Property and Justice*, 42.

19 *Ibid.*, 39.

20 See, for example, Buckland and McNair, *Roman Law and Common Law*, 62.

a person may do in relation to an object governed by rules on trespassory protection depends on the prevailing interpretation of the ownership concept.²¹

These fundamental conceptual interpretations and classifications support and clarify the theoretical framework of both the current chapter and the book as a whole. But what do these general theories and assumptions mean for land ownership in the context of the European acquisition of African territory in the late nineteenth century?

2 European and African Perspectives

2.1 *Land Law from a European Point of View*

In the European legal tradition private land ownership is a key notion. Land law governs the range of complex relationships that can exist between individuals and collectives with regard to land. These relationships are most commonly understood as a bundle of rights and obligations held by individuals and collectives with regard to the acquisition, exploitation, preservation, use and transfer of specific plots of land. 'Because human beings are fated to live mostly on the surface of the earth, the pattern of entitlements to use land is a central issue in social organization.'²² This first sentence of Robert Ellickson's famous article on property in land expresses the essence of land rights and land law: land is first and foremost the means of man's subsistence and private property in land secures man's maintenance.²³ Land tenure systems represent relations among members of society with respect to land, which next to water is the most essential but scarce resource they have. Systems of land tenure all turn on the question 'Who holds what interest in what land?'²⁴

Private land ownership is generally claimed to promote individual liberty, political stability and economic prosperity. Private land ownership evolved in parallel to the four stages of subsistence.²⁵ The underlying thought, and the reason why private land ownership has emerged, is that

21 Harris, *Property and Justice*, 39–40.

22 R.C. Ellickson, 'Property in Land,' *Yale Law Journal*, 102 (1992–1993), 1317.

23 See M.G. Yakubu, *Land Law in Nigeria* (London, Basingstoke: MacMillan, 1985), 2–3.

24 Bentsi-Enchill, 'African Systems of Land Tenure,' 116.

25 The four stages of development theory assumed that human being and his institutions were created progressively by the circumstances in which from time to time and from place to place human being happened to find himself: '[...] society "naturally" or "normally" progressed over time through four more or less distinct and consecutive stages, each corresponding to a different mode of subsistence, these stages being defined as hunting, pasturage, agriculture, and commerce.' R.L. Meek, *Social Science and the Ignoble Savage*

when land is individually owned, a self-interested owner may be tempted to use it without regard to the costs and benefits conferred on neighbors or others. Individuals may be able to reduce deadweight losses by (1) enforcing existing property rights; (2) transferring property rights to better managers; or (3) redefining property rights so as to create better-tailored incentives for appropriate economic activity.²⁶

In contrast to collective property, private land ownership minimizes deadweight losses and transaction costs. On the other hand, private land ownership does require the policing of boundaries as well as techniques to fence off privately owned land. The shift from collective to individual land ownership, or the distribution of land, gives rise to conflicts about the exact course of boundaries and about who owns a particular piece of land. And, because boundaries of privately owned land are established by people, communities of people must introduce rules as well as adequate and consistent means of delineating plots of land. Only then can ownership be proved and conflicts be prevented or, if need be, settled. If a civil society is founded on collective property rights to land, mechanisms controlling behaviour of both the group and its individual members must be established, because ‘When many people use the same piece of land, tragedies of shirking and grabbing lurk.’²⁷ These mechanisms, however, varying from participatory to hierarchical governance, carry with them far higher costs than do systems that are used to monitor private land ownership.

The classical Blackstonian²⁸ account of private land ownership resonates in the current understanding of the phenomenon. Joseph Singer encapsulates the traditional interpretation of private land ownership as follows:

(Cambridge University Press, 1976), 2. The core of this theory lies in the idea that societies are subjected to progressive development through successive stages based on different modes of subsistence, which depend on the temporal and spatial context in which the particular society exists.

26 Ellickson, ‘Property in Land,’ 1326. ‘In the nature of the case, parcels of land are the objects most susceptible to proprietary rights other than ownership. There are three common types: rights to enjoy some extracted category of the use-privileges which *prima facie* are comprised within ownership; rights to deny to the owner the enjoyment of some of his ownership privileges; and rights to subtract some monetary value out of the wealth-potential of the land.’ Harris, *Property and Justice*, 56.

27 Ellickson, ‘Property in Land,’ 1348.

28 According to the English legal scholar Sir William Blackstone (1723–1780), private land ownership has to be understood as comprising a bundle of private entitlements regarding land: ‘[O]wnership by a single individual (“that sole and despotic dominion which

The classical conception assumes (a) consolidated rights; (b) a single, identifiable ‘owner’ of that bundle of rights; (c) who is identifiable by formal title rather than informal relations or moral claims; (d) rigid, permanent rights (e) of absolute control (f) conceptualized in terms of boundaries which protect the owner from non-owners by granting the owner the absolute power to exclude; and (g) full power of the owner to transfer those rights completely or partially on such terms as the owner may choose.²⁹

While this traditional understanding of private property rights is a common one, it is by no means unique. Regimes of private and collective property of land can be found all over the world, and they do not necessarily exclude each other: there is a wide range of land ownership systems between the extremes of purely collective and purely private property of land. The nature of land ownership depends on the specific circumstances in a particular civil society, and the various institutionalized forms of land ownership reflect societal demand. In this respect, Ellickson is right to assert that ‘a close-knit group tends to create, through custom and law, a cost-minimizing land regime that adaptively responds to changes in risk, technology, demand, and other economic conditions.’³⁰

As observed above, there is a distinction between property rights and territorial rights: ‘[T]he primary function of a property right is to give the right-holder

one man claims ...”); in perpetuity; of a territory demarcated horizontally by boundaries drawn upon the land, and extending from there vertically downward to the depths of the earth and upward to the heavens; with absolute rights to exclude would-be entrants; with absolute privileges to use and abuse the land; and with absolute powers to transfer the whole (or any part carved out by use, space, or time) by sale, gift, devise, descent, or otherwise.’ Blackstone paraphrased in Ellickson, ‘Property in Land,’ 1362–1363. See also C.K. Meek, *Land, Law and Custom in the Colonies*, 3rd edn (London: Frank Cass, 1968), 1.

29 J.W. Singer, ‘Property and Social Relations: From Title to Entitlement,’ in: G.E. van Maanen and A.J. van der Walt, *Property Law on the Threshold of the 21st Century* (Antwerp, Apeldoorn: Maklu, 1996), 70–71.

30 Ellickson, ‘Property in Land,’ 1397. Singer proposes that property should be understood as a social system, which ‘involves, not relations between people and things, but among people, both at the level of society as a whole (the macro level) and in the context of particular relationships (the micro level). Four features of this system deserve emphasis. First, multiple models exist for defining and controlling property relationships. Second, property rights must be understood as both contingent and contextually determined. Third, property law and property rights have an inescapable distributive component. Fourth, property law helps to structure and shape the contours of social relationships.’ Singer, ‘Property and Social Relations,’ 78.

control over the use and benefit from a thing, and the primary function of a territorial right is to give the right-holder the power to establish justice within a particular region.³¹ Interference in land rights by the governing authority is legitimate when that authority seeks to perform its designated duty of regulating and distributing land rights. The governing authority, today most commonly associated with the State, regulates society and therefore also the use of land. Given the regulating role of the State, this authority ‘improves an enabling environment in which people can live and use land optimally,’³² which may make it incumbent on the State to interfere in land rights. The negative duty of the State to refrain from interfering in private property rights and to protect these rights the protection of these rights is among the basic principles underlying the regulating role of the State. The distributing role of the governing authority concerns ‘the situations whereby the state intends to improve the living conditions of those who live from the land.’³³ In other words, land and land policy are used by the governing authority to distribute wealth. It is here that the positive duty of the State to enable its citizens to enjoy property rights becomes manifest.

To conclude, land rights serve both the private and the public spheres. In the private arena, land forms a fundament of people’s material and psychological security, and the legal regimes that are in place to regulate land tenure directly affect a society’s entire population. In the public domain, the instrumental use of land rights often aims at achieving political, economic and social goals.

2.2 African Land Law

The 1921 *Amodu Tijani v. The Secretary of the Southern Provinces of Nigeria* case,³⁴ which Chapter 6 addresses in more detail, offers an interesting glimpse of the European interpretation of African land ownership. In their judgment,

31 C. Nine, *Global Justice and Territory* (Oxford University Press, 2012), 73–74.

32 T.R.G. van Banning, *The Human Right to Property* (Antwerp, Oxford, New York: Intersentia, 2002), 326. ‘The state has had and always will have to interfere with land rights in order to fulfil its governance role. It has to build roads, construct public facilities and protect the environment. It also has to balance the interests of various groups in society; these balancing acts regularly and unavoidably affect land.’ *Ibid.*

33 *Ibid.* See also T.W. Bennett *et al.* (eds.), ‘Land Ownership: A Changing Concept,’ *Acta Juridica* (1985), p. v.

34 *Amodu Tijani v. The Secretary, Southern Provinces of Nigeria*, 1921, 2 A.C. 399 or 3 N.L.R. 21 (Appeal from the Divisional Court of Southern Nigeria to the Privy Council). Reference to this case is also made by M.F. Lindley in his *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longmans, Green and Co., 1926), 347.

their Lordships refer to the 1898 Report on Land Tenure in West Africa, which had been prepared and drawn up by Chief Justice Rayner. The report describes the character of the tenure of land among the native peoples in that part of Africa, and it is quoted extensively by the Court:

The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognised, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land.

This passage is considered to be the first Western articulation of African understanding of property rights to land. This first attempt to understand the African land tenure system contains three misconceptions, as Clement Ng'ong'ola clearly describes.³⁵ First, it is erroneous to suggest that communal land tenure has to be understood in the sense that every member of a particular group or

35 C. Ng'ong'ola, 'Land Problems in Some Peri-Urban Villages in Botswana and Problems of Conception, Description and Transformation of "Tribal" Land Tenure,' *Journal of African Law*, 36 (1992), 144–148. See also Bryant, *Land*, 16–29.

community had an equal claim to a particular piece of land.³⁶ Second, the interpretation of the position and the role of the native ruler as it appears in the *Amodu Tijani* case is inaccurate: 'While acknowledging the error of attempting to translate the chief's political position and his powers of land administration into the language of ownership, it should also be appreciated that equating his position to that of a trustee does not take the clarification of his rights, duties, powers and privileges very far.'³⁷ Third, the Court's suggestion that natives are not familiar with the notion of ownership of land is also troublesome.³⁸

At this point it is important to note that nineteenth-century legal doctrine did acknowledge African natives' property rights to land. Westlake, for example, asserted that '[s]ettled agricultural populations know property in land, either as belonging to individuals or to families, or, if as belonging in full measure only to the tribe, at ease with such rights of a proprietary nature vested in individuals or in families as are necessary for cultivation.'³⁹ However, he pointed to the limits of this native ownership because of the natives' way of life: 'Hunting and nomad tribes may have so slight a connection with any land in particular as to share but little, if at all, the ideas which we connect with property in the soil.'⁴⁰

Another attempt to understand the tenure systems of Africa was made by the British Governor-General of Nigeria, Frederick Lugard (1858–1945).⁴¹ Lugard subscribed to the conventional European view that the African property regime was of a customary nature, and he emphasized the familial and communal character of these property rights. From the European point of view, African natives were unfamiliar with private land ownership, but that view may

36 'Communal ownership, given its usual common-law denotation, might mean either that a right is held by a group of people jointly, i.e. by a single inseparable title, or by a group in common, i.e. each person having own separate but same title. This ambiguity is not explained.' T.W. Bennett, 'Terminology and Land Tenure in Customary Law: An exercise in Linguistic Theory,' *Acta Juridica* (1985), 176.

37 Ng'ong'ola, 'Land Problems,' 146.

38 'Colonial policy towards African tenure was informed by two tenacious beliefs: that individual ownership of property was the hallmark of civilization and that customary law knew only communal ownership. [...] However, it does not follow that customary land tenure was (or is) communal.' T.W. Bennett, 'African Land – A History of Dispossession,' in: R. Zimmermann and D. Visser (eds.), *Southern Cross. Civil Law and Common Law in South Africa* (Kenwyn: Juta, 1996), 72.

39 Westlake, *Chapters*, 144.

40 *Ibid.*

41 F.D. Lugard, *The Dual Mandate in British Tropical Africa* (Edinburgh, London: William Blackwood, 1922), 280–281.

not stand up to analysis Was native land ownership in Africa indeed based solely on custom and community, or, in other words, was private ownership of land non-existent? To address these questions, land ownership in Africa must be discussed from a sociological and anthropological perspective⁴² and from the view point of the natives themselves.⁴³ In what follows the African system of native land tenure will be described, and this description includes a comparison between the rules and institutions of the African and European systems.

Before the European voyages of discovery, there was a wide variety of political entities in Africa. These entities endorsed rules which 'existed to define the appropriate reciprocal behavior of individuals,' and mechanisms which 'existed to maintain the social order.'⁴⁴ Mechanisms to maintain social order varied greatly 'between constituted authority and various forms of self-help, with religious and supernatural sanctions, and processes of reconciliation playing their parts.'⁴⁵ In short, social order and the existence of law, more specifically customary law, were common features of these African political entities.⁴⁶

Although describing African systems of landholding poses problems,⁴⁷ traditionally the nature of African native systems of land tenure is characterized by three interdependent denominations. First, it is custom-based. Second, because of the communal nature of native land tenure, the political organization of African peoples is closely linked to tenure and proprietary notions. Third, African natives have a 'spiritual' relationship with the land they live on and that their ancestors lived on before them. These three elements, which can

42 See, for example, A.N. Allott, 'The Ashanti Law of Property,' *Zeitschrift für vergleichende Rechtswissenschaft*, 68 (1965), 137ff; A.N. Allott, 'Family Property in West Africa: Its Juristic Basis, Control and Enjoyment,' in: J.N.D. Anderson (ed.), *Family Laws in Asia and Africa* (London: Allen and Unwin, 1968), 122ff and M. Gluckman, *The Ideas in Barotse Jurisprudence* (New Haven, London: Yale University Press, 1965).

43 See E.D. Morel, *Nigeria, Its Peoples and Problems* (London: Smith, Elder and Co., 1911).

44 C.M.N. White, 'African Customary Law: The Problem of Concept and Definition,' *Journal of African Law*, 9 (1965), 86.

45 *Ibid.*

46 See M. Gluckman (ed.), *Ideas and Procedures in African Customary Law* (Oxford University Press, 1969).

47 G. MacCormack, 'Problems in the Description of African Systems of Landholding,' *Journal of Legal Pluralism*, 21 (1983), 1–14. More generally on property rights in Africa South of the Sahara, see H.W.O. Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa,' in: A. Claassens and B. Cousins (eds.), *Land, Power & Custom* (University of Cape Town Press, 2008), 95–108 and J.P. Powelson, *The Story of Land. A World History of Land Tenure and Agrarian Reform* (Cambridge, Mass.: Lincoln Institute of Land Policy, 1988), 257–284.

only be meaningfully considered together, form the main characteristics of African native land tenure.

First, the essence of customary law, as Ng'ong'ola aptly formulates, is that it refers to norms, values, habits and other commitments of groups or communities which must be appreciated as law.⁴⁸ Unlike statutory tenure,⁴⁹ the customary law basis of proprietary rights to land in African native legal systems is related to the needs of a subsistence system of hunting and fishing, pasturage and agriculture, which in turn is closely connected to the natives' communal way of life. This subsistence depends on a sufficiency of land to allow for rotation, which includes allowing land to lie fallow. Native communities need rules to solve conflicts of distributive scarcity. Customary land tenure in Africa entails that land belongs to all the people, and the land may be used by individuals, families and communities. Family property has a particular place within customary land law.⁵⁰ Membership of a certain family or community gives individuals privileges and rights with regard to the access to and disposal of the land.⁵¹ The main features of customary land law are that the land belongs to the community, implying that all the individuals of that community have equal rights of access and use regarding land. The native ruler, who has governing powers over the land, is 'in the position of a trustee and holds the land for the use of the people.'⁵² The content of the rights and rules with

48 C. Ng'ong'ola, 'Customary Law, Land Tenure and Policy in some African Countries at the Threshold of the Twenty-first Century,' in: G.E. van Maanen and A.J. van der Walt, *Property Law on the Threshold of the 21st Century* (Antwerp, Apeldoorn: Maklu, 1996), 392. On the uncontroversial issue of the interpretation of customary law, see *ibid.*, 393. See also K. Akuffo, 'The Conception of Land Ownership in African Customary Law and Its Implications for Development,' *African Journal for International and Comparative Law*, 17 (2009), 57–78; M. Chanock, 'The Law Market: The Legal Encounters in British East and Central Africa,' in W. Mommsen and J. de Moor (eds.), *European expansion and the law* (Oxford, New York: Berg, 1992), 279–305; P. Fitzpatrick, 'Traditionalism and Traditional Law,' *Journal of African Law*, 28 (1984), 20–27 and also H. Klug, 'Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law,' *Journal of Legal Pluralism and Unofficial Law*, 35 (1995), 119–148.

49 On the distinction between customary and statutory land tenure, see F. Twaib, 'The Dilemma of the Customary Landholder,' in: Robert Debusmann and Stefan Arnold (eds.), *Land Law and Land Ownership in Africa. Case Studies from Colonial and Contemporary Cameroon and Tanzania* (Bayreuth: Bayreuth African Studies, 1996), 82–110.

50 C.O. Olawoye, *Title to Land in Nigeria* (London: Evans Brothers, 1981), 36–38.

51 Yakubu, *Land Law in Nigeria*, 6.

52 *Ibid.*, 8. 'The powers of a ruler over land are in respect of the following: a) General Administration: A ruler as a sociological and political authority is charged with the responsibility to see that the community land is administered well for the common benefit of the

regard to acquisition of property differ according to the object in question, the party on whom these right have been conferred, and against whom they can be upheld.⁵³

Second, the communal nature of native African landholding has as a consequence that the political organization of the native group and the system of land tenure are closely connected. The relationship between the community and the land they hold is hard to interpret, because 'the rights of individuals and of the group with respect to the same piece of land often co-exist within the same social context.'⁵⁴ Additionally, land is in most cases not owned or worked by any large unit: 'Everywhere there are individual rights, that is to say that a single individual, or two or more close relatives, have definite rights to a particular plot of ground and to its produce.'⁵⁵ These rights are connected to membership of a family, clan or local group. Often, these rights are limited to the period of effective occupation and restricted in respect of succession and transfer: sale of the land by an individual member of the group does not appear to be possible, or if it is, it can only be effectuated under strict conditions set by the native group.⁵⁶ Generally, the inalienability of land and the equality of group members are assumed to be the cornerstone of communal land ownership.⁵⁷ Although individual proprietary rights and the benefits connected to these kinds of rights are often not of current interest within the native conception of landholding, they are not absent.⁵⁸ In this respect, the African natives' relationship with the land has a more possessory nature than an absolute, proprietary one. As the head of the village, the ruler fulfils a custodian function

people; b) Trusteeship Position: A ruler is a trustee of the community land. He administers land for the use and common benefit of the people. He cannot sell or make an outright gift of community land. [...] The consequence of the Ruler's position as a trustee over land is that he represents his community in all land disputes. He sues and he can be sued for any matter connected with the community land.' *Ibid.*, 12–13. See also Bentsi-Enchill, 'African Systems of Land Tenure,' 127. For an intriguing perspective on customary law, see White, 'African Customary Law,' 89.

53 Bouckaert, 'What is Property,' 780.

54 T.O. Elias, *Nigerian Land Law* (London: Sweet and Maxwell, 1971), 73. Land which are communally hold, 'often embrace both those in which individual members of the group hold clearly recognized rights and those over which no claim of right is ever asserted whether by groups or by individuals.' *Ibid.*

55 Meek, *Land*, 17.

56 *Ibid.* See Elias, *Nigerian Land Law*, 130–131.

57 See Ng'ong'ola, 'Customary Law,' 403. See also R. Roberts and K. Mann, 'Law in Colonial Africa,' in: K. Mann and R. Roberts (eds.), *Law in Colonial Africa* (Portsmouth, London: James Currey, 1991), 25.

58 Okoth-Ogendo, 'Nature of Land Rights,' 111.

over the land, but he cannot be considered the owner of the land: 'The normal unit of land ownership is the extended-family, or kindred. Land once granted to a family remains the property of that family, and the chief has no right to any say in its disposal.'⁵⁹ The native rulers were regarded as holders of land who had assigned powers of administration and allocation. Paramountcy and land tenure do not come together in the person of the native ruler. In other words, the ruler is 'in no sense the *ultimus haeres* to any land to which there is no succession, since in the Customary Law care is taken to continue the *persona* of the family.'⁶⁰ The African ruler had a 'political and social pre-eminence'⁶¹ function with regard to the land on which his community lived. Consequently, the native land tenure system of land, based on kinship, ensures social and political stability.

Third, the relationship of African natives with their land has to be articulated. In the majority of native communities, the authority of customary rules and institutions has religious, mythical and ancestral origins. With regard to the relationship between customary rules and their cultural foundation, Boudewijn Bouckaert argues that

Although tribal societies have had to develop rules and institutions to solve interpersonal conflicts about the use of scarce resources, these rules and institutions are not perceived as a separate legal order. They remain closely intertwined within the cultural background of the mythical-conventional world view. [...] Lacking a perception of law as a separate order and lacking a specialized class devoted to solving legal problems, it is not surprising that we are unable to find a general and abstract notion of property in tribal legal systems.⁶²

Charles Meek observes four classes of land within an Ibo village in Nigeria. First, there are lands which are 'sacred or taboo,' implying the spiritual values of the land. Often this spiritual relationship with the land refers to the people's relationship with their ancestors, whom they worship. Second, virgin forest on land is not used for farming, because forests offer protection and defence to

59 Meek, *Land*, 27.

60 J.E. Casely Hayford, *The Truth about the West African Land Question*, 2nd edn (London: Frank Cass, 1971), 67.

61 Elias, *Nigerian Land Law*, 78. 'This is not, however, to deny that a chief may enjoy a dual capacity; his position of control and administration of community land, as well as his position as a land-owning individual in his private capacity.' *Ibid.*

62 Bouckaert, 'What is Property,' 779.

the village, shade to people and cattle, and supplies of wood and fibre. Third, farm land is communally held by the entire village, which is composed of the rulers and several families. Last but not least, there is the land which is individually held and cultivated, i.e., land that is held 'by a single individual or by a small working group composed of a father and sons, or a man and his younger brothers or cousins.'⁶³

The very brevity of this outline of the general characteristics of customary land tenure in Africa requires that it be qualified. First, these features express a general view on native land tenure in Africa – contextual details have been left out. Each African community had its own habits and rules, which resulted in a variety of differing customary land tenure systems on the African continent. Second, even this native African land tenure system based on customary law was not free from foreign influences. Since times immemorial, African natives have encountered and been in contact with non-African natives, and this has affected their customs, rules and ways of life. For example, the first European colonization wave of the sixteenth and seventeenth centuries had already confronted the African native populations with unfamiliar legal concepts, rules and systems regarding land tenure. It was from that moment on that African land tenure systems were influenced by European legal thought. In other words, when the European colonists of the nineteenth century first arrived in Africa, European legal concepts, rules and systems had already begun to make their mark.⁶⁴ In addition, in the colonial period African natives actively participated in the development of customary law.

3 Concluding Remarks: New Imperialism and Natives' Property Rights

In the sixteenth and seventeenth centuries, contractual thinkers, of whom Thomas Hobbes (1588–1679), John Locke (1632–1704) and Jean-Jacques

63 Meek, *Land*, 21. Yakubu distinguishes five sorts of African land use: forest land, marsh land (found along river beds or water lodge areas), grassland, fallowland (has been cultivated and has now reverted to grassland with the previous cultivator retaining the intention of coming back to take it) and sacred and taboo land. Yakubu, *Land Law in Nigeria*, 4–5.

64 See, for example, L. Benton, 'Possessing Empire: Iberian Claims and Interpolity Law,' in: S. Belmessous (ed.), *Native Claims. Indigenous Law against Empire, 1500–1920* (Oxford University Press, 2012), 19–40; A. Fitzmaurice, 'Powhatan Legal Claims,' in: S. Belmessous (ed.), *Native Claims. Indigenous Law against Empire, 1500–1920* (Oxford University Press, 2012), 85–106; K. Mann and R. Roberts, *Law in Colonial Africa* (Portsmouth, London: James Currey, 1991) and S. Pierce, *Farmers and the State in Colonial Kano. Land Tenure and the Legal Imagination* (Bloomington, Indianapolis: Indiana University Press, 2005).

Rousseau (1712–1778) were the most prominent, placed the institution of property within the political realm and emphasized the development of property from commonly to privately owned objects, from *de facto* to *de iure* possession. Private property, therefore, is the foundation on which rests the superstructure of public authority and power, i.e., sovereignty. Against this background, Fitzmaurice argues that '[t]he division over whether the state needed to exist before occupation could create property would be central to discussions of colonial property.'⁶⁵ He shows that in these discussions both philosophical positions – property and rights are created prior to the state and vice versa – were used to argue either that native populations did not live in States and, for that reason, did not possess rights or that native political entities were legitimate because each polity organized property: 'Similarly, the argument that rights pre-exist the state was used to argue that indigenous peoples had not exploited nature and so did not possess property, but it was also employed to argue that even if indigenous peoples did not live in recognizably sovereign states, they still possessed property rights.'⁶⁶

In nineteenth century Europe, the concepts of property and sovereignty were formally separated: they were classified as belonging to different areas of law (private law and public law respectively), and in many European States they were codified separately. Property rights were considered to have been created by the State on the basis of the State's territorial sovereignty. Paradoxically, in order to give sovereignty an independent position vis-à-vis property, legal doctrine used the model of property and its determining characteristics to shape sovereignty as an institute. This circular dependency became particularly apparent in the development of international law. Following the demise of feudality at the end of the eighteenth century, property, and more specifically ownership, became an absolute institution within the private law systems of the various continental Europe States. In Great Britain, the birthplace of the common law tradition, property law retained its feudal origin and with it a broad range of proprietary rights to land.

The nineteenth century was also the era of territorial expansion through colonialism. Economic and political considerations combined with the opportunities offered by the Industrial Revolution to encourage Europeans to venture out into the world and establish settlements abroad. Encounters with non-Europeans led to confrontations between private individuals as well as between political entities and legal systems. Especially with regard to property rights to land, more specifically land ownership, conceptual differences and conflicts were the order of the day. The Europeans regarded land ownership

65 Fitzmaurice, *Sovereignty, Property and Empire*, 123.

66 *Ibid.*

both as an absolute, formalized institution and as a key private interest that needed to be protected by the State. They were confronted with the African interpretation of property rights to land. African natives considered their lands as the primary living condition. Although their property rights to land were predominantly communal and customary in nature and based on religious convictions and ancestral relations, the Europeans through their earlier contacts with African peoples had already exerted some influence on how property rights were regulated within African political communities. Private land ownership, for example, was not unknown to the African natives.

Although there are differences in the understanding of property in general and land ownership in particular, *dominium* played a central role in the European acquisition of African territory and in the relations between Europeans and African natives. New Imperialism for Africa implied the European acquisition of sovereign rights over African territory. These rights were acquired by means of bilateral treaties between African rulers and European States. Cession and protectorate treaties were the instruments that transferred sovereignty, either in whole or in part, from the African rulers to the European contracting parties. This raises the following questions: What effects did this treaty-based transfer of sovereignty have on the natives' property rights? Did the Europeans recognize and respect the existing native proprietary rights to land? By nineteenth-century legal standards, were the natives' property rights to land infringed and obligations of international law violated? To answer these questions, the cession and protectorate treaties between European States and African rulers must first be analysed and assessed in terms of how they were negotiated and concluded. Subsequently, it must be established whether these treaties were observed and whether international law was violated. Only then can an attempt be made to ascertain whether the acquisition and partition of Africa by the European colonial powers was illegal.

Imperium

1 Introduction

The sixteenth century scholastic Francisco Suárez (1548–1617) was one of the first to describe the fundamental distinction between property and sovereignty within the law of nations. Perhaps somewhat confusingly, for these two concepts he used the terms *dominium proprietatis* and *dominium iurisdictionis* respectively. According to Suárez, *dominium proprietatis* (proprietary power) indicates the right to private property that all persons enjoy and which they can enforce against any and all private and public interventions. Sovereign power, or *dominium iurisdictionis*, is the authority as exercised by the rules: it is based on the territorial realm and it is defined by its objective to guarantee the protection and prosperity of that realm.¹ It is the latter concept, the exercise of sovereign rights over territory, with which this chapter is concerned. It will be referred to by its more customary name in academic discourse: *imperium*.

Capturing both territory and sovereignty, *imperium* is commonly rendered as territorial sovereignty. *Imperium* connects the spatial and subjective dimensions of legal order. *Imperium* is primarily a right over persons and it is secondarily a right over things, that is, over land and parts of sea.² This close and interdependent relationship between sovereignty and territory has been the subject of many academic works and debates. Daniel O’Connell formulates the close relationship between sovereignty and territory as follows: ‘Sovereignty connotes nothing more than the supreme legal competence within a defined region, a competence which is relative only.’³ And, arbitrator Max Huber’s definition of territorial sovereignty in the *Island of Palmas* case (1928) is in every international lawyer’s toolkit: ‘Territorial sovereignty [...] involves the exclusive

1 F. Suárez, *On Laws and God the Lawgiver (De legibus, ac Deo legislatore)*, in: *Selections from Three Works. Vol II: The Translation*, transl. G. Williams (Oxford University Press, 1944), Bk II Ch. XIX, § 9 (347).

2 Hugo Grotius in Yanagihara Masaharu, ‘*Dominium and Imperium*,’ in: Y. Onuma (ed.), *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 147–173.

3 D.P. O’Connell, *State Succession in Municipal Law and International Law*, vol. i (Cambridge University Press, 1967), 26.

right to display the activities of a State.⁴ Shaw gives a more comprehensive definition of territorial sovereignty: '[T]erritorial sovereignty in fact marks a link between a particular people and a particular territory, so that within that area that people may exercise through the medium of the State its jurisdiction while being distinguished from other peoples exercising jurisdiction over other areas. It consists of a coherent body of rights and duties imposed upon States in relation to specific pieces of territory.'⁵

The main purpose of this chapter is to analyse and interpret the concept of territorial sovereignty from an international legal perspective and within the timeframe of the nineteenth century. As a consequence, the central object of scrutiny is the external component of sovereignty, and to make this theoretical discussion tangible and relevant within the scope of this book, it will be put into the context of the European partition of and entitlement to African territory in the late nineteenth century. The question to be answered, therefore, is what territorial sovereignty as a legal concept entailed, in particular in the late nineteenth and early twentieth centuries, from both a European and an African perspective.

Although the concepts of sovereignty and territory are separate concepts, they have become closely related, in particular in the context of the international legal order, by their direct relation to the concept of the State. The first step is to state the theoretical and conceptual assumptions that underlie the discussion of sovereignty presented here (§2). Next, the chapter looks more closely at the nineteenth-century theory and practice of sovereignty within the context of European international law as it stood at the time (§3). Following this overview, the chapter describes and analyses the African view on both international law and the position and role of the concept of sovereignty (§4). Subsequently, the relationship of African natives with their territory will be explored and compared to the European perspective on territorial sovereignty. Finally, the Chapter offers some concluding remarks on sovereignty in the context of the European acquisition and partition of Africa at the end of the nineteenth century (§5).

2 Theoretical and Conceptual Framework

In this chapter sovereignty is understood in a broad sense rather than in the narrow sense of international legal doctrine in the nineteenth century. Under this doctrine, still prevalent today, sovereignty is considered to be the

4 *Island of Palmas (Netherlands v. United States of America)*, 1928, 2 RIAA 829, 839.

5 Shaw, *Title to Territory in Africa*, 11–12.

backbone, a ‘fundamental axiom,’⁶ or an ‘essential dogma’⁷ of international law in theory and practice. Koskenniemi describes this traditional view on sovereignty, which presupposes the inseparable connection between sovereignty and the State, as follows: ‘It [sovereignty, MvdL] works as a description and a norm. It characterizes the critical property an entity must possess in order to qualify as a State. And it involves a set of rights and duties which are understood to constitute the normative basis of international relations.’⁸ This traditional conceptualization of international sovereignty is problematic, because it expresses a European understanding of sovereignty. Originally, sovereignty was not connected to the State and the distinction between internal and external sovereignty only developed over time. Moreover, sovereignty in the traditional sense is a formal concept and has only a tenuous connection with international law in practice. To avoid using a fiction in interpreting the many faces of a real world phenomenon, sovereignty has to be understood, to use the words of Martin Loughlin, as ‘a representation of the autonomy of a political sphere.’⁹ Sovereignty is a dynamic concept and its meaning is relative to its specific spatial and temporal context. Sovereignty as the supreme power of a political entity, according to F.H. Hinsley, is ‘the idea that there is a final and absolute political authority in the political community [...] and no final and absolute authority exists elsewhere [...]’.¹⁰ However, neither within a particular political entity nor in relation to other polities is sovereignty unlimited. Law sets the boundaries of sovereign power to avoid abuse of authority.

6 Shaw, *International Law*, 487.

7 R. Domingo, *The New Global Law* (Cambridge University Press, 2010), 73.

8 Koskenniemi, *From Apology to Utopia*, 300. Another example of the traditional view – aligning sovereignty, territory and State – can be found in the definition of sovereignty given by Rafael Domingo: ‘Sovereignty is thus a property inherent to any state, which gives it supreme power in its territory, control of its legal system, and the right to recognize external bodies or entities that establish contact with it.’ Domingo, *New Global Law*, 65. See also Shaw, *International Law*, 487–488: ‘International law is based on the concept of the state. The state in its turn lies upon the foundation of sovereignty, which expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person. [...] Since such fundamental legal concepts as sovereignty and jurisdiction can only be comprehended in relation to territory, it follows that the legal nature of territory becomes a vital part in any study of international law. Indeed, the principle whereby a state is deemed to exercise exclusive power over its territory can be regarded as a fundamental axiom of classical international law.’

9 M. Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 228. See also M. Loughlin, ‘Ten Tenets of Sovereignty,’ in: N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003), 56.

10 F.H. Hinsley, *Sovereignty* (New York: Basic Books, 1966), 26.

Interestingly, the narrow understanding of sovereignty is not only problematic to recent legal scholarship. The American lawyer Robert Lansing (1864–1928) had already pointed to the non-constitutive nature of the territorial State for the existence of sovereignty in 1913: ‘In the consideration of sovereignty, the state as a qualification of occupation of territory is for the purpose of these notes non-essential; and its omission from the definition avoids controversy as to the correctness of the limitation which its adoption would impose.’¹¹ And as early as the 1920s, doubts arose about the fundamental assumption in international law that State, territory and sovereignty align. Even then, it was recognized that territorial statehood is one of a number of ways to organize a political entity.

As the concept of sovereignty evolved from the Middle Ages onwards, it developed both an internal and an external component. The former was affirmed by the French Revolution, the latter evolved in parallel to the law of nations. Sovereignty in its internal sense implies that the sovereign’s authority is original, absolute and indivisible vis-à-vis the citizens of the political entity concerned. Internal sovereignty entails the authority relationship within a political organization between the ruler and the ruled, a relationship that is often defined in the constitution of that particular entity. The French jurist Maurice Costes, whose most productive period was the first two decades of the twentieth century, emphasizes the personal nature between sovereign and subjects by defining internal sovereignty as ‘*une sorte de maîtrise sur les personnes et sur*

11 R. Lansing. ‘Notes on Sovereignty in a State,’ *American Journal of International Law*, 1 (1907), 108. Lansing confirmed that ‘[w]hat certain publicists have tried to avoid and what they cannot avoid is that sovereignty and the sovereign existed before the state.’ *Ibid.*, p. 112. Lansing provided an understanding of sovereignty in relation to law: ‘There is in a modern political state, as in a primitive community, an irresistible energy which can control all human conduct within the state. This irresistible energy is superior physical might which has no limitations other than those inherent in human nature. This superior physical might confer upon its possessor or possessors the power to compel obedience to his or their will. This dominant will is expressed by action or by command. The supreme coercive physical power I would define as *sovereignty*; the expression of the dominant will of its possessor or possessors I would define as *law*. Sovereignty so defined is a natural product of human association affected by the desire for its continuance. Law, in any but an artificial sense, is the mental product of the possessor of the sovereignty. Thus effective rules of human conduct (and they are the only ones worthy of consideration), whether they apply to individuals or to states, depend ultimately upon paramount human energy or sovereignty, which though founded in nature, seems to me, not only an appropriate, but an essential, term in international law as well as in constitutional law.’ R. Lansing, ‘A Definition of Sovereignty,’ *Proceedings of the American Political Science Association*, 10 (1913), 74.

*les choses, résultant d'un rapport intime entre, d'une part, le pouvoir qui l'exerce et, d'autre part, les populations et les territoires qui y sont soumis.*¹² Often, internal sovereignty is associated with authority or supremacy, while external sovereignty signifies the autonomy of the polity. Sovereignty in its external sense comprises the status of a political entity in relation to other political entities, and it regulates their interactions. In most cases it involves the control over foreign affairs and the defence of the territory. In present-day international relations, external sovereignty concerns the international legal order that defines the mutual rights, duties, powers, competences and titles of States. Independence equality are the two fundamental principles that govern interstate relations. In short, sovereignty presupposes or assumes the supremacy and independence of a State.

3 Nineteenth-century European International Law: Sovereignty, Territory and State

The constitutive principles of nineteenth-century international law – sometimes called the ‘Relative Golden Age of Modern International Law’¹³ – were

¹² M. Costes, *Des Cessions de Territoires* (Paris, Toulouse: Rivière and Co., 1914), 43.

¹³ J. Shen, ‘The Relativity and Historical Perspective of the Golden Age of International Law,’ *International Legal Theory*, 6 (2000), 21. ‘While secularised hallmarks of civilisation represent a significant break with the Christian international law tradition, non-Christian stadial theories of progress were easily adaptable to secularised imperialism. Throughout the seventeenth and eighteenth centuries Europeans could and did claim prescription and/or first valid discovery or occupation against indigenous groups that were deemed to have a lower form of production (e.g. nomadic), culture (e.g. no writing), or political system (e.g. anarchy, or monarchy). Similarly, there are numerous cases when the early modern secularisation of international law made it possible to accord full recognition to non-Europeans’ right to property, territorially defined states, and sovereignty. It remains to be seen whether the nineteenth-century doctrinal turn in international law [...] continued at least in part the stages-based justification of imperialism [...], or whether Victorian imperial evangelism constitutes a volte-face from almost three centuries of self-consciously secularising imperialist legal discourse, resurrecting in effect sixteenth- and seventeenth-century Catholic justifications of imperialism. Without drawing a comprehensive arc, one can begin a pointillist picture of this change by contrasting, for instance, Vattel’s (1758) criterion for being a member of the natural society of nations (namely a state’s own claim to govern itself by its own authority and laws) with post-Kant and post-Bentham elaborations that the correct hallmark of civilisation is not self-determination but recognition by a club of nations, self-appointed as already civilised. If not Iberian Catholicism, then at least a common, minimalist Christianity then became a defining

non-intervention, equality of States, balance of power, legitimacy, international community and international reciprocity.¹⁴ Territorial expansion played a crucial role in shaping the international legal order in the second half of the nineteenth century. Saskia Sassen has described the conditions that facilitated the creation of international law: '[T]he world scale at the time was largely constituted through the projection of national capitalisms onto foreign geographic areas,' which led to an 'emerging orientation toward interstate coordination through both national legislation and international agreements.'¹⁵ Imperialism, in other words, boosted the universalization of European international law.

Grewe has observed that this expansion of the European law of nations was favoured, and indeed made possible by, three mutually reinforcing factors: the transformation of a family of Christian European nations into a secular society of civilized nations; the globalization of the State system; and Britain's superior position in this era through its control over the world's oceans and its colonial possessions in overseas territories.¹⁶ European international law, however, was not only carried to overseas territories. Lawyers from all corners of the earth flocked to Europe to study and took home with them the concept and principles of European international law.¹⁷ As a consequence of this expansion of European international law to places and peoples outside Europe, the appearance of sovereignty changed: it became imperial. 'Imperial sovereignty presents itself as the nemesis of modern sovereignty: imperial sovereignty reflects a fusion of economic and political power, the elimination of the distinction between public and private, the erosion of civil order which underpins the idea of official power, and the disintegration of a political relationship.'¹⁸ Imperial sovereignty inevitably eliminated the traditional dichotomy between the economic and the political spheres and, by extension, between the private and the public spheres. A substantial corollary of this imperial sovereignty is that late nineteenth-century international legal doctrine overemphasized the external

hallmark of civilisation in positive international law.' M. Somos, 'Selden's *Mare Clausum*. The Secularisation of International Law and the Rise of Soft Imperialism,' *Journal of the History of International Law*, 14 (2012), 329.

- 14 M. Vec, 'Principles in 19th century International Law Doctrine,' in: L. Nuzzo and M. Vec (eds.), *Constructing International Law. The Birth of a Discipline* (Frankfurt am Main: Klostermann, 2012), 215.
- 15 S. Sassen, *Territory, Authority, Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006), 132 and 136.
- 16 Grewe, *Epochs of International Law*, 445.
- 17 See Becker Lorca, 'Universal International Law,' 475–552.
- 18 Loughlin, 'Ten Tenets of Sovereignty,' 84.

dimension of sovereignty. The identification of States by their independence¹⁹ in relation to other States and political entities took priority over the internal and vertical relationship they had with their subjects.²⁰

On this interpretation of sovereignty, moral limitations of sovereign powers were not considered to fall within the legal realm; limits of this kind depended on the sovereign's discretionary powers and were not seen as compulsory, as Lansing's argumentation shows: 'All such influences being followed only voluntarily by the possessor of the sovereignty and operating by permission rather than by positive power, obedience to them does not determine the possession of the real sovereignty.'²¹

Traditionally, international legal scholars emphasize the antithesis between natural law and positivism. They read a strict dualism regarding the natural law approach and positivism between the writers of the pre-nineteenth and the nineteenth centuries. Positivists are often styled as opponents of natural lawyers because of their alleged rejection of natural law, justice, and morality, and their epistemological approach to sources. As was shown no such strict dualism existed.²² Koskenniemi argues that stating that the nineteenth century was the 'golden age of international legal positivism' meant that 'the professionals moved within a fully consensualist or otherwise ascending argument' is wrong.²³ Two arguments support his view. First, most nineteenth-century

19 'A group of men is fully sovereign when it has no constitutional relations making it in any degree dependent on any other group: if it has such relations, so much of sovereignty as they leave it is a kind or degree of semi-sovereignty, though the constitution may not call it by that name.' Westlake, *Chapters*, 87.

20 Nevertheless, the understanding of sovereign rights as being unlimited and supreme within the State was deeply rooted in the legal doctrine of that time. Sovereignty was conceived as 'the power to the extent of the natural capacity of the possessor to do all things in a state without accountability.' Lansing, 'Notes on Sovereignty in a State,' 110. According to Lansing, this definition implies that, first, '[s]overeignty is real (or actual) only when the possessor can compel the obedience to the sovereign will of every individual composing the political state and within the territorial state,' that, second, '[s]uch complete power to compel obedience necessarily arises from the possession of physical force superior to any other such force in the state,' and that, '[t]he exercise of sovereignty in a state does not involve reasonableness, justice, or morality, but is simply the application or the menace of brute force.' *Ibid.*

21 *Ibid.*

22 See Lesaffer, 'Classical Law of Nations,' 426 and Vec, 'Principles,' 226. See also Craven, 'Invention of a Tradition,' 363–402.

23 Koskenniemi, *From Apology to Utopia*, 131. See also M. Koskenniemi, 'Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law,' *Constellations*, 15 (2008), 189–207.

legal scholars preserved some ideas of natural law, which offered arguments when positive ones were not available. Second, the alleged differences between positivism and natural law are not as marked as they seem to be.²⁴ A purely positivist approach proved impossible and the presence of natural law and other *a priori* concepts and principles necessary. Initially, the emphasis shift from the natural law to the positivist approach entailed a move from an ideological to a more pragmatic or realistic methodological approach. Law was no longer deductively derived from nature; law, as a man-made product, was inductively created. Law, more specifically international law, was created by and for States, and it became the task of international legal doctrine to observe and explain this empirical phenomenon. Accordingly, instead of characterizing this shift as a revolution resulting in a fundamental distinction, the relation between natural law and positivism can best be described or characterized as a minor adjustment of focus, a slight change of direction.

This methodological change in legal doctrine, however, turned out to be not such a change in perspectives after all. Eventually a contradiction in terms did arise: although the positivists claimed to be empirical by following 'the facts of international life without any *a priori* discrimination,'²⁵ they actually constructed theories based on the conduct of European States to justify European colonial practices in overseas territories. As will be argued in Chapter 8, these theories proved to be out of touch with reality. Positivists were not that realistic and even developed ideological traits; the acclaimed empiricists turned out to be epistemologists after all. This ambiguity had a fundamental impact on international law in the age of New Imperialism, especially with regard to the legality of the partition of Africa.

Two different but interrelated and interdependent worlds came into existence in the nineteenth century, created by European legal doctrine. On the one hand, a civilized European world was constructed. This order, to which international law applied, was one in which it was incumbent on States to respect each other's sovereignty and territorial integrity. On the other hand, as a world order in its own right Europe now faced a non-European and uncivilized world order. The central expansionist activity of European States was their civilizing mission, both in the positive sense of exporting European values and instituting good governance and in the negative sense of assimilating

24 Koskenniemi, *From Apology to Utopia*, 132.

25 C.H. Alexandrowicz, 'Empirical and Doctrinal Positivism in International Law,' *British Yearbook of International Law*, 47 (1974–1975), 289. See J. Pitts, 'Boundaries of Victorian International Law,' in: D. Bell (ed.), *Victorian Visions of Global Order* (Cambridge University Press, 1997), 81.

non-European people. In fact, European international law came to 'cover, though not apply to, the African continent as a quiet companion of imperilistic diplomacy and colonialism.'²⁶ This dichotomy is the common thread that runs throughout the entire theory on colonization and the justification of Africa's partition by means of cession and protectorate treaties. Although positivist legal doctrine denied Africa's sovereignty, territoriality and statehood, European States had to conclude treaties with African rulers to acquire sovereign rights over territory. In this light, Umzurike Oji Umzurike connects the arbitrary allocation of sovereign powers to African natives and the conclusion of these treaties: 'Since Africans were denied international personality, their future was decided by bilateral treaties entered into by European States. The recognition by European states of the exclusive right of one of them over a territory proved sufficient title in international law.'²⁷ This observation raises the questions whether these treaties were valid according to international law and whether they were complied with. These questions will be addressed in the following chapters

Although, in theory, the positivist view created a harmonious world defined by international society, sovereignty and civilization, the reality of the scramble for African territory was one of conflict and disorder, resulting in an even more divided world. Moreover, from a pragmatic point of view, the confrontation between Europeans and African natives occurred mainly through written treaties. This practice marked the reciprocal relationships in which territorial sovereignty was subject to transfer and, thus, asserted the applicability of international law to these relationships. In other words, while in nineteenth-century international legal doctrine international law applied solely to relations between sovereign States that belonged to the civilized European world, the practice of New Imperialism shows that international law did regulate contacts and relations between this world and that of the uncivilized African natives. Treaty practices between European and African parties bear out the fictitiousness of the world view informing and informed by nineteenth-century international legal doctrine. Theoretically, a redeeming quality of New Imperialism might be its consistency. However, as will be argued later, both from a practical and an African perspective, its legality is highly questionable.

26 Onuma, 'When was the Law of International Society Born,' 50.

27 U.O. Umzurike, *International Law and Colonialism in Africa* (Enugu: Nwamife Publishers, 1979), 24. See J.-A.C. Pemberton, 'The So-Called Right of Civilisation in European Colonial Ideology, 16th to 20th Centuries,' *Journal of the History of International Law*, 15 (2013), 37–50.

Practice evidenced international law's applicability to relations between States and other political entities, for example, treaty practices between European colonial powers and African rulers. Before the nineteenth century, treaties between European States and native rulers and peoples were commonly regarded as treaties governed by international law, despite the native treaty party not being a State by contemporary standards.²⁸ In the wake of positivist jurisprudence, international law became exclusionist: international law only applied to the relations between members of the 'family of civilized nations.' A few exceptions aside, non-European nations were excluded from international legal discourse. This situation justifies the conclusion that in the course of the nineteenth century the scope of international law 'shrank.'²⁹ According to Alexandrowicz, the law of nations before the nineteenth century was not European but inherently universal.³⁰ In the nineteenth century, positivism lost its empirical footing and became doctrinal. Positivism was doctrinally Eurocentric and bound to falsify history: 'The rejection of extra-European source material was instrumental in building up a new *European* (pseudo-universal) international law.'³¹ Nineteenth-century legal scholars had to establish theories in order to justify the excesses of territorial expansion.

In sum, from the historical and theoretical analysis of the concept of sovereignty presented above it follows that its manifestation is characterized by its contingent nature. The meaning and understanding of sovereignty depend on the political reality in which it serves. Sovereignty organizes political reality and is both internal and external to a specific political entity. Its context-bound character is shaped not only by the notions of absoluteness, supremacy, autonomy and independence, but also by the ideas of equality, non-intervention and recognition. The meaning and interpretation of sovereignty change with time and depend on the socio-political and economic circumstances and needs of different peoples.³²

This observation traces back to the general definition of sovereignty given in the first section of the current chapter. Sovereignty is a regulative principle that has an internal dimension – maintaining societal order within

28 See, for example, A.D. McNair, *The Law of Treaties*, 2nd edn (Oxford: Clarendon Press, 1961), 53–54; and I. Brownlie, *Treaties and Indigenous Peoples* (Oxford: Clarendon Press, 1992), 8–9.

29 Alexandrowicz, *Introduction to the History of the Law of Nations*.

30 Alexandrowicz, 'Empirical and Doctrinal Positivism in International Law,' 288.

31 *Ibid.*, 289.

32 See J. Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press, 1995), 247.

a political entity – and an external dimension – representing the autonomy and identity of a political entity in relation to others.³³ As society and political entities originate, alter and disappear, so do the meaning and purpose of sovereignty. Sovereignty is, therefore, not necessarily bound to territory, nor, by extension, to statehood. Consequently, the claim that ‘a State is sovereign is a tautology and the expression “sovereign state” is a pleonasm’³⁴ has to be rejected. Sovereignty, to use the words of Robert Jackson, is ‘a constitutional arrangement of political life and is thus artificial and historical; there is nothing about it that is natural or inevitable or immutable.’³⁵

External sovereignty gained the upper hand in international law, and, as soon as independence became the main criterion for the recognition of statehood, the three concepts of territory, sovereignty and State became aligned. *Imperium* as the unifying notion of territory and sovereignty became the realm of the State, more precisely the civilized, European-style State; both in theory and practice international law governed relations between these States, members of the international society or the ‘family of civilized nations.’ Outside this realm, there were confrontations between European States and foreign, in particular African, political entities, and European legal doctrine declared international law inapplicable to relations with this ‘other’ world consisting of uncivilized, non-sovereign entities. It was only towards the end of the nineteenth century, and as a result of the attempts of legal doctrine to legitimize the colonization of Africa, that territory coincided with civilization and sovereignty, and together these notions became a constitutive condition for the recognition of statehood. In practice, however, African political entities were capable of transferring sovereignty, whether wholly or in part, over their territory by treaty. Although these entities did not fulfil the theoretical conditions of statehood as defined by contemporary legal doctrine – recognition of statehood by the members of the family of civilized nations – they were considered sufficiently sovereign to relinquish sovereignty.

33 ‘[A]s seen from inside a state, sovereignty is paramount authority, and as seen from outside it is self-governing authority.’ Jackson, ‘Sovereignty in World Politics,’ 433. See also S. Jodoin, ‘International Law and Alterity: The State and the Other,’ *Leiden Journal of International Law*, 21 (2008), 1–28.

34 S. Lee, ‘A Puzzle of Sovereignty,’ *California Western International Law Journal*, 27 (1997), 243.

35 Jackson, ‘Sovereignty in World Politics,’ 432.

4 The African Perspective

In its Advisory Opinion on the *Western Sahara* (1975), the International Court of Justice (ICJ) determined that the Western Sahara was not *terra nullius* at the time of the Spanish colonization of the area, because, for one thing, 'Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.'³⁶ This interpretation by the Court suggests that a public sphere did exist at the time of the confrontation between Europeans and African natives. This confrontation did not only occur between private individuals, but also between polities represented by a ruler, on both the European and the African side. Following the analysis of sovereignty from the nineteenth-century European perspective in the previous section, sovereignty will now be assessed from the African perspective. The African view on international law and order and the position and role of the concept of sovereignty will be taken into account, although there is not a wealth of literature on law and colonialism from the perspective of the subjugated peoples.³⁷ The central issue is to what extent there was a public sphere in African polities, or, in other words, whether there was a hierarchical or vertical relationship between rulers and their subjects. Related issues that will be dealt with are the status of the ruler with regard to his people, which is mainly characterized by personal relationships, and the status of the political entity as a whole vis-à-vis the international community or family of States. Additionally, the relationship of the African natives with their territory, their soil, will be explored and compared to the European perspective.

Before the scramble for African territory got underway at the end of the nineteenth century, eighty percent of the African population were ruled by her own kings, queens, rulers, chiefs, clan and lineage heads, in empires, kingdoms, communities, tribes, clans and other polities of various sizes and shapes.³⁸ Although the term 'sovereignty' does not appear either in the vocabulary of African political entities or in sources on this subject, sovereignty in the sense of supreme authority and representation of the autonomy of the polity is indeed observable in Africa. While African political entities which the Europeans

36 *Western Sahara*, Advisory Opinion, 1975, ICJ Reports 4, at §81.

37 S.E. Merry, 'Law and Colonialism,' *Law and Society Review*, 25 (1991), 889–922.

38 A.A. Boahen, 'Africa and the Colonial Challenge,' in: A.A. Boahen (ed.), *General History of Africa*, vol. vii (London, Paris, Berkeley: Heinemann Educational Books, UNESCO, University of California Press, 1985), 1. See also J.A. Andrews, 'The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century,' in: M.N. Shaw (ed.), *Title to Territory* (Aldershot: Ashgate Dartmouth, 2005), 417.

encountered in the nineteenth century did not meet the conditions of the traditional, European understanding of sovereignty, it did comply with the broad notion of sovereignty, that is, a representation of the autonomy of an organized political entity.

As to the native authority's territorial power base, Taslim Elias explains that in the chieftaincy-based or monarchical African polities, political rights and obligations were territorially delimited and that the territorial areas were demarcated on the basis of local communities, which in their turn consisted of lineage ties and bonds of direct cooperation.³⁹ This personal loyalty to the ruler combined with the property in land of the ruler's subjects resembles the feudal system of medieval Europe. Although the African polities did not meet the nineteenth-century, European understanding of sovereignty, this did not mean that these polities were unfamiliar with the European notion of sovereignty. As observed earlier, from the sixteenth century onwards, African political entities had been confronted with and influenced by the European understanding of sovereignty.⁴⁰ Interactions, whether economic, diplomatic or legal, between Africa and Europe long predated European colonial rule on the African continent. Before the competition for African territory began in earnest and changed the social and political organization of African polities, mutual benefits had linked people from the two continents for centuries.⁴¹

The question now is whether and if so, to what extent these sovereign African polities were territorially based. Here, the issue of the relationship between sovereignty and property, and by extension, between the public and the private domains comes to the fore. Admittedly, in African political entities there was no categorical distinction between the public and the private spheres. In *Amodu Tijani v. The Secretary of the Southern Provinces of Nigeria* (1921),⁴² the Court extensively cited the Report on Land Tenure in West Africa

39 T.O. Elias, *Africa and the Development of International Law*, new edn (Dordrecht, Boston, London: Martinus Nijhoff, 1988), 35. Here, Elias referred to his own work: T.O. Elias, *Nature of African Customary Law* (Manchester University Press, 1956), Chapter 2.

40 See Elias, *Africa and the Development of International Law*, 43. See also L. Benton and R.J. Ross (eds.), *Legal Pluralism and Empires, 1500–1850* (New York University Press, 2013) and L.A. Fallers, *Law without Precedent. Legal Ideas in Action in the Courts of Colonial Busoga* (University of Chicago Press, 1969).

41 See E.A. Ayandele, 'External Influence on African Society,' in: J.C. Anene and G.N. Brown (eds.), *Africa in the Nineteenth and Twentieth Centuries. A Handbook for Teachers and Students* (Ibadan, London: Ibadan University Press, Nelson, 1966), 144–146.

42 *Amodu Tijani v. The Secretary, Southern Provinces of Nigeria*, 1921, 2 A.C. 399 or 3 N.L.R. 21 (Appeal from the Divisional Court of Southern Nigeria to the Privy Council). Reference to this case is also made by Lindley in his *Acquisition and Government of Backward Territory*, 347.

(1898), prepared and written by Chief Justice Rayner, in which native sovereignty and property were closely examined. The report shows that land was communally held and that all members of a community had equal rights to this communal land. The position of the ruler of the community was similar to that of a trustee in that he held the land for the beneficial use by the members of the community. He had authority over the people within the borders of the communal land, but proprietary rights remained in the hands of the community. Moreover, the ruler did not have the power to dispose of the land without consulting the community elders. Meek, who has identified the main characteristics of native systems of landholding, gives a comprehensive account of the entanglement of institutions of sovereignty and property by African standards. Meek states that these landholding systems

are devised to meet the needs of a subsistence system of agriculture and depend on a sufficiency of land to allow of a rotation which includes a long period of fallow. Land is held on (a) a kinship, and/or (b) a local group basis. Individuals have definite rights, but these are qualified by membership of a family, kindred and ward (or small village). Similarly, the individual claims of families exist currently with the wider claims of the clan or local group. Title, therefore, has a community character. It is also usufructuary rather than absolute. Land may only be sold under conditions which do not conflict with the rights of the kin or local group. The chief is the custodian of land, but not its owner. The normal unit of land ownership is the extended-family, or kindred. Land once granted to a family remains the property of that family, and the chief has no right to any say in its disposal. This constitutes a definite limitation on the conception of land as the collective property of the tribe or local group. The kinship basis of land-holding ensures social stability, but the absence of individual proprietary rights prevents the raising of money on land and so is a hindrance to development. Land may be pledged and redeemed at any time. The principle of redeemability ensures that land shall not be permanently lost, but it may be an impediment to progress since no one will attempt to improve land of which he may be deprived at short notice. The restrictions on the sale of land, the limitation of the possession to the period of effective use, and the periodic re-allocation of land, all ensure that land shall not be uselessly withheld from cultivation or lost to the community.⁴³

43 Meek, *Land*, 26–27. For an extended discussion of territorial sovereignty and landownership in Nigeria, see Yakubu, *Land Law in Nigeria*, 12–13 and 59.

Although Rayner's report and Meek's observations are European interpretations of native sovereignty, several general features can be distilled from these passages. First, the relationship between the native ruler and the population was not a hierarchical but a personal one, and that relationship was governed by customary law.⁴⁴ In general, African polities were communal or peasant societies and organized and governed through kinship ties – a strong central authority was mostly absent. This internal dimension of sovereignty and its relation to native polity land are described by Kwamena Bentsi-Enchill: 'From outside, the state or polity has the appearance of a monolithic unit holding land; viewed from the inside, however, the polity or state has the primary aspect of a control mechanism, the group regulating through law and organization its relation to its sub-groups and individual members and the relations between them.'⁴⁵ The status of African political entities originated in the property in land of their subjects.

Second, the African natives' interpretation of supreme authority was closely connected to territory as well as to property and land tenure. It is in this light that Bentsi-Enchill states: 'Depending in part on the degree of organization of state and governmental machinery there falls within its jurisdictional authority responsibility for protecting the community and its territory from various evils, including foreign attack and domestic strife, and for maintaining law and custom and the interests recognized thereunder.'⁴⁶ Sovereignty in political entities in pre-colonial Africa was not understood in the absolutist sense of the word: 'chiefs did not claim sovereign "ownership" of their demesnes.'⁴⁷ Nonetheless, these observations confirm that the African polities did possess both internal and external sovereignty. Internally, the relationship between the ruler and the people was defined by authority and jurisdiction. The external aspect of the sovereignty of African polities was characterized by independence, relations with other polities and protection against external dangers.

Third, territory and land formed the soil in which native African families were rooted: spiritual and ancestral relationships between the people and the land were central to the existence of the political entity. From anthropological

44 See Elias, *Africa and the Development of International Law*, 43 and 45. See also T.W. Bennett, *Customary Law in South Africa* (Lansdowne: Juta, 2007), Chapter 4.

45 Bentsi-Enchill, 'African Systems of Land Tenure,' 122.

46 *Ibid.*

47 B.P. Frohnen, 'A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective,' *Transnational Law & Contemporary Problems*, 20 (2012), 620. Bruce Frohnen based his argument on the book chapter of P.P. Ekeh, 'The Impact of Imperialism on Constitutional Thought in Africa,' in: O. Akiba (ed.), *Constitutionalism and Society in Africa* (Aldershot: Ashgate, 2004), 25–42.

literature on the political organization of African native polities it can be concluded that the concepts of sovereignty and property were determinative of the identity and functioning of native groups.⁴⁸ In the majority of cases these polities were organized hierarchically. The native ruler and a circle of senior community members stood at the top of the social pyramid. Kinship relationships and personal allegiance characterized the internal organization of the polity. The essential role of land is especially apparent J.F. Ade Ajayi's observations. He has surveyed several cultural and political regions in early nineteenth-century Africa, particularly West-Africa and the Congo Basin.⁴⁹ Joseph Anene has done the same for the nineteenth-century native populations of Benin, the Niger Delta, Congo and Angola.⁵⁰ Their anthropological, cultural and historic studies show the resemblance between the organizational structures of African political entities and the feudal structures of medieval Europe.

From the native African perspective on the external dimension of sovereignty, the independence and autonomy of the African political entity stand out clearly, and both are closely related to territory.⁵¹ Bentsi-Enchill points to the necessity of any polity, whether State or tribe, having a territorial basis: 'African societies, like human societies everywhere, have territorial structuring. Everywhere we look communities of varying magnitude make claims regarding the land they occupy that it is "theirs" and distinguish their relationship thereto from that of "strangers" or "guests."' ⁵² As organized unities, African polities (tribes, clans, families, etc.) had consciously defined identities in their internal and local relations and in their relations with European individuals and States. From his analysis of studies of nineteenth-century pre-colonial Africa

48 The most authoritative anthropological works are those of D. Biebuyck (ed.), *African Agrarian Systems* (Oxford University Press, 1963); P. Bohannan, *Social Anthropology* (New York: Holt, Rinehart and Winston, 1963); M. Chanock, *Law, Custom, and Social Order* (Cambridge University Press, 1985); M. Chanock, *The Making of South African Legal Culture 1902–1936* (Cambridge University Press, 2001) and Gluckman, *Ideas in Barotse Jurisprudence*.

49 J.F. Ade Ajayi, 'A Survey of the Cultural and Political Regions of Africa at the Beginning of the Nineteenth Century,' in: J.C. Anene and G.N. Brown (eds.), *Africa in the Nineteenth and Twentieth Centuries. A Handbook for Teachers and Students* (Ibadan, London: Ibadan University Press, Nelson, 1966), 75–91.

50 J.C. Anene, 'The Peoples of Benin, the Niger Delta, Congo and Angola in the Nineteenth Century,' in: J.C. Anene and G.N. Brown (eds.), *Africa in the Nineteenth and Twentieth Centuries. A Handbook for Teachers and Students* (Ibadan, London: Ibadan University Press, Nelson, 1966), 270–290.

51 Territory was constitutive for both sedentary and nomadic living political entities.

52 Bentsi-Enchill, 'African Systems of Land Tenure,' 117.

Terence Ranger concludes that ‘far from there being a single “tribal” identity, most African moved in and out of multiple identities, defining themselves at one moment as subject to this chief, at another moment as a member of that cult, at another moment as part of this clan, and at yet another moment as an initiate in that professional guild.’⁵³ He speaks of ‘overlapping networks of association and exchange’ which were spread over wide territorial areas. External sovereignty in this sense then has a fairly flexible scope. In the same light, Sean Stilwell describes the African native polities as having ‘fluid ethnic identities.’⁵⁴ This fluidity of African polities, however, does not alter the fact that these political unities existed autonomously and independently. European States recognized this status by consenting to the possibility of concluding treaties that transferred, either wholly or in part, sovereignty over territory.⁵⁵ On the European acceptance of the existence of African polities, Ranger observes that ‘[r]eady connections between African and European systems of governance could only be made at the level of the monarchy; Africa possessed, so the colonizers thought, dozens of rudimentary kings.’⁵⁶ European colonial powers were aware of the necessity to collaborate with native rulers, for without such alliances the Europeans could not effectively control their newly acquired territories.

5 Concluding Remarks

In the nineteenth century, the foundations for current international law and order were laid; in international legal doctrine and politics the concepts of sovereignty, territory and State were aligned and considered to constitute

53 T. Ranger, ‘The Invention of Tradition in Colonial Africa,’ in: E. Hobsbawm and T. Ranger (eds.), *The Invention of Tradition* (Cambridge University Press, 1983), 248. See also O.C. Okafor, ‘After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa,’ *Harvard International Law Journal*, 41 (2000), 503–504.

54 S. Stilwell, ‘The Imposition of Colonial Rule,’ in: T. Falola (ed.), *Africa. Colonial Africa, 1885–1939*, vol. iii (Durham: Carolina Academic Press, 2002), 18.

55 ‘It should be pointed out, since this is often ignored, that the phase of actual conquest was preceded by years of negotiation and treaty-making between the imperial powers and African rulers. This phase of negotiation shows that the European powers originally accepted their African counterparts as their equals, and, secondly, that the former did recognize the sovereignty and independence of the African states and polities.’ Boahen, ‘Africa and the Colonial Challenge,’ 9. On the status of African native polities and their place within international legal order, see Gathii, ‘Africa,’ 407–428.

56 Ranger, ‘Invention of Tradition in Colonial Africa,’ 212.

international order. The State was considered an abstract political entity empowered with international legal personality – i.e., it possessed territorial sovereignty – and it was accompanied by three assumptions: all States are formally equal; no State is legally allowed to interfere in the internal affairs of another State; and territory and the control exercised over this territory co-exist. Moreover, in legal theory and politics, positivism took precedence over natural law; realism rather than rationalism prevailed. In nineteenth-century international legal doctrine, the colonial encounter amounted to a confrontation between European States and African political entities. The assumption that the non-European world lacked sovereignty enabled positivists to construct this encounter as an arena in which the European sovereign made, interpreted and enforced the law. In other words, the colonial encounter made it possible for positivists to construct a system of international law that was based on inclusion in or exclusion from the family of civilized nations by imposing European norms and values on non-European lands and peoples. The basic doctrinal and theoretical assumption was the dichotomy between civilized Europe and uncivilized Africa. The concept of civilization was essential to the justification of European colonial practices on the African continent; it was used purposefully, if arbitrarily, to promote the interests of the European powers, thus disadvantaging the African natives.

Although, in theory, the positivist view created a harmonious world defined by international society, sovereignty, and civilization, the reality of the scramble for African territory was one of conflict and disorder, creating a world that was even more divided than it had been before the age of New Imperialism. While in nineteenth-century international legal doctrine international law applied solely to relations between sovereign States that belonged to the civilized European world, the practice of New Imperialism shows that international law did regulate contacts and relations between this world and that of the uncivilized African natives. Treaty practices between European and African parties bear out the fictitiousness of the world view informing and informed by nineteenth-century international legal doctrine. Theoretically, a redeeming quality of New Imperialism might be its consistency. However, as will be argued in the following chapters, from an African perspective, its legality is highly questionable.

External sovereignty gained the upper hand in international law, and as soon as independence became the criterion for the recognition of statehood the three concepts of territory, sovereignty and State became aligned. *Imperium* as the unifying notion of territory and sovereignty became the realm of the State, more precisely the civilized, European State; both in theory and practice international law applied to the relations between these States, members of

the international society of nations. Outside this realm, there were confrontations between European States and foreign, in particular African, political entities, and European legal doctrine declared international law inapplicable to relations with this 'other' world consisting of uncivilized, non-sovereign entities. It was only towards the end of the nineteenth century, and as a result of the attempts of legal doctrine to legitimize the colonization of Africa, that territory coincided with civilization and sovereignty, and together these notions became a constitutive condition for the recognition of statehood. In practice, however, African political entities were capable of transferring sovereignty over their territories, whether wholly or in part, by treaty. Although they did not possess statehood, that is to say, they were not recognized as possessing statehood by the members of the family of civilized nations, they were considered to be sovereign entities. Here, the fictitious nature of the dualist and State-centric legal order first manifests itself, a nature that has since persisted into the Post Modern Age (1914-present), an era characterized by the plurality and diversification of legal subjects on the international level and the gradual detachment of sovereignty and territory by globalization.⁵⁷

The next chapter will address how the interplay between sovereignty and territory – *imperium* – effected and justified the European acquisition of legal title to African territory.

57 See J.L. Brierly, *The Basis of Obligation in International Law and Other Papers*, ed. by J.L. Brierly, H. Lauterpacht and C.H.M. Waldock (Oxford: Clarendon Press, 1958), xv and xvi. For twentieth- and twenty-first-century perspectives on sovereignty and territory, see J.L. Cohen, *Globalization and Sovereignty* (Cambridge University Press, 2012); T. Nardin, *Law, Morality, and the Relations of States* (Princeton University Press, 1983); B.R. Roth, 'State Sovereignty, International Legality and Moral Disagreement,' in: T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (Oxford, Portland, 2008), 123–161 and M.N. Shaw, 'Territorial Administration by Non-territorial Sovereigns,' in: T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (Oxford, Portland: Hart, 2008), 369–415.

Territorium et Titulus

1 Introduction

The term property as a legal construct denotes the ownership claim, or title, one or more persons can have to a thing or interest. It is a private-law right which can accrue to every legal or natural person. When interests or things are claimed in property, disputes may (and often do) arise,¹ and for that reason property claims require regulation and, by extension, the authority to impose such regulation. This is where sovereignty comes in. Sovereignty is the power, or right of control, over a specific group of persons and it can only be exercised by a person or entity that holds a dominant position – regardless of whether this person or entity obtained this privileged position through election, appointment or appropriation. Sovereign rights ensure that a person's property is respected by and protected against other persons. In addition, sovereignty transforms property into a legal claim, a right which can be enforced. It is this basic relationship² between property and sovereignty that underlies the concepts of *dominium* and *imperium* discussed in the previous chapters. Both concepts are specified conceptualizations of property and sovereignty and imply the claim to a demarcated piece of the earth's surface. *Dominium* implies a person's claim to a particular parcel of land vis-à-vis one or more other persons, and *imperium* concerns the right to control a group of people inhabiting a particular territory. Sovereignty enables persons to have private-law rights to a particular parcel of land within a particular territory.

Traditionally, territory is defined as the geographical space in which politically organized human inhabitation is realized. Territory in this narrow sense is highly relevant, because, as Shaw argues, 'it constitutes the tangible framework for the manifestation of power by the accepted authorities of the State in question.'³ In other words, territory is directly connected with the concept

1 'The first man who, having enclosed a piece of ground, bethought himself of saying "This is mine," and found people simple enough to believe him, was the real founder of civil society.' J.-J. Rousseau, *Discourse on the Origin and Foundation of Inequality in The Social Contract and discourses*, transl. G.D.H. Cole (London: Dent, 1973), 76.

2 On the historical discussion on the relationship between property and sovereignty – what was first: property or sovereignty, see Fitzmaurice, *Sovereignty, Property and Empire*, Chapters 4 and 5.

3 M.N. Shaw, 'Territory in International Law,' *Netherlands Yearbook of International Law*, 13 (1982), 61. For an extended reading, see Shaw, *Title to Territory*; and Shaw, 'Acquisition of Title in Nineteenth Century Africa.'

of the State as a specific form of political organization. In the words of Enrico Milano, territory consists of ‘the spatial sphere within which a state’s sovereignty is normally manifested.’⁴ While it is true that the concept of territory is indeed a constitutive element for statehood, it does not, as will be argued in this chapter, necessarily coincide with the concept of the State. The notion of territory contains both an external and an internal element, namely, the expression of the power-balance between two coexisting or rivalling political entities, and the relationship between a group of people and the tangible space they inhabit. Shaw describes the internal and external components of territory as follows: ‘territory is the physical aspect of the life of the community as an entity and therefore reflects and conditions the identity of that community.’⁵ The identity of a political entity, which makes it distinct from other polities, is based on the relationship the population has with its territory. In his book *The Birth of Territory*, Elden understands territory as

[...] a *historical* question: produced, mutable, and fluid. It is *geographical*, not simply because it is one of the ways of ordering the world, but also because it is profoundly uneven in its development. It is a word, a concept, and a practice, where the relation between these can only be grasped genealogically. It is a *political* question, but in a broad sense: economic, strategic, legal, and technical.⁶

Inevitably, territory plays an important role in international law, because many of the fundamental principles of international law are based on the concepts of territorial exclusivity and sovereign equality⁷ and on such ensuing principles as territorial integrity, political independence and non-intervention. In other words, when the modern conception of the State was introduced, sovereignty and territoriality became intimately connected, and they were often considered equivalents. The origins of this relationship can be found in the Age of Empire.

The nineteenth century, more precisely its closing two to three decades, witnessed a speedy, vast and often violent territorial expansion of some European States beyond the European continent. This chapter will discuss the acquisition of and entitlement to African territory by European States from a nineteenth-century perspective. By doing so, it aims to identify the theoretical

4 E. Milano, *Unlawful Territorial Situations in International Law. Reconciling Effectiveness, Legality and Legitimacy* (Leiden, Boston: Martinus Nijhoff, 2006), 66.

5 Shaw, ‘Territory in International Law,’ 63.

6 Elden, *Birth of Territory*, 330. *Italics* are original.

7 See Shaw, ‘Territory in International Law,’ 67.

and practical relevance of the concept of territory in the encounter between European States and African political entities. It will be shown that the European States mainly used cession and protectorate treaties to acquire African territory and that the difference between cession and establishing a protectorate, while delicate, is essential (§2). The main questions to be addressed are whether international law applied to these treaties and, if so, what the international law status of these treaties was. The reason for discussing the international legal framework and its underlying principles is that it is precisely the treaty practices of European States and African polities in the late nineteenth century that reveal a persistent and inherent tension between international law and politics. The chapter concludes with an introduction of three case studies on the treaty practices in British Nigeria, French Equatorial Africa and German Cameroon (§3).

2 Treaties, Cession and Protectorates

As Edward Keene points out, treaties are ‘valuable indicators’ in that they ‘provide a concrete way of assessing the norms that international actors believe to be operating at any given time.’⁸ In essence, the acquisition of African territory by European States in the late nineteenth century revolves around the transfer and exercise of sovereignty. Chapter 3 has shown that there was a crucial difference between *de facto* sovereignty, i.e., the factual exercise of sovereignty, and *de iure* sovereignty, i.e., the recognition of being sovereign and possessing sovereign rights. Recognition of sovereignty and personality under international law was a pivotal notion in nineteenth-century positivist legal doctrine. Positivist legal scholars were mainly occupied with establishing which acts were sufficient to determine that a European State had acquired sovereign rights over a territory, whether State control of that territory was effective, and whether a State could claim a valid title to the territory. The perceived difference in degree of civilization between the European and non-European worlds was the main argument to justify the territorial expansion beyond Europe.⁹ The African political entities headed by their ruler were not recognized by

8 E. Keene, ‘A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century,’ *International Organization*, 61 (2007), 333.

9 See Anghie, *Imperialism*; E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press, 2002); A. Pagden, *Lords of All the World. Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800* (New Haven, Conn.:

European States as equal counterparts. As Anghie argues, the recognition doctrine was about 'affirming the power of the European states to claim sovereignty, to reinforce their authority to make such determinations and, consequently, to make sovereignty a possession that they could then proceed to dispense, deny, create or partially grant.'¹⁰ He also asserts that the history of sovereignty doctrine in the nineteenth century 'is a history of the processes by which European states, by developing a complex vocabulary of cultural and racial discrimination, set about establishing and presiding over a system of authority by which they could develop the powers to determine who is and is not sovereign.'¹¹ In the context of the scramble for Africa, these processes made it imperative to establish whether African rulers possessed and exercised sovereign rights to territory and whether they could lawfully alienate these rights.

Although it is true that the doctrine of recognition of sovereignty depended on the discretionary powers of a selective group of European and a few non-European States, recognition itself did not have to be explicit: it could be inferred from common practice. Contemporary doctrine held that nineteenth-century international law applied only to the members of the family of civilized nations, but in the confrontation between European States and African political entities, rules certainly were applied: the acquisition of Africa did not occur in a legal vacuum. African rulers transferred sovereign rights to European States and it is this transfer process which implies European recognition of African rulers possessing sovereign rights. Cession and, mainly, protectorate treaties between African rulers and European States were the most frequently used instruments to cede partial or full sovereignty. This side of colonial practice has so far received relatively little attention in international legal doctrine.

The key question is, of course, whether the native African rulers possessed sovereign rights. Doctrinally, African political entities were not regarded as subjects of international law, i.e., as sovereign States. Their authoritative and independent status was not recognized explicitly by the members of the family of civilized nations, i.e., European and a handful of non-European States. It remains unclear, however, how these native rulers could lawfully transfer sovereign rights over territory to the European States by means of treaties. Answering this question requires assessing the status of the cession and protectorate treaty practices on the African continent in the framework of nineteenth-century international law as well as establishing the authority of

Yale University Press, 1995) and E. Tourme Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law*, (Cambridge University Press, 2012), Chapter 11.

10 Anghie, *Imperialism*, 100.

11 *Ibid.*

the treaties themselves. In his study on treaty practices between Europeans and Africans, Alexandrowicz makes it clear that both the European and the African parties were well aware of the content of the object of transfer: 'Sovereignty in Europe was at that time mostly vested in absolute emperors or semi-absolute monarchs whose sovereign rights were as much considered as derived from dynastic and divine origin as the sovereignty of African rulers.'¹²

As a matter of common understanding in international legal doctrine, the legal effect given by Europeans to the treaties they concluded with Africans depended on the legal status Europeans were prepared to concede to African rulers. Europeans considered Africans to be uncivilized, living in primitive political entities, and represented by kings and rulers who were not sovereigns in the proper, i.e., European, sense of the word.¹³ These treaties were consequently not awarded the status of international treaties governed by the basic principle of *pacta sunt servanda*: as the majority of nineteenth-century legal scholars argued, they were 'binding only on the conscience and could be enforced or ignored at will.'¹⁴ However, not only is this theoretical presumption underlying the institution of 'unequal treaties'¹⁵ questionable in itself, it is also, as will be shown, rebutted by international legal practice.

Rules of law did apply to the relationships between European States and African polities, because these relationships were formalized and declared binding in treaties. These rules of law concerned the law of nations in its broad sense, not the narrow or limited understanding of international law as inter-State law conceived and imposed by nineteenth-century European lawyers and politicians. Extrinsic though these rules of law may have been – i.e., falling outside the scope of the conventional family of civilized nations – they were nonetheless valid rules of law, because the European States and the

12 Alexandrowicz, 'Role of Treaties,' 39. 'While the metaphysical or theological background of divinity and dynasty might have been different, both European and African rulers were in perfect agreement as to the nature of transactions concluded and as to the transfer of territorial sovereignty and title in international law.' *Ibid.*, 40. See also C.H. Alexandrowicz, 'New and Original States: The Issue of Reversion to Sovereignty,' *International Affairs*, 45 (1969), 465–480.

13 Umozurike, *International Law and Colonialism*, 43. See Elias, *Africa and the Development of International Law*, 19.

14 Umozurike, *International Law and Colonialism in Africa*, 43.

15 See H. Kleinschmidt, 'Das europäische Völkerrecht und die ungleichen Verträge um die Mitte des 19. Jahrhunderts,' *Publications of the Deutsche Gesellschaft für Natur – und Völkerkunde Ostasiens*, (2007) 1–83. Available at: <http://www.oag.jp/images/publications/oag_taschenbuch/Vertraege-Kleinschmidt-lango704.pdf> [accessed on 18 April 2014]; and F. Nozari, *Unequal Treaties in International Law* (Stockholm: Bryan Sundt, 1971).

African polities agreed on them and applied them. It is this practice of nineteenth-century international law that calls for a restatement of the definition and role of international law, and Alexandrowicz does just that. He considers international law to be 'a mechanism which is not confined to the cooperation of states in conditions of perfect mutual understanding.'¹⁶ Alexandrowicz gives a positive yet pragmatic definition of international law by stating that it is aimed at the reconciliation of 'even opposing ideologies or civilisations in spite of each party's dogmatic insistence on certain principles. In such cases the task of international law is to provide a forum for coexistence and to reduce the barriers of prejudice.'¹⁷ Alexandrowicz' perception of international law is that it was not only imposed on non-civilized nations and created by the encounter between civilized and non-civilized nations (as Anghie argues), he regards the existence of the law of nations as a necessary condition for the European-African encounter to take place. On this view, the European-African confrontation could only have played out the way it did because of the existence and use of international law. This book endorses this instrumental view.

The next step is to analyse the cession and protectorate treaties concluded between European States and African rulers on the basis of the following questions. Are the cession and protectorate treaties concluded between European States and African rulers in the late nineteenth century indeed just '*ein Stück Papier mit Negerkreuzen darunter*,'¹⁸ a status they were assigned by contemporary legal scholars influenced by positivist thought and upheld by twentieth-century international legal doctrine? Or do these documents have legal value after all? The highly relevant follow-up question is whether treaties could only be concluded by States, or by other sovereign entities too.

Before discussing the cession and protectorate treaties concluded between European colonial powers and African rulers, three preliminary remarks must be made. The first one is that by concluding cession and protectorate treaties, the European colonial powers acknowledged that Africa was no *terra nullius*: 'European States, in establishing their dominion over countries inhabited by people in a more or less backward stage of political development, have

16 Alexandrowicz, 'Role of Treaties,' 29. Soviet lawyers of the twentieth century accused the nineteenth-century legal doctrine of this limited understanding of international law based on one community or family of nations according to one common ideology. They argued that international law existed independent of any ideology. See G.I. Tunkin, *Theory of International Law*, transl by W.E. Butler (London, Allen and Unwin, 1974).

17 Alexandrowicz, 'Role of Treaties,' 29.

18 Bismarck as quoted in F.F. Müller, *Deutschland – Zanzibar – Ostafrika. Geschichte einer deutschen Kolonialeroberung 1884–1890* (Berlin: Rütten and Loening, 1959), 301.

adopted as the method of such extension, Cession or Conquest, and have not based their rights upon the Occupation of *territorium nullius*.¹⁹ Within living memory, the continent had been covered by a network of political entities resembling European-style States and a variety of empires which yet revealed some similarities and even traces of unity. In other words, pre-colonial Africa was covered and inhabited by political communities, and they were acknowledged as such by European States. As has been shown above, at the end of the nineteenth century it was commonly accepted, both in theory and in practice, that Africa was not *terra nullius*, and this effectively ruled out the possibility of acquiring African territory by occupation.²⁰ Instead, derivative modes had to be used in order to acquire sovereign rights over territory and an elaborate practice of concluding treaties between European States and African rulers arose. Representing Britain in treaty negotiations with African rulers, the explorer and colonial administrator Lord Lugard (1858–1945) had occasion to observe that the conclusion of treaties was no longer an exclusive competence of and activity between sovereign European States: ‘They [the local African king and chiefs, MvdL] most thoroughly understand the nature of a written contract, and consider nothing definitely binding till it is written down. Most of them write. Every clause is discussed in all its bearings, sometimes for days; words are altered, and the foresight and discrimination which the natives show in forecasting the bearing in the future of every stipulation is as keen almost as would be that of Europeans [...]’.²¹ European and African contracting parties negotiated and concluded treaties as would two equal European sovereign entities.

To all intents and purposes then, the sovereign rights of rulers of African native polities were recognized by European States.²² Put differently, the native

19 Lindley, *Acquisition and Government of Backward Territory*, 43. See also C.H. Alexandrowicz, ‘The Afro-Asian World and the Law of Nations (Historical Aspects),’ *Recueil des Cours*, 123 (1968), 172; H. Bull, ‘European States and African Political Communities,’ in: H. Bull and A. Watson (eds.), *The Expansion of International Society* (Oxford: Clarendon Press, 1984), 99–114 and J. Fisch, ‘Africa as *Terra Nullius*,’ in: S. Förster, W.J. Mommsen and R.E. Robinson (eds.), *Bismarck, Europe, and Africa* (Oxford University Press, 1988), 347–375.

20 See Onuma, ‘When was the Law of International Society Born,’ 49. See also J. Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Steiner, 1984) and Shaw, *Title to Territory in Africa*, 27 and 38.

21 F. Lugard, ‘Treaty Making in Africa,’ *Geographical Journal* (1893), 54.

22 Alexandrowicz summarizes the writing of Hesse on the legal capacity of contracting parties and the legal character of the contract or treaty, as follows: ‘The author referring to the Rulers (called Captains) emphasises that they had what [Hesse] defines as “Aktivlegitimation” i.e. active capacity to confer rights in their territories to other sovereigns.

rulers' acknowledged ability to conclude treaties confirmed their as sovereigns or, at the very least, as international legal subjects. While international law in its doctrinally limited sense did not apply to relations between European States and African natives, the well-attested practice of treaties having been concluded does corroborate the applicability of the law of nations, including natural law and customary law principles of *pacta sunt servanda* and *bona fides* on these relations. This is in keeping with Dionisio Anzilotti's argument that rulers representing their peoples possess international personality and that such agreements are consequently international treaties.²³ Brownlie concurs: concluding treaties with various types of polities is possible as long as they have some kind of a territorial base and a more or less definable and unified social structure.²⁴ These conditions are confirmed by the International Court of Justice (ICJ) in its Advisory Opinion on the *Western Sahara* (1975) when it states that the land belonging to politically and socially organized tribal societies is not *terra nullius*.²⁵ The reasoning of the Court is based mainly on the fact that in the late nineteenth century the Spanish negotiated and concluded treaties with the peoples living on Western-Saharan soil, and the Court confirms that territorial acquisition by occupation is original, while acquisition by cession is derivative.²⁶ Following this line of reasoning, the Court acknowledges the legal personality of the African polities concerned and the ability of their rulers to transfer sovereign rights over territory under nineteenth-century international law.

Although this Advisory Opinion of the ICJ might be constructed as serving the competitive interests of European States vying for African territory,²⁷ it did contribute towards relaxing the tight doctrinal bond between State and

The German agencies (Companies) which exercised delegated sovereign powers and were the transferees of those rights by treaty and are defined as having "Passivlegitimation" i.e. the capacity to receive the rights.' Alexandrowicz, *European-African Confrontation*, 39.

23 D. Anzilotti, *Cours de droit international*, transl. by G. Gidel (Paris: Sirey, 1929), 129–130.

24 I. Brownlie, 'The Expansion of International Society: The Consequences for the Law of Nations,' in: H. Bull and A. Watson (eds.), *The Expansion of International Society* (Oxford: Clarendon Press, 1984), 362.

25 *Western Sahara*, Advisory Opinion, 1975, ICJ Reports 4.

26 *Ibid.*, §§ 79 and 80.

27 'It suited the European powers to have a cloak of legitimacy laid over their claims to cession vis-à-vis rival claims by other European powers.' Andrews, 'Concept of Statehood,' 122. See also L. Benton, 'From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900,' *Law and History Review*, 26 (2008), 595–620; S. Touval, 'Treaties, Borders, and the Partition of Africa,' *Journal of African History*, 7 (1966), 279–293 and C.M. Warner, 'The Political Economy of "Quasi-Statehood" and the Demise of 19th Century African Politics,' *Review of International Studies*, 25 (1999), 233–255.

sovereignty, especially as regards the treaty-based establishment of European protectorates in Africa. For this reason, it is hardly an exaggeration to say that the introduction of the protectorate treaty was a turning point in colonial or imperial history. The crucial point here is that the very act of establishing protectorates by means of treaties recognized and affirmed the native rulers' sovereign rights to control and direct the internal affairs of their political communities. This argument is supported by the British policy of indirect, which Chapter 8 will address in more detail. For now two observations are worth bearing in mind. The first of these is that a European State which concluded a treaty with an African ruler implicitly or explicitly recognized the capacity of that ruler to transfer sovereignty.²⁸ The second observation is that if a European State based its territorial claims on treaties concluded with African rulers, it would often justify these claims by arguing that, first, it had acquired rights through treaties, and that, second, it had entered into mutual obligations towards an African nation 'which it could not honourably relinquish.'²⁹ In sum, in defending their territorial claims, the European States would refer to the proprietary rights these treaties had created as well as their contractual obligations under these treaties.

The second preliminary remark concerns the contracting parties and the addressees of the cession and protectorate treaties. Although the treaties were concluded between European States and African rulers, it was the presence of other European States in Africa that proved a driving force. In the early days of the scramble for Africa, it is unlikely that a European contracting party, on signing the treaty, had the premeditated objective of extinguishing pre-existing rights; its main purpose would have been to prevent other European powers from acquiring the territory concerned. New Imperialism was all about finishing first: African territory was to be acquired on a first come, first served basis. In trading terms, the cession and protectorate treaties were first and foremost 'receipts,' proof of transfer, for the acquisition of certain pieces of African territory. In late nineteenth-century Africa, bilateral cession and protectorate treaties often reflected the tripartite relations between the contracting African

28 'The content of the treaties made with the chiefs is also significant. In most of them there was an express provision recognizing the sovereignty of the chiefs and their capacity to cede their territory to whomever they so wished. If the British and the other European colonizing states felt that the chiefs did not have the expressed powers it seems odd that they should have been made the subject of the treaties.' J. Mugambwa, 'Treaties or Scraps of Paper? A Second Look at the Legal Character of the Nineteenth Century British/African Colonial Agreements,' *Comparative and International Law Journal of Southern Africa*, 20 (1987), 84.

29 Touval, 'Treaties,' 288.

rulers, the contracting European colonial powers and rival European States. While the bilateral treaties themselves did not explicitly consider, serve or reflect the interests of third parties, European rivals amongst them, such treaties did signal to European competitors that the territory concerned was out of their reach.³⁰ In this sense, the rivalry between European colonial powers was a constant: unseen, in the wings so to speak, yet always there. Treaties ‘formalized the consent of indigenous peoples to European colonial activities and therefore provided legitimacy and legality to the European appropriation of much of the globe.’³¹

The third preliminary remark is that although African rulers were sometimes unfamiliar with the political, institutional and diplomatic workings of European States this does not mean that these rulers played no part in the European acquisition and partition of Africa. As Saadia Touval observes, ‘African societies did not exist in a political vacuum, and their leaders usually had political experience gained in dealing with neighbouring societies, with tribal authorities that were superior or subordinate to them, and with rival groups or individuals.’³² African rulers had a keen sense of the significance and vulnerability of their political position, especially in relation to rival tribes. That is why, according to Touval, ‘they were aware of some possible implications and uses of their newly created relationship with the white man.’³³ The local rulers seized the opportunity offered by European ambition to collaborate with the Europeans to strengthen their position with regard to other African rulers. In some cases, African rulers tried to preserve as much of their authority and independence as possible, by ‘playing off the European powers against each other.’³⁴ African rulers, in other words, maintained and even increased the political pressure in the arena in which European States competed for African territory. Moreover, African rulers themselves took the initiative to conclude treaties with European States in their search for protection against certain European powers which ‘seemed to them at the time a much greater evil.’³⁵ In sum, African rulers were not merely on the receiving end of European norms

30 For a contemporary illustration of the concurring European interests on the African continent, see A.-G. De Lapradelle, ‘Chronique Internationale 1898–1899,’ *Revue de droit public et de la science politique*, 11 (1899), 277–308.

31 S. Belmessous, ‘The Paradox of an Empire by Treaty,’ in: S. Belmessous (ed.), *Empire by Treaty. Negotiating European Expansion, 1600–1900* (New York: Oxford University Press, 2015), 11.

32 Touval, ‘Treaties,’ 285.

33 *Ibid.*

34 *Ibid.*, 286.

35 *Ibid.*, 287.

and values, they also actively created law that governed relations between them and their European counterparts. There are cases in which they used and misused European recognition in concluding bilateral treaties.

These three preliminary remarks demonstrate the controversy over the validity of the treaties concluded between European States and African rulers. The African rulers representing their peoples had the power to conclude international treaties, whether it concerns cession of protectorate treaties. The validity of these treaties, however, was intensely debated.³⁶ Three main validity issues were the alleged inalienability of native sovereignty,³⁷ the consent of both parties³⁸ and the fulfilment of the formal requirements of registration and publication. Onuma enumerates these and related validity issues, pointing out that these issues also engaged contemporary legal doctrine:

In the 'scramble for Africa,' European powers did question the validity of the agreements concluded by their rivals and African rulers. Issues which a third (European) party raised in attacking the validity of the agreements between a rival European power and an African ruler ranged widely: (1) whether an African agent held the authority to dispose the territory or the authority to rule, (2) whether a European agent held the authority to represent his country, (3) whether the agreement was concluded according to the appropriate rules of the African political entity, (4) whether the 'genuine' will of the African ruler was expressed, especially whether there was not an element of coercion or fraud, and so on.³⁹

Onuma continues:

However, hardly any European state seemed to attack other European states for concluding an agreement with an African ruler on the ground

36 See, for example, Alexandrowicz, *European-African Confrontation*; Anghie, *Imperialism*, 65–82, Belmessous (ed.), *Empire by Treaty*; J. Gilbert, *Indigenous Peoples' Land Rights under International Law. From Victims to Actors* (Ardsley, New York: Transnational, 2006), 42–54; Koskenniemi, *Gentle Civilizer*, 136–143; Mugambwa, 'Treaties or Scraps of Paper,' 79–93 and Roelofsen, 'Treaties between European and Non-European Powers,' 409–417.

37 T. Meron, 'The Authority to Make Treaties in the Late Middle Ages,' *American Journal of International Law*, 89 (1995), 3–6 and Pemberton, 'So-Called Right of Civilisation,' 49–50.

38 In the context of the treaty conclusion between the European State and the African ruler, the condition of African ruler's voluntary consent to entering the treaty was indeed questioned, especially during the Berlin Conference (1884–1885) by the American delegate Mr. Kasson. See, for example, Alexandrowicz, 'Role of Treaties,' 46–47.

39 Onuma, 'When Was the Law of International Society Born,' 48–49.

that African tribes were uncivilized and therefore not entitled to conclude a treaty with an European state. This fact suggests that despite the notion of international law as the law of/among civilized nations, which prevailed among European states during this period, the European states implicitly recognized with each other the capacity of African rulers under international law as long as they appeared as a party of a treaty purporting the cession of their territory and the establishment of protectorates.⁴⁰

What Onuma's account shows is that the legality question is far more immanent than the validity question. That is why in this and the following chapters it is not so much the validity of the cession and protectorate treaties but rather the extent to which European States complied with them that will be the object of scrutiny. Although the legality of these treaties is conditional on their being valid, European compliance with and enforcement of these treaties has remained underexposed in international legal doctrine. Therefore the validity of the treaties between the European and African contracting parties is presupposed on the basis of the existence of and subsequent conduct upon these treaties, and, thus, international legal practice to be able to examine the legality of these treaties. Before discussing the cession and protectorate treaties in more detail, the next section first explains the international legal framework in which these treaties were concluded.

2.1 *International Legal Theory*

The core feature of treaties is that they are intended to create legal obligations between the contracting parties. The fundamental principles of concluding treaties, universally accepted and applicable, were *pacta sunt servanda*,⁴¹ good faith, freedom of consent, equality of parties, reciprocity of rights and duties, and *nemo plus iuris transferre potest quam ipse habet*. These principles applied to relations between all nations, regardless of whether they were recognized as States or whether they were members of the family of civilized nations. Transcending the dualist world view, they applied to and between nations, and the validity and application of these principles were recognized by both European and non-European nations. These principles went beyond the dichotomy

⁴⁰ *Ibid.*, 49.

⁴¹ 'No Government would decline to accept the principle *pacta sunt servanda*, and the very fact that Governments find it necessary to spend so much effort in explaining in a particular case that the *pactum* has ceased to exist, or that the act complained of is not a breach of it, either by reason of an implied term or for some other reason, is the best acknowledgement of that principle.' McNair, *Law of Treaties*, 493.

between the civilized, State-centric European world and the non-civilized African world.⁴² Although international law in its narrow understanding of inter-State law did not regulate relations between European States and African political entities, the law of nations did.

This law of nations is founded on, and consists first and foremost of, contractual relationships between nations. It is the principle of *pacta sunt servanda* – the possibility of binding oneself by agreement to another – that is constitutive of international law and legal order.⁴³ The principle of *pacta sunt servanda* makes agreements legally binding,⁴⁴ and the principle of *bona fides* or good faith expresses the moral axiom of fairness.⁴⁵ In other words, the integrity of the international legal community stands or falls with these two principles being complied with,⁴⁶ an observation which dates back to the seventeenth century. While Grotius was mainly concerned with identifying the circumstances and conditions that render promises binding,⁴⁷ Pufendorf formulated

42 Although the African continent was not organized according to the European State system, there were sovereign or semi-sovereign entities. Alexandrowicz enumerated the African polities which existed around 1872. See Alexandrowicz, 'Role of Treaties,' 28.

43 'The earliest primitive communities, without a legislature or officials of any kind must have lived by certain primary rules, without which no community could retain that degree of cohesiveness which is essential for its very existence. [...]The fact of community [...] and speculations about the origin of law have led to a wide acceptance of the view that in all communities a primary or basic rule about the obligation of "promises" must have existed.' J.F. O'Connor, *Good Faith in International Law* (Aldershot, Brookfield: Hants, Dartmouth, 1991), 6. See also D.J. Bederman, *International Law in Antiquity* (Cambridge University Press, 2001), 137–206 and M. de Taube, 'L'inviolabilité des traités,' *Hague Recueil des Cours*, 32 (1930), 295.

44 On the principle of *pacta sunt servanda*, see I.A. Akrum, *Pacta sunt servanda en rebus sic stantibus in het volkenrecht* (Paramaribo: Van de Boomen, 1978); R. Hyland, 'Pacta Sunt Servanda: A Mediation,' *Virginia Journal of International Law*, 34 (1993–1994), 405–433; J.L. Kunz, 'The Meaning and the Range of the Norm *Pacta Sunt Servanda*,' *American Journal of International Law*, 39 (1945), 180–197; I.I. Likashuk, 'The Principle *Pacta Sunt Servanda* and the Nature of Obligation under International Law,' *American Journal of International Law*, 83 (1989), 513–518; M.P. Sharp, 'Pacta Sunt Servanda,' *Columbia Law Review*, 41 (1941), 783–798 and H. Wehberg, 'Pacta Sunt Servanda,' *American Journal of International Law*, 53 (1959), 775–786.

45 See O'Connor, *Good Faith*, 42. See also E. Zoller, *La Bonne Foi en Droit International Public* (Paris: Pedone, 1977). For an account on good faith in the common law tradition, see R. Zimmerman, 'Good Faith and Equity,' in: R. Zimmerman and D. Visser (eds.), *Southern Cross. Civil and Common law in South Africa* (Kenwyn: Juta, 1996), 217–260.

46 See, for example, J.P. Humphrey, 'On the Foundations of International Law,' *American Journal of International Law*, 39 (1945), 231–243.

47 Grotius, *De iure belli ac pacis*, 2.11.1.4., Prol. 6 and 15.

the principle of *pacta sunt servanda*, which he based on the social contract.⁴⁸ It was Suarez, in his *De legibus ac Deo legislatore* (1612), who introduced the maxim in the modern law of nations. Grotius, in his turn, strengthened the position of the principle as a legal principle and considered it the foundation of the law of nations. He asserted that positive law as it applies to relations between nations and between sovereign rulers and their subjects is ultimately based on agreements among or common to peoples and individuals. The principle of *pacta sunt servanda* makes these agreements binding. As a maxim, *pacta sunt servanda* was a 'necessary cornerstone for the survival of a legal system after the collapse of the old European order';⁴⁹ and so, as Lesaffer asserts, is *bona fides*: 'Without this, both treaties and custom would lose their juridical dimension and the law would become completely obsolete in the organization of relations between now truly sovereign princes.'⁵⁰ David Bederman confirms that the principle of *pacta sunt servanda* 'was a necessary corollary for intelligible rules of treaty interpretation.'⁵¹ He argues that 'there would be no point in having autonomous rules for construing disputed treaty texts unless it was widely believed that the obligations contained in treaties were to be

48 S. Pufendorf, *De jure naturae et gentium libri octo*, ed. by J. Brown Scott and transl. by C. and W. Oldfather (Oxford: Clarendon Press, 1934), at 3.4. *Pacta sunt servanda*, according to Pufendorf, required that human sociability observed agreements faithfully. He based his argument on Cicero and Augustine. See Hyland, 'Pacta Sunt Servanda,' 425–426.

49 R.C.H. Lesaffer, 'The Medieval Canon Law of Contract and Early Modern Treaty Law,' *Journal of the History of International Law*, 2 (2002), 196.

50 *Ibid.* 'The accentuation of the principle of "*pacta sunt servanda*" in the early modern doctrine of the law of nations has to be explained as a reaction to the collapse of the medieval international order of the *respublica christiana* and the emergence of the sovereign state. [...] The affirmation of the sovereign state and the collapse of Christian unity led to a long and severe crisis of the European legal order from the sixteenth century to the second half of the seventeenth century. The emergence of international law doctrine was an attempt of the intellectual elite to remedy this. [...] In this way, one can say that natural law came to hold the same place that Roman, feudal and above all canon law had held until the beginning of the sixteenth century. When the theorists of international law of the early modern and modern period started to elaborate this natural law, they very often fell back on the general principles of private law. Natural law thusway was a bridge between international law and private law. In the matter of consensualism and contract, this included bridging the distance between international law and canon law.' *Ibid.*, 180 and 198.

51 D.J. Bederman, 'Grotius and his Followers on Treaty Construction,' *Journal of the History of International Law*, 3 (2001), 35. On treaty interpretation, see H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties,' *British Yearbook of International Law*, 26 (1949), 48–85 and C.C. Hyde, 'Concerning the Interpretation of Treaties,' *American Journal of International Law*, 3 (1909), 46–61.

performed in good faith.⁵² This fundamental character of *pacta sunt servanda* clearly puts the principle beyond such legal perspectives as naturalism and positivism.⁵³ Indeed, the international legal principles of *pacta sunt servanda* and good faith not only had universal significance from a natural law perspective,⁵⁴ they were also in line with State conviction and practice,⁵⁵ i.e., customary law.

In general, the ‘sanctity of contracts’ principle signifies that treaty obligations have to be fulfilled in good faith. The legally binding force of the principle of *pacta sunt servanda*, however, has met with debate. Among other critical scholars,⁵⁶ Onuma puts the principle into perspective and challenges its binding force. He argues that while the rule of *pacta sunt servanda* in its general sense is universally and timelessly valid, ‘the substance of such a supra-historical and universal rule would be so vague and equivocal, lacking the strictly binding character of law, that specific legal consequences could hardly be deduced from it.’⁵⁷ Onuma continues to state that ‘the validity or existence of the “common” rule of *pacta sunt servanda* in the naïve and general sense of the term does not necessarily secure that normative expectations of each party would be realized through this rule in a stable and reliable manner.’⁵⁸ He concludes by saying that ‘even if both parties concluded an agreement, the actual implementation of such an agreement would depend on various contingent factors.’⁵⁹ Although Onuma is right to observe that the principle of *pacta sunt*

52 Bederman, ‘Grotius,’ 35.

53 See A. Orakhelashvili, ‘The Origins of Consensual Positivism – Pufendorf, Wolff and Vattel,’ in: A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Cheltenham, Northampton: Edward Elgar, 2011), 110.

54 J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch Dargestellt* (Nördlingen: Beck, 1868), 55. Bluntschli argued that the applicability of international law was not dependent on the degree of civilization of a political entity; it covered all the peoples across the world. See G. Gozzi, ‘History of International Law and Western Civilization,’ *International Community Law Review*, 9 (2007), 358.

55 Not only between European States and other European polities interaction took place on the basis of *pacta sunt servanda* and *bona fides*, e.g., Lesaffer, *Peace Treaties*.

56 Among the skeptics of *pacta sunt servanda* are J.L. Brierly, *The Law of Nations* (Oxford: Clarendon Press, 1938), 208; F. Pflüger, *Die einseitigen Rechtsgeschäfte im Völkerrecht* (Zurich: Schulthess, 1936), 20–21 and G. Scelle, *Précis de Droit des Gens*, vol. ii (Paris: Sirey, 1934), 336.

57 Onuma, ‘When was the Law of International Society Born,’ 40. See also Y. Onuma, ‘Agreement,’ in: Y. Onuma (ed.), *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 174–220.

58 Onuma, ‘When was the Law of International Society Born,’ 40.

59 *Ibid.*

servanda does not in and of itself impose any enforceable obligation under international law and that it should always be attended by actual obligations, these observations do not detract from the fundamental character of the principle.⁶⁰ The viability of the international legal community depends on the consent of and agreements between its members. Together with the principle of good faith the principle of *pacta sunt servanda* is the higher norm, which goes beyond the will of the contracting parties. Hersch Lauterpacht (1897–1960) describes the nature of the principle as follows:

But from a more general point of view what appears to those directly concerned as an immediate source of the obligation is only a condition under which a higher, more comprehensive rule shall become operative. Thus the will of the parties is only a condition under which the higher rule, i.e. that promises should be kept, comes into operation. It is a rule of municipal law which, as between individuals, gives legal force to promises; it is the objective validity, independent of the will of States, of the rule *pacta sunt servanda* which renders legally possible the working of conventional international law.⁶¹

The rule of *pacta sunt servanda* thus imparts objective force to international treaties. In this sense, the principle of *pacta sunt servanda*, accompanied by good faith, can be considered the *Grundnorm* of international law: '*Pacta sunt servanda* is a customary norm of general international law, a constitutional norm of a superior rank, which institutes a particular procedure for the creation of norms of international law, namely the treaty-procedure.'⁶² Anzilotti

60 See, for example, G. Schwarzenberger, *International Law*, 3rd edn (London: Stevens and Sons, 1957), 15.

61 H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co., 1927), 57. 'Now, a legal rule is an objective norm independent of the will of the person who is bound by it. To say that the binding force of treaties is derived from the will of contracting parties who, through an act of self-limitation, give up a part of their sovereignty, is to leave unanswered the query why the treaty continues to be binding after the will of one party has undergone a change. The will of the parties can never be the ultimate source of the binding force of a contract whose continued validity is necessarily grounded in a higher objective rule.' *Ibid.*, 56.

62 Kunz, 'Meaning and Range', 181. '*Pacta sunt servanda* means the institution, by general international law, of a special procedure – the treaty procedure – for the creation of international norms. Norms, thus created, are valid and must be kept, as long as no norm-abolishing fact, as laid down by norms of international law, has occurred.' *Ibid.*, 197.

too points to the principle as an integral part of international law.⁶³ The intimate relationship between the principles of *pacta sunt servanda* and good faith is addressed by the International Law Commission (ILC) in its commentary to Article 23 of the Vienna Convention (1966): '*Pacta sunt servanda* – the rule that treaties are binding on the parties and must be performed in good faith – is the fundamental principle of the law of treaties. [...] There is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*.'⁶⁴ In its commentary, the ILC also refers to case law of the Permanent Court of International Justice⁶⁵ and the ICJ⁶⁶ which emphasizes the fundamental character of both principles. In the course of time, the theory and practice of international law have shaped the principle of *pacta sunt servanda* from a customary to a written rule. But what status did the rules on the sanctity of contracts and good faith have in the nineteenth century, more specifically regarding the acquisition of African territory by means of cession and protectorates?

As a universal principle, *pacta sunt servanda* was familiar to both European and African parties throughout the life cycle of cession and protectorate treaties (negotiation, conclusion and execution). The principle was acknowledged by the Africans and played an important role in the lives of Africans, because it enabled orderly and friendly relations within political communities and with other communities to be maintained. 'Agreements were often entered into by one king or paramount chief with another as much to regulate their external relations as to promote territorial advancement. There were, of course, well established rules for securing a truce as for regulating the practice of warfare.'⁶⁷

63 D. Anzilotti, *Lehrbuch des Völkerrechts*, vol. i (Berlin, Leipzig: De Gruyter 1929), 38 ff and 49 ff.

64 Commentary on Article 23 of the Vienna Convention on the Law of Nations, *Yearbook of the International Law Commission*, vol. ii (New York: United Nations, 1966), 211. See also C. Binder, *The Pacta Sunt Servanda Rule in the Vienna Convention on the Law of Treaties: A Pillar and Its Safeguards* (Leyden: Nijhoff, 2008) and W.P. Gormley, 'The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith,' *Saint Louis University Law Journal*, 14 (1969–1970), 367–428.

65 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ, 1932, Series A/B, No. 44, 28; and *Minority Schools in Albania*, PCIJ, 1935, Series A/B, No. 64, 19 and 20.

66 *Rights of Nationals of the United States of America in Morocco*, Judgment, 1952, ICJ Reports 212.

67 Elias, *Africa and the Development of International Law*, 44. Elias provides and discusses a good example of the applicability of *pacta sunt servanda* in and among African polities,

Moreover, referring to Lord Lugard's experiences in Eastern and Western Africa, Alexandrowicz gives examples of African rulers' familiarity with and commitment to the principle of *pacta sunt servanda*.⁶⁸ Alexandrowicz shows how before the nineteenth century international relations and diplomacy were based on mutual compliance with promises made between European States and non-European political entities.⁶⁹ The obvious conclusion must be that the principle that agreements must be kept was indeed recognized by both European and African contracting parties. In this sense, the law of nations did apply to the European-African contacts, or, in the words of Elias: '[T]hese relationships must have thrown up certain general principles of international behaviour, certain universally accepted standards of international conduct between one State and another.'⁷⁰

Although there is consensus in legal doctrine that the existence of cession and protectorate treaties did not presume equality between parties⁷¹ – African territories inhabited by natives governed by their rulers were not considered

by quoting a treaty concluded between the *Association Internationale Africaine* and the Chiefs of Pallaballa, documented in H.M. Stanley, *The Congo and the Founding of its Free State* (New York: Harper, 1885), 197: 'Proverb after proverb could be quoted from many different African languages to the effect that it has always been an established principle that agreements must be kept. One illustration should be sufficient. When H.M. Stanley, acting as Chief Agent of the *Association Internationale Africaine*, signed a treaty with five Chiefs of the districts of Pallaballa in the Congo on 8 January, 1883, the use of the expression "Cession of Territory" had to be technically interpreted in a subsequent treaty of 19 April, 1884, to exclude the subsoil of the territory purported to be sold under the earlier treaty which must be taken to relate only to "The purchase of the Suzerainty by the Association." This second exercise was necessary because the chiefs, on being told that their first treaty had transferred an absolute title to the European grantees, were anxious either to set aside the whole transactions at once or to have it rectified in order to avoid a breach of the agreement later on. It is interesting to record that a little while previously the five chiefs had solemnly declared, in Article 5 of another treaty entered into among themselves as follows: "The confederated districts guarantee that the treaties made between them shall be respected." *Ibid.*

68 Alexandrowicz, 'Role of Treaties,' 47–50. See also Shaw, *Title to Territory in Africa*, 41.

69 C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967) and Alexandrowicz, *European-African Confrontation*. Gustavo Gossi, for example, shows that the principle of *pacta sunt servanda* also applied to international Islamic law: Gozzi, 'History of International Law,' 361–364.

70 Elias, *Africa and the Development of International Law*, 45.

71 G. Jèze, *Etude théorique et pratique sur l'occupation comme mode d'acquérir les territoires en droit international* (Paris: Giard and Brière, 1896), 128 and K.F. Heimburger, *Der Erwerb der Gebietshoheit* (Karlsruhe: Braun, 1888), 114. Arnold McNair stated that 'according to the modern doctrine of international law, and agreement made between a State and a native chief or tribe cannot be regarded as a treaty in the international sense of the term; nor

States – reciprocal relations between the European and African parties is not rejected. This observation raises the question what the nature was of the relationship between Europeans and Africans that was established by concluding cession and protectorate treaties. In other words, what was the legal value or authority of these documents? This question will be addressed next.

2.2 *Cession and Protectorate Treaties*

As a derivative mode of acquisition, cession is based on consensus about the transfer of sovereignty over territory. Although cession mainly occurs by way of treaty, the expression of consensus is not bound to any particular form. In nineteenth-century legal doctrine, cession entailed ‘the formal transfer of dominion by a previous lawful possessor.’⁷² The dominion to be formally transferred refers to sovereignty, i.e., both internal and external sovereign powers. As the continuity principle prescribed, there was no automatic or necessary extinguishment of existing private property rights to the land. This principle was commonly accepted within international law in the context of State succession. The acquiring State, however, did have the competence to enact legislation in order to acquire and allocate property rights to land. In this respect, the general rule was (and still is) that private property shall not be taken for public use without compensation (the Lockean ‘takings clause’).⁷³ Cession of land by a State had to be effected by the person or body that had been so authorized under the constitution of that State. Not fulfilling this condition of authority would make the cession void. The cession would also be voidable if it had been obtained through fraud or by coercion brought to bear on the persons negotiating on behalf of the ceding State.⁷⁴ Moreover, under certain conditions, a forced cession could resemble a conquest. The question that follows from these observations is whether nineteenth-century international

can it be said that such an agreement produces the international legal effects commonly produced by a treaty’ McNair, *Law of Treaties*, 52–53.

72 T.A. Walker, *A Manual of Public International Law* (Cambridge University Press, 1895), 32. ‘The area of territory conveyed and the moment of the transfer of sovereignty are alike ruled by the express terms of the instrument of conveyance. Provided good faith be shown by the parties to the contract, the determination of the boundaries of the region conveyed must thus be a mere matter of textual interpretation and of the facts of the previous ownership. The date of transfer, in default of express determination in the convention itself, must be taken to be that of the signature of the instrument.’ *Ibid.*

73 J. Locke, *Two Treatises of Government*, ed. by P. Laslett (Cambridge University Press, 2010), at II.135.

74 Lindley, *Acquisition and Government of Backward Territory*, 166.

law allowed cession agreements to be concluded between European States and African rulers.

According to Lindley, for a cession to be valid it had to meet five conditions.⁷⁵ First, an agreement made by a native sovereign could only be validly made with, or with the consent of, the ruler or government that had the supreme rights to the rights over the region. Second, with regard to the capacity of the parties, the treaty should be concluded or approved by an authorized person. The third condition concerns the form of a cession: the agreement should be made or executed in a form which was common to the contracting parties. Fourth, it had to be ensured that the natives concerned understood the provisions of the treaty. And, fifth, the cession of sovereign rights from the native ruler to the European State should not involve compulsion. Contemporary international legal doctrine, however, remained silent on what compulsion entailed. Although cession between two members of the family of civilized nations made under compulsion were considered void, this consequence was not often attached to compulsory cessions made between Europeans and native rulers.⁷⁶ It was, however, considered important that the contracting natives entered into the agreement freely, and although Lindley did not ascertain that these rules fell within the scope of international law in its narrow sense,⁷⁷ he acknowledged that if these rules 'are not in substance complied with, the acquiring Power loses the legal protection which a valid Agreement would have given it for a reasonable time between the making of the Agreement and the establishment of an efficient administration over the territory.'⁷⁸ In other words, if the European State did not fulfil the cession conditions within a reasonable period of time after the actual acquisition, the cession of the sovereign rights to the territory would not be considered legal. Interestingly, Lindley seems to have applied norms of international law in its narrow sense of inter-State law to relations between European States and non-European political entities.

The second legal instrument often used to establish territorial title was the protectorate treaty. Protectorates were constructs devised by politicians and primarily so for financial reasons: they were seen as a means to avoid the

75 *Ibid.*, 169–172.

76 *Ibid.*, 174–175.

77 Lindley also excluded non-European peoples on the ground of the dichotomy European versus non-European order, by quoting Westlake: '[Westlake] objects that if International Law made any such requirement, a Power might have fulfilled the conditions laid down by the Final Act of the Berlin Conference and yet be liable to have its title disputed on the ground that the cession from the natives was bad in regard to such matters as the capacity of the native authority to make the cession, or the form in which it was made.' *Ibid.*, 175.

78 *Ibid.*, 177.

financial burden of instituting a full-blown colonial government.⁷⁹ Yet the definition and the scope of the concept of protectorate are not unambiguous. A common contemporary definition of a protectorate reads as follows: ‘*Protectorate* is the recognition of the right of the aboriginal or other actual inhabitants to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and to discharge the duties of the protecting power.’⁸⁰ Or, to use the words of the British jurist Sir Henry Jenkyns (1838–1899): ‘By the exclusion of external relations with foreign powers, the protector is held according to international law to assume the external sovereignty of the protected territory, and the territory becomes what is termed by international writers a semi-sovereign state [...].’⁸¹ A protectorate implied that European power did not possess either its soil or its population. Westlake defines protectorate as ‘a relation existing between two states, of which the protected one is controlled or even wholly represented in its foreign affairs by the protecting one, while the latter has such authority in the internal affairs of the former, if any, as the arrangements between them provide for.’⁸² He concludes that the ‘protected state is therefore not independent, but neither does it altogether lose an international existence, for its foreign affairs are distinctly its own, even when wholly managed for it by the protecting state.’⁸³ Initially, Westlake subscribes to the view that protectorates could only be established between two States, but he concedes that ‘in recent times a practice has arisen by which in such [uncivilized, MvdL] regions civilised powers assume and exercise certain rights in more or less well defined districts, to which rights and districts, for the term is used to express both the one and the other, the name of a protectorate is given by analogy.’⁸⁴ In short, protectorate treaties transferred external sovereignty rights over territory to the protecting State and could be concluded between European powers and African rulers as equals in order to create a mutual relationship of protection.

A twentieth-century definition of the protectorate is given by Alexandrowicz, and an intriguing definition it is, because it emphasizes the duty of the protecting State: ‘The protectorate means a split of sovereignty and its purpose

79 W.E. Hall, *International Law* (Oxford: Clarendon Press, 1880), 24.

80 Memo by Lord Selborne, January 3rd, 1885, quoted in W.R. Louis, ‘The Berlin Congo Conference,’ in: P. Gifford and W.R. Louis (eds.), *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (New Haven, Conn.: Yale University Press, 1971), 209.

81 Jenkyns, *British Rule and Jurisdiction*, 166.

82 Westlake, *Chapters*, 177.

83 *Ibid.*

84 *Ibid.*, 178–179.

is to vest in the Protector rights of external sovereignty while leaving rights of internal sovereignty in the protected entity. In this way the Protector shelters another entity against the external hazards of power politics.⁸⁵ The validity of a protectorate treaty, like that of a cession treaty, was dependent on several conditions.⁸⁶ When a protectorate was established, often by way of a protectorate treaty,⁸⁷ internal sovereignty rights remained in the hands of the protected entity.⁸⁸ As a European entitlement to overseas territories, a protectorate was not considered to be part of the dominions of the European motherland and could not be classified as a European possession.⁸⁹ This element was the crucial difference between a colony and a protectorate.⁹⁰ In theory, protectorate treaties between European powers and African native rulers implied that the Europeans recognized, either implicitly or explicitly, the internal sovereignty of the native rulers, and this recognition included acknowledgement of the power of these rulers to regulate existing and future property rights within their territories.

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- 85 Alexandrowicz, *TEuropean-African Confrontation*, 62. On the nature of the treaty of protection, see C.H. Alexandrowicz, 'The Juridical Expression of the Sacred Trust of Civilization,' *American Journal of International Law*, 65 (1971), 152.
- 86 In general four conditions had to be met: '(1) The parties to the treaty must be possessed of full contractual capacity, i.e. they must, in general, be independent states. (2) The contracting agents must contract within the terms of their authority. [...] (3) The contracting parties must freely consent to the terms of the treaty. [...] (4) The object of the treaty must not contravene the principles of international law.' Walker, *Manual of Public International Law*, 84.
- 87 'Yet the existence of the "protectorate agreement" gave the outward appearance that the African societies had entered into the governing relationships voluntary and, furthermore, continued, in certain capacities, to rule themselves. Indirect rule thus gave the European states power, but without the responsibilities they would have encountered through direct rule.' M. Mulligan, 'Nigeria, the British Presence in West Africa and International Law in the 19th Century,' *Journal of the History of International Law*, 11 (2009), 293.
- 88 Thomas Baty described four stages of development in the history of the protectorate. See T. Baty, 'Protectorates and Mandates,' *British Yearbook of International Law*, 2 (1921–1922), 114–115.
- 89 See C. Lucas, *The Partition and Colonization of Africa* (Oxford: Clarendon Press, 1922), 211. See also Elias, *Nigerian Land Law*, 17.
- 90 See Jenkyns, *British Rule and Jurisdiction*, 192–193. In this light, it should be reminded that British practice, was based on the feudal system of land tenure, in which it is recognized that the Crown has the ultimate title to territory – the Queen is sovereign and owns all the land within her dominion. See K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

However, there was no common understanding and use of the protectorate concept among the colonizing powers during the acquisition of Africa in the late nineteenth century. The Great Powers involved in the struggle for African territory – Britain, France and Germany – held different views on the extent, substance and implications of protectorates. These differences generated a considerable amount of theoretical and abstract scholarly literature. According to Grewe, for example, British scholars, in contrast to their German and French counterparts, ‘sought to maintain the fiction of a legal distinction between “colony” and “protectorate,”’ because, as Grewe asserts, ‘it was the British view that the protectorate relationship did not give the protector State any jurisdictional authority over the nationals of other States sojourning in the territory of the protectorate.’⁹¹ From the perspective of German international legal doctrine, the distinction between colony and protectorate was ‘completely fluid,’ and the new, hybrid political institution of the colonial protectorate was transitional filling. From the French perspective, as Grewe describes it, the ‘protectorate is only a restriction, a limitation, a moderation, to which the victorious power submits in its own interest, to the degree it deems appropriate; at any time it can draw the last consequences of its conquest.’⁹² Whether there is merit in Grewe’s theoretical qualifications of the British, German and French interpretation of the protectorate concept can only be investigated by analysing the protectorate treaties these powers concluded with African rulers in the late nineteenth century. In other words, the question to be answered is whether these theoretical assumptions are supported by empirical findings. Did international legal theory address the practice of treaty-making between Europeans and Africans?⁹³ The question is material, because the value and authority of the protectorate treaties concluded between African rulers and European States under nineteenth-century international law can only be determined on the basis of both international legal theory and practice.

3 Conclusion

New Imperialism on the African continent implied a European struggle for title to territory in the late nineteenth and early twentieth centuries. Bilateral

⁹¹ Grewe, *Epochs of International Law*, 473.

⁹² *Ibid.*, 474.

⁹³ Jörg Fisch points also at the alleged discrepancy between theory and practice: Fisch, ‘Africa as *Terra Nullius*’, 358, 360–369. In this light, Koskenniemi speaks of the universalism versus relativism opposition: Koskenniemi, *Gentle Civilizer*, 136–143.

treaties between European States and African rulers representing their peoples, which effected cession of territorial sovereignty or established protectorates, were the two legal instruments most commonly used to create European title to African territory. This chapter's has addressed two central questions. The first one concerned the meaning and role of territory in the context of the European treaty-based acquisition and partition of Africa, and the second one the status of cession and protectorate treaties between European States and African rules in nineteenth-century international law. Were these treaties merely pieces of paper marked with a cross by African rulers, a status constructed by contemporary legal scholars following a positivist line of reasoning and upheld by twentieth-century international legal scholarship? Or did these documents have legal value after all? In other words, were these cession and protectorate treaties sources of law? An attempt to answer these questions will have to take into account the implementation and the consequences of these treaties, and these questions are crucial in setting the stage for the question whether these treaties were valid and if they were whether treaty obligations were violated.

The very existence of cession and protectorate treaties implies that the European confrontation with nations in the non-civilized part of the world did not occur in a legal vacuum. In this confrontation between members of the family of civilized nations and non-member nations, more specifically the European-African confrontation, the law of nations applied. This fact effectively means that the dualist world view can be regarded as being fictitious. It is questionable to what extent there really existed, as proclaimed by mainstream contemporary international legal doctrine, two worlds, one civilized, the other non-civilized – a divide characterized by two different missions: one of toleration between the members of the family of civilized nations, and one of civilization between these members and nations that were not recognized as members. Although contemporary legal doctrine emphasized a dichotomist world view supported by the civilization argument, practice shows that European States did conclude bilateral treaties with African political entities, and this practice implies that African rulers were acknowledged to have the capacity to conclude treaties and to possess sovereign powers. The cession and protectorate treaties between European States and African political entities established mutual relations between the contracting parties.⁹⁴ By using such legal instruments and by signing them, the Europeans acknowledged the capacity of the African rulers to conclude treaties and to transfer sovereign rights over territory. Put differently, cession and protectorate treaties were acknowledged as treaties between two sovereign contracting parties. This also implies that

94 See Alexandrowicz, 'Afro-Asian World and the Law of Nations', 208.

the capacity to conclude treaties did not require European-style statehood. It was not the narrow interpretation of international law as inter-State law but the law of nations that regulated the confrontation and relations between States and other political entities.

Contemporary and current international legal doctrine is too radical in arguing for the existence of two worlds, one in which international law applied and one in which it did not. International legal practice does not support this strict dualist perspective: both the possibility of concluding bilateral treaties in the non-civilized world and their existence imply that international law did indeed apply to relations between European States and African political entities. A number of key principles and rules of international law – most prominently *pacta sunt servanda* and *bona fides* – went beyond the State versus non-State dichotomy. In other words, there were indeed rules of law which universally applied to encounters between nations: the law of nations. Within the community of civilized nations, international law is a specific branch of the law of nations.

Determining the status of the cession and protectorate treaties on the basis of the narrow understanding of nineteenth-century international law, as contemporary legal scholars did, is just one part of the story: it provides the theoretical and Euro-centric perspective on the value of these treaties. The subsequent question to be answered is what the meaning of these treaties was in the broader context of the law of nations? The next three Chapters will examine and compare the background to and the texts of the treaties concluded between European States and African political entities in British Nigeria, French Equatorial Africa and German Cameroon. Sovereignty and property and the relationship between these two legal phenomena will be at the heart of this analysis. The purpose of performing these case studies is to establish the status and value of these treaties in nineteenth-century international law. These case studies also examine what happened after the cession and protectorate treaties had been concluded. Only then can it be determined whether these treaties were complied with, whether, by extension, international law was violated and whether the colonization of Africa was legal.

British Nigeria

1 Introduction

In the 1880s, while France was occupied with the Sudan and Germany not yet a serious competitor, Great Britain acquired its most important overseas territory in the Western part of Africa, Nigeria, so named by Lady Flora Lugard (1852–1929), British journalist and wife of Lord Lugard, first Governor-General of the territory.¹ Britain initially targeted the Nigerian coast, which is formed by the Niger Delta and its tributaries. Britain acquired this territory by concluding treaties, specifically protectorate treaties, with Nigerian native rulers. This chapter aims to examine the context of these treaties in terms of their negotiations, texts and follow-up.

Traditionally, protectorate treaties were concluded between two States by which one State transferred its external sovereign rights – its rights to enter into and maintain relations with other States – to the protecting State. In the age of New Imperialism, however, Britain used protectorate treaties not only to acquire external sovereignty, but also internal sovereign rights, i.e., the rights to control the internal affairs of the African polity it had undertaken to protect. And having acquired internal sovereign rights, Britain also claimed to have acquired proprietary rights to African land. To substantiate this main argument, the current chapter appraises *imperium* and *dominium* and their relationship in the context of the British colonization of Nigeria in the late nineteenth century. It explores how the concepts of *dominium* and *imperium* appeared in the treaties between the British and the Nigerian people(s), and whether the institutions of territorial sovereignty and land ownership were used accurately and consistently. The chapter offers an analysis of protectorate treaties, specifically treaty provisions that concern the transfer of territorial sovereignty and private property of land, as well as the remedies under and beyond the treaties which could be invoked in case of breach of treaty. First, the historical background to the British presence in Nigeria is outlined (§2). Second, the theoretical framework of title to territory is explained from the British perspective (§3). Third, the results of a study and analysis of treaty practices between British and Nigerians are presented (§4). Fourth, the chapter assesses the lawfulness of these treaties and other kinds of agreements by discussing British conduct and the legislation enacted by the British after treaties had

¹ Lady Lugard introduced the name in *The Times* on 8 January 1897.

been concluded as well as the role of the British colonial judiciary and its case law (§5). Finally, the findings are summarized and British colonial practices in Nigeria are placed in the broader context of the European acquisition and partition of Africa in the late nineteenth century (§6).

2 Historical Background

As early as the seventeenth century, the British had found their way to the West-African coast, where the main economic activity was trading slaves. The abolition of the British slave trade on 1 January 1808 radically changed British motives for being in Africa and therefore their activities. In the 1830s, a lively trade in palm oil developed. Especially the interior was rich in this oil, and it was the waterways, the Oil Rivers, of which the Niger was the most important, that brought the British to the area. European traders were forbidden by their own authorities to do business directly with African natives, which is why African middlemen were used to liaise between the oil producers in the *Hinterland* and the European traders on the coast. The intermediate trade took place in the coastal city states of Brass, Bonny, and Calabar, which did not fall under British dominion and where trade and politics were hardly separable. The African middlemen had the monopoly on the intermediate trade, secured by commercial treaties with British traders. The British historian Augustus Mockler-Ferryman (1856–1930) paints a clear picture of contemporary practices in the Niger area: “The common theory that “trade follows the flag” hardly holds good with regard to the Niger, for that the Union Jack now floats over the greater part of these vast territories is due almost entirely to the efforts of traders and trading companies, though it is only fair to add that the British Government has usually backed up the traders whenever necessary.”² Consolidating its commercial interests on the West-African coast and the Niger became Britain’s primary objective. This consolidation involved concluding treaties between British agents and African rulers or peoples on such issues as the abolition of the slave trade and human sacrifices, the promotion of peaceful trade and the protection of British subjects and missionaries.³

2 A.F. Mockler-Ferryman, ‘British Nigeria,’ *Journal of the Royal African Society*, 1 (1902), 160. See also M. Crowder, *The Story of Nigeria* (London, 1962); and M. Crowder, *Colonial West Africa Collected Essays* (London, 1978).

3 J.C. Anene, *Southern Nigeria in Transition 1885–1906. Theory and Practice in a Colonial Protectorate* (Cambridge University Press, 1966), 31–32.

Another important trade centre for British agents was the Kingdom of Lagos. Here, the growing palm oil trade drew British attention. In 1861, Britain convinced the King of Lagos, Docemo, to dispose of his empire in favour of the British in return for an annual bonus of GBP 1,000. As a result, Lagos became an English Crown colony. In 1849, a British consul had been appointed to control the area of the Oil Rivers. The consul looked after the British interests and over time earned the respect of the African rulers, who appealed to him when in difficulty. However, the consul's judicial and administrative duties (and powers) were limited to British subjects. Other than appointing a consul the British Government took no action – hence the name 'informal empire.'⁴

The British consolidated their commercial interests in the Niger Delta and its watershed⁵ mainly through concluding treaties between British agents and African rulers and their peoples. Although the British government did not want to be directly involved in the acquisition and administration of overseas territories, mainly for financial reasons, it did promise traders that they could count on military support, if necessary. This restraint remained British government policy until the 1880s.

In 1880, British consul Edward Hewett found that informal empire no longer sufficed. Britain exercised exclusive influence over territories without having acquired formal possession of them. As consul, Hewett was expected to maintain order and uphold the law, but he did not have the authority to perform his duties. He advocated a formal empire for two reasons: to overrule the powerful position of the African middlemen and to avoid French interference.⁶ In April 1882, Hewett requested the Secretary of State for the Colonies, the Earl of Kimberley (1826–1902), to establish a protectorate or a Crown colony in the Nigerian coast area. Remarkably, this request was accompanied by letters from the Cameroonians in which the African rulers 'were alleged to be willing to surrender their country to the British Queen.'⁷ Kimberley, however, rejected the request.⁸ A member of the anti-imperial Government of Prime Minister William Gladstone (1809–1898), Kimberley emphasized the additional responsibilities of the British government when acquiring the territory of

4 Wesseling, *Verdeel en heers*, 233. See Sanderson, 'European Partition of Africa,' 97. See also W.R. Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Durham: Duke University Press, 1973).

5 See P.J. Cain and A.G. Hopkins, 'The Political Economy of British Expansion Overseas, 1750–1914,' *Economic History Review*, 33 (1980), 463–490.

6 Pakenham, *Scramble for Africa*, 192.

7 Anene, *Southern Nigeria in Transition*, 56.

8 Wesseling, *Verdeel en heers*, 234.

'barbarians.' British occupation of the Niger would only lead to war, war would require funding and taxes would have to be raised in the home country to replenish the treasury.

Then Sir George Goldie Taubman (1846–1925; hereafter 'Sir Goldie') entered the stage.⁹ From 1877, he led a very successful trading company, initially named the United African Company, which in 1882 became the National African Company. A trader and an imperialist, Sir Goldie dreamt of building a vast British empire based on commerce on the African continent. Since the 1870s, the British had obtained access to the Niger and, alongside the trade in the Niger Delta with its African trade centres and middlemen, a new trade market had been established in which British did business directly with African producers. French traders also found their way into the interior, which led to fierce competition between them and the British. At the end of 1884, following various mergers with British and French trading companies, Sir Goldie and his National African Company had the trade monopoly on the Lower Niger. British rule in the Lower Niger area was acknowledged by the European powers at the Berlin Conference (1884–1885).

However, this did satisfy Sir Goldie's ambitions; he aimed to expand his power to the interior and add a new colony to the British Empire. He set up more and more trading posts along the Niger and concluded treaties with African rulers, 37 agreements by 1884.¹⁰ In these treaties, the rulers put their signatures under clauses stipulating that they 'ceded the whole of our territory to the National African Company (Limited) and their descendants for ever' and that they consented to the National African Company's monopoly on trade.¹¹ The Dutch historian Henk Wesseling correctly observes that the National African Company ruled *de facto* as some sort of government over the *Hinterland*, even without the official permission of the British government.¹² Although Hewett and Sir Goldie both secured treaties with the rulers of the Oil Rivers and the Niger districts, it was Sir Goldie's company that landed better deals, because African rulers 'ceded' their territories to the National African Company 'in perpetuity.' What Sir Goldie aimed for, however, was an official mandate by the British government, by way of a charter, because only then would he be

9 For an elaboration on Sir Goldie's life, see J.E. Flint, *Sir George Goldie and the Making of Nigeria* (London: Oxford University Press, 1960).

10 Wesseling, *Verdeel en heers*, 236.

11 E. Hertslet, *The Map of Africa by Treaty*, 3rd edition, vol. i (London: Frank Cass, 1967), 131–154.

12 Wesseling, *Verdeel en heers*, 236.

able to attain his political purpose: the incorporation of Nigeria into the British Empire.¹³

Initially, the British government remained reluctant to intervene in Nigeria. Although the necessity for political action became increasingly clear in the early 1880s, the British government feared the financial and political consequences. However, by the end of 1883 the British government changed its mind because the need to control the trade market and the African middlemen became urgent and competition with the French stiffened.¹⁴ In July 1884, Hewett was empowered to conclude treaties with the object of establishing a British protectorate in the Niger area. The British Foreign Office sent him there with a number of standard treaty forms, each containing the same eight articles. Under these provisions African territory was brought under British protection and Britain obtained the right to free trade, which effectively ended the African middlemen's power. Whether or not these treaties were understood by the African natives who signed them, they were of vital importance to the British: these treaties were the title deeds of Britain's prospective colony of Nigeria. However, two other European powers with colonial aspirations – France and Germany – became increasingly eager to acquire African territory and did not avoid a confrontation with Britain. As a result, a steeplechase could not be avoided.

In contending for concluding protectorate treaties with African rulers, Bismarck acted more swiftly than the British: he sent the German explorer Gustav Nachtigal (1834–1885) with the war ship on a mission to the African west coast.¹⁵ Nachtigal travelled on the warship *Möwe*, and on 5 July 1884 he concluded treaties in Togoland. He subsequently, on 14 July, succeeded in concluding a protectorate treaty for the territory of Cameroon, beating Hewett to it, who had yet to go ashore.¹⁶ Here the first signs of the scramble for Africa appear. Despite this competition, no conflict arose between the two powers: at the Conference of Berlin, Britain recognized Germany's sovereignty over Cameroon and Bismarck supported the British title to the Niger area. Soon after the Conference, which accelerated the scramble and put a strain on international relations, Britain and Germany signed an agreement demarcating their spheres of influence in Nigeria and Cameroon. The criterion of effective

13 *Ibid.*, 237.

14 See, for example, P. Gifford and W.R. Louis (eds.), *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (New Haven, Conn.: Yale University Press, 1971).

15 See, for example, P.M. Kennedy, *The Rise of the Anglo-German Antagonism 1860–1914* (London: Allen and Unwin, 1980).

16 Wesseling, *Verdeel en heers*, 239.

occupation, introduced at the Berlin Conference, implied that a valid title to territory could only be established if a European power was able to defend the territory against external attacks and to secure peace and order within the area. This requirement of effective occupation outlawed the British 'colonial' policy of informal empire and encouraged rival expeditions.

In contrast with the French government's colonial policy of direct rule aimed at assimilation, the attitude of the British government to the events on the African continent was tentative and indecisive. It took some time until the British grasped the imperial reality. Important players in the British political arena at the end of the nineteenth century were the liberals Gladstone, Earl Granville (1815–1891) and Sir Harcourt (1827–1904). Lord Rosebery (1847–1929), who was a convinced imperialist, succeeded Gladstone in 1894 as Prime Minister. The following year, the conservatives seized power in British politics, and Lord Salisbury (1830–1903) took his place as Prime Minister. He appointed Joseph Chamberlain (1836–1914) as Secretary for the Colonies. It was Chamberlain who propagated the transition to formal empire in Africa. He condemned liberalism and propagated an active political and economic role of the British State. The period of *laissez faire* was had ended, as had the era of freedom of trade; Chamberlain believed in protectionism and imperial preference.¹⁷ The new policy or regime turned on investment and development, in which 'scientific administration' and 'constructive imperialism' were considered key concepts of the ambition to establish a British Empire from the Cape to Cairo.¹⁸

Returning to the Nigerian situation, the British government asserted its sphere of influence or protectorate power not only over the coastal area between Lagos and Cameroon, but also over the territory behind the coastal strip up to where the Niger and the Benue Rivers converged. After the Conference of Berlin, there was a growing consensus that a protectorate did not suffice to justify or claim total rule over a territory. Although the Final Act did not prescribe effective occupation of the *Hinterland* as a condition for closing the door on other European powers, this condition was increasingly emphasized in practice.¹⁹ Faced with this trend, the British government could only conceive of one solution, namely, to grant Sir Goldie's National African Company a Royal Charter. Goldie's desire for such a charter met with resistance in political circles, because of the grant's foreseen financial and political consequences. The Charter authorized Sir Goldie's company, renamed the Royal Niger Company, to administer those territories in the Niger basin regarding which it had

17 *Ibid.*, p. 259.

18 *Ibid.*

19 See Fisch, 'Africa as *Terra Nullius*,' 347–375.

concluded protectorate treaties. As will be argued, the British reinterpreted these treaties in a way that allowed them to claim comprehensive and absolute cession of African territory to the company. Although the Royal Charter granted to the company merely recognized the company's claim, the Royal Niger Company demanded full sovereignty over the area. Instead of operating in the name of the British Crown, the Company presumed it had acquired sovereign rights over the territory. In addition to the Royal Charter, which granted the Company sovereign rights and the capacity to intervene as a government, the Company would receive a trade monopoly.²⁰ On 10 July 1886, the Royal Niger Company, succeeding the National African Company, was constituted, although enthusiasm and support for this move were modest.²¹ Questions arose about the costs of increased British involvement and doubts were expressed as to whether trading companies were indeed able to represent Britain's interests and control the acquired territory. The chartered Company eventually secured a tract of territory covering the Niger and Benue basins, an area almost twice the size of Britain, and one which, with the exception of South-Africa, would prove to be the most remunerative of tropical Africa. Thus, Britain possessed a protectorate and the Royal Niger Company had a charter, but the British government continued to have reservations about intervening in and assuming responsibility for local affairs; it remained cautious and tried to keep its distance.

Even so, Britain found itself increasingly drawn into the affairs of the protectorate of Nigeria and Sir Goldie's chartered company because of problems and conflicts between British traders in the Niger Delta and the Royal Niger Company. In addition, the relationship between the British and the African natives was troubled. Especially in its relations with African rulers, Britain began to interpret the protectorate treaty in ever broader terms. At first, the British strategy of choice was one of 'preventive imperialism': the British Crown extended its 'gracious favour and protection' to the African people and territory, a philosophy that is perfectly described in a letter of the British consul in Nigeria, Hewett, to an African ruler with whom the British were negotiating a treaty: 'The Queen does not want to take your country or your markets, but at the same time is anxious that no other nation should take them.'²²

Nonetheless, conflicts between traders and African natives became more frequent, intense and violent. The African natives resented the European merchants for entering the interior markets, because the European presence

20 Wesseling, *Verdeel en heers*, 239.

21 *Ibid.*, 240.

22 F.O. 84/1862, see letter from Hewett to Jaja from 1 July 1884, which is attached to the correspondence from Jaja to Salisbury on 5 May 1887.

threatened their commercial advantages as middlemen. This volatile situation forced Britain's hand and the British intensified their involvement in the Nigerian protectorate. In April 1886, the British Minister of Foreign Affairs informed Hewett that the limited interpretation of the protection treaties should be abandoned, and that Britain should claim its sovereignty over the whole territory of Southern Nigeria.²³ In this way the concept of the protectorate became to be interpreted so broadly as to transform its substance. This trend is confirmed by Anene, who states that '[t]he illusion that in a colonial protectorate the internal sovereignty of the indigenous rulers was to be respected was apparently preserved by the nature of the task imposed on the British Consul. [...] European writers have referred to this period as the "paper protectorate." This view is based on the assumption that it was the business of Britain to establish an elaborate Crown colony administration in 1885. Britain had in fact no legal or moral right to do so.'²⁴

This situation, of course, led to conflicts and disputes between the merchants and the African inhabitants. As a protectorate power, Britain did not have the authority to intervene in the internal affairs of the African polities, which, as will be shown, was clearly expressed in the concluded treaties. The British government became increasingly involved in the problematic colonial affairs regarding the Oil Rivers and the Niger, and it became clear that the colonial policy of consular rule could not be maintained. The Oil Rivers Protectorate existed only on paper and nothing was undertaken to make it really effective. The consul was not averse to making use of African rulers to administer the Protectorate. Support for establishing a Crown colony grew. A report on the Royal Niger Company argued that 'the best form of administering the district [...] would be by a strong Consular administration' under the supervision of an executive which had to 'maintain order and assist in opening up the country,' if necessary by means of 'armed police or constabulary.'²⁵ In 1891, the protectorate became a *de iure* colony with *de facto* direct rule. A consul-general was given broad authority; the headquarters arose in Old Calabar and a vice-consul was placed in charge of the five other principal rivers: Opobo,

23 Wesseling, *Verdeel en heers*, 241.

24 Anene, *Southern Nigeria in Transition*, 73. "The creation of a status for protectorates different from that of colonies was intended to give the Crown a free hand in dealing with the people in areas the Crown itself designated as "foreign land" under its control. It was a technicality for differential treatment that could hardly be justified." Umozurike, *International Law and Colonialism*, 48.

25 Report on the Royal Niger Company by Major Macdonald, 93, as quoted in Anene, *Southern Nigeria in Transition*, 130.

Benin, Brass, Bonny and Forcados. An administrator for the Niger Delta was appointed in 1893, and the area was henceforth called the Niger Coast Protectorate. This effectively put an end to Sir Goldie's ideal, unified British rule under his Royal Niger Company: British traders did not want to subject themselves to Sir Goldie and the Lower Niger area was ruled by two opposing British parties, the government in the Delta and the Company on the river.²⁶

Although the British and French spheres of influence had been defined in a convention between the two powers in 1890, tensions between the two were commonplace. France provoked the British by stating that they had no real power, in the sense of effective occupation, over the Lower Niger area. This meant, so the French asserted, that the British claims could not be maintained in practice. The danger of a violent collision between the two parties was real and may even have seemed inevitable. British military forces went northwards to the Middle and Upper Niger, and French soldiers sought their way to the east and the south, heading for the sea and the Lower Niger. The two sides did indeed clash over the areas of Dahomey and Borgu, both of strategic importance because of their position along the Niger.²⁷ A detailed examination of these conflicts is beyond the scope of this chapter; but it is worth to draw attention to the main player on the Nigerian territory: Lord Lugard, also called 'The Maker of Nigeria.'²⁸ It was Lord Lugard, famous for his *The Dual Mandate in Tropical Africa*,²⁹ who introduced the administrative system of 'indirect rule.'³⁰

Lord Lugard, a professional soldier who first served the British government in East Africa, fought against the French over territory in West Africa. Although attempts at peaceful negotiations were made, territorial expansion took priority in the eyes of the two powers. From 1896 on, the French were active in the West African arena, and in 1897 even occupied the city of Bussa claimed by Britain, situated near the border with French Dahomey (present-day Benin). As a matter of fact, there was no effective British presence in Bussa, but Sir Goldie's Royal Niger Company had already concluded treaties with local rulers in 1885 and thus had recognized treaty rights to the territory of Bussa. Here, title to territory based on effective occupation clashed with title to

26 Wesseling, *Verdeel en heers*, 243.

27 For further reading on these conflicts between France and Britain, see *ibid.*, 260–265; and Pakenham, *Scramble for Africa*, 452–469.

28 Wesseling, *Verdeel en heers*, 261. For the life story of Lord Lugard, see M. Perham and M. Bull (eds.), *The Diaries of Lord Lugard* (London: Faber and Faber, 1963).

29 Lugard, *Dual Mandate*.

30 Although Lord Lugard introduced the term 'indirect rule,' the phenomenon of hybrid governance was not new. See Pagden, *Lords of All the World*, 127.

territory founded on treaty rights. Paper protectorates no longer sufficed. However, if Britain gave in on this point, its Niger policy would collapse, because that policy rested squarely on the treaties the Royal Niger Company had concluded with the African rulers.³¹ Moreover, as Bussa was the gateway to the Niger, French occupation of the city would threaten the trade monopoly and, by extension, the economic future of the Royal Niger Company. British Minister of Colonies Chamberlain was prepared to support Sir Goldie's Company and he gave him financial and military aid. At the end of 1897, the West African Frontier Force, a field force under the command of Lord Lugard, was set up, consisting of men from the Hausa and Yoruba peoples. Lord Lugard was given a free hand by Chamberlain in achieving a single objective as part of a chessboard policy: next to every French settlement, a British one had to be set up.

As was to be expected, this chessboard policy resulted in many incidents: a hoist-the-flag race between France and Britain ensued, leaving effective occupation a fanciful notion. What is more, the indigenous population fell victim to this violent competition. The Foreign Office, later the Colonial Office,³² formally regretted the need for military domination, but it was adamant that there were no alternatives to military subjugation in dealing with 'barbarians.'³³ Eventually, both parties recognized that the situation was irregular and unendurable. They signed a convention on 14 June 1898, which laid to rest an antagonism that had lasted twenty years. Britain made some territorial concessions to France, but it retained political control over the Lower Niger area.

The British-French Niger Convention of 1898 dividing West Africa roughly mirrored the process of the partition of the whole of Africa by the European colonial powers. It clearly reflects the differences in British and French ambitions: As British imperialism was economically inspired, Britain settled for the small but economically most profitable area in West Africa, Nigeria and the Gold Coast. The French, aspiring to political power and prestige, aimed to gain as much territory as possible in an effort to establish the largest empire. The British government entered into negotiations with the Royal Niger Company in order to arrange the administration of and the authority over the territory. In 1900, the Niger Coast Protectorate was united with the Lower Niger area, which until then had been under the supervision of Sir Goldie's company – a

31 Wesseling, *Verdeel en heers*, 264.

32 On the role of the Colonial Office in British Nigeria, see J.M. Carland, *The Colonial Office and Nigeria, 1898–1914* (London: Macmillan, 1985). On the Colonial Office and its history, see D.M. Young, *The Colonial Office in the Early Nineteenth Century* (London: Longmans, 1961).

33 Anene, *Southern Nigeria in Transition*, 323.

move that resulted in the Protectorate of Southern Nigeria. On 9 August 1899, the Royal Niger Company transferred its powers to the British government, in exchange for GBP 865,000. In a letter to the Secretary of Treasury of 15 June 1899, the Foreign Office put forward the reasons for revoking the Charter: 'The West African Frontier Force, now under imperial officers, calls for direct Imperial control; the situation created towards other firms by the commercial position of the Company, which, although strictly within the right devolving upon it by Charter, has succeeded in establishing a practical monopoly of trade; the manner in which this commercial monopoly presses on the native traders [...] are some of the arguments which have influenced his Lordship.'³⁴The Colony of Lagos remained an administrative unit and a new Protectorate of Northern Nigeria was constituted.

At first, Nigeria under British rule was split up into three administrative areas. Northern Nigeria was subjected to the British and became a protectorate between 1900 and 1903 under the supervision of Lord Lugard, who occupied the emirates of Kano and Sokoto on 3 February and 15 March 1903 respectively. Subsequently, in 1906, the Colony of Lagos was added to the Protectorate of Southern Nigeria. The positions of consul-general and consul were abolished and a High Commissioner was appointed. The Protectorate of Southern Nigeria was administered by a High Commissioner, four Divisional Commissioners, three Travelling District Commissioners, nine District Commissioners, a Chief Justice, Judges, an Attorney General, and other officials.³⁵ Southern Nigeria was divided into four districts – Western, Central, Eastern, and Cross River – and on each of the principal rivers a Commissioner's Court was established. In the course of time, native courts and courts of justice were instituted in every district to assist the European courts.

As almost all British overseas territories, Nigeria was administered through indirect rule, a system of government that was allowed the British colonial administration to rule the African inhabitants through their native rulers. Lord Lugard described this system of administration as follows:

The essential feature of the system [...] is that the native chiefs are constituted as an integral part of the machinery of the administration. There are not two sets of rulers – the British and the native – working either separately or in co-operation, but a single Government in which the native chiefs have well-defined duties and an acknowledged status equally

34 Papers relating to the Surrender of the Charter of the Royal Niger Company, C. 9372 (1899), as quoted in Mockler-Ferryman, 'British Nigeria,' 165.

35 *Ibid.*

with British officers. Their duties should never conflict, and should overlap as little as possible. They should be complementary to each other, and the chief himself must understand that he has no right to place and power unless he renders his proper services to the State.³⁶

Indirect rule mobilized existing tribal structures and traditions, based on customary law, to help govern the subjected peoples and territories. However, the British authorities limited the power of local rulers to govern their societies by retaining ultimate ruling power: Britain had the final say.

How did the British obtain these jurisdictional powers over African territory? Answer this question requires taking a closer look at the substance of the treaties and other agreements British delegates and companies concluded with African, in particular Southern Nigerian, rulers and peoples.

3 Treaties and Contracts between Britain and African Natives

In 1909, the total length of British frontiers in Africa ranged between 16,000 and 17,000 miles, of which approximately 10,000 miles had already been surveyed, approximately 6,000 miles were marked on the ground, and 2,150 miles were marked and ratified in accordance with common procedures.³⁷ A brief glance at the list of treaties and agreements concluded in Southern Nigeria as provided by the librarian and archivist Sir Edward Hertslet (1824–1902) in his *The Map of Africa by Treaty* (1894)³⁸ brings home the enormity of the scale

36 Lugard, *Dual Mandate*, 203. 'British Africa [...] has been home of indirect rule, both in the sense of utilizing native officials and of developing along native lines. Nigeria has its policy determined by British Residents and the general work of administration overlooked by them: but the ordinary system of rule is by powerful native chiefs and councils, which have the power of drafting local budgets and imposing taxes.' S.H. Roberts, *The History of French Colonial Policy 1870–1925* (Hamden, Conn.: Archon Books, 1963), p. 642. See Carland, *Colonial Office and Nigeria*, 66–79. On native administration in other British territories in Africa, see Lord Hailey, *Native Administration in the British African Territories*, vol. v (London: Her Majesty's Stationary Office, 1953).

37 Hertslet, *Map of Africa by Treaty*, viii. See J.E. Flint, 'Nigeria: The Colonial Experience from 1870 to 1914,' in: L.H. Gann and P. Duignan (eds.), *Colonialism in Africa 1870–1960*, vol. v (Cambridge University Press, 1969), 225.

38 Hertslet, *Map of Africa by Treaty*. The object of this book was, as Hertslet formulated it himself, 'to show how, by Treaty, Conquest, or Cession, or under the name of a Protectorate, European Powers have succeeded, at different times, in obtaining a footing in various parts of the African Continent, and how those occupations have been greatly extended

of the acquisition of territory and land by cession. The authentic minutes of the treaties between Europeans and African natives could be written in the language of the European contracting party and, subsequently, translated into the local African language, or in the languages of both contracting parties. Although Britain also concluded various territorial agreements with France and Germany, in what follows attention will be directed at the treaty and contractual relationships Britain established with the African rulers and their peoples.

The following sections analyse the types of treaties and agreements concerning Nigerian territory British representatives or trading companies concluded with African rulers.³⁹ First, a number of essential treaties from the second half of the 1800s will be analysed and discussed. Next, the treaties concluded between British and Nigerians in the age of New Imperialism will be scrutinized. It is important to bear in mind that the treaties concluded in the 1850s and 1860s mostly reflected economic considerations, as earlier treaties had done, while later treaties were increasingly political in nature. Along with this transition from economic to political incentives, protectorate treaties would come to be used far more often than cession treaties. Another fundamental trend was that the treaty texts would include clauses on sovereignty and property as well as use a variety of synonyms for 'have' and 'transfer'.

3.1 *Early Stage: Cession Treaties and Trade Contracts*

One of the first treaties transferring title to territory the British concluded was in the Lagos area. On 1 March 1852, Akitoye, the King of Lagos and the Church Missionary Society signed an agreement that granted pieces of land to the British missionaries.⁴⁰ The purpose of this transfer of land was to build churches, schools, and dwelling houses for missionaries and native agents. The transfer of the land was worded as follows: 'That King Akitoye has made over to the Rev. C.A. Gollmer the above specified pieces of land for the benefit of the Church Missionary Society, without any condition, and free of expense, and without limit of time, he declares by placing his mark to his name in the presence of his

during the last few years; in other words, to enable all those who are interested in the development of Africa to examine for themselves the TITLE DEEDS by which each Foreign Power maintains its right to the Possessions which it holds, or to Territory which it occupies, or claims influence over, in that part of the world.' *Ibid.*, vi.

39 Note that Edward Hertslet summarized ten forms of standardized treaties, which the National African Company and, later on, the Royal Niger Company used to conclude agreements with native rulers between 1884 and 1892. *Ibid.*, 137–154.

40 For a detailed address of the treaty conclusion and the subsequent annexation by Britain of Lagos, see A.G. Hopkins, 'Property Rights and Empire Building: Britain's Annexation of Lagos, 1861,' *Journal of Economic History*, 40 (1980), 777–798.

Chiefs and others.' The precise meaning of 'has made over' is unclear. Did the object of transfer comprise only rights of use of the land, or land ownership? Or did the transfer even concern rights of sovereignty? At this stage, the agreement of King Akitoye and the Church Missionary Society is likely to have been of a purely private character, in which no territorial sovereignty was involved. It was an economic transfer in which only private rights over land passed from the African ruler to an English community.

The second half of the nineteenth century witnessed a change in the nature of the agreements that were concluded between Europeans and African natives. The original aim of these agreements had been to establish trade and economic relations, but political considerations began to play an increasingly important role in the regulation of European-African relations. With the gradual transition from an economic to a political nature of the agreements, the terminology used shifted from a private to a public one. This shift was marked in particular by the introduction in the 1860s of the term 'treaty' to denote legal relationships between British agents and African natives. A clear example of one of the few cession treaties⁴¹ is the one transferring sovereignty rights over the Lagos territory from the local ruler to Britain. On 22 June 1861, the British Government decided to appropriate Lagos as a British Dependence. King Docemo, son of Akitoye, initially refused to transfer his territory to Britain and declined to sign the treaty with the Britain. The British representatives anticipated Docemo's resistance by including a passage in the treaty text in which they declared that they did not intend to violate the sovereign rights of the King: 'Her Majesty's Government would be most unwilling that the establishment of British Sovereignty at Lagos should be attended with any injustice to Docemo.'⁴² The treaty also specified that the King of Lagos would receive a pension from the British. Nevertheless, the treaty of 6 August 1861 ceding the Lagos territory clearly identified 'dominion and sovereignty' as the objects of transfer. It explicitly spoke of 'British occupation' by 'the taking of possession of Lagos.' Article 1 of the 1861 treaty reads as follows:

I, Docemo, do, with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and island of Lagos, with all the rights, profits, territories and appurtenances whatsoever thereunto

41 Cession of all-comprehensive sovereignty over territory was a hardly used by the British to acquire title to African territory. For the overview of concluded cession treaties by the British on Southern-Nigerian territory, see Hertslet, *Map of Africa by Treaty*, 89–111.

42 *Ibid.*, 92.

belonging, and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island, and premises, with all the royalties thereof, freely, fully, entirely, and absolutely. I do also covenant and grant that the quiet and peaceable possession thereof shall, with all possible speed, be freely and effectually delivered to the Queen of Great Britain, or such person as Her Majesty shall thereunto appoint, for her use in the performance of this grant; the inhabitants of the said island and territories, as the Queen's subjects, and under her sovereignty, Crown, jurisdiction, and government, being still suffered to live there.

Despite the transfer of sovereignty, Docemo retained some of his rights and duties under Article II of the 1861 treaty. Yet from Docemo's perspective and that of his people, it remained unclear what the precise object of cession was. The treaty stipulations are clear to the extent that sovereignty was transferred, but did this transfer automatically imply that the natives lost their property rights to the land?⁴³ While from the treaty text it is clear that sovereignty was the object of transfer, the status of the natives' property rights after the cession remained unclear; their protection was minimal, as follows from the word 'suffered' in the last sentence of Article I. However, Article III stated that 'in the transfer of lands, the stamp of Docemo affixed to the document will be proof that there are no other native claims upon it, and for this purpose he will be permitted to use it as hitherto.' According to Antony Hopkins, this clause served two purposes, namely, 'to clarify the fact that Docemo had ceded only political sovereignty, and not possession of the land of Lagos; and to confirm the validity of the system of land grants which had come into being during the consular period.'⁴⁴ Whether or not Docemo was aware of the significance of his signature and regardless of his intended object of transfer, he ceded full sovereignty rights over the territory to the British Crown, which in its turn promised not to interfere with Docemo's and his people's use of the land. However, as will be argued later (§4), the practice of issuing land grants and instituting individual land ownership by the British authorities, however, turned out to be a source of commercial benefits for the British and led to the expropriation of native land.⁴⁵ On 6 August, a provision was added to the treaty, in which

43 This unclear treaty formulation is admitted in Meek, *Land*, 294.

44 Hopkins, 'Property Rights and Empire Building,' 789.

45 'The land market became the pulse of commercial activity: prosperity and expansion encouraged successful merchants to buy land and extend credit; falling profits and contraction led to credit squeezes and foreclosed mortgages. Inequalities derived from differential landownership developed as fortunate or skilful businessmen accumulated

Docemo declared to have ‘understood the foregoing Treaty perfectly and agrees to all conditions thereof.’⁴⁶

In the same year (1861), the King of Bagroo and his chiefs ceded their territory to the British Queen. They declared to ‘cede, surrender, give over, and transfer [...] the full, entire, free, and unlimited right, possession, dominion, and sovereignty’ in and over their land. The wording of the treaty is unambiguous: Great Britain extended its sovereignty over the territory of Bagroo and the people of Bagroo were subjected to British jurisdiction. The question that remains, however, is whether the people of Bagroo retained ownership of the land.

Another example of ceding sovereign rights over territory in the early years of British rule over Nigeria concerned the territory of Badagry. On 7 July 1863, British lieutenant-governor, commander-in-chief, vice-admiral and acting consul John Hawley Glover, in the name of Her Britannic Majesty, concluded an agreement with the rulers of Badagry (representing their people) which transferred the territory of Badagry to Britain. It should be noted that this covenant was a *cession agreement*: the term ‘treaty’ was not used. Article 1 enumerated the purposes of the agreement: ‘In order for the better keeping of the peace and quiet of the well-disposed persons living in Badagry, and for the better security of their lives and properties, as also for the purpose of setting aside all pretensions on the part of the King of Porto-Novo and others to the right and royalty of this district of Badagry [...]’ In other words, the main objective of the agreement was to protect the Badagry people. Article 1 continued:

We, whose names are hereunto subscribed, being Chiefs of Badagry, have freely and willingly ceded to Her Majesty the Queen of Great Britain, her heirs and successors, for ever, the town of Badagry, and all the rights and territories and appurtenances whatsoever thereunto belonging, as well as all profits and revenues, absolute dominion and sovereignty of the said town and territory of Badagry, freely, fully, entirely and absolutely.

Under this provision the native rulers directly ceded their sovereignty rights over the Badagry territory to Britain. The Badagry people became subjects of the British and consequently had to rely on the British government for protection of their person, goods and rights.

property, and as the unlucky or the incompetent sank into landless obscurity or moved elsewhere.’ *Ibid.*, 791–792.

46 Additional Article to the Treaty of Cession of the Island of Lagos to the British Crown of 6 August 1861. February 18, 1862.

Next to transactions of sovereignty rights over territory, agreements on property rights to land were concluded and even more common, as the indenture between the people of Okeodan and Britain on 17 July 1863 shows. The main provision of the document reads as follows:

[T]he said Chiefs have consented and agreed to the said Thomas Tickel [resident agent] to grant and convey to Her Majesty the Queen of Great Britain, her heirs and successors for ever, the piece or parcel of land [...] and [...] that they have the right to grant and convey the said land to Her Majesty the Queen of Great Britain, her heirs and successors, notwithstanding any act of the said Chiefs done or committed; and that any of Her Majesty's representatives [...] shall have peaceable and quiet possession of the said land free from all incumbrances [...] And the said hereinbefore-named Chief releases to Her Majesty the Queen of Great Britain, her heirs and successors, for ever, all claims upon the said land.

Clearly, this agreement 'granted and conveyed' land ownership from the rulers of Okeodan to the British Crown. It is a case of public authorities acting in a private capacity. The natives retained the right to stay on and enjoy the land and its fruits. Jurisdictional rights over the territory were not mentioned. These types of agreements were negotiated and concluded between Europeans (private individuals, companies and States) and African rulers and natives.⁴⁷ Most of these early treaties contain a provision excluding cession of territory to European States and other political entities. Such an exclusion clause commonly read as follows: 'It is further agreed that no cession of territory, and no other Treaty or agreement, shall be made by the King of [...] than the one they have now made with Great Britain without the full understanding and consent of the British Government,' as it says in the treaty Britain concluded with the rulers of Aboh on 13 October 1863.

The cession treaty between the King of the Samoo Bullom country and Great Britain, concluded on 2 May 1877, explicitly mentions both the transfer of sovereign rights over the territory and the continuation of native property rights to the land: the British Queen accepted the sovereignty over the territory – including the waters – under the condition of 'reserving and guaranteeing [...] to the native inhabitants of the said islands and lands so ceded aforesaid [...] and assigns the full, free, and entire possession of so much of the said lands as is now held and occupied by them, save and except such sovereignty as aforesaid.' In this contractual relationship with a native ruler, Britain did

47 Alexandrowicz, *European-African Confrontation*.

distinguish between sovereignty and property rights. A similar distinction can be observed in an agreement the native ruler Nquiliso concluded with the British Major H.G. Elliot on 17 July 1878. While the agreement dealt with the cession of sovereignty in the first article of the agreement – ‘Nquiliso cedes [...] all sovereign rights which he now possesses, or is entitled to claim’ – the second article stipulated that the ruler ‘agrees to cede to [...] such portions of land as may hereafter agreed upon’ and that ‘the land [...] be paid for at a fair valuation.’ In other words, the British treaty party explicitly acknowledged the existence of the natives’ private rights to land and recognized that a fair price had to be paid by British settlers to these natives if these settlers wanted to acquire ownership of the land.

3.2 *The 1880s and 1890s: Protectorate Treaties*

Before the Conference of Berlin (1884–1885) Britain concluded various types of agreements with African natives for the purpose of subjecting the African people to the protection of the British Crown. As mentioned before, the political aspect became gained in prominence in establishing relationships between European and African parties, and this rise of political influence coincided with the institution of a public legal sphere. From the middle of 1884 onwards, concluding treaties would become the exclusive instrument to create legal relations between the Europeans and African natives. Feeling the pressure of French and German rivalry, the British changed their colonial policy from indirect rule to a more directly regulated form of government. Establishing protectorates instead of concluding cession treaties turned out to be an effective and efficient way of acquiring title to territory: a protectorate kept France and Germany out and limited the financial burdens on Britain. Shortly after the Conference of Berlin had ended, a notification was issued in the *London Gazette*, proclaiming the establishment of the British protectorate over the Niger Districts, the Oil Rivers Protectorate: ‘It is hereby notified for public information that, under and by virtue of certain Treaties concluded between the month of July last and the present date, and by other lawful means, the territories on the West Coast of Africa, herein after referred to as the Niger Districts, were placed under the Protection of Her Majesty the Queen from the date of the said Treaties respectively [...].’⁴⁸

Between 1884 and 1892, the National African Company and its successor, the Royal Niger Company, concluded several treaties with native rulers and their peoples and others inhabiting and possessing territories in the basin of the

48 See Hertslet, *Map of Africa by Treaty*, 117.

Niger District.⁴⁹ In these treaties of protection, the native rulers committed themselves not to transfer their territories to others by way of cession, or to enter into treaty negotiations with foreign States without the notification and preceding consent of the British Government. These treaties had been standardized: all that remained to be specified were date, place, names and territory. Standardized treaty forms thus completed only required signing.

In addition to the treaties concluded by trading companies, Hewett in 1884 concluded several treaties with native rulers and their peoples in the Niger Districts that subjected the territories of these rulers and peoples to the protection of Britain.⁵⁰ These treaties prioritized transferring sovereignty; property rights were explicitly excluded from transfer to the British. It would seem that the British became increasingly aware of the differences between sovereignty and property, so much so that they ensure that these concepts were explicitly mentioned in their treaties with African natives. The objective of these treaties – establishing a relationship of protection between Britain and the African polity – was expressed unambiguously, as in the treaty of 4 July 1884 with the rulers of New Calabar: '[the Queen of Great Britain] undertakes to extend to them, and to the territory under their authority and jurisdiction, her gracious favour and protection.' Inserting exclusion clauses in these treaties underlined this relationship, because in these provisions the African contracting party granted the British 'the right to trade, to work mines, to cultivate ground, to gather produce of any kind, or to carry on any other occupations in our country' and declared that they would 'not grant such rights to, nor deal in any way with any strangers and foreigners, nor enter into any Treaties whatever with them, without the consent and authority [of the British].'⁵¹ In the treaty between the King and Chiefs of Opobo, concluded on 1 July 1884 and used as a model for many treaties in this part of Africa, the native rulers had to 'agree' and 'promise' to 'refrain from entering into any correspondence, Agreement, or Treaty with any foreign nation or Power, except with the knowledge and sanction of Her Britannic Majesty's Government.' Moreover, non-intervention clauses were routinely included in these treaties, declaring that the British would 'bind themselves not to interfere with any of the native laws or customs of the country.' Or, as the National African Company declared in its agreement with the rulers of Atani, concluded on 20 September 1884, the British contracting party undertook to 'respect all native laws and customs of the country, and

49 For the texts of the treaties, as they are divided into ten categories, see *ibid.*, 137–154.

50 See *ibid.*, 116.

51 See *ibid.*, 137–154.

not to interfere with the existing rights of any of the natives without first obtaining their consent.'

That Britain increasingly had to rely on treaties of protection with African rulers to realize the expansion of its empire and to prevent other European States from acquiring title to African territory was the consequence of the competitive atmosphere between European colonial powers stirred up by the Conference of Berlin. In October 1885, shortly after the Conference had ended, at a time when competitive tensions between European powers increased, Britain established a protectorate by treaty over the territory of Mahin. The intense rivalry between Germany and Britain had a significant impact on this treaty. Amapetu, the King of Mahin, who represented his people and territory, played a crucial role in the struggle for power between the two European colonial powers. The Mahin treaty addressed the issues of who acquired title to the Mahin territory, whether the treaty was concluded validly, and what the prospective rights to the territory implied, and it settled these issues in favour of the British Crown. Article 1 of the Mahin treaty of 24 October 1885 clearly expressed the object of the treaty:

King Amapetu, of Mahin, led by the desire to strengthen and enlarge the relations, commercial and otherwise, maintained by the trading and mercantile community of Lagos with him and his country, to protect the independence of the latter, to fortify his Government, to procure to his subjects the advantages of civilization, and to secure to strangers the due protection of life and property, begs Her Majesty the Queen of Great Britain and Ireland, Empress of India, to take him and his country, including the island or land called Atijere, and all portions of his country bounded by the sea, *under Her most gracious protection*. [Italics added]

From this passage it can be deduced that the object of the treaty was twofold: transferring partial sovereignty rights over the territory and establishing a protectorate. It is clear that the British Crown was burdened with the protection of the 'independence' of the territory under Amapetu's rule. The exclusion clause that was included in the treaty (Article 11) straightforwardly stated that 'King Amapetu hereby engages not to cede his country nor any parts of it to any other Power, nor to conclude treaties with other Governments without the special consent of Her majesty the Queen.'⁵²

⁵² The rulers agreed 'to refrain from entering into any correspondence, agreement or treaty with any foreign nation and to submit all disputes with other neighbouring states for settlement by the British Consuls.' Flint, *Sir George Goldie*, 225.

Another interesting development was the enactment in the year 1888 of several proclamations and declarations at a time when Britain was negotiating treaties with African rulers. In these written acts, the independence of a certain territory was emphasized and the exclusion clause took a prominent place in these documents.⁵³ The treaty between Britain and the Kingdom of Ketu is a case in point. This treaty established a relationship of protection and was signed by both contracting parties: 'We, the King-designate, Chiefs, Elders, and people of the kingdom of Ketu, hereby offer ourselves and our territory to be included within the protectorate of Her Majesty's Government of Lagos [...]. The treaty also contained very clear provisions on the exclusion of other foreign States from the concerned territory: 'We engage not to enter into any negotiations with any foreign State without the express permission of Her Majesty's Government,' and '[w]e further engage to make no cession of territory, and no Treaty or Agreement other than one we now have made, without the full understanding and consent of the Governor for the time being of the Colony of Lagos on behalf of Her Majesty.' The treaty thus clearly allocates internal sovereignty rights to the protected entity and external sovereignty rights to the protecting State – as a traditional protectorate required.

Another example of an African ruler issuing a declaration confirming his agreement to his territory being placed under the protection of the British Crown concerns the territory of Ilaro. On 21 July 1888, a 'convention' on the transfer of partial sovereignty rights over territory was signed and it included a sound exclusion clause. The very next day, the King of Ilaro issued a declaration in which he underlined the independence of the Kingdom whilst reaffirming that the Kingdom would subject itself to the protection of 'Her Britannic Majesty': '[W]e entreat Her said Majesty to take our territory under her gracious protection; accordingly, and to include it in the protectorate of her Colony of Lagos.' Several questions arise as to the compatibility of the declaration and the convention as well as to the interpretation of the texts of both documents.⁵⁴ The King of Ilaro signed a treaty of protection transferring external sovereignty to Britain and formally reaffirmed this transfer in a separate declaration.

In some cases, the British did not have to resort to bilateral treaties with Nigerian rulers to gain sovereign rights over territory. These rulers issued a unilateral declaration in which they transferred their sovereignty and property rights

53 See, for example, the Proclamation of the British Protectorate over Igbessa (15 May 1888); the Declaration of the King and Chiefs of Ife (22 May 1888); the Declaration of the King and Chiefs of Itebu (28 May 1888), see Hertslet, *Map of Africa by Treaty*, 104–107.

54 These questions involve the issue of the validity of the treaty. See Chapter 4.

over a certain territory to the British Queen. A case in point is that of Kosoko, the ex-ruler of Epé and the former King of Lagos.⁵⁵ The question is whether a native ruler had the power to transfer sovereign and proprietary rights unilaterally without consulting his people, especially when considering that he represented his people and their rights. It is safe to say that the validity of such unilateral proclamations is controversial.

The early treaties made an explicit distinction between sovereignty rights and private property rights appeared, while treaties concluded in the 1880s and 1890s used shorter, standardized and general formulations that did not specify how existing land rights were affected. As a result, treaty provisions left more room for discretion: clear statements on, for example, non-interference with native customs, laws and property rights featured less prominently in the treaties and eventually disappeared altogether.⁵⁶ The fundamental change was the increasing indeterminacy of the scope of the sovereign rights over territory, i.e., the object of transfer in the treaties between Britain and the African natives. The scope and substance of the relationship of protection remained unclear: the division of sovereignty rights between Britain as protector and the African ruler as the protected party was no longer articulated in any significant detail. This indeterminacy led to British interference with the sovereign rights of the African ruler, British control of the internal affairs of the polity and, eventually, British expropriation of native land.

As indicated earlier, in the early years of concluding protectorate treaties, the British would explicitly undertake not to interfere with the property rights of the African inhabitants. The protectorate treaties left the door open to acquiring private property rights to land, but private property rights to land could only be acquired if compensation was paid. Sovereignty rights were transferred, native proprietary rights to land remained unaffected and such property rights could only be acquired by (or on behalf of) the European contracting party if the native African owners were compensated, as a standard treaty form of the National African Company stated: '[T]he National African Company (Limited) will not interfere with any of the native laws, and also not encroach on any private property unless the value is agreed upon by the owner and the said Company.'⁵⁷ However, the successor to the National African

55 See Hertslet, *Map of Africa by Treaty*, 95.

56 See, for example, the protectorate treaty concluded by Royal Niger Company with the African rulers of the Boussa territory (near Borgu) on 20 January 1890. Hertslet, *Map of Africa by Treaty*, 154.

57 *Ibid.*, 137. A standard formulation of a protectorate treaty concluded by the National African Company contained the following provisions: '[T]he National African Company (Limited) agree:

Company, the Royal Niger Company, while quick to use its discretionary powers to acquire title to land, proved less willing to pay compensation to African natives.⁵⁸ In actual fact, compensation was hardly ever paid, and even when it was paid, it neither represented the value of the acquired land nor amounted to a reasonable sum. As the Royal Niger Company not only acted in its own private interest, but was also mandated by the British government to conclude protectorate treaties and rule the protected Nigerian territories in the name of the British Crown, the distinction between sovereignty and property and,

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1. The said Company will not interfere with any of the native laws, and will not encroach on any private property unless the value is agreed upon by the owner and the said Company.
 2. The said Company will not interfere with any of the ground now occupied by the natives of the country unless agreed to both sides.
 3. The said Company reserve to themselves the right of excluding foreign settlers other than those now settled in the country.
 4. The said Company agree to respect the rights of the native landowners, and the said Company will not take possession of their land without payment of the same.' *Ibid.*

58 A standard treaty format used by the Royal Niger Company consisted of the following provisions:

1. We, the undersigned King and Chiefs of ... [territory], with the view of bettering the condition of our country and people, do this day cede to the Company, including as above their assigns, for ever, the whole of our territory, but the Company shall pay private landowners a reasonable amount for any portion of land that the Company may require from time to time.
2. We thereby give to the Company and their assigns, for ever, full jurisdiction of every kind, and we pledge ourselves not to enter into any war with other tribes without the sanction of the Company.
3. We give to the Company and their assigns, for ever, the sole right to mine in any portion of our territory.
4. We bind ourselves not to have any intercourse as representing our tribe or state, on tribal or state affairs, with any person or persons other than the Company, who are hereby recognised as the authorised Government of our territories: but this provision shall in no way authorise any monopoly of trade, direct or indirect, by the Company or others, nor any restriction of private or commercial intercourse with any person or persons of any nation whatsoever, subject, however, to administrative dispositions in the interest of commerce and of order.
5. In consideration of the foregoing, the Company bind themselves not to interfere with any of the native laws or customs of the country, consistently with the maintenance of order and good government, and the progress of civilisation.
6. The Company bind themselves to protect, so far as practicable, the said King and Chiefs from the attacks of any neighbouring aggressive tribes.
7. In consideration of the above, the Company have this day paid the said King and Chiefs of ... [territory] goods to the value of ... [amount], receipt of which is hereby acknowledged. *Ibid.*

more generally, between public and private law blurred. It is also worth noting that the treaties did not specify remedies in case parties breached their contractual obligations.

In 1885, the National African Company was granted a Royal Charter and was renamed the Royal Niger Company. This event was a milestone in Britain's presence in Nigeria. The Royal Charter contained various passages which were, from a legal point of view, controversial, debatable and, even, disputable, especially those provisions that concerned the rights, duties, tasks and competences of the Royal Niger Company. The mandate of the Company was neither well defined nor strictly demarcated. The Crown confirmed the Company's entitlement to the sovereignty rights African rulers in the Niger basin had ceded to the Company, and it authorized the Company to administer these rights for the Company's own benefits. Here, the private interests of the Company and the public interests of the British authorities became entangled. The main duties of the Company were to advocate and continue trade on Nigerian territory and to establish an administration on the basis of delegated sovereignty: '[T]hey have two duties to fulfil, the return of a satisfactory dividend to their shareholders, and the administration of the territories entrusted to them to the advantage of the natives within it.'⁵⁹ When the Royal Niger Company was constituted (under Royal Charter), the number of rights possessed by the British State changed; the activities of a private entity were backed by the public involvement of the British State. The Company was assigned the task of administering those territories regarding which it had signed protectorate treaties: 'The treaties were thus reinterpreted by the British so that they claimed complete and perpetual cession of territory to the company. The Niger Company then purported to be the complete sovereign ruler of the area, and the British protectorate granted to the company was simply a recognition of the company's claim.'⁶⁰ This confusion of private and public interests soon led to many problems and conflicts which required the British government to intervene directly. The Royal Charter was withdrawn in 1899.

The British tendency to rule their Nigerian territories directly ran parallel to the phenomenon of the 'colonial protectorate' which obliterated the difference between a colony and a protectorate. In principle, a protectorate was established by means of a treaty concluded between a European State and an African political entity and only transferred external sovereignty rights over

59 S. McCalmont Hill, 'The Growth and Development of International Law in Africa,' *Law Quarterly Review*, 16 (1900), 259.

60 Mulligan, 'Nigeria,' 290. The text of the original document is published in the Parliamentary Papers, 1899, vol. LXIII, C. 9372. See Hertslet, *Map of Africa by Treaty*, 125–126 and 154.

territory. After the protectorate treaty had been concluded, however, the European State would exercise all-comprehensive sovereignty rights – resembling its control over a colony – over the ‘protected’ territory. Michael Mulligan asserts this deployment of the colonial protectorate by Britain by arguing that ‘in the Niger Delta, as elsewhere, the model of indirect rule that had been prevalent since the early 1880s was thus superseded by more direct rule. The protectorate, which had formally been a means of control of external sovereignty, now encompassed control of internal sovereignty as well.’⁶¹ In theory, Britain acquired external sovereignty rights over the African territory by establishing a relationship of protection with the African ruler on the basis of a treaty. In practice, however, the British expanded their exercise of sovereignty rights to include control over the internal affairs of the African polity. In other words, the protectorate treaty was the first step to fully fledged colonial rule by Britain. This shift towards increased interference in the internal affairs of Nigerian polities can be clearly seen in Article 5 of the treaty Britain concluded on 2 September 1887 with the rulers of the Obako district on the Upper Opobo River: ‘The Kings and Chiefs of Obako hereby engage to assist the British consular or other officers in the execution of such duties as may be assigned to them; and, further, to act upon their advice in matters relating to the administration of justice, the development of the resources of the country, the interests of commerce, or in any other matter in relation to peace, order, and good government, and the general progress of civilization.’

Britain concluded hundreds of treaties (or similar agreements) with native Nigerian rulers and these could of course not all be discussed here, but the few that have are a fairly representative selection. Initially, the British made a clear distinction between cession to acquire sovereignty over territory and the establishment of protectorates. Cession treaties, however, were soon abandoned in favour of acquiring title to territory by establishing treaty-based relationships of protection with African rulers and their polity. The treaty concluded with native ruler Kazembe on 31 October 1891 is an exception. It was a cession treaty and it explicitly distinguished sovereignty rights and proprietary rights: ‘I [Kazembe] do hereby cede to Her Majesty the Queen of Great Britain [...] the full sovereign rights of my country, reserving only the proprietary rights to the soil.’ The protectorate treaties differentiated between rights of sovereignty and property and they would invariably contain exclusion non-intervention clauses. When the scramble for Africa intensified, protectorate treaties were standardized, formalized and generalized: contractual arrangements of the rights and duties of the contracting parties became less detailed. The distinction

61 Mulligan, ‘Nigeria,’ 300.

between external and internal sovereignty rights was articulated less clearly and this indeterminacy gave the British colonizer broader discretionary powers. Nevertheless, Britain continued to distinguish between sovereignty and property in their treaties with African rulers.

However, after the treaties had been concluded, interpretation and compliance issues arose that had to be resolved. Even Britain, which favoured establishing protectorates over creating colonies and which discountenanced direct intervention and involvement in its overseas territories, gradually resorted to direct rule of these territories. In addition to exercising external sovereignty rights, Britain started to interfere in the internal affairs of the African political entities it had concluded treaties with and thus encroached on the sovereign rights of the rulers concerned. There were two reasons for this increasing interference. First, the intensified power struggle between the main European States on the African territory eroded Britain's reluctance to acquire and rule its overseas territories. Traditionally, it had insisted that economics and trade, not politics, should determine overseas relations, but this position changed when France and Germany entered the scene to realize their desire to expand their empires by way of formal rule. The condition of effective control, as explicitly included in Article 35 of the Final Act of the Berlin Conference, strengthened Britain's urge to intensify its rule in the protectorates. Second, the number and scope of conflicts and problems in the protectorates increased. These conflicts emerged among British settlers and traders, between them and the native inhabitants and among the African natives themselves. Preventing and settling these conflicts required intensified British authority to establish law and order. It should be noted that in this period the British hardly, if ever, used the construct of the colonial protectorate to justify their interference in the internal affairs of African polities. What the analysis of British treaty practices in Nigeria in the late nineteenth century shows is the high frequency of recurrence of the dichotomies of theory versus practice, of the wording of the treaty texts versus the interpretation of these texts and of law versus politics.

4 **Legislation in the Wake of the Acquisition of Sovereignty over Territory**

Now that it has been established how property and sovereignty issues were addressed in treaties and agreements between Britain and Nigerian natives transferring sovereign rights over territory, the next question to be answered is how existing sovereignty and property rights fared after the treaties had been signed. To that end, post-treaty legislation and case law will be examined, but

first two particular features of the British constitutional system must be briefly commented on, because they are relevant to understanding British rule of overseas territories. The first feature is Britain's dualist legal system. To confer title to territory on the Crown, the mode of acquisition had to be acknowledged by law and the status of treaties transferring title depended on municipal law. A treaty, as indeed any instrument of customary international law, had no effect in municipal law if it were not incorporated or adopted. And if municipal law provided a solution for a problem and international law suggested a different solution, the latter solution had to be rejected. In other words, international law was supplementary law and its position vis-à-vis municipal law was subordinate. This dualism was and still is a leading feature of the British legal system.

The effect of this dualist approach was that the British Crown was not bound by international law that had not been incorporated into its national legal system and as a consequence had enormous freedom of action in the international practice of acquiring territories. In practice, the Crown, exercising its prerogative powers, would often claim unilaterally to have acquired both sovereignty and ultimate property rights over the territory, regardless of the mode of acquisition (i.e., cession or protectorate treaty) and without any intervention from the legislature. The Act of State, understood as the unlimited and unimpaired power of the Crown, was a powerful British weapon. Power, not law, had the final word in the acquisition of overseas territory. Power served the Crown and it was through power that the Crown acquired and exercised rights. This of course raises the question whether in the context of the acquisition of territory the dualist British legal system and the prerogative powers of the Crown implied that Britain was not bound to norms of international law. This question will be addressed in Chapter 8.

The second feature concerns British understanding of the relationship between property and sovereignty. In the late nineteenth century, British doctrine made a clear distinction between territorial sovereignty and ownership of land, as Sir Kenneth Roberts-Wray observes: '[I]t must be emphasized that by acquisition of territory we do *not* mean acquisition of title to the land. That is a very different matter.'⁶² In case of a territory belonging to the Crown's dominions, sovereignty vested in the Crown is of two kinds: the power of government and the title to the land.⁶³ While territorial sovereignty and property of land are unified with regard to the Crown's dominions, in a protectorate the Crown only had external sovereignty rights over the territory. In the case of cession,

62 K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens and Sons, 1966), 99.

63 *Ibid.*, 625.

the Crown acquired jurisdiction over the territory and ultimate ownership of the land. The distinction between territorial sovereignty and land ownership is explicitly referred to in British legal doctrine: '[O]wnership of the country is radically different from ownership of the land: the former can belong only to a sovereign, the latter to anyone.'⁶⁴ Under feudal law, British land fell under the sovereignty and was the property of the Crown, which implied that 'when a new colonial possession is acquired by the Crown and governed by English law, the title so acquired is not merely territorial but also proprietary.'⁶⁵ In other words, when the Crown acquired territorial sovereignty through conquest, occupation or cession, it also acquired ultimate land ownership. Because the Crown was considered to be the supreme proprietor – at the apex of the feudal pyramid – rights in land were by definition always relative. In a colony, irrespective of the application of feudal law, the absolute or ultimate title to land was vested in the Crown. In a protectorate, feudal law, as such, was not applied.⁶⁶ These two characteristics of the British constitutional system underlay and helped shape Britain's colonial venture.

After acquiring Nigerian territory by means of treaties, the British Crown had legislative powers over ceded territories: 'For conquered and ceded Colonies, it is established beyond question that the Sovereign has full power under the Prerogative to make laws either in the constituent field or otherwise.'⁶⁷ According to the Foreign Jurisdiction Act (1890), there is a difference in the extent of legislative powers of the Crown with regard to protectorates, a difference that will be addressed later in this section. Although the British government was reluctant to engage in direct rule in the African territories, it became increasingly involved in governing its colonies and protectorates. Legislation enacted for the Nigerian area,⁶⁸ often Orders in Council, were the follow-up to the protectorate and cession treaties in the sense that such legislation intended to implement the arrangements laid down in these treaties. In general, the powers and duties of the legislature in the colonies and protectorates were determined by the particular legislative instrument. Legislation could

64 *Ibid.*

65 *Ibid.*, 626.

66 *Ibid.*, 636.

67 K. Roberts-Wray, 'The Authority of the United Kingdom in Dependent Territories,' in: J.N.D. Anderson, *Changing Law in Developing Countries* (London: Allen and Unwin, 1963), 17.

68 For the texts of the acts, see R.F. Irvin, *Collection of the Principal Enactments and Cases Relating to Titles to Land in Nigeria* (London: Stevens and Sons, 1916). See also C. Mwalimu, *The Nigerian Legal System*, vol. ii (New York: Peter Lang, 2009), 298–318.

therefore be enacted in territories acquired by means of cession and protectorate treaties.

Following the conclusion of the 1863 Lagos cession treaty, an extensive system of land grants was established, and this system took individual land ownership as its point of departure.⁶⁹ The British authorities controlled the allocation of property in land by issuing Crown grants to both settlers and African natives claiming land. Between 1868 and 1912 the British authorities in Lagos issued some 4,000 Crown grants.⁷⁰ Transactions between persons holding rights under the Crown grants had caused difficulties and conflicts, since these transactions had sometimes been effected under native customary law and sometimes under British common law. To regulate titles to territory and settle disputes legislation seemed to be the solution.

In addition to acquiring rights through treaties, Britain introduced statutes regulating land tenure in the southern part of Nigeria. Legislation, mostly Orders in Council, prohibited land speculation in an attempt to ensure subsistence-level production and a continuous supply to the market. The Orders in Council regulated the competition for land and land grabbing and clarified the legal relationships between competitors and the titles to the territories. British Parliament intervened more and more and British governance in Nigeria became increasingly direct.

One of the most influential statutes of the time was the Foreign Jurisdiction Act (1890), replacing its 1843 predecessor,⁷¹ which authorized the British Crown to exercise jurisdiction over all natives and foreigners in its

69 Although individual landownership was made available for Nigerian natives, communal landownership did not disappear. See K. Mann, 'African and European Initiatives in the Transformation of Land Tenure in Colonial Lagos (West Africa), 1840–1920,' in: S. Belmessous (ed.), *Native Claims. Indigenous Law against Empire, 1500–1920* (Oxford University Press, 2012), 239.

70 Meek, *Land*, 295.

71 The 1843 version of the Foreign Jurisdiction Act stated that 'it is and shall be lawful for Her Majesty to hold, exercise and enjoy any power or jurisdiction which Her Majesty hath, or may have at any time have, within any country or place out of Her Majesty's dominions in the same and as manner as if Her Majesty has acquired such power or jurisdiction by the cession or conquest of territory,' and that the British Crown is empowered 'to establish laws and institutions and to constitute courts and officers for the peace, order, and good government of Her Majesty's subject and others within existing and future settlements on or adjacent to the coast of Africa.' P.R.O., F.O. 881/2258, *London Gazette*, 27 February 1872. See Roberts-Wray, *Commonwealth*, 166. For a more detailed account of the Foreign Jurisdiction Act (1890), see H. Jenkyns, *British Rule and Jurisdiction beyond the Seas* (Oxford: Clarendon Press, 1902), 148–164.

protectorates, despite the fact that Britain did not officially possess these territories. Article 1 of the Act stated that the Crown had the power to exercise jurisdiction 'within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.' To be clear, 'foreign country' referred to countries outside the Crown's dominions. As a consequence, the British Crown had exclusive control over the foreign relations of its protectorates and was responsible for the internal peace and order of these territories. The British Crown conferred powers on itself to act within a territory, regardless of how that territory had been acquired, and this self-authorization considerably extended the scope of Britain's legal personality under international law. Moreover, Crown jurisdiction could not be challenged in court. The Preamble to the Foreign Jurisdiction Act 1890 stipulated that the law was determined in Westminster and applied to Britain and its colonies and dominions. As a result of this Act the distinction between a protectorate and a colony blurred and eventually disappeared altogether, and this change also had implications for the distinction between sovereignty rights and private property rights. The relationship between territorial sovereignty and private land ownership will be addressed later. While it remained unclear whether the Foreign Jurisdiction Act of 1890 also applied to protectorates, considering that protectorates were officially not part of the Crown dominions, the Order in Council of 1892 stated explicitly that the establishment of a protectorate implied Britain's right to govern the subjects of a protectorate.⁷² With this Order in Council the British allocated the rights of internal sovereignty to themselves; a move that was commonly accepted by the European States in their competition for African territory.

Second, the Native Lands Acquisition Proclamation (1900) provided that 'no person other than a Native shall either directly or indirectly acquire any interest in or right over land within Southern Nigeria from the Natives without the written consent of the High Commissioner first had and obtained. Any such interest in or right over land acquired without such consent shall be void.'⁷³ In other words, bureaucratic thresholds such as consular consent in order to transfer land were built into land acquisition by the British. This shows that African native rulers no longer had a say in the allocation of rights to land and that they gradually lost the sovereignty rights they had retained under the protectorate treaties to the British authorities.

Third, the Public Lands Act (1903) provided that the British governor had the competence to take any 'lands required for public purposes for an estate

72 See McCalmont Hill, 'Growth and Development of International Law,' 261.

73 Article 1 of the Native Lands Acquisition Proclamation (1900).

in fee simple or for a less estate, on paying compensation to be agreed on or determined by the Supreme Court of the Colony.' The Act further ruled that 'the Governor is to give notice to all the persons interested in the land, or to the persons authorized by the Ordinance to sell and convey it.' The ruler of the African polity was authorized to sell and convey land in property of a native community in fee simple, whether or not such conveyance was in contravention of any native law or custom. In addition, '[t]here [would] be no compensation for land unoccupied unless it [wa]s proved that, for at least six months during the ten years preceding any notice, certain kinds of beneficial use have been made of it. In other cases the Court [wa]s to assess the compensation according to the value at the time when the notice was served, inclusive of damage done by severance.'⁷⁴

Fourth, the Crown Lands Management Proclamation (1906) regulated the management, control and disposition of Crown Lands in the Protectorate of Southern Nigeria. It provided that the 'High Commissioner shall have the management of all Crown lands in the protectorate, and may at any time and from time to time sell, lease, exchange or otherwise dispose of such lands as he may think fit.'⁷⁵ Article 1 of the Proclamation defined Crown lands as 'all lands and all rights in and over lands which at any time of after the commencement of this proclamation are vested in, held in trust for, or otherwise belong to His Majesty, his heirs and successors.' In addition to having obtained sovereignty, the British Crown acquired ultimate land ownership by issuing an Order in Council (1907) which stipulated that the lands of the protectorate of Southern Nigeria were Crown lands: 'His [the African ruler's] personal property and personal rights are in that case secured to him; but the property in the soil itself belongs neither to him nor to his tribe, but lies in the protecting power, who may grant unreserved portions to settlers or occupants. In such a case the title to the land is usually secured by registration in a court provided for that purpose, presided over by the resident or administrator.'⁷⁶ The effect of this Order in Council was that internal and external sovereignty rights, whose separateness was essential to the difference between a protectorate and a colony, merged and this in turn led, at least on paper, to the expropriation of land owned by natives.

Fifth, Crown lands were lands which the Royal Niger Company acquired through the various treaties it had concluded with the local rulers. These lands

74 See *Amodu Tijani v. The Secretary of the Southern Provinces of Nigeria*, 1921, 2 A.C. 399 or 3 N.L.R. 21.

75 Article 3 of the Crown Lands Management Proclamation (1906).

76 McCalmont Hill, 'Growth and Development of International Law,' 263.

were taken over by the British government under the Niger Lands Transfer Ordinance (1916). Sections 2 and 4 of this Ordinance are particularly relevant. They stipulated that 'all the lands and rights within the Southern provinces of the protectorate belonging to the Niger Company Limited [...] on January 1, 1900 [...] shall be and are hereby vested as from January 1, 1900, in the Governor in trust for Her Majesty.' However, certain lands and rights to these lands, such as trading posts and natural resources, remained in the hands of the Company. Although the Ordinance gave the British government control over these lands, in practice it left the local inhabitants in undisturbed possession and enjoyment of their rights under local law and custom.

Sixth, the Native Lands Acquisition Ordinance (1908) regulated the acquisition of native-held land by foreigners, British nationals and other non-natives. It was repealed in 1917. Article 3 of the ordinance provided that '(a) No alien shall acquire any interest or right in or over any land within the Protectorate from a native except under an instrument which has received the approval of the Governor'; and '(b) Any instrument which has not received the approval of the Governor as required by this section shall be null and void.'⁷⁷ Article 4 provided a remedy in the form of a penalty 4 if there Article 3 was not complied with. In other words, the Ordinance authorized the acquisition of privately owned land by the British government, i.e., Crown lands, conditional on the consent of the British authorities.

Seventh and last, the Public Lands Acquisition Act (1917) authorized the Governor 'to acquire lands when required for public purposes.' Rights to unoccupied lands automatically accrued to Britain. Section 13 of this Act defined unoccupied lands: 'Lands shall be deemed to be unoccupied where it is not proved that beneficial use thereof for cultivation, or habitation, or for collecting or storing water of for any industrial purpose has been had for a continuous period of at least six months during the period of ten years immediately preceding the publication of the notice stating that such lands are required for public purposes.' In other words, this Act gave the British authorities and settlers the power to expel African natives from their own lands when their use of the land did not meet British expectations.

By enacting legislation after cession treaties had been signed and protectorates had been established in the Niger area, Britain gradually acquired full sovereignty over the territory and ownership of the lands. The Foreign Jurisdiction Act (1890) and the proclamation of Crown lands proved crucial stages in this process.

77 *The Nigeria Handbook. Containing Statistical and General Information respecting the Colony and Protectorate*, 5th edn (Lagos: The Government Printer, 1924), 178.

5 The Judiciary and Its Case Law

As has been argued, after cession and protectorate treaties had been concluded, the instrument British authorities used most to control the territory was legislation. In the same period, case law emerged on the acquisition of sovereign rights and land ownership, as the various treaties gave rise to conflicts that were brought before colonial courts. The treaty concluded between Britain and the rulers of Okrika on 17 May 1888 contains the typical formulation of jurisdiction: 'It is agreed that full and exclusive jurisdiction, civil and criminal, over British subjects and their property in the territory of Okrika is reserved to Her Britannic Majesty, to be exercised by such Consular or other officers as Her Majesty shall appoint for that purpose. The same jurisdiction is likewise reserved to Her Majesty in the said territory of Okrika over foreign subjects enjoying British protection, who shall be deemed to be included in the expression "British subject" throughout this Treaty.'

A selection of judgments delivered by the Judicial Committee of the Privy Council will be considered to ascertain how treaties concluded between Britain and African native rulers were interpreted and executed. This analysis will be preceded by a brief exploration of the judiciary system in British Nigeria and the division of judicial authority between the Nigerian protectorate and Britain.

5.1 Colonial Judiciary

English law was first formally introduced in Southern Nigeria by the enactment of the Supreme Court Ordinance (1876), which in essence accepted that the native populations continued to observe and be governed by their customary law. However, this acknowledgement of and respect for native laws was not unconditional, because these laws should not be 'repugnant to natural justice, equity and good science.'⁷⁸ Furthermore, the natives' customary laws should of course not conflict with any colonial legislation enacted by Britain.

Although English would officially only take effect in Southern Nigeria in the second half of the nineteenth century, the first judgments based on English law were pronounced in the early nineteenth century. The courts delivering these judgments never entirely replaced the natives' judicial systems. Indeed, the courts were primarily established to advance British interests and not for the benefit of Nigerians. Serving justice was considered a secondary priority.

78 See O. Adewoye, *The Judicial System in Southern Nigeria, 1854-1954* (London: Longman, 1977), 25-26. See also W.M. Hailey, *An African Survey. Revised 1956* (Oxford University Press, 1957).

As Omoniyi Adewoye drily observes, ‘the courts might have served the ends of justice, but they served much more besides.’⁷⁹ They were, after all, deployed as instruments of Britain’s policy of conquest and control over Southern Nigeria. The courts had been put in place for the clear if admittedly not express purpose of serving British interests, adjudicating mutual trade disputes and resolving conflicts with African natives. Nevertheless, to avert the appearance of partiality these new courts had to judge cases brought before them in accordance with the law.

The British-established courts in Southern Nigeria served a dual and sometimes contradictory purpose of formalizing legal relations between natives and British and of extending British territorial influence. The first proper English-style courts to be established in Nigeria were the courts of equity. These were constituted in the Niger Delta by Hewett, the first opening its doors in the district town of Bonny in 1854. These courts were established in response to the necessity ‘to administer some rough form of justice between Africans and European supercargoes trading along the Niger coast.’⁸⁰ Justice was administered in accordance with the principles of fairness and sincerity, applied to the circumstances of a particular case.⁸¹ These courts would mostly concern themselves with trade disputes and with drafting and enforcing regulations on matters of common interest to European traders. Courts of equity were composed mainly of British traders, with only a few native leaders or rulers serving, and were instruments to extend and perpetuate British power over the territory. The importance of the courts is described by Adewoye:

The Court of equity was a tribunal not only for settling European disputed locally, but also for dealing with conflicts between Africans and European traders. Undoubtedly it marked a significant step in the establishment of British power and authority in the Niger delta. For by the use of the court European traders and British officials were able to move away from the precincts of the African ruler and operate on the basis of an institution outside his purview. Not only did the court require no sanctions from the local ruler, in some instances it also exercised jurisdiction, formally or informally, over his subjects.⁸²

79 Adewoye, *Judicial System*, 31.

80 *Ibid.*, 33.

81 *Ibid.*

82 *Ibid.*, 36. ‘The Court of Equity was meant to be a forum in which disputes involving any parties in trade, whether Europeans or Africans, could be settled without resorting to measures that would disrupt trade or cause social strife. However, its significance lies in

The British consul in the Niger Delta also held jurisdictional power. It fell to him to enforce the agreements and treaties concluded between the native rulers and the British government and he was authorized to make rules and regulations to maintain peace, order and good government – by British standards of course – in the territory under his control.

The Royal Niger Company established its own courts under the Charter it had been granted, an arrangement that conferred governmental and administrative powers on the Company. In practice, this meant that district agents of the Company had the authority to try a limited range of civil and criminal cases.

Other more or less judicial institutions were a number of governing councils, which were introduced in 1885. These governing councils had been authorized to dispose of a wide range of jurisdictional issues: they were charged with enforcing consular orders, preserving the peace, maintaining the physical and communicational infrastructure, regulating commerce and adjudicating minor civil and criminal actions. It was these governing councils that pulled the strings on Nigerian soil and, even more so than courts of equity, served as instruments of the British colonial establishment.

Alongside these British judicial institutions, there was a variety of native courts, which performed judicial and administrative duties. It is fair to ask, however, to what extent these courts were ‘native.’ African rulers did serve on these courts. However, as follows from the proclamation establishing a Supreme Court for the Southern Nigeria Protectorate (see below), it is fair to ask to what extent these native courts could genuinely take cognizance of native interests. In May 1900, a proclamation established a Supreme Court for the Southern Nigeria Protectorate. Section 9 of the proclamation stipulated the competences of the new Supreme Court: the Supreme Court ‘shall possess and exercise, so far as circumstances admit, all the jurisdictions, powers and authorities which are vested in or capable of being exercised by Her Majesty’s High Court of Justice in England.’ It was awarded full jurisdiction over all courts in the Southern

that it was the first instance in which Britain’s merchants in the area were united for concerted action. It thereby provided the necessary basis on which future diplomacy would have to work and make imperialism there a reality. In the early years of its foundation the Court of Equity was not given official recognition by the British government. And yet it always enjoyed the good will – and at times the active support – of the British Consuls in the region. Indirectly therefore – and perhaps without knowing it – the British government was providing cover for a protectionist syndicate.’ A.D. Nzemeke, ‘Free Trade and Territorial Partition in Nineteenth-Century West Africa: Course and Outcome,’ in: S. Förster, W.J. Mommsen, and R. Robinson (eds.), *Bismarck, Europe, and Africa. The Berlin Africa Conference 1884–1885 and the Onset of Partition* (Oxford University Press, 1988), 61.

Nigeria Protectorate. The applicable law, according to Section 11 of the proclamation, was to be 'the Common Law, the doctrines of Equity, and the statutes of general application which were in force in England on 1 January 1900.' In practice, the Supreme Court only adjudicated conflicts among British subjects and between British subjects and African natives and other European settlers, because lack of staff and resources kept it from deploying the full scope of its jurisdiction. In the territory of the Royal Niger Company, the Supreme Court mostly heard commercial disputes and cases involving foreigners.

How did the native population receive these 'made in England' judicial authorities that were imported and imposed on them without their say-so? Perhaps unsurprisingly, the natives were initially distrustful of these institutions and reluctant to bring cases before them, preferring to rely on their own judicial bodies to administer justice by customary law standards. Nonetheless, when it became clear that the British and their courts were there to stay, the native population came to terms with the British style of dispensing justice. After the Lagos Colony and the Southern Nigeria Protectorate merged in 1906, some changes in the judicial organization had to be implemented to create a unified legal entity.

Although the Privy Council was not physically present in the Britain's overseas territories, it did play a determinative role in matters judicial and legislative. In addition, the Privy Council was the executive institution of the British Crown and took a prominent place in colonial affairs, as the Crown was closely involved with its territorial possessions. In other words, all three branches of State organization – administration, legislature and judiciary – were united in the position and activities of the Privy Council. In 1834, the Judicial Committee was instituted to deal with the legal affairs of the Privy Council and it served as the supreme court of appeal for the British colonies, protectorates and other dependent territories.

On a final note, British judges, both in the overseas territories and at home, often relied on the Act of State doctrine: they would decline to decide many a case that concerned the Crown's prerogatives, because courts of justice were not allowed to review these prerogatives. Consequently, as James Gathii states, 'common law courts effectively made the entire complement of the Crown's prerogatives in a protectorate or foreign possession not amenable to judicial review and only limitable at the discretion of the Crown by moral principles.'⁸³

83 Gathii, 'Imperialism,' 1044.

5.2 Case Law

Do the judgments of the Nigerian courts and the Judicial Committee of the Privy Council offer proof of the inaccurate and inconsistent use of *imperium* and *dominium* at the time of Nigeria's and Africa's colonization?. The Judicial Committee of the Privy Council formulated intriguing judgments on the treaty-based transfer of sovereignty and private property rights and developed interesting arguments.⁸⁴ Although most judgments of the Privy Council that will be discussed concern the British overseas territory of Southern Nigeria, some key decisions regarding South Africa, Rhodesia and Swaziland will also be dealt with. These decisions show close similarities on the facts and in how the British operated with respect to land acquisition. The cases to be discussed represent the leading opinions of the Privy Council in its case law on colonial affairs. The selected judgments give an explanatory and to all intents and purposes complete survey of the treaty practices concerned. They also answer the question whether the central legal concepts of territorial sovereignty and private property were used accurately and consistently in the interpretation of the treaties concluded with African natives as part of a strategy to maximize the rights and powers of the British. What will also be assessed is whether Judicial Committee of the Privy Council considered the British colonization of Nigeria legal. The cases to be considered set important precedents.⁸⁵

84 See Elias, *Nigerian Land Law*, 17–71 and Olawoye, *Title to Land*.

85 The considered judgments form a precedent in the following cases: *Nirea Tamaki v. Baker*, 1901, A.C. 561; *Chief Young Dede and another v. The African Association, Limited*, 1911, 1 N.L.R. 130; *The Commissioner of Lands v. The Oniru*, 1912, 2 N.L.R. 72; *Oduntan Onisiwo v. The Attorney-General*, 1912, 2 N.L.R. 79; *Akpan Awo v. Cookey Gam*, 1913, 2 N.L.R. 100; *Adegbola v. Johnson & Lawanson*, 1921, 3 N.L.R. 81; *Eyamba v. Holmes & Moore*, 1924, 5 N.L.R. 83; *Chief Ndoko v. Chief Ikore and The Attorney General*, 1926, 7 N.L.R. 76; *Lieutenant-Governor of the Southern Provinces v. Bakare Ajakaiye and Alli Laditan and Lieutenant-Governor of the Southern Provinces v. Eni Igbakan Dosumu and Fadiya Okoya*, 1927, 7 N.L.R. 21; *Chief Ndoko v. Chief Ikoro and The Attorney-General*, 1927, 7 N.L.R. 76; *Uwani v. Akom and others*, 1928, 8 N.L.R. 19; *Ogini v. Thomas, Governor's Deputy and Owa of Ilesha and others*, 1928, 8 N.L.R. 41; *Efana Efana Henshaw v. Elijah Hensaw, Andem Ewa and others, and Compagnie Francaise de l'Afrique Occidentale*, 1928, 8 N.L.R. 77; *Bakare Ajakaiye and another v. The Lieutenant-Governor, Southern Provinces of Nigeria*, 1929, A.C. 679 or 9 N.L.R. 1; *Sakariyawo Oshodi v. Moriamo Dakolo and others*, 1930, 9 N.L.R. 13; *Brimah Balogun and Scottish Nigeria Mortgage and Trust Co. Ltd. v. Saka Chief Oshodi*, 1930, 10 N.L.R. 36; *Okafo Egbuche and another v. Chief Idigo and another*, 1931, 11 N.L.R. 140; *Eleko v. Officer Administering the Government of Nigeria*, 1931, A.C. 662; *Egbuche and another v. Chief Idigo and another*, 1934, 11 N.L.R. 140; *Chief Secretary to the Government v. James George and others*, 1942, 16 N.L.R. 88; *Chief Akinlolu Oloto v. Victor Williams and Charles Williams*, 1943, 17 N.L.R. 27; *Bankole Ajibola and another v. Shittu Ajibola*, 1947, 18 N.L.R. 125; *Edun v. Thomas*, 1947,

After the Conference of Berlin (1884–1885), the scramble for Africa rapidly intensified as France and Germany began to seek and compete for territorial expansion in earnest. The British felt threatened and regarded its rivals ambitions and efforts an attack on its own interests. The British government became especially convinced that it had to strengthen its titles to territories, as nominal protectorates and colonies no longer sufficed. As the Berlin Conference had decided and as was laid down in its Final Act, aspiring colonizers would have to demonstrate effective control over the concerned territories. Britain strengthened its titles to territory by granting a Royal Charter to the most important British trading company, by adapting the content of the cession treaties (blurring the distinction between sovereignty rights and property rights), and by enacting Orders in Council, official laws in the British overseas territories, which affected the cession treaties concluded between Britain and African natives. These Orders in Council repealed and revoked the cession treaties by declaring and promulgating that the ceded territories not only fell under British sovereignty, but were in fact the property of the British Crown. In other words, national laws were enacted to correct, adapt or repeal cession treaties for the purpose of acquiring property rights over land, thus expanding British control over the territory. Other legal instruments, such as ordinances, commands and proclamations, were also enacted, applied and enforced to unilaterally transfer African private property rights over land to the British Crown – without the consent or involvement of African natives having been sought.

British practices on the African continent come to light in the case law of the Judicial Committee of the Privy Council. As regards the practice of concluding cession treaties, it was recognized that the African contracting party, the native ruler, was an independent sovereign, who had the power to conclude cession treaties to transfer sovereignty.⁸⁶ In addition, the Judicial Committee repeatedly affirmed the distinction between a protectorate and a colony or annexation as well as the consequences and implications of these different legal institutes.⁸⁷ Generally, cession treaties concluded between the British Crown

19 N.L.R. 22; *Chief Commissioner, Eastern Provinces v. Ononye and others*, 1944, 17 N.L.R. 142; and *Garuba v. The Public Trustee*, 1947, 18 N.L.R. 132. This list of cases is not pretended to be exhaustive. For an elaboration on several of these cases, see Elias, *Nigerian Land Law*, 17–71. See also Olawoye, *Title to Land*.

86 *Thomas Cook and James Charles Cook v. Sir James Gordon Sprigg*, 1899, A.C. 572 (Appeal from the Supreme Court of the Cape of Good Hope to the Judicial Committee of the Privy Council).

87 This comes especially to the forefront in the case of *Rex v. The Earl of Crewe, ex parte Sekgome*, 1910, 2 K.B. 576 (Appeal to the Judicial Committee of the Privy Council).

and a native ruler were held to transfer territorial sovereignty with the proviso that such transfer did not affect natives' property rights to land – a proviso that reflects adherence to the continuity principle.

The Judicial Committee acknowledged that British jurisdiction had at times been stretched to its limits by means of Orders in Council, but it held that such conduct was considered an Act of State, which for that reason could be neither challenged in court nor attributed under the Foreign Jurisdiction Act (1890).⁸⁸ The Judicial Committee also ruled on the allocation of power to the British Crown and the chartered trading companies: the former acquired sovereignty over the territory, the latter rights of enjoyment in view of their trading purposes and objects.⁸⁹ In *Southern Rhodesia* (1919)⁹⁰ the Judicial Committee held that 'a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are un-allotted is sufficient for the establishment of complete power.' Orders in Council enacted over 'unalienated' lands could therefore establish sovereignty rights over territory in favour of the Crown; the Crown had the capacity to unilaterally annex territory to its dominions.

The differences between concepts and their understanding in various legal orders were also taken into account. If concepts were transplanted from one legal order to another, this should be done with caution, as the Judicial Committee took care to point out.⁹¹ With respect to the nature of native land tenure, which was taken to be communal,⁹² the Judicial Committee asserted that the British title to the territory was qualified by the rights of enjoyment or use of the native communities that inhabited the territory; these rights had been recognized by the British Crown as the outcome of deliberate policy. In cession cases, the Judicial Committee recognized the continuity doctrine: 'No doubt there was a cession to the British Crown, along with the Sovereignty, of the radical or ultimate title to the land, in the new Colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected.'⁹³ Referring to *The Attorney-General of*

88 See *ibid.*

89 *The Attorney-General of Southern Nigeria v. Holt*, 1915, A.C. 599 (Appeal from the Supreme Court of Southern Nigeria to the Judicial Committee of the Privy Council).

90 *Southern Rhodesia, In re*, 1919, A.C. 211 (Appeal to the Judicial Committee of the Privy Council).

91 *Amodu Tijani v. The Secretary of the Southern Provinces of Nigeria*, 1921, 2 A.C. 399 or 3 N.L.R. 21 (Appeal from the Divisional Court of Southern Nigeria to the Privy Council).

92 See *Nigeria Handbook*, 177–179.

93 *Amodu Tijani v. The Secretary of the Southern Provinces of Nigeria*, 1921, 2 A.C. 399 or 3 N.L.R. 21.

Southern Nigeria v. Holt (1915), the Judicial Committee in *Amodu Tijani v. The Secretary of the Southern Provinces of Nigeria* (1921) held that while the cession treaty between the British Crown and a native ruler effectuated a transfer of rights, it did not affect the factual situation: the private property rights of the natives had to be respected.⁹⁴ Continuity of existing property rights to land which changed jurisdictional power was the general rule.

Eventually, the Judicial Committee would rule that a cession treaty granted the British Crown all rights of protection, legislation, jurisdiction and administration over the territory and inhabitants of that territory, provided that the natives were guaranteed their laws and customs, and their grazing and agricultural rights, 'so far as not inconsistent with the laws pursuant to the convention.'⁹⁵ Here, a crucial qualification of the continuity doctrine was introduced: in the case of cession, existing property rights had to be respected as long as they were consistent with British law.

The establishment of a protectorate gave the British Crown territorial sovereignty in the international relations of the protected territory; protectorates were not part of the Crown's dominions. British authorities had certain if limited powers to enact legislation, but they could not interfere with the private property rights, more specifically the land ownership, of the native population.

In conclusion, as to whether *imperium* and *dominium* were used consistently, it can be said that the object and purpose of the cession treaties were at first generally clear: the transfer of sovereignty over territory from an African native ruler to the British Crown on condition that the private property rights over land of the natives were respected. However, by way of subsequently enacted legislation – a competence the British obtained when they acquired sovereign power – the Crown did interfere in private property rights of natives. Britain had the formal competence to enact legislation regarding the allocation of land ownership, because it had acquired jurisdictional rights over the territory by way of cession. In exercising this authority, Britain did not breach the law. The continuity principle, however, was ignored soon after the cession treaty had been signed, and natives were subjected to mass expropriation. Although the principle of continuity carried weight in court cases involving the transfer of sovereignty, it cannot be concluded that failure to respect the continuity principle constituted a violation of law. The principle served as a standard of good behaviour, a political guideline. Disregarding the continuity principle and not respecting native land ownership, while morally objectionable, were

94 See Meek, *Land*, 26–27.

95 *Sobhuza II v. Allister M. Miller and others*, 1926, Annual Digest 1925–1926, No. 28 (Appeal from The Special Court of Swaziland to the Judicial Committee of the Privy Council).

not illegal. If, however, the protection of native property and proprietary rights had been explicitly formulated, as it had been in most cession treaties, Britain failed to comply with its treaty obligations. In these cases, the cession of sovereignty over territory was illegal.

As regards protectorate treaties, in *Sobhuza II v. Allister M. Miller and others* (1926),⁹⁶ the Judicial Committee established the factual situation of the transfer of sovereignty rights and the legislative powers involved. What it did not do, however, was conclude that these practices were unlawful, illegal, or a violation of treaty obligations. The Judicial Committee did not address the legality issue, because the Foreign Jurisdiction Act and the Act of State doctrine prevented it from doing so. It affirmed that a protectorate implied that the protector only had the power to exercise external sovereignty rights. Interference in affairs of internal sovereignty was, however, not entirely excluded. Legislative acts, mostly in Orders in Council, would be issued (with increasing frequency), extending external sovereignty rights to include internal sovereignty rights. Mostly for financial and political reasons, a protectorate would continue to go by that name, but in practice, a protectorate essentially was a colony or a Crown dominion. Accordingly, the protecting power could acquire native property rights by way of these legislative acts. The Judicial Committee refrained from assessing the legality of these practices, because Acts of State were not open to judicial review.

Lastly, in *Adeyinka Oyekan and others v. Musendiku Adele* (1957),⁹⁷ the Judicial Committee of the Privy Council lucidly summarized its position on the effect of the Act of State on a cession treaty between the Crown and African natives. Its conclusion merits full quotation:

[T]he Treaty of Cession was an Act of State by which the British Crown acquired full rights of sovereignty over Lagos. In these circumstances the courts of law will not take it upon themselves to construe the Treaty. The effect of the Act of State is to give to the British Crown sovereign power to make laws and to enforce them, and therefore the power to recognise existing rights or extinguish them or to create new ones. In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the Treaty, but to the conduct of the British Crown. It has been laid down by their Lordships' Board that 'Any

96 *Ibid.*

97 *Adeyinka Oyekan and others v. Musendiku Adele*, *Journal of African Law*, 1 (1957), 186–192 (Appeal from the West African Court of Appeal to the Judicial Committee of the Privy Council).

inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of his predecessors avail him nothing.' [...] In inquiring, however, what rights are recognised, there is one guiding principle. It is this: the courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst therefore the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes. It will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law [...]. Furthermore if a dispute arises between the inhabitants as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law [...] except, of course, in those cases, now growing in number, where English conceptions of individual ownership have superseded previous conceptions.

In sum, although the conclusion of a cession treaty was considered to be an Act of State by which the English Crown acquired sovereign powers over the African territory concerned, the Judicial Committee once again considers that native property rights should be respected and be valued in accordance with native customary law. In other words, the Judicial Committee recognized the continued existence of native property rights, and if native property were expropriated, the native proprietor was entitled to compensation. Here the analysis of the Judicial Committee stops, because the Act of State doctrine prescribes judicial restraint in matters involving the Crown. Their Lordships were not prepared to interpret the cession treaty to determine whether it safeguarded existing rights; they would only consider the conduct of the Crown, because the rationale of the Act of State 'is to give to the British Crown sovereign power to make laws to enforce them, or create new ones.'⁹⁸ Consequently, no reference was made to any British wrongdoing in failing to meet their treaty obligations and to respect native property rights. The Judicial Committee ultimately refrained from concluding that in failing to adhere to the continuity principle, the Crown acted unlawfully. The continuity principle – which potentially restricted the Act of State doctrine – yielded to that doctrine; political expediency prevailed over legal argument; might is right.

98 *Adeyinka Oyekan and others v. Musendiku Adele*, 1957, 2 All E.R. 785, 788.

6 Conclusion

Two main questions have been addressed in this chapter. The first of these was how in the second half of the nineteenth century property and sovereignty were arranged in treaties and agreements between Britain and Nigerian natives transferring sovereign rights over territory. The second was how existing native sovereignty and property rights fared after treaties had been concluded. Although there had been a British presence on the African continent for some centuries, British rule on and over Nigerian territory started with the cession of Lagos in 1861. Many treaties transferring sovereign rights over territory were to follow. From the mid-1800s onwards, the nature of the agreements between Britain and African natives changed. Where they had originally been driven by economic concerns, they gradually came to be politically motivated. This shift concurred with the increasing use of treaties over contracts. Public law instruments thus gained prominence as a means of regulating relations between Britain and African natives. Britain continued to control its overseas territories through indirect rule.

In the 1880s, the competition between European States for title to African territory reached fever pitch. The contest between Britain and its two main European rivals, France and Germany, combined with the political pressure fuelled by the Conference of Berlin (1884–1885) to compel Britain to abandon its policy of indirect rule and to gradually assume direct control over its African territories. The growing emphasis on effective control of extra-European territories and the European race for African territory boosted the use of protectorate treaties over cession treaties to acquire sovereignty rights over African territory. When it transpired that establishing a traditional protectorate was unrealistic, European politicians introduced the colonial protectorate to acquire and justify title to African territory. Britain was fully involved in and actively contributed to these high-pace developments.

Britain concluded many treaties transferring sovereignty rights from Nigerian rulers to the British State. As time went by and more treaties were concluded, ambiguities in protectorate treaties on the precise object of transfer increased. This development gave rise to the question how the sovereignty rights of the native rulers and the existing native rights to land were affected. Boundaries between British sovereignty exercised over the territory and the sovereignty rights of the native rulers blurred, and this indeterminacy helped to pave the way for the extension and strengthening of British rule over Nigeria. Under the Foreign Jurisdiction Act (1890), the British authorities in the Nigerian territories could, in the name of the Crown, enact Orders in Council which were regarded as Acts of State. By way of these Orders Britain

unilaterally awarded itself territorial sovereignty at the expense of the native rulers, whose sovereignty were effectively deprived of any substance. The Orders in Council enabled the British authorities to set up concession systems granting lands and rights to land to British settlers, necessarily implying the appropriation of native property and entitlements. The Judicial Committee of the Privy Council confirmed Britain's practice of establishing colonial protectorates by means of treaties, but refused to assess the lawfulness of this practice. Britain's acquisition and direct rule of Nigeria were accomplished through Acts of State that were not open to judicial review.

But questions remain. Was it legally permissible to set aside the continuity principle after the cession treaties had been concluded? Could national legislative acts repeal the treaties establishing protectorates? Did these acts override treaties that had been concluded under international law? Could treaties be lawfully amended or repealed under national law without the consent of the other treaty party required by contemporary international law? How should the fundamental principles underlying the conclusion, interpretation and execution of treaties be assessed? And did Britain and, more generally, European States violate international law? Chapter 8 addresses these questions by comparing the British, French and German treaty-making practices on the African continent.

French Equatorial Africa

1 Introduction

As in Britain, the imperialist wind blew through French politics and society in the late nineteenth and early twentieth centuries. This renewed interest in overseas territories originated in a national trauma: the loss of most of the Alsace-Lorraine region to Germany in 1871. This event, a keenly felt humiliation, would determine French foreign policy until after World War I. French foreign and, by extension, colonial policy was directed at restoring its status among the other European powers: 'France had to reforge her prestige in the community of European nations. This, according to Jules Ferry, would have to be done, not on the Rhine, but in Africa.'¹ France mitigated its revanchist attitude to Germany over time as it adjusted its national politics. Weighing the pros and cons of its colonial venture in Africa, France decided on an autonomous colonial policy. Subordination, centralization, executive supremacy, uniformity and formality characterized French rule of its African territories. However, French criticism of informal empire, the system of rule used by Britain and, to a lesser extent, Germany,² diminished in the 1890s when France realized that direct rule of the overseas territories was impossible and that it necessarily had to deploy trading companies active on the ground.

Despite its preference to acquire African territory by way of occupation, French control over Equatorial Africa originated in the establishment of protectorates by concluding treaties with native rulers in the 1880s and 1890s.³ Once the French and African contracting parties had signed the treaty text, French law, administration and institutions were imported into the protectorate. French sovereignty being exercised over African territory put considerable strain on both the sovereign rights of the native ruler and native land ownership. It is this tension that gives rise to the two main questions to be addressed in this chapter. First, what property and sovereignty arrangements were made in the treaties and other agreements concluded between the French and the people residing in Equatorial Africa in the second half of the nineteenth century? Second, how did existing sovereignty and property rights fare after the

1 J.J. Cooke, *New French Imperialism 1880–1910: The Third Republic and Colonial Expansion* (Newton Abbot, Hamden: David and Charles, Archon Books, 1973), 11.

2 See Koskenniemi, *Gentle Civilizer*, 144.

3 Fisch, 'Africa as *Terra Nullius*,' 354–357.

treaties had been signed? The main purpose of the current chapter is to establish the facts of the treaty-making practices between France and African rulers as a prelude to assessing the legality of these practices in Chapter 8.

First a brief historical background to French presence in Equatorial Africa will be given (§2). Next, the treaty texts and practices between France and native rulers in Central Africa will be analysed and evaluated, with particular attention being paid to the transfer of sovereignty over territory and the French approach to native land ownership (§3). Following this exploration, the discussion will shift to the legislation France enacted in Equatorial Africa after the treaties had been concluded (§4) and the interpretation and execution of the treaties (§5). The chapter concludes with some remarks on the issue of the legality of the French colonization of Africa (§6).

2 Historical Background

By the time of Third French Republic was established, France's imperial history stretched back to the sixteenth century. In the second half of the eighteenth century, France had lost a great deal of territory and influence in India, Canada and the Caribbean to Britain. In the early nineteenth century, the French set their heart on imperial expansion in Northern Africa, with the acquisition of Algeria as its first major result⁴ after its unsuccessful invasion of Egypt in 1798–1801.⁵ From the seventeenth century onwards, the Senegal in West Africa was the lifeline for French trade.⁶ West Africa was the springboard for French territorial expansion on the African continent.⁷ The appropriation of Tunisia in 1881 proved pivotal in the founding of the French Empire and in France's rehabilitation on the international scene. Although France was especially interested in the Arabic part of the continent, Sub-Saharan Africa played a vital role in French colonial practice. French rule was established over a territory stretching 1,400 miles from the lower Congo River to Lake Chad, and consisted of present-day Gabon, the Congo Republic, the Central African Republic and the southern part of Chad. In the late nineteenth century, this area was known

4 J. Sessions, *By Sword and Plow: France and the Conquest of Algeria* (Ithaca: Cornell University Press, 2011).

5 A.L. Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895–1930* (Stanford University Press, 1997), 16–19. See Wesseling, *Verdeel en heers*, 27–28.

6 Wesseling, *Verdeel en heers*, 218–219.

7 *Ibid.*, 220–232.

as French Equatorial Africa,⁸ covering 2,687,190 square kilometres,⁹ i.e., more than five times the surface area of France. Before elaborating on the colonization of this specific part of Africa, French imperial practices on the whole continent will be considered.

French colonial policy and practice reflected the view of the French liberal government minister Jules Ferry (1832–1893) that economic, political and cultural considerations were the main drivers of French territorial expansion in Africa.¹⁰ As Minister of Foreign Affairs (1883–1885) and Prime Minister (1880–1881 and 1883–1885), Ferry laid the foundation for French colonialism. He felt that economic considerations dominated France's national and international politics and these considerations required industrialization, protection, markets and colonies.¹¹ From a political perspective France wanted to restore the balance of power by expanding its sphere of influence outside Europe. It was especially the political ambition behind the scramble for Africa that heightened tensions between France and its European contenders,¹² and as the Fashoda incident (1898) proved, the antagonism between France and Britain in particular was palpable.¹³

Even so, the cultural incentive also mattered. The French believed in the superiority of their culture and saw it as their mission to civilize others. This conviction explains why the French policy of assimilation, influenced by nationalist and patriotic sentiments, played a central role in France's rule

8 See C. Coquery-Vidrovitch, 'French Congo and Gabon, 1886–1905,' in: G.N. Sanderson and R. Oliver (eds.), *The Cambridge History of Africa*, vol. vi (Cambridge University Press, 2008), 298–314. See also A. Mangongo-Nzambi, 'La délimitation des frontières du Gabon (1885–1911),' *Cahiers d'études africaines*, 9 (1969), 5–53.

9 As is determined in 1920. The total extent of the whole French Empire amounted in that same year 10,184,810 square kilometres. See Roberts, *History of French Colonial Policy*, xvi.

10 Wesseling, *Verdeel en heers*, 33. See also J. Darcy, *La Conquête de l'Afrique* (Paris: Perrin, 1900).

11 S.H. Roberts, *The History of French Colonial Policy 1870–1925* (Hamden, Conn.: Archon Books, 1963), 15.

12 See G. Hardy, *La Politique Coloniale et le Partage de la Terre au XIX et XX Siècles* (Paris: Albin Michel, 1937).

13 See D. Bates, *The Fashoda Incident of 1898: Encounter on the Nile* (Oxford University Press, 1984); W. Churchill, *The River War: An Account of the Reconquest of the Sudan* (London: Longmans, Green and Co., 1902), Chapter 17; D. Levering Lewis, *The Race to Fashoda: European Colonialism and African Resistance in the Scramble for Africa* (New York: Weidenfeld and Nicolson, 1987) and C.M. Andrew and A.S. Kanya-Forstner, 'Gabriel Hanotaux, the Colonial Party and the Fashoda Strategy,' *Journal of Imperial Commonwealth History*, 3 (1975), 22–104.

of African territory.¹⁴ Assimilation was the ‘system which tends to efface all difference between the colonies and the motherland, and which views the colonies simply as a prolongation of the mother-country beyond the seas.’¹⁵ Overseas territories were, in other words, considered extensions of the European mainland. ‘Assimilation, by giving the colonies institutions analogous to those of metropolitan France, little by little removes the distances which separate the diverse parts of French territory and finally realizes their intimate union through the application of common legislation.’¹⁶ In the acquired territories French administration would be established and Paris would assume control. In keeping with the earlier tradition of colonization, as in Algeria in the 1830s, government by direct colonial rule became the standard of French colonial policy. The development of the overseas territories as particular and separate entities could not be countenanced: ‘[T]hey were pieces in the wider organism and their sole function was to strengthen France and to serve her needs. They had to develop along the lines France needed, they had to sacrifice themselves if need be for France.’¹⁷ This zeal and firmness in France’s policy towards overseas territories differed markedly from the British strategy and attitude towards Africa and its indigenous population. British rule was first and foremost based on maintaining existing political relationships and respecting – indirect rule. The mission of civilization and assimilation pursued by France in its overseas territories in the late nineteenth century was not universally embraced. Critics, among them the French jurist Charles Salomon (1862–1936), averred that the civilization argument was just a means to further commerce and increase economic benefits.¹⁸

In 1890s, France came to realize that it could not establish effective control in all of its territories on the African continent: it relied increasingly on the efforts of trading companies, which were mandated to acquire territory by means of treaties with native rulers and to establish control over these territories. This gradual loosening of direct rule led to disorder and conflicts, and it left the French authorities facing a dilemma. On the one hand, the aim of formally extending French sovereignty in Africa by direct political control based

14 See, for example, Conklin, *Mission to Civilize*.

15 Roberts, *History of French Colonial Policy*, 67. See R.F. Betts, *Assimilation and Association in French Colonial Theory* (New York: Columbia University Press, 1961).

16 A. Arnaud and H. Méray, *Les Colonies françaises, organization administrative, judiciaire, politique et financière* (Paris: Challamel, 1900), 4, translated in Betts, *Assimilation*, 8.

17 Roberts, *History of French Colonial Policy*, 23. See O.-Ch. Galtier, *Des Conditions de l’Occupation des Territoires dans le Droit International Contemporain* (Toulouse: Lagarde et Sebille, 1901), 72.

18 C. Salomon, *L’Occupation des Territoires sans Maître* (Paris: Giard, 1889), 195.

on the civilization mission was to avoid and mitigate the excesses of economic exploitation. On the other hand, as direct rule of African territories turned out to be politically and financially unattainable, the French authorities recruited private companies to colonize and control the overseas territories. Yet these companies failed to maintain order and to keep out European competitors, and by the end of the century the French authorities felt they had no choice but to intervene again and restore order through direct rule: 'Eventually the companies resorted to protectionist practices (in breach of their charters), proved unable to administer territories granted to them, or failed to forestall expansions by other powers.'¹⁹

The quest for scientific knowledge was another reason for France to seek territorial expansion in Africa, and the French authorities dispatched explorers and scientists on missions to the African *Hinterland*. These private individuals and associations also concluded treaties with native polities. The French government preferred independent and, above all, inexpensive explorers to commercial companies, governmental diplomats and military forces. The support of private initiatives and associations, such as the *Comité de l'Afrique française* and the *Union coloniale française*, enabled the French to penetrate the lands between the Oubanghi and Chari rivers. However, the thirst for scientific knowledge soon turned into a rush for territory, driven by nationalist motives.²⁰

In Equatorial Africa, a dedicated and adventurous man acted as trailblazer for French colonization: Pierre Savorgnan De Brazza (1852–1905), an Italian by birth who became a French citizen. He was a French patriot and served as a junior officer in the French navy. Although De Brazza's first expedition (1870–1878) was a private undertaking, to his mind he went to Africa to establish a great empire in the name and for the benefit of the French State. The main purposes of his expedition were to secure for France 'un accroissement territorial de sa primitive colonie en même temps qu'un accès privilégiée vers le bassin du Congo[:]'²¹ territory and trade privileges. On his second mission (1879–1882), aimed at opening the Congo River to French navigation, De Brazza founded Franceville on the Upper Ogowé – in the south-east of present-day

19 Koskenniemi, *Gentle Civilizer*, 117.

20 G. Teissier, 'La mise en valeur du Congo,' *Année coloniale*, 1 (1899), 60 as quoted by M.A. Rouget, *L'Expansion coloniale au Congo Français* (Paris: Larose, 1906), 613.

21 M. Dubois and A. Terrier, *Les colonies françaises. Un siècle d'expansion coloniale* (Paris: Challamel, 1901), 583. On the extent of the Congo Basin and the French control over it, see G. de Courcel, 'The Berlin Act of 26 February 1885,' in: S. Förster, W.J. Mommsen, and R. Robinson (eds.), *Bismarck, Europe, and Africa. The Berlin Africa Conference 1884–1885 and the Onset of Partition* (Oxford University Press, 1988), 251.

Gabon – and Brazzaville, located on the Congo River opposite Belgian Leopoldville (now Kinshasa). These two posts developed into hubs for trade in goods and services. To acquire valid and titles to territory, De Brazza concluded treaties with African rulers on the transfer of sovereign rights over territory. France thus acquired a vast area of territory covering the north bank of the Congo between Brazzaville and Ubangui.

French politicians, however, were unaware of De Brazza's efforts to extend France's empire on the African continent. And if they had heard of them, they were reticent about welcoming the results of De Brazza's colonial venture, French experiences in Algeria being fresh in their minds.²² At first, the French public were not enthusiastic either about their republic's renewed colonial interest in the African continent;²³ what occupied French citizens was economic, social and political instability on the home front. Eventually, however, French politicians were won over to imperialism and they succeeded in harnessing popular support. In November 1882, French Parliament recognized the bilateral treaties De Brazza had concluded with African rulers – these formed the constitutional basis of the newly established protectorate of French Congo (1891), existing of the united territories of Congo and Gabon.

De Brazza opened up a territory for trade and control that was four times the size of France. He undertook a third mission (1883–1885), which resulted in the acquisition of the territories of Loango and Pointe-Noire by concluding bilateral treaties with the rulers of both territories. French legal scholars considered the acquisition of African territory by way of 'peaceful' bilateral treaties a symbol of French civilization and courtesy, and they favourably compared De Brazza's working method to that of explorers who were employed by the other European colonizers, such as the British-American journalist for the *New York Herald* and explorer Henry Morton Stanley (1841–1904), who served the Belgian King Leopold II (1835–1909), and the German adventurer Carl Peters (1856–1918), who opened up East Africa in Germany's campaign for imperial expansion.²⁴ After De Brazza's explorative and acquisitive activities in the French Congo, he was dismissed by the French government and succeeded by Emile Gentil (1866–1914). Gentil was mandated to exploit the acquired territories for trade and economic benefits, violently oppressing the native population as he did so.²⁵ In the final years of the 1800s, De Brazza was recalled from the French

22 See Koskenniemi, *Gentle Civilizer*, 110. See also Cooke, *New French Imperialism*, 13–14.

23 See Betts, *Assimilation*, 3.

24 Koskenniemi, *Gentle Civilizer*, 107.

25 See G. Hanotaux and A. Martineau, *Histoire des Colonies Françaises et de l'Expansion de la France dans le Monde*, vol. iv (Paris: Plon, 1929), 441–534.

Congo, because he was deemed to have exhausted his usefulness and even regarded as an obstacle to French colonial policy. Through his expeditions, De Brazza had come to appreciate the interests of the natives inhabitants, even to the point of defending them and their interests against the French colonial ruler. He acted openly against the brutal economic exploitation of the territory and the horrendous consequences it had for the natives and their lands.²⁶

In the wake of the Conference of Berlin and its Final Act (1885), the demarcation between the Independent State of Congo, ruled by Leopold II, and French Equatorial Africa had to be settled – a delicate matter –²⁷ as had the border between French Equatorial Africa and German Cameroon. In 1894, France and Germany signed a convention on the delineation of the border between Equatorial Africa and Cameroon, which was reaffirmed at the convention of 18 April 1908. As from 1890, the French desire to create a united French empire in Africa connecting the French territories in North, West and Central Africa determined the development of French Equatorial Africa. In July 1898, the Anglo-French treaty on the Niger delimited the spheres of interest between the two States. The border between French Equatorial Africa and British Sudan was agreed on in March 1899. Finally, the territory of Oubangui-Chari, the area south of Chad, was added to the French empire between October 1910 and February 1911. The protectorate treaties concluded between the European powers and native rulers in the race of the former for African territory was the main mode of establishing the borders of the territories under the control of the different European States. In other words, the delimitation of the French empire depended on the protectorate treaties concluded with natives.

3 French Treaty Practice in Equatorial Africa

Although legal doctrine distinguished various modes of acquisition, the actual practice of acquisition was not as clear-cut. France often acquired African territory through a combination of occupation, cession and protection. In theory, occupation as an original mode and cession as a derivative mode were regarded as opposites; the use of occupation excluded the use of cession and vice versa. France relied on the cultural differences between Frenchmen and the African natives to justify the acquisition of African territory through occupation. In view of the combined use of modes, the late nineteenth century jurist Octave

²⁶ R. West, *Brazza of the Congo* (Newton Abbot: Victorian, 1973), 156.

²⁷ See for the exact delimitation Hanotaux and Martineau, *Histoire des Colonies Françaises*, 425.

Galtier, for example, introduced the phenomenon of fictive occupation.²⁸ A contemporary of his, Pierre Dareste, professor of colonial legislation in Paris, rejected the civilization argument as justification for occupation.²⁹ On the one hand, he argued, their lack of civilization excluded the natives from enjoying sovereignty and property rights, as was indeed the position of the French authorities, including the judiciary. He observed that non-civilized populations inhabited the land and that this did not stop the French from considering Africa *terra nullius*. On the other hand, Dareste pointed out that some cession and many protectorate treaties were concluded between French agents and African rulers, and these treaties implied French recognition of the presence and entitlement of the African polities.

Salomon introduced another acquisition mode next to occupation and cession. While acknowledging that cession and protectorate treaties were concluded between French representatives and African rulers, he reasoned that these treaties did not entail a traditional transfer of sovereignty between two civilized entities, but between the civilized French State and barbarous African polities.³⁰ Salomon argued for a hybrid mode of acquisition: qualified occupation. It recognized that the land was inhabited by African political entities which were able to sign treaties transferring sovereign rights, but which came down to occupation of the land – the presence and entitlement of the native population were ignored. The French colonizer assumed the acquisition not only of sovereignty over the territory, but also of proprietary rights to the land. Although the French acknowledged that original acquisition of African territory was impossible and that they therefore had no choice but to conclude bilateral treaties with the rulers of African polities, they did not recognize the African treaty party as an equal. In practice, the French obtained full control over the territory, which they justified by referring to the civilization argument. Salomon referred to the treaty between De Brazza and Makoko, which will be addressed later in this section, as an example of qualified occupation.³¹ French interpretation and application of the modes of acquisition, based on distinction between civilized and non-civilized nations, was ambiguous. In theory, France recognized its African co-contracting party, while in practice the French behaved as if the territory had been acquired by occupation. What

28 Galtier, *Conditions de l'Occupation*, 76–77.

29 P. Dareste, *Recueil de législation, doctrine et jurisprudence coloniales*, vol. xxix (Paris: Sirey, 1927), 6.

30 Salomon, *Occupation*, 235–236. See also Jèze, *Étude théorique*, 117.

31 Salomon, *Occupation*, 235.

Salomon called qualified occupation, a quasi-original mode of acquisition, was in effect a colonial protectorate.

The acquisition of African territory by occupation became untenable and forced the French to use derivative modes of acquisition and to rely increasingly on bilateral treaties with native rulers. This does not mean that France had not signed treaties with African nations before. France had been concluding treaties with African natives since the early seventeenth century, especially in North Africa in present-day Morocco, Algeria and Tunisia.³² The object of these treaties involved either commercial issues, such as trade privileges, customs duties and the payment of debts, or more political concerns, such as establishing peaceful relationships. Although France concluded treaties with African rulers in the early 1800s,³³ in the second half of the nineteenth century cession and protectorate treaties were the fundament of French title to African territory and the expansion of French rule over the territory.³⁴

Before discussing particular treaty practices and texts, two remarks have are called for. The first one concerns the status of native rulers and their recognition by France. The French assumed that the African treaty party had the capacity to transfer territorial sovereignty rights. This legal competence of the African ruler was often expressed explicitly in one of the treaty provisions, a non-intervention clause. In such a clause the African ruler declared that he and his people were independent of any foreign power. In the majority of cases, the French used the negative formulation of the native ruler's capacity, in which the native ruler had to state that he – and other chiefs of the territory – was not dependent on any external control: 'Nous n'avons jamais signé ou contracté aucun engagement avec l'étranger – que nous ne dependons d'aucun Chef ayant signé ou contracté en notre nom un semblable engagement [...]'.³⁵ Moreover, these treaties often contained a provision stipulating that earlier

32 On the French treaties with African natives in the seventeenth and eighteenth centuries, see Alexandrowicz, *European-African Confrontation*, 9 and 18–28.

33 See E. Rouard de Card, *Les Traités de Protectorat conclus par la France en Afrique 1870–1895* (Paris: Pedone, 1897).

34 For an overview of the cession and protectorate treaties concluded by France with African rulers in Equatorial Africa between 1819 and 1890, see Hertslet, *Map of Africa by Treaty*, 634–641.

35 Declaration of the native rulers of Dambbo, made on 15 November 1883, quoted in Alexandrowicz, *European-African Confrontation*, 35. Such declarations can also be found in many other treaties, as Alexandrowicz enumerated: the treaties with the rulers of Campo on 19 November 1883, with the rulers of Boughié, Igouba and Miongo of the country of Andjé (Gabon) on 6 June 1884, and with Massai on 22 August 1884. *Ibid.*

treaties with other foreign powers were null and void.³⁶ At the time when a treaty was signed, the French recognized the African ruler as an independent sovereign who intended to transfer sovereign rights over his territory to France.

The second remark concerns the validity of the treaties that had been concluded. As has been argued, for the purpose of acquiring title to territory the French acknowledged the capacity of African rulers representing their people to conclude treaties transferring sovereign rights. Motivated by self-interest, France, and European States generally, deemed international law applicable when dealing with African polities. The French could take possession of inhabited African territory under two conditions. First, the native ruler had to consent to France taking possession of the territory, and this consent had to be given freely and expressed intelligibly. Second, French possession should not deprive the natives of land usage.³⁷ However, many questions arose with regard to the validity of the treaties. Had the cession or protectorate treaty been concluded and signed voluntarily or had it been imposed? Did the indigenous treaty party truly, i.e., conceptually, understand the treaty text? Did the native ruler oversee the consequences of the treaty? Had the signatures of the native chiefs been obtained in accordance with the principle of informed and free consent? As mentioned in Chapter 1, the validity, or legality, of the treaties is problematic, but answering the questions this issue gives rise to is not the objective of this book. Instead, the main line of inquiry is to establish whether the Europeans kept the promises they had laid down in the treaties.

To that end, in the following sections the cession and protectorate treaties France concluded with African rulers will be analysed.

3.1 *Cession Treaties*

Treaties between France and African rulers in Equatorial Africa date back to the 1810s.³⁸ As in the case of Britain, these treaties were traditional cession treaties.³⁹ The French, however, continued to use cession treaties more often alongside establishing protectorates. Between 1839 and 1843, the French concluded treaties with King Denis and King Louis, who possessed the land on the left and right banks of the Gabon respectively. These treaties awarded

36 See *ibid.*, 67.

37 Jèze, *Étude Théorique*, 116.

38 Hertslet, *Map of Africa by Treaty*, 634.

39 Many titles to territory were acquired by the French by the conclusion of cession treaties in Equatorial Africa. It concerned, for example, the territories of Gabon (9 February 1839), Grand Bassam (19 February 1942), Batanga (30 March 1942), Nalous (27 July 1848), Cayor (2 February 1862), etc. For an extensive overview, see *ibid.*, 634–641.

territorial concessions or privileges to France. France used the territory to build military batteries and fortifications on the ground. In 1842, Louis ceded his sovereignty, 'la souveraineté pleine et entière,' to France. He also ceded the property rights over the old village of his father, giving the French a free hand in building whatever they wanted on this piece of land. In other words, by means of this treaty both the sovereignty rights and some of the property rights of Louis were transferred to the French.

Other cession treaties were to follow and all would contain a standard provision on the transfer of full sovereignty rights over the territory: 'la souveraineté de la rivière du Gabon, comme de toutes les terres, îles et presque îles ou caps baignant cette rivière était concédée pleine et entière sur les deux rives à Sa Majesté le roi des Français.'⁴⁰ On 19 February 1842, the French lieutenants L'Alouette and La Malonine and captain Le Brick de Marseille signed a treaty in the name of France with the native ruler King Peter of the territory of Grand Bassam. Full sovereignty rights over the territory and the river of Grand Bassam were ceded to the King of France. Moreover, the French appropriated the exclusive right to dispose of the land, to cultivate it and to build on it: they had the discretion to decide on the usage of land and on buying of land from the actual owners. Additionally, an exclusion clause was inserted, stating that another State or nation was not allowed to interfere with French sovereignty over the territory.⁴¹ With this cession treaty, all-comprehensive sovereignty rights were transferred from an African native ruler to the French. This transfer included the power to appropriate and allocate property rights to the land. The French guaranteed the protection of the native inhabitants, which expressed the reciprocal element of the treaty relationship. Similar treaties were concluded with King Koako (1843 and 1845) and with the rulers of Cagnut (1851), the island of Elobey (1855) and Cape Lopez (1862).⁴²

In the Cape Lopez treaty, concluded on 1 June 1862, the native rulers of Cape Lopez transferred the sovereign rights to their territory to France, as Article 1 of the treaty stipulated: 'concèdent de leur plein gré au Gouvernement français la souveraineté de leurs territoires.' The natives and their rights fell under the authority of the French and the French government explicitly undertook to protect the native subjects in Article 4: 'Le Gouvernement français accorde aux Rois et Chefs signataires du présent traité et à leurs sujets, [...] protection.'

40 Rouard de Card, *Traités de Protectorat*, 83–84.

41 The formulation of an exclusion clause, initially based on the protection of commercial interests, but later on political ones too, within cession and protectorate treaties was common practice. See Alexandrowicz, *European-African Confrontation*, 55–56.

42 H. Paulin, *L'Afrique Equatoriale Française* (Paris: Eyrolles, 1924), 6.

The implications of this transfer for existing property rights to lands within the territory would only become clear at a later stage. In the treaty between the King of Cayor and France of 4 December 1863, the King undertook to recognize 'la suzeraineté de l'Empereur des Français et se placer sous la protection de la France' (Article 2). In the treaty concluded between colonel M.E. Pinet-Laprade and King Malégui-Touré, the King agreed to 'placer lui, son pays et ses sujets sous la suzeraineté et le protectorat de la France.' And in the treaty between France, represented by Governor M.E. Pinet-Laprade, and the King Douka of Landoumas of 21 January 1866, declared to 'placer lui et son pays sous la suzeraineté de la France' (Article 1). In Article 2, the Governor recognized Douka as the King of Landoumas and promised to protect him. Of particular interest is the fifth treaty provision, which contained an explicit expression of the continuity principle: 'Rien n'est change pour le moment aux Conventions qui règlent les droits que paient à Douka les traitants pour leurs établissements à terre.' The treaty would not annul existing rights to the land.

Another example of a cession treaty as formulated by the French authorities is that between the Kings of Bériby and Lieutenant François-Eugène Crespin on 4 February 1868. In this treaty, the Kings 'concèdent [...] la souveraineté pleine et entière de tout le territoire soumis à leur autorité.' Sovereignty rights over the territory of Bériby were transferred to France, but the applicability of the continuity principle was implicitly recognized: 'les Français auront donc seuls le droit d'y arborer leur pavillon et d'y créer tous les établissements ou fortifications qu'ils jugeront utiles ou nécessaires, en achetant les terrains aux propriétaires actuels' (Article 1). Explicit references to this principle were uncommon. Usually, only words expressing the cession of sovereignty over the concerned territory were used, as the treaty with the King of Dahomey transferring Kotonou beach, concluded on 19 May 1868: 'Le roi de Dahomey [...] fait cession à la France de la plage de Kotonou.' Or, as in the treaty with the King of Boungé of 23 August 1873, the native ruler gave France 'en toute propriété tous les territoires sous sa domination.' To conclude this enumeration, on 3 April 1879, King Bey-Scherbro of the Samo territory concluded a treaty with the French Colonel M.G. Brière de l'Isle, in which the King declared to place 'son pays et ses sujets sous la suzeraineté et le protection de la France et s'engage à ne jamais céder aucune partie de sa souveraineté sans le consentement du Gouvernement de français.'

French cession treaties concluded with native rulers were clear on the object of transfer: sovereignty over territory.⁴³ Until the early 1870s, France

43 See, for example, the cession treaties regarding Gabon of 9 February 1839 and Batanga of 30 March 1842. See A.J.H. de Clercq and J. de Clercq, *Recueil des Traités de la France*, vol. iv (Paris: Amyot, 1865), 445 and 617.

concluded few treaties on the transfer of territorial sovereignty with native rulers in Equatorial Africa. This period of low treaty intensity, however, was marked by a gradual, if incomplete, transition from the use of cession treaties to the use of protectorate treaties.

3.2 *Protectorate Treaties*

A characteristic feature of French protectorate treaties⁴⁴ was their emphasis on the 'protection' the French would offer to the territory and to native inhabitants. The French considered an exclusion clause constitutive of establishing of a protectorate. Often a non-intervention clause was included in the treaties, underlining the division of sovereignty rights between France and the native ruler. One of the first protection treaties the French concluded in Equatorial Africa was that of 14 January 1868. The signatures at the bottom of the document were those of the French lieutenant Aymès and the rulers of Fernand Vaz. The French considered the acquisition of this territory an important accomplishment, because this area, a lagoon in which the Ogooué disembogued, gave access to an enormous *Hinterland*. This estuary was well known for its economic riches, such as palm oil and rubber trees. Article 1 formed the basis for the transfer of partial sovereignty.⁴⁵ The native rulers consented to cede their sovereignty over their territories to the French government to the extent that the cede sovereignty included the right to enter into relationships with foreign nations and to protect the territory against foreign intervention. Article 2 contained an exclusion clause by which the French assumed exclusive rights to establish and develop 'their' land and to limit the freedom of the natives exercising their rights by subjecting such exercise to the consent of the French government: 'Les Français auront seuls le droit d'y arborer leur pavillon. Les Rois et les Chefs susdits s'engagent à n'autoriser sur leurs territoires aucun établissement de quelque nature que ce soit sans l'agrément du Gouvernement français.'

The effectuation of a treaty establishing a relationship of protection did not depend on the form and length of the treaty. For example, the treaty of 14 February 1868 between captain Bougarel, officially representing France, and the ruler of Bilogue, Eyano, contained just a few sentences and its main purpose was to establish 'la protection française.' In short but clear wording a

44 For an overview of the protectorate treaties France concluded in Equatorial Africa, see Hertslet, *Map of Africa by Treaty*, 634–641.

45 'Article 1 – Les Rois et les Chefs ci-dessus dénommés concèdent de leur plein gré au Gouvernement français la souveraineté de leurs territoires et, par suite, le droit exclusif de traiter avec les puissances étrangères et d'y fonder tels établissements qu'il jugera convenable.'

French protectorate over the Bilogue territory was instituted. In general, however, as protectorate treaties gained prominence, indefinite or ambiguous formulation of the treaty provisions prevailed. It was especially when the scope of transferred rights had to be established that words failed. On the one hand, the French intended to establish protectorates and accordingly classified these treaties as protectorate treaties. On the other hand, subsequent French conduct suggested that all-comprehensive sovereignty rights over the territory had been transferred. In the majority of cases, the subject of natives' proprietary rights to land was addressed and arranged explicitly in the treaties. Formulations such as 'Les chefs et tous les indigènes conservent l'entière propriété de leurs terres' are common in French protectorate treaties.⁴⁶ A final observation is that a majority of the treaties concluded in the 1860s were signed by official representatives of the French government, often in a military capacity. This indicated the public nature of the French colonial venture, a corollary of the French policy of direct rule.

On 17 October 1867, the French High Commissioner of Gabon and the Gold Coast, Mr Fleuriot de Langle, signed a protectorate treaty with the rulers of the Seckiani, a people on the Gabonese coast. This treaty followed earlier treaties of commerce and political relations concluded in 1842, 1844 and 1845, and aimed at establishing a French protectorate. Article 2 of the treaty stated that the rulers consented to French intervention in political affairs: '[N]ous avons librement consenti entre ses mains un traité qui donne à la France le droit d'intervention politique dans nos affaires.' The treaty also expressed the intention to treat the African natives and French citizens as equals (Article 5). In the final provision of the treaty, the native rulers undertook to place themselves under the sovereignty of the French government and to become subjects of the French Empire (Article 6). The object of the treaty – transfer of partial external sovereignty – was clear, but the extent of the transferred sovereignty was not. On the one hand, the text seems to indicate the transfer of full internal and external sovereignty rights. For example, the provision on equal treatment of African natives implies that the African polity was placed under French supervision and supports the claim that sovereignty was ceded. On the other hand, the treaty is officially archived in the French records as a protectorate treaty, which suggests the transfer of external sovereignty rights only. In addition, the treaty did not address the issue of the effect of the treaty on existing rights to

46 Article 3 of the protectorate treaty between France and the rulers of the Konga territory of 12 October 1888. A.J.H. de Clercq and J. de Clercq, *Recueil des Traités de la France*, vol. xviii (Paris: Durand et Pedone-Lauriel, 1893), 120–121.

land. No mention was made of native land ownership. This is another indication that this treaty established a protectorate, because such rights need not be addressed when instituting a relationship of protection. This lack of specificity might even benefit the native population, because there was a very real chance that formulating existing rights would narrow their scope.

The race for African territory, more specifically Equatorial Africa, truly began in the 1870s. On 24 October 1877, for example, the rulers of Fouta placed their territory 'sous la protection de la France.' Several explorers entered the mainland of Equatorial Africa, with De Brazza as the main contender. His first mission was from 1875 to 1878, which took him to and beyond the Ogooué River, second in importance to the Congo River only, and two branches of the Congo, the Alima and the Likona. De Brazza concluded various treaties with African rulers and their people, creating the protectorate of French Congo, which contained 'un grand nombre de petits royaumes ou de villages, grâce aux traités régulièrement passés avec les chefs indigènes par M. de Brazza lui-même.'⁴⁷ The protectorate existed of a patchwork of native kingdoms and other political entities, with which De Brazza had concluded treaties. When De Brazza encountered African tribes living on the banks of the river occurred, local rituals and customs were observed to establish friendly relations and trust between the African natives and the French.⁴⁸ These contacts were vital in opening the door to French trade on and rule over the territory.

During his second mission in Equatorial Africa, which started in 1879, De Brazza aimed to open up the Congo and to secure for France free navigation of the Congo River. It was not all plain sailing though: Stanley entered the fray. What emerged was a competition for treaties to acquire title to territory in this part of Africa between an Italian who acted in the name of France and a British American who served a Belgian sovereign. Before De Brazza founded Franceville on the confluence of the Ogooué and the Passa, he set foot on the territory of the Batékes. This native community was ruled by King Makoko. Makoko welcomed De Brazza and subsequently signed a protectorate treaty on 10 September 1880. This protectorate treaty with the Batékes people is one of the most cited treaty texts in French colonial history, and it is yet another case of ambiguity attending the distinction between cession and establishing a protectorate appeared. This confusion was mainly caused by the use of the words 'prise de possession.' According to the literal text of the treaty, Makoko transferred external and internal sovereignty over the territory to France. It is

47 Rouard de Card, *Traités de Protectorat*, 84.

48 West, *Brazza*, 83. The French could, however, count for native resistance too. *Ibid.*

clear that the sovereignty rights over the specified territory were ceded from Makoko to De Brazza. The treaty emphasised taking possession of the territory in the name of France. The term possession was used, referring not to the public but rather the private law sphere. What remained unclear was whether this meant the transfer of external and internal sovereignty or merely external sovereignty over the territory and whether proprietary rights to the land were involved in the transfer or not.

Two opposing explanations can be offered for the fact that the treaty either mentioned native property rights not at all or only in passing. One is that the treaty concluded between De Brazza and Makoko established a conventional relationship of protection, leaving internal sovereignty rights, and by extension the right to possess and allocate private rights to property, to the people of the Batékes. The other is that full sovereignty over the territory was transferred, as part of which transfer the French also obtained the competence to acquire and allocate property rights to land. From the treaty text the nature of the treaty cannot be derived. French legal doctrine, however, assumed that the treaty established a protectorate over Makoko's territory: 'Le 10 septembre 1880, intervint une traité par lequel le roi Makoko soumettait ses Etats à notre protectorat.'⁴⁹ It was not until November 1882, that French Parliament recognized the series of bilateral treaties concluded by De Brazza with African rulers, constituting the French Congo.⁵⁰ Many French jurists regarded the treaty as genuinely negotiated between De Brazza and Makoko – 'Makoko was neither coerced nor tricked'⁵¹ – and that the treaty was therefore to be conceived as having been validly concluded. According to these authors, among whom Henry Brunschwig, the treaty between the two parties was concluded on a basis of equality and brought reciprocal advantages, and was therefore not founded on the hierarchical relationship presumed by the civilization mission.

After having mandated sergeant Malamine to establish colonial rule over the protectorate, De Brazza continued on his explorative and acquisitive journey into the *Hinterland* of Gabon along the Congo. He was, however, not the only person acting and concluding treaties under the auspices of France.

49 Rouard de Card, *Traité de Protectorat*, 85.

50 The ratification of the treaty with King Makoko was asked for separately by the Government to the Chambers. For the text of the request, see Dubois and Terrier, *Colonies françaises*, 605. For more details on this treaty and its ratification by the French Government, see J. Stengers, 'The Partition of Africa: L'Impérialisme Colonial de la fin du XIX-Siècle: Mythe ou Réalité,' *Journal of African History*, 3 (1962), 469–491.

51 H. Brunschwig, 'La négociation du traité Makoko,' *Cahiers D'Etudes Africaines*, 6 (1966), 11. See also West, *Brazza*, 110.

In addition to the efforts of several explorers to establish a French protectorate in Equatorial Africa,⁵² the Ministry of the Marine in the 1880s directed attempts to establish new settlements in the estuaries of the Congo and Ogooué rivers. The responsible minister instructed Mr Cordier, the commandant of the ship *Sagittaire*, to conclude treaties with the natives living in these deltas. On 12 March 1883, Cordier concluded a treaty with the King of Loango, Manimacosso-Chicusso, which placed the concerned territory under the protection of France. A closer look at the text of this treaty is necessary, because it is representative of the majority of the treaties concluded between French agents and African rulers in the area and because it uses some noteworthy concepts, formulations and references. The main provision of the treaty was Article 1: 'S.M. le roi de Loango déclare placer son pays sous la suzeraineté et le protectorat de la France.' On the basis of this provision Manimacosso-Chicusso placed his territory under the suzerainty and protection of France. The use of the feudal law concept of suzerainty is noteworthy. The term protectorate in combination with suzerainty was common in French protectorates.⁵³ Although establishing a protectorate and referring to a suzerainty relationship are not necessarily contradictory, their combined use can and did cause confusion. On the one hand the term suzerainty suggested a hierarchical relationship between France and the African polity. On the other hand, a protectorate presumed the existence of reciprocal obligations between the two contracting parties. Despite (or quite possibly because of) this ambiguity, treaty formulations of this kind enabled France to divide sovereignty rights between itself and the native ruler.⁵⁴ A case in point is the treaty with native ruler Moré Sédou of 21 April 1880, who placed 'son pays et ses sujets sous la suzeraineté et la protection de la France.'

52 Notorious names of explorers were those of Dolisie, Dunod, Fourneau, Cholet, de Poumayrac de Masredon and Gaillard. A. Dolisie concluded an important treaty with the native rulers of the territories of Mobendjellé, on 5 September 1887. For the treaty text, see Rouard de Card, *Traité de Protectorat*, 182–183.

53 Treaties containing this combination of suzerainty and protection regarded the territories of Haback (21 April 1880), Candiah, Maneah and Tombo (20 June 1880), Loango (12 March 1883), Bramaya (14 June 1883), Bangone and Betimbe (5 September 1883), Ouvia (23 August 1884), Djolof (18 April 1885), Caniak (2 February 1887), Impfondo (21 September 1887), Bougombo (6 October 1888), Bozolo (8 and 9 October 1888), Bozagné (11 October 1888), Badjongo (11 October 1888), Konga (12 October 1888), Bodjo (19 October 1888), Boyelé (21 October 1888), N'Goma (22 October 1888), Mondjimbo (23 October 1888), Bollembé (30 October 1888) and Longo (4 November 1888). See Hertslet, *Map of Africa by Treaty*, 634–641.

54 See Alexandrowicz, *European-African Confrontation*, 80.

Unlike the foregoing treaties, the protectorate treaty concluded with Manimacosso-Chicusso explicitly mentioned the property rights of the African inhabitants. Article 3 stipulated that Manimacosso-Chicusso and his subjects would retain their property rights and the liberties accompanying these rights, such as use and sale of the land. Article 4 laid down the freedom of commerce, the prohibition of slave trade and the acknowledgement of the equal status of the African and French contracting parties. These provisions suggest a non-hierarchical protection relationship. The reiteration of the prohibition of slave trade appeared in almost every treaty which the French concluded with African natives. The assertion of this prohibition reflected French commitment to human civilization and served first and foremost to advertise and justify French colonial practices on the African continent. Article 5 was an exclusion clause. The last provision of the treaty acknowledged the public nature of the agreement by stating that the treaty would enter into force after French Parliament had ratified it.

As compared to the treaty concluded with the King of the Batékes, this treaty was far more detailed and precise on the object of transfer. Clearly, the territory of Manimacosso-Chicusso was placed under the protection of France and the natives' property rights would be respected. Property rights were not included in the transfer of rights over the territory: they were left unaltered in the hands and at the free disposal of the African natives. To all intents and purposes then, a traditional protectorate was established: Manimacosso-Chicusso retained his internal sovereignty and therefore the authority to allocate and regulate property rights. Numerous treaties were concluded in the Congo containing a general provision to the effect that the African ruler concerned, representing his people in the treaty with the French, and his people would retain the property rights to their lands: 'Conserveront l'entière propriété de leurs terres.'⁵⁵

A good example of establishing a traditional protectorate is offered by the treaty between France, represented by Captain Galliéni, and several African rulers in the Haut-Niger territory on 3 April 1880. The rulers declared that they 'vivent indépendants de toute puissance étrangère et qu'ils usent de cette indépendance pour placer, de leur plein gré, eux, leur pays et les populations qu'ils administrent, sous le protectorat exclusif de la France' (Article 1). In this provision then the rulers asserted their independence and agreed to place it

55 *Ibid.*, 102. Treaties containing this clause are enumerated by Alexandrowicz: the treaty with the rulers Ouyiou and Kikoua Mobai on 15 August 1891, Zebia and Couma of Libonga on 28 August 1891, DOUNGOUTA of Cetema on 30 August 1891, the ruler of Dambassa on 1 September 1891, and Nikessé of Yakomo on 6 September 1891.

exclusively under French protection. Article 2 described in some detail what this protection by France entailed: 'Le Gouvernement français s'engage à ne jamais s'immiscer dans les affaires intérieures du pays, à laisser chaque chef gouverner et administrer son peuple suivant leurs us et coutumes ou religion; à ne rien changer dans la constitution du pays qu'il prend sous la protection.' A protectorate, in its traditional sense, meant abstaining from interference in the internal affairs of the native population and respecting their laws and customs. The same formulation can be found in the treaties with the ruler of Fouladougou, Bouloukoun-Dafa, concluded on 16 April 1880 and with the rulers of the Kita territory of 25 April 1880. A frequently used variation on the clarification of the division of rights and duties within a protectorate can be found in the treaty concluded with the King of Gadougou on 12 March 1881. In Article 1, the King declared to place his territory under the exclusive protectorate of France and, in Article 2, France 'promet aide et protection au roi Bassi; elle ne s'immiscera pas dans les affaires intérieures du pays.'

This extensive explanation of the division of rights between France and the native ruler in the context of a protectorate disappeared from the treaties in the course of time. In 1884, for example, when a French protectorate was established over the territory of Niécoma, Article 1 stated the following: 'Le pays de Niécoma est placé sous la protection de la France.' No description or indication of the rights and duties of either treaty party was given. Another example of a basic protection treaty is that signed on 15 December 1883 by the rulers of the Bata territory and France in Libreville. The rulers 'demand[ent] la protection du Gouvernement français' – they asked for the protection of the French government. What this protection entailed was not articulated. This became common practice in the treaties concluded during the last two decades of the nineteenth century. For example, the treaty with the rulers of Cottocrou, concluded on 21 July 1887, only stated that the rulers concerned 'reconnaissent la protection française,' and in the treaty of 23 December 1888, the ruler of Kantora declared that his territory 'est placé sous la protectorat de la France.'

In addition to individuals, whether or not mandated by the French State, associations also entered into treaties with African rulers. The aim of the treaties concluded by these associations was that of 'relinquishing sovereignty,' as Alexandrowicz characterizes the purport of the activities of these associations.⁵⁶ The private initiatives of the associations led by the French explorer

56 *Ibid.*, 58–59. Examples of provisions stating that cession of territory 'involves relinquishment' of rights are to be found in the treaty with the King of Dieba of 14 June 1883, the King of Vindenou of 29 December 1883 and King Kinguela Macassa of 20 March 1884. *Ibid.*, 59.

Paul Crampel (1864–1891) and the Polish explorer Jean Dybowski (1856–1928) were welcomed enthusiastically and supported by the French government. Both men contributed to the territorial extension of France by signing several treaties with native rulers. A treaty that is representative of these private initiatives is the treaty of 18 October 1888 concluded between the rulers of the villages of Mindong and Kaléton and Crampel, who signed the treaty in the name of France. Article 1 brought the territories and peoples of Mindong and Kaléton under the ‘sovereignty and protection’ of France and confirmed that other nations were excluded from obtaining sovereign rights over the territories concerned: only external sovereignty rights would change hands. However, the substance of the relationship of protection was not defined and articulated. Under Article 2 and 4, the French treaty party received some rights and privileges regarding the use of the territory, but the treaty text did not imply or suggest installing a French administration. These provisions can be construed as an intention of the French not to interfere with the internal sovereignty of the African rulers. Article 3 subjected the settlement and acquisition of land within the territories concerned by Frenchmen and ‘strangers’ to approval of the French authorities, more specifically the commissioner-general.⁵⁷ While this indicates French interference with the internal sovereignty rights of the rulers of the Mindong and Kaléton polities, at least in relation to strangers, it does not automatically exclude a relationship of protection. Article 3 did imply that the natives could not freely dispose of their property rights, but in Article 5 the French undertook to respect the law and customs of the native inhabitants, as long as these did not contradict humanity. Article 6 stipulated that the natives would be treated as French subjects. That the agreement involved the establishment of a treaty relationship between France and the native rulers was recognized in Article 7, which referred to the need of treaty ratification.

The vagueness in determining the object of transfer indicates that the French gave themselves room for discretion. In the twilight zone between cession and protectorate, they were free to act as if they held sovereign authority in controlling the territory and to serve French interests. The treaties France concluded with native rulers exemplify the paradox of the colonial protectorate. On the one hand only external sovereignty rights were subject to transfer, as the establishment of a protectorate indicated. On the other hand, the extent of the transferred sovereign rights was indeterminate, which imbued the French with much space to expand their rule over the territory, as will be

57 ‘Aucun Français ou étranger ne pourra s’établir ni acheter de terrain dans la région s’il n’est agent du gouvernement et envoyé par le commissaire général ou l’autorité compétente ou s’il n’a reçu de la dite autorité une permission spéciale à cet effet.’ *Ibid.*

argued later on (§4). In comparison to Britain, France was less reluctant to employ colonial protectorates. The use of open formulations and contradictions left room for discretion on the side of the French authorities.

Another situation in which the precise object of transfer and the division of sovereignty rights were left undetermined was the treaty concluded between France and King Glass, ruler of his people living in a part of Gabon, on 28 March 1844. Article 4 of the treaty contained a non-intervention clause stipulating that '[c]onsidérant la bonne administration intérieure du Roi Glass rien n'y sera change.' Here, the division of sovereign rights into an external and an internal element, between the protector and the protected, was obvious. Article 1, however, seemed to imply the transfer of external and internal sovereignty in that it stated that 'Le Roi Glass [...] concède la souveraineté [...]' What this formulation makes clear is that the French were well aware of the distinction between a protectorate and a colony or annexation.

In response to the increasing competition for African territory in the last two decades of the nineteenth century, the French simplified their treaty texts. Short and standardized treaties became common practice in the rush for territorial title. Such a standard treaty, consisting of three sentences, was concluded on 5 December 1891 between Dybowski and M'Poko, the ruler of the villages of Makorou.⁵⁸ Under the exclusion clause,⁵⁹ the territory was placed under the protection of France. Under this treaty the natives committed themselves to protecting French citizens and to guaranteeing the French free passage and settlement on the territory. This indicated that the rulers retained their rights of internal sovereignty. As in other protectorate treaties, the substance of this relationship of protection was not determined, but in view of the wording of the treaty a traditional protectorate was established, implying that only external sovereignty was transferred from the native ruler M'Poko to France.

3.3 *Evaluation of French Treaty Practices*

What does this analysis of French treaty practices in Equatorial Africa yield? First, from the 1850s onwards, the nature of French treaty practices on the African continent gradually changed. Initially, cession under the assumption of the continuity principle was the main mode to acquire sovereignty over African territory. Cession, however, was soon abandoned and establishing protectorates became the means to gain control over territory. The French developed a broad practice of instituting colonial protectorates on the basis of bilateral

⁵⁸ Rouard de Card, *Traités de Protectorat*, 186–187.

⁵⁹ Often this exclusion clause was accompanied by the prohibition directed to the African natives to alienate land to other Europeans. See Dareste, *Recueil de législation*, 1827, 2.

treaties they concluded with native rulers. From a financial, political and practical perspective, annexation of African territory was undesirable and impossible. Title to African territory had to be acquired through protectorate treaties that aimed to exclude other European States from claiming the territory. Preferring protectorates to cession of sovereignty over territory was a carefully considered policy change implemented by the French colonial power.

Second, the substance of the established relationships of protection was indeterminate as a result of ambiguous and contradictory terminology, such as the simultaneous use of protectorate-related terminology and the concept of suzerainty. While the wording of the treaty would often indicate a traditional protectorate based on a relationship between equal parties, the African polity was placed under the suzerainty of France, a move which effectively constituted a hierarchical relationship between the dominant French and the subordinate African contracting parties.⁶⁰ Some of the first treaties included a non-intervention clause. Such a clause stated that the treaty-based relationship of protection between Frenchmen and African natives conferred external sovereignty rights on France, while the African ruler preserved the authority over the internal affairs of his polity. In addition, the French contracting party often expressly undertook to respect native laws and customs on condition that these did not conflict with French standards.

Third, if existing rights to land were mentioned in the treaties at all, France promised to respect them – in keeping with the continuity principle. Free disposal of the property and rights was excluded; such disposal was subject to French approval. The treaties concluded in the period when the scramble was at its fiercest did not address existing rights of natives at all.

Fourth, the French civilizing mission was incorporated in the treaties. The African contracting party was expected to accommodate French individuals and authorities and to develop its culture in accordance with French civilization.⁶¹ Assimilation of local people to French law and customs was often explicitly addressed in the treaties with such formulations as ‘Le chef s’engage à user de toute son influence pour faire bénéficier les populations soumises à son autorité de tous les avantages de civilisation.’⁶²

60 See Galtier, *Conditions de l’Occupation*, 80.

61 See J. Vernier de Byans, *Condition Juridique et Politique des Indigènes dans les Possessions Coloniales* (Paris: Leclerc, 1906).

62 Article 5 of the protectorate treaty between France and the ruler of the Bodjo-Bagoumba territory (Congo) of 19 October 1888. A.J.H. de Clercq and J. de Clercq, *Recueil des Traités de la France*, vol. xviii (Paris: Durand et Pedone-Lauriel, 1893), 140–141.

During the scramble for Africa, the French used standardized treaties which established relationships of protection. Towards the end of the European race for territory, the wording of French treaties with native rulers became increasingly vague, especially in describing which rights were transferred to what extent from the ruler to France. This indeterminateness gave the French much room for discretion in interpreting and executing the treaties. This evaluation raises the question whether and how treaty obligations and guarantees were brought into practice and whether this practice observed contemporary international law. To address this question the following sections will explore the legislation enacted by the French authorities in the territories in Equatorial Africa and case law on the conduct of France after it had signed a protectorate treaty.

4 Legislation in the Wake of the Transfer of External Sovereignty

France regarded its overseas territories as extensions of the European motherland: the colonies were integral parts of the French Republic and the Colonial Office was charged with the central organization of the colonial system. In fulfilling its task, the Colonial Office was supported by the *Conseil Supérieur*, an independent organ of experts that was tasked to give advice on colonial matters. The Colonial Office functioned on a very general level in that it only observed everyday colonial matters and developments. In practice, the Ministry of Foreign Affairs and the Ministry of Interior Affairs determined the actual administration of the colonies. The French Ministry of the Colonies is often characterized as being 'the mouthpiece of central interests' in that it had 'no function of linking the interests of both colony and mother-country.'⁶³ The Colonial Office was used as an instrument by two Ministries to realize their politics.

The French authorities preferred to rule the overseas territories through legislation and by applying the legal system directly, but the French government was forced to delegate competences to authorities and private individuals and companies in the colonies themselves, because centralized rule over the overseas territories proved untenable. Nevertheless, French Parliament retained its position of sovereign power in that its acts could not be challenged and it had the power to bar any legislative act in and regarding the overseas

63 Roberts, *History of French Colonial Policy*, 136. Roberts adds to this: 'Nor is it [the French Ministry of Colonies] concerned only with questions of general policy: it administers and governs as well decides policy.' *Ibid.*

territories. French Parliament used its competence to legislate in all matters colonial. Legislation in the colonies existed for the greater part of decrees, ordered and imposed by French authorities. Legislating by way of decrees was considered an effective and consequent way to control non-European territories.⁶⁴

Decrees regarding concessions and determining the public domain in French Equatorial Africa were necessary to organize the territory and possession of land.⁶⁵ Legal security in transactions of real estate and low transaction costs were essential to territorial trade and exploitation. A special commission was established in 1898, which had to design a concession system enabling companies to divide the lands in Equatorial Africa. The concession system was based on two premises: French land law applied to the African territories and the French State owned all lands which were 'vacant et sans maître.' France had the right to dispose of the land and allocate possession of it to others, and concessionaires' associations obtained a monopoly on land possession.⁶⁶ To achieve effective control over the territory, establishing a regime of registered property and determining public domain lands were crucial. Decrees were proclaimed enabling large-scale concessions and allocations of land by and to France and its subjects.⁶⁷ This system of concessions delegated to some large colonial companies 'la libre possession de certains territoires avec obligation pour elles d'y créer des routes, d'y améliorer le cours des fleuves, d'y utiliser le sol, mais aussi avec la sécurité que personne ne pourra venir derrière elles jouir et bénéficier de leurs dépenses et de leurs efforts.'⁶⁸ These associations were given the right by the French State to use the land and to buy plots of land from native inhabitants which they possessed within ceded territory.⁶⁹ By simple decree – bypassing both French Parliament and the *Conseil d'Etat* – the French government delegated the authority to organize the police force, levy taxes, administer justice and conclude treaties with other nations to these colonial companies.

64 On French legislation in its overseas colonies, see P. Dislère, *Traité de législation coloniale*, 2nd edn (Paris: Dupont, 1897).

65 See J. Imbart de la Tour, *La question du domaine et l'organisation de la propriété dans les colonies françaises* (Paris: Challamel, 1900).

66 For the conditions to obtain a concession, see *Journal Officiel du Gabon*, 1^{re} année, N° 8, p. 3, as published Rouget, *Expansion coloniale*, 617.

67 See Paulin, *Afrique Equatoriale*, 78.

68 E. Etienne, *Les compagnies de colonisation* (Paris: Challamel, 1897), as quoted by Paulin, *Afrique Equatoriale*, 78. See also Pauliat Report in *Journal Officiel* (1898), 13.

69 F. Challaye, *Le Congo Français. La Question Internationale du Congo* (Paris: Alcan, 1909), 168.

An example of a decree instituting a large-scale concession system was the decree of 28 March 1899, promulgated in French Congo. The concessions involved hundreds of thousands of hectares of land.⁷⁰ The decree stated that the concessionaires would have a quasi-monopoly for thirty years on the agricultural and industrial exploitation of the specified lands as well as on the exploitation of the forests.⁷¹ In exchange for the use and exploitation of the land, a license fee had to be paid and the French administration was authorized to intervene in this system of conceding and allocating land.

As a consequence of the extent of the rights and liberties the French State was willing to delegate, many associations and companies of concessionaires⁷² were established to organize and exploit French territories, and a truly unprecedented rush for concessions ensued. Great parts of Equatorial Africa fell into the hands of private settlers and companies. Disorder came to dominate day-to-day reality and was ubiquitous: 'A concession virtually meant the handing-over of a given area to a private Company, with its power untrammelled within that area, – in fact, the setting up of so many *enclaves* of practically independent trading kingdoms within the colony.'⁷³ Often the companies did not observe the principle of free navigation, did not comply with the rules and conditions imposed by the French authorities and failed to respect the rights of the native inhabitants – the latter were frequently dispossessed.⁷⁴

Instituting these concession systems met with resistance. Opponents of the system pointed to the presence of African polities and argued that the lands of Equatorial Africa were held in collective property by the indigenous inhabitants. These lands, the critics argued, were not 'vacant et sans maître,' they were not *terra nullius*. In fact, so the critics argued, African natives were dispossessed of their lands as a consequence of the concession systems. Regarding these dispossessions, Félicien Challaye (1875–1967), a lieutenant of De Brazza,

70 Already in 1893 the so-called Daumas concession took place, which conceded 11 million hectares from the French State to the settler Daumas. For the text of the concession document, see Rouget, *Expansion coloniale*, 610.

71 Paulin, *Afrique Equatoriale*, 79.

72 The active associations of concessionaires were in Gabon, the *Société agricole, forestière et industrielle pour l'Afrique (S.A.F.I.F.)* and the *Compagnie de la N'Goko-Sangha* (later the *Compagnie Française Congo-Cameroun*); and in the Moyen-Congo, the *Société française du Haut-Congo*, the *Société l'Alimaïenne*, the *Société de l'Ongomo*, the *Société de l'Alima*, the *Compagnie de la Lefini*, the *Compagnie de la Kimé et de la Kéni*, the *Société de la Sangha Equatoriale*, the *Compagnie forestière Sangha-Oubanghi* and the *Société Française l'Ouhamé-Nana*. See Paulin, *Afrique Equatoriale*, 81–82.

73 G. Bruel, *L'Afrique Equatoriale Française* (Paris: Larose, 1918), 430.

74 Paulin, *Afrique Equatoriale*, 79.

who was to report on French colonial practices, stated that France did not observe its international obligations. He urged the French State to intervene and put a stop to the illegal situation.⁷⁵ Paris did react. In 1898, a Commission of Colonial Concessions was set up in Paris, which introduced a new concession system by formulating the obligations of the individual and collective concessionaires in the famous Pauliat Report.⁷⁶ The Report supported the idea of establishing reserves in which the natives had to live, a suggestion adopted by the French authorities. What the Report did not do was end or limit the race between French companies for concessions to African land.

In addition to instituting concession systems, the French authorities introduced a registration system for real property. This system of land ownership registration was based on the French *Code Civil* and aimed to bring order and prevent conflicts. These objectives were, however, never realized. The registration system turned out to be so complex as to render the desired overview unattainable, and it resulted in conflicts between Europeans and between Europeans and African natives. The French authorities responded by enacting more legislation and the resultant workload increase caused the colonial judicial system to grow exponentially.

In an attempt to establish effective control and to regulate the appropriation and allocation of rights to land in Equatorial Africa, the French created new administrative and judicial bodies. Direct rule implied the imposition of French administrative and judicial culture on the native inhabitants: dictated assimilation.⁷⁷ Although the native population of Equatorial Africa resisted French rule, they were unable to stop France's imperial expansion and its consequences. Colonial legislation extinguished African natives' rights.⁷⁸ Both native sovereignty and property rights were undermined after the protectorate treaties had been concluded. Whether this unilateral extension of French sovereignty over African territory accorded with contemporary international law is an issue that will be addressed in Chapter 8.

5 Case Law and the Interpretation of Treaties

French conduct after the protectorate treaties in Equatorial Africa had been concluded entailed the gradual acquisition of full sovereign powers over the

75 Challaye, *Congo Français*, 185. See J.-L. de Lanessan, *Principes de Colonisation* (Paris: Alcan, 1897), 59.

76 Pauliat Report in *Journal Officiel* (1898).

77 Dareste, *Recueil de législation*, 12.

78 See De Lanessan, *Principes de Colonisation*, 59.

territory by the unilateral enactment of legislation. The French gave themselves the authority to regulate and allocate property rights, which in practice meant dispossessing natives and often relocating them to reserves. In their relations with other European colonial powers, the French government used the treaties with the African natives to substantiate their claims to the land. Using a selection of judicial decisions, this section offers a brief evaluation of France's interpretation and execution of its protectorate treaties.

The first thing to be observed is that French case law was not as extensive and rich as that of Britain. There are very few judicial decisions that directly address sovereignty and property rights and the relationship between the two concepts in the context of the French acquisition of African territory. In addition to the difference in legal traditions (civil law and common law), two main reasons can be adduced to explain the scarcity of relevant case law. First, the natives of Equatorial Africa had limited access to French colonial courts. Natives would face many obstacles in trying to bring their case before court: their presumed lack of civilization, the small number of colonial courts throughout the entire French-controlled territory in central Africa (making for virtually unfeasible travel distances) and the financial obligations attached to instituting legal action made it hard if not impossible for natives to claim their rights in court.

The judicial system in Equatorial Africa, modelled after the French domestic system, was hierarchical. The system ranged from courts of first instance to the highest instances of the *Cour de Cassation* or the *Conseil d'Etat*, both located in Paris. Courts were often called *Justices de paix*. Every protectorate, which was divided into areas, had its own judges and courts based on the model of French judicial organization. The French Congo, for example, had four *Justices de paix*, located in Brazzaville, Loango, Loudima and Ouesso. In Libreville, capital of the Gabon protectorate, a tribunal of first instance and a *Justice de paix* were instituted, and two *Justices de paix* could be found in the interior, in N'Djolé and Fernand Vaz. Oubangui-Chari accommodated two *Justices de paix*, one in Fort de Possel and the other in Bangui, and the protectorate of Dahomey boasted two *Justices de paix* (in Cotonou and Grand Popo). As these courts were instituted and managed by the French authorities, the independence and impartiality of the serving judges was not to be taken for granted. There was, however, also a number of mixed courts, in which both French and African judges settled disputes between Frenchmen and African natives.⁷⁹

The second reason for the relatively low number of judicial decisions was that the French legal system was bureaucratic and centralized. As there were many administrative procedures to be followed to file complaints against the

79 Alexandrowicz, *European-African Confrontation.*, 85–89.

French authorities, in the majority of cases a solution was found within the political and bureaucratic channels of French colonial administration. Most disputes on territorial rights and land ownership were settled out of court.

The introduction of the French legal system into Equatorial Africa was conceived as very formalistic. With the *Code Civil* as the fundament, French legal conceptions and constructs were applied to the African context. For example, the question whether taxes were indivisible in the case of African nations, as their property regimes regarding land were dissimilar to the French system.⁸⁰ The introduction by the French of concepts such sale and concession into these local systems of collective land ownership led to complex situations. According to the French colonizers, the sale of land in the strict sense of the word was ‘tout à fait inconnue des indigènes de l’Afrique [...] qui ne sont jamais entrés en contact avec des européens ou avec des indigènes civilisés.’⁸¹ As Chapter 2 has shown, the European categorization of natives’ property rights to land as collective, inalienable and dependent on the personal relationship between the rulers and their subjects did not match day-to-day reality.⁸² Nevertheless, the nature of native land tenure was totally different from ownership described in the *Code Civil*, determined as it was by the individual and alienable nature of property. Through the formalistic and assimilative approach of the French colonizers, a system of individual proprietary rights regarding land and the concession system were transplanted into the native legal system and society. Legal questions and conflicts were bound to arise.⁸³

For example, in a case before the French court at Loango (1900),⁸⁴ the main question was whether the natives living in a defined area of the French Congo possessed the land they inhabited. The conflict arose between British traders and the French State. The British traders claimed ownership of the land, arguing that African natives had owned the land they had transferred to the British, while the French litigant denied this could have happened, referred to the treaty concluded between the French agent Cordier and an African ruler on 12 March 1883. In the wake of this protectorate treaty, which did not determine the scope of the sovereignty rights transferred, the French introduced the system of land concessions. In essence, the Court had to decide whether it was the

80 Tribunal civil de Nouméa, 28 octobre 1925, in: Dareste, *Recueil de législation*, 1927.

81 P. Dareste, *Le régime de la propriété foncière en Afrique Occidentale* (Paris: Marchal et Billard, 1908), 8.

82 See *ibid.*, 16.

83 For more details and an extensive exposition of case law, see *ibid.* and P. Dareste, *Les collectivités indigènes devant les tribunaux français* (Cannes, 1912).

84 The case can be found in Roberts, *History of French Colonial Policy*, 350.

British or the French who held ownership title to the land and therefore had the power to alienate the land. The Court decided in favour of the French litigant by stating that the land fell within the French system of concessions, that within this system the land did not belong to the natives and that the natives could not have validly transferred title to the land to third persons without the approval of the concessionary power, i.e., the French administration. In other words, natives only possessed rights of enjoyment. It was France, according to the Court, that possessed the ultimate title of ownership to the land. As the natives had not owned the land, the British settlers could not have acquired this right, let alone transfer it.

In the *John Holt* case (1905),⁸⁵ the issue of the legality of the colonial protectorate was of some relevance. The *Cour de Cassation* had to decide whether the trading company of John Holt had proprietary rights to, exploitation rights of and building rights on a particular piece of land in French Congo. On the basis of the preceding decision of the *Cour de Cassation*, this question was answered in the negative: the French State had acquired exclusive rights of sovereignty over the territory as well as property rights to the land by way of occupation. The Court argued that under international law private persons cannot occupy territory. The Court based its reasoning on Article 539 *Code Civil* and the Decree of 28 March 1899, which implied that both the public and the private domain were in the hands of the French State after it had acquired territory by way of occupation. All proprietary rights to land accrued to the French State. The Court referred to the rights of the African natives three times.⁸⁶ First, the Court spoke of the presence of African natives inhabiting the territory and the possibility of occupation at the same time. African natives inhabiting, using and owning the land did not prevent the Court from confirming the status of the territory as that of *terra nullius*. Second, the Court did not acknowledge the existence of natives' property rights to the land before the French acquired the territory. According to the Court, natives did not possess the land by French standards of land ownership. Third, the Court recognized the applicability of international law in this situation. It argued that only sovereign States had the power to acquire sovereign rights over territory by way of occupation. The Court pointed out that occupation could only be effected by States, not by private persons or companies such as the trading company of John Holt.

85 *John Holt et C^o c. Cie Coloniale de l'Ogooué*, Cour de Cassation (Chambre civile), 30 March 1905, in: P. Dareste (ed.), *Recueil de législation, doctrine et jurisprudence coloniales*, vol. xiii (Paris: Sirey, 1905), 97–102.

86 *Ibid.*, 102.

The *Cour de Cassation* thus confirmed the transition from occupation of *terra nullius* to *territorium nullius* on the basis of the cultural differences between the French occupier and the native inhabitants.⁸⁷ In the *John Holt* case the Court argued that occupation, as a concept of international law, could only be effected by a sovereign State such and that through occupation France had acquired both all-comprehensive sovereignty rights over the territory and full rights of land ownership.⁸⁸ This ruling set a precedent for several judicial decisions.⁸⁹ This monopoly of the French State on the occupation of *terra nullius* conferred general and exclusive proprietary on the French State following occupation of territory. The presence of African people on this territory did not alter the status of the territory of *terra nullius*. The inhabitants people were considered non-civilized and their political entities non-States.⁹⁰ In sum, French colonial courts commonly upheld French occupation of African territory as well as its justification, the civilization argument.⁹¹

Nevertheless, the Court affirmed that the question of the applicability of international law required French lawyers to perform a delicate balancing act. On the one hand they would argue that international law regulated only relations between the members of the family of civilized nations. On the other hand, they would have to admit that international law did play a part in the acquisition of African territory, as international law also governed relations between what were termed civilized and non-civilized countries. Whether France complied with its international obligations when it colonized Africa is a question that will be addressed at a later stage.

87 *Ibid.*, 97–102. See H. Bonfils and P. Fauchille, *Manuel de Droit International Public*, 3rd edn (Paris: Pedone, 1901), 300 and Jèze, *Étude théorique*, 59.

88 *John Holt et C^o c. Cie Coloniale de l'Ogooué*, Cour de Cassation (Chambre civile), 30 March 1905, in : Dareste, *Recueil de législation*, 1905, 97–102.

89 The judgment on the *John Holt* case formed a confirmation of several other decisions: Juge de paix de Libreville, 13 May 1899, *Recueil* 1899, 118; Conseil d'appel du Congo, 10 January 1900, *Recueil* 1903, 5; Chambre des requêtes, 11 March 1902, *Recueil* 1903, 5; Juge de paix de Loango, 27 November 1901, *Recueil* 1901, 96 ; Conseil d'appel de Libreville, 27 November 1901, *Recueil* 1902, 26; Juge de paix de Libreville, 24 September 1900, *Recueil* 1901, 96; Conseil d'appel de Libreville, 24 October 1901, *Recueil* 1901, 168; Tribunal civil de Libreville, 16 January 1902, *Recueil* 1902, 56; Conseil d'appel de Libreville, 17 June 1902, *Recueil* 1903, 61; Tribunal civil de Libreville, 18 June 1902, *Recueil* 1903, 22; Tribunal supérieur de Libreville, 27 January 1904, *Recueil* 1904, 132 and Tribunal de 1re instance de Libreville, 14 May 1903, *Recueil* 1905, 73. These cases were all published in Dareste, *Recueil de législation*, 1905.

90 See, for example J. Chailley, 'La Politique Indigène aux Colonies,' *Revue Bleue*, 12 (1888), 354–358; and A. Girault, *Les Colonies Françaises avant et depuis 1815* (Paris: Sirey, 1943).

91 Dareste, *Recueil de législation*, 1927, 6.

There is hardly any case law that sheds light on the relationship between French and African sovereignty rights and on how this relationship affected property rights. French authorities or settlers and African natives rarely met head-on in legal proceedings. In the majority of cases, sovereignty and proprietary issues arose in disputes between French settlers or companies and French local authorities. Many disputes over the concession system were brought before colonial courts. French courts often had to offer an interpretation in conflicts between Frenchmen, and in these legal disputes native land ownership, natives' private property rights, the definition of uninhabited territories and the nature of rights transferred from African natives to French colonialists were rarely involved directly.

As mentioned earlier, the concession system, which presupposed the applicability of French law and the absolute property rights of the French State, had to organize and allocate land ownership to establish legal security regarding transactions of real estate and reduce transaction costs. While under these concession systems natives often retained the option to acquire title to a piece of land, in practice hardly any native inhabitants exercised it. Natives tried to live as much as possible in accordance with to their own laws and customs. From the case law of colonial courts it can be inferred that French courts tried to do justice to both natives and the French colonizers: they would recognize native property rights yet at the same time confirm the absoluteness and exclusiveness of French property rights to African land. Although there were cases in which judges reminded the French of the rights of African natives and of the duties of the French colonizer towards the native populations, the legality of cession and protectorate treaties and the subsequent implementation of the concession system were never questioned, let alone rejected.

Whether, in the case of cession, the continuity principle was respected, whether the French failed to comply with their obligations articulated in protectorate treaties, whether natives' rights of sovereignty and property were impaired, and whether international law was violated are questions the French judiciary did not address. As a consequence of regarding the colonization of Africa as an Act of State, French courts never evaluated its legality: Acts of State could not be subjected to judicial review.

6 Conclusion

Although the French did not use cession treaties to acquire territorial rights very often, ceding territory by way of treaty was a recognized mode of territorial acquisition and the French did sometimes use it. As has been shown,

cession treaties transferred full sovereignty over territory from native rulers to the French. In keeping with the continuity principle, no property rights were involved in these transfers, a matter which was explicitly stipulated in the treaties.⁹² Soon after the treaties had been signed, however, existing rights to the territory were extinguished. The French introduced their own methods and systems of regulating and allocating proprietary rights to land, and these methods and systems ignored native sovereignty and land ownership. Day-to-day practice showed that the protected African territory came under French colonial rule. This raises the question whether France acted in accordance with the law.

The legality question also comes to the fore in the context of treaties establishing protectorates. In traditional protectorates, sovereignty was divided between France as the protector and the African native polity as the protected entity without any diminution of sovereignty rights.⁹³ Tasks and competences had to be assigned to both France and the African ruler. The French, however, faced problems which required them to intervene directly and consequently to extend their sovereignty rights to include not only external relations and defence, but also internal affairs. This development required French legal doctrine to justify French appropriation of extended sovereignty rights at the expense of the competences of the African ruler. French legal doctrine argued that although France promised to preserve native institutions, laws and customs as much as possible, changes and interventions by French authorities were unavoidable.

According to the French jurist Arthur Girault (1865–1930), there were several reasons why France needed to extend sovereign rights over the territory from external to internal sovereignty.⁹⁴ The first of these was that all legal institutions inevitably evolve over time. After the protectorate treaties had been concluded, transformations in the law were necessary to respond to the day-to-day problems that arose in society. Native legal institutions in Africa had to evolve: new needs arose because of the European presence on the African ground, and this presence created challenges for the natives to adapt to the new situation. New legal institutions were established under French rule. In other words,

92 However, many exceptions on the rule exist. See Jèze, *Étude théorique*, 203.

93 A. Girault, 'La condition juridique des indigènes dans les pays de protectorat,' in: P. Daresté, *Recueil de législation, doctrine et jurisprudence coloniales*, vol. 25 (Paris: Sirey, 1922), 3. The sharing of sovereignty was confirmed by Engelhardt: E. Engelhardt, *Les Protectorats Anciens et Modernes* (Paris: Pedone, 1896), 207.

94 Girault, 'Condition juridique des indigènes,' 3–6.

Girault asserted that France was permitted to interfere in the internal affairs of the protected African territories, because it became part of them.

Girault's second argument is that the case law of the colonial courts and tribunals expanded and influenced the evolution of the law in the protectorates. The judicial interpretation of texts and the adaptation of customary rules were based on the changing factual situation in which these texts and customs had to function. Another factor that required native African law to evolve was the introduction of French legal concepts made. Moreover, French civil servants had to apply the law to every-day events and situations. The establishment and development of case law, the introduction of legal concepts and the presence of civil servants necessitated the French extension of sovereignty. In other words, French interference with the rights of internal sovereignty of the native ruler was *a posteriori* justifiable.

Girault's third argument supporting the rationale behind the French extension of sovereignty rights concerned the various legislative modifications imposed by the French. Although the French initially intended to introduce these legislative changes through a dialogue with the African natives, France eventually resorted to creating and enacting legislation unilaterally. Girault recognized that while the initial intention of mutual agreement was in conformity with the rationale of the protectorate treaty, in practice that intention never bore fruit. Decrees were the most frequently used legislative instrument to rule a protectorate. In Girault's view, extension of external sovereignty rights to control over internal affairs by way of unilateral legislation was acceptable.

Fourthly, in addition to the development of case law and the enactment of legislation, legal reports were written on the situation in the protected territories and the relationship between the French and the African natives. Nationally and internationally, the plurality and inconsistency of different legal systems proved problematic. Legal conflicts arose between France, the African polities and the international legal order. To settle and avoid disputes, differences between these three levels of legal order had to be resolved. Consequently, legislation had to be enacted to effectuate the necessary adjustments, which implied transformations in native law. Girault argued that for the benefit of French, native and international law, intervention in the internal affairs of the protected African entity was unavoidable.

Finally, the status of the natives after signing a protectorate treaty changed as a result of the French presence. Changing societal circumstances required the French colonizer to respond adequately. Girault gave these five reasons for French interference to justify French practices. It is perhaps worth noting that justifying the French extension of sovereignty rights after the protectorate treaties had been concluded can be considered to imply an admission on

Girault's part that France did not comply with its obligations towards the African ruler, nor towards the nation as a whole.

The jurist Édouard Engelhardt (1828–1916), assistant to Ferry (see Sections 1 and 2), clearly outlined France's duties towards the African nation when a protectorate had been established: 'Le protecteur et le garant en effet promettent aide et assistance au protégé et au garanti et il peut même arriver que l'engagement du garant comprenne la clause fondamentale, soit formelle, soit implicite, de tout pacte de protectorat, c'est-à-dire qu'il porte sur la défense de l'intégrité territoriale du garanti.'⁹⁵ Under the protectorate treaty, France guaranteed help and assistance to the protected, implying the crucial duty of defending the territorial integrity of the African nation. Although it fell to France to maintain external relations, African internal autonomy had to be respected. In practice, however, the natives lost their lands, including their proprietary rights to these lands, and the authority of the native ruler was impaired. According to Engelhardt, the transfer of external sovereignty itself implied possibilities of extending it to include competences that were originally part of the internal autonomy of the protected entity. In this sense, he agreed with Girault: the extension of France's sovereignty was a natural process triggered by the treaty-based establishment of a protectorate.⁹⁶

Another French jurist, Frantz Despagnet (1857–1906), confirmed that effective occupation of a protectorate would lead to the acquisition of all-comprehensive sovereign rights over territory in that a protectorate was 'une sorte de conquête morale precedent et justifiant par la suite la conquête matérielle.'⁹⁷ Despagnet argued that when a civilized State such as France established a protectorate in an uncivilized African entity, France imposed its sovereignty and the African entity would become a colony under the rule of the protecting State. After the protectorate treaty had been negotiated and signed, and as French legal doctrine asserted, annexation was therefore the logical next step.

Given these justifications for the French acquisition practices on the African continent, the question remains whether the unilateral extension of sovereignty by France on the basis of a protectorate treaty was legal. Was the acquisition of all-comprehensive sovereignty indeed a logical consequence or a natural process – in other words, a legal act – after a protectorate treaty had been concluded? More importantly, was France legally obligated to respect

95 Engelhardt, *Protectorats Anciens et Modernes*, 216.

96 See *ibid.*, 216–217.

97 Despagnet quoted in McCalmont Hill, 'Growth and Development of International Law,' 251.

native land ownership and the native ruler's sovereign rights, to comply with the treaty provisions and to act in accordance with international law? Chapter 8 will address these vital questions. According to Koskenniemi, the most characteristic aspect of nineteenth-century French international law was 'its ability to connect a cosmopolitan outlook with an impeccably patriotic alignment behind French interests.'⁹⁸ The question is, however, whether this French approach to international law represented and accorded with international law as it stood at the time.

98 Koskenniemi, *Gentle Civilizer*, 270.

German Cameroon

1 Introduction

After the unification of Germany in 1871, a decade passed before Germany's imperial ambitions and its quest for territorial expansion became a matter of public debate. In the 1880s, the call for colonial activities became stronger as German private trading companies applied to their government for an official mandate to acquire and rule African territory. Despite his initial reluctance to become involved in colonial affairs, Chancellor Bismarck yielded to the twin temptation of expanding Germany's international power and creating an overseas empire. The Germans acquired their first territories in the tropical and river part of Sub-Saharan Africa. The colonial protectorate of *Deutsches Kamerun* was established on the basis of bilateral treaties between Germany and African native rulers.

The central issue of this chapter is the German acquisition of Africa in particular Cameroonian, territory by way of treaties in the late nineteenth century. The aim will be to establish the historical context in which these treaties were negotiated and concluded and to analyse the treaty texts. The textual analysis will address property and sovereignty arrangements in the treaties transferring territorial sovereignty from the Cameroonian rulers to Germany. Once the treaty-making context has been outlined, the next question to be addressed is how existing sovereignty and property rights fared after the treaties had been signed. Specifically, the chapter will first discuss the historical context of the German colonial venture in Africa, more specifically Cameroon (§2). Second, protectorate treaties concluded between Germany and Cameroonian polities will be analysed to find out whether and how sovereign and property rights were mentioned (§3). Third, the chapter will examine how Germany established its control over the territory by means of legislation after the treaties had been concluded (§4). Fourth, the interpretation and execution of the treaties will be explored by discussing German conduct and the reactions of native inhabitants (§5). The chapter will conclude by making some observations anticipating the question whether Germany's acquisition of Cameroon was legal (§6).

2 Historical Background

Bismarck dominated the internal and foreign policies of the new German Empire from its foundation in 1871 to the early 1890s. He intended to transform

Germany into one of the greatest military powers on the European continent. In terms of imperial expansion, however, Germany was often considered to lag behind. In the early 1870s, Germany was neither prepared nor able to acquire overseas territories. It was fully occupied with internal affairs and was therefore not in a position to match the colonial aspirations of other European powers.¹ The unification of Germany, however, not only redrew the geographical map of Europe, it also betrayed a strong nationalistic mindset, which was a key driver of Germany's imperial expansion in the 1880s.² Initially, Bismarck had no need for colonies and even labelled colonial adventures as irrational activities.³ In the 1870s, Bismarck's diplomacy⁴ was trained on a calculated strategy

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- 1 For an extensive overview of the pressing internal affairs occupying German politics in the last three decades of the nineteenth century, see H.-U. Wehler, *Das Deutsche Kaiserreich 1871–1918* (Göttingen: Vandenhoeck and Ruprecht, 1994). See also W.J. Mommsen, *Imperial Germany 1867–1918: Politics, Culture and Society in an Authoritarian State* (London: Arnold, 1997).
 - 2 For an extensive overview of the general motives of the German colonization mission, see A. Bernard, 'Germany's Colonial Aims,' *Journal of the Royal African Society*, 16 (1917), 306–313; T. Büttner, *Geschichte Afrikas. Von den Anfängen bis zur Gegenwart*, vol. ii (Berlin: Akademie, 1976); F.R. Cana, 'German Aims in Africa,' *Journal of the Royal African Society*, 14 (1915), 355–365; Förster, Mommsen and Robinson, *Bismarck, Europe and Africa*; K. Hausen, *Deutsche Kolonialherrschaft in Afrika. Wirtschaftsinteressen und Kolonialverwaltung in Kamerun vor 1914* (Zurich, Freiburg: Atlantis, 1970); P. Heine and U. van der Heyden (eds.), *Festschrift zum 60. Geburtstag von Peter Sebald. Studien zur Geschichte des deutschen Kolonialismus in Afrika* (Pfaffenweiler: Centaurus, 1995); G. Knopp, *Das Weltreich der Deutschen. Von kolonialen Träumen, Kriegen und Abenteuern* (München: Pendo, 2010); Mommsen, *Imperial Germany*; H. Schnee, *Kolonialmacht Deutschland* (Berlin: Hillger, 1940); H. Sippel, 'Aspects of Colonial Land Law in German East Africa: German East Africa Company, Crown Land Ordinance, European Plantations and Reserved Areas for Africans,' in: R. Debusmann and S. Arnold (eds.), *Land Law and Land Ownership in Africa. Case Studies from Colonial and Contemporary Cameroon and Tanzania* (Bayreuth: Bayreuth African Studies, 1996), 3–38; H. Stoecker (ed.), *German Imperialism in Africa. From the Beginnings until the Second World War* (London: Hurst, 1977); H. Zache, *Das Deutsche Kolonialbuch* (Berlin, Leipzig: Andermann, 1926) and H. Zache, *Imperialismus und Kolonialpolitik* (Berlin: Kolonialdruckerei, 1927).
 - 3 Wesseling, *Verdeel en Heers*, 137. Bismarck put forward four different reasons why colonies would be an absurd liability for the Reich, which are formulated by Pakenham in the form of four questions: 'First, would new colonies pay their own way? ... Second, was public opinion ready for them? ... Third, how could the German navy defend such colonies? ... Fourth, what about the damage to his own diplomacy?' Pakenham, *Scramble for Africa*, 203–204.
 - 4 On the developments in the diplomatic field and the role of Germany, see A. Green, *Fatherlands: State-Building and Nationhood in Nineteenth-Century Germany* (Cambridge University Press, 2001); H. Kissinger, *Diplomacy* (New York: Simon and Schuster, 1994), 103–200; G. Knopp, *Das Weltreich der Deutschen. Von kolonialen Träumen, Kriegen und Abenteuern* (München: Pendo, 2010); Mommsen, *Imperial Germany*; W. Mulligan, 'Restrained

of diverting the attention and energies of the major European powers away from the European continent to overseas territories.⁵ Directing his attentions to sustaining the European balance of power and to strengthening Germany's position within Europe, Bismarck did not see colonization as the way forward. First, Germany had no military infrastructure and means to acquire and protect foreign territory, and Bismarck was loath to make the necessary investments. Second, Germany had no trading companies that were capable of exploiting the colonies on a large scale and Bismarck did not desire to facilitate them. Germany was not in need of resources. In fact, overproduction was already causing many problems on the European mainland. Third, the financial burden of acquiring and especially ruling colonies curbed public enthusiasm for a colonial venture in Africa. Or, in the words of Bismarck: 'Wir sind noch nicht reich genug, um uns den Luxus von Kolonien leisten zu können.'⁶ Bismarck's perspective on looking after German national interests in Germany's relations with other European States was continental; Bismarck's 'map of Africa was in Europe.'⁷

However, in the years 1884–1885 Bismarck changed his mind,⁸ as he came under pressure of the nationalist movements within parliament,⁹ the trading companies lobby and internal social problems. An accumulation of political, economic and social considerations were the incentive for Bismarck to participate in the quest for African territory. Mary Townsend eloquently describes this mixture of motives, which convinced German politicians, and Bismarck in particular, of the need for territorial expansion: '[A]n enhanced national consciousness expressed by Germans both at home and abroad; a swollen purse requiring objects for expenditure, and then a depleted purse in need of large dividends regardless of risk; and abnormally inflated production demanding outlet markets; mushroom industries clamouring for raw materials; an

Competition: International Relations,' in: S. Berger (ed.), *A Companion to Nineteenth-Century Europe, 1789–1914* (Malden, Oxford, Carlton: Blackwell, 2006), 401–422; J.L. Richardson, *Crisis Diplomacy. The Great Powers since the Mid-Nineteenth Century* (Cambridge University Press, 1994) and Wehler, *Deutsche Kaiserreich*.

5 W.J. Mommsen, 'Bismarck, the Concert of Europe, and the Future of West Africa, 1883–1885,' in: S. Förster, W.J. Mommsen and R. Robinson (eds.), *Bismarck, Europe and Africa* (Oxford University Press, 1988), 153.

6 L. Gall, *Bismarck: Der weiße Revolutionair* (Frankfurt: Propyläen, 1980), 617.

7 This remark was made by Bismarck to a German traveller in Africa on 5 December 1888, as quoted in Gall, *Bismarck*, 623.

8 See Wesseling, *Verdeel en Heers*, 142–144.

9 See P. Grupp, *Deutschland, Frankreich und die Kolonien* (Tübingen: Mohr, 1980), 47–85 and 86–211.

overstocked labor market using emigration as a safety-value; and finally, an ever growing navy promising protection to overseas ventures and investments.¹⁰ Bismarck's overall conclusion was that Germany could not afford to let France and Great Britain take the lead in the quest for colonies. Although the benefits of a colonial venture in Africa remained uncertain, Bismarck argued that Germany's future depended on overseas possessions.¹¹ In general, Bismarck was prepared to respect all existing and future colonial possessions of other powers, large or small, as long as they could be considered to have been properly established and were recognized under international law. In addition, far from impeding exploratory initiatives, he encouraged German nationals to sail the oceans in an effort to open up undiscovered worlds and to conduct profitable trade.

Initially, Germany's colonial policy was conditional: the German government should not be directly involved in the colonial activities of its nationals. 'Das Reich wollte keine überseeischen Provinzen erwerben, sondern die wirtschaftliche Tätigkeit deutscher Unternehmer in einer geordneten, staatlichen Regierung unterstehenden Gebieten unter seinen Schutz stellen.'¹² Private trading companies had to bear the costs and risks of their undertakings. While the German State was the nominal protector, trading companies bore maximum responsibility and government intervention was kept to a minimum. This construction, which Bismarck called the *Schutzgebiet*, will be addressed in Section 3. The only support these companies could rely on was 'imperial backing',¹³ a political construction analogous to the British model of Royal Charters.

German politicians anticipated voter sentiments to gain support for a German venture on the African continent, especially by pointing out that the

10 M.E. Townsend, *Origins of Modern German Colonialism 1871–1885* (New York, London: Longmans, Green and Co., 1921), 16–17. On the motives of Bismarck and his national policy, see also V.G. Fanzo, 'Trade and Supremacy on the Cameroon Coast, 1879–1887,' in: M. Njeuma, *Introduction to the History of Cameroon Nineteenth and Twentieth Centuries* (New York: St. Martin's Press, 1989), 72 and H. Pogge von Strandmann, 'Domestic Origins of Germany's Colonial Expansion under Bismarck,' *Past & Present*, 42 (1969), 140–159.

11 In a speech before the Reichstag on 26 January 1889, Bismarck explained the following: 'Ich muß an Jahrzehnte, an die Zukunft meiner Landsleute denken, ich muß daran denken ob man mir nicht nach zwanzig, nach dreißig Jahren den Vorwurf machen wird daß dieser furchtsane Kanzler damals nicht die Courage gehabt hat uns jenen Besitz zu sichern, der jetzt ein guter geworden ist.' Quoted in Wesseling, *Verdeel en Heers*, 143–144.

12 P. Sack, 'Grundzüge der Rechts- und Verwaltungsordnung' in: R. Voigt and P. Sack (eds.), *Kolonialisierung des Rechts* (Baden-Baden: Nomos, 2001), 46.

13 Mommsen, *Imperial Germany*, 79.

scramble for African territory had already begun, but so far only between Britain and France. Every minute counted. If Germany did not claim territories immediately, the chance to establish a firm German presence on African territory would be lost forever. This time-is-of-the-essence feeling created an atmosphere of pressure in which the political class acted and decided on the German colonial venture. It was called *Torschlusspanik*, i.e., the panic that came from the feeling that time was running out, the fear of Germany missing out. Eventually, Bismarck proved susceptible to this panic. To Bismarck, engaging in colonial ventures meant political safety and social order for some more time. In addition to these national considerations, the Congress of Berlin (1878) made clear that Germany could no longer neglect international interests and affairs. The *Torschlusspanik* fed the urge to strengthen Germany's international position.

The first steps of the German colonial venture were taken by Bismarck when he decided to force Britain to abandon its policy of informal empire, as this policy implied excluding German political influence from African territory neither occupied nor claimed by Britain. British colonial policy was based on classic liberalism in that it used the method of indirect imperialism, implying that the flag would follow trade. Free trade, exploitation and no State intervention were the leading principles of this manner of acquiring and controlling overseas territory. Bismarck rejected British claims to universal supremacy in colonial issues, which resulted in a German-French colonial *entente* and the convening of the Berlin Conference in 1884. Official protection had to be extended to German nationals inhabiting overseas territories where Great Britain did not exercise jurisdiction *de facto* and where German subjects and their interests were not protected. Formal protectorates, which were mainly instituted by the British, could no longer be tolerated. Effective occupation,¹⁴ as was the Final Act of Berlin had stipulated, would henceforth be the criterion by which territorial claims of European powers in overseas regions were to be supported and assessed. The Conference agreed on a formula that specified which conditions had to be fulfilled (and when) in order to deem territorial occupation effective.¹⁵

In November 1883, although he still hesitated, Bismarck agreed to dispatch a mission led by Gustav Nachtigal (1834–1885), an explorer and former consul-general, to collect information about Cameroon and the trade activities there,

14 See H. Sippel, 'Typische Ausprägungen des deutschen kolonialen Rechts- und Verwaltungssystems in Afrika,' in: R. Voigt and P. Sack (eds.), *Kolonialisierung des Rechts* (Baden-Baden: Nomos, 2001), 351.

15 See Articles 34 and 35 of the Final Act of the Berlin Conference (1885).

and to support the establishment of a naval patrol, a consular service, negotiations for a coaling station along the Cameroonian coast and trade agreements with the native rulers – activities that as yet did not imply annexation. However, before Nachtigal and his men reached the Cameroonian coast, Berlin had changed his orders. Bismarck had had to yield to pressure exerted by German commercial merchants looking after their interests and whose political lobby could muster broad popular support. Nachtigal was instructed to apprehend the coast between Bimbia and Cape St. John, hoist the German flag and declare that the German trading companies had signed treaties with the rulers. In this part of Africa, the Germans and their commercial interests had to be protected directly by Germany. In fact, this official mandate by the German government to conclude treaties with native rulers in order to acquire sovereign rights over the territory merely confirmed current practice. Even before Bismarck had given his assent, private initiatives to conclude treaties were undertaken by the German trading companies of Woermann and Jantzen & Thormählen.¹⁶

Bismarck opted for private commercial control by trading companies and never aimed to establish colonies, as the latter alternative required a complex administration and meant a heavy financial burden. Relatively soon, however, all investments by the German government in the acquisition and administration of African territory proved unprofitable. In addition, colonies needed schemes to attract settlers from the motherland. Overseas territories generally tended to become a burden on the European governments. Bismarck wanted an institution that would merely protect German trading interests, with traders bearing the responsibility and with minimal government involvement. As Great Britain did, Germany considered setting up chartered companies – companies with a *Königliche Freibrief*. Bismarck promised to safeguard the African claims of the trading companies and associations from interventions or attacks by foreign powers. In return, the occupied land would fall under the sovereignty of the German Empire. These chartered companies, as newly established legal persons,¹⁷ would acquire territory without creating administrative and financial responsibilities for the German State. The charter system enabled Bismarck to implement a colonial policy without needing to ask the

16 See S.G. Ardener, *Eye-Witnesses to the Annexation of Cameroon 1883–1887* (Buea: Government Press, 1968), 22–23. See also Fanson, 'Trade and Supremacy,' 77–78.

17 For a more detailed reading, see H. Sippel, 'Recht und Herrschaft in Kolonialer Frühzeit: Die Rechtsverhältnisse in den Schutzgebieten der Deutsch-Ostafrikanischen Gesellschaft (1885–1890),' in: P. Heine and U. van der Heyden (eds.), *Festschrift zum 60. Geburtstag von Peter Sebald. Studien zur Geschichte des deutschen Kolonialismus in Afrika* (Pfaffenweiler: Centaurus, 1995), 469.

Reichstag for public financing. However, the chartered companies were put in charge of law and order in the colony: they became responsible for executing a colonial policy in return for trade monopolies in the acquired territories. As a consequence, the companies had to conclude numerous treaties with African natives to acquire territory, each tribe having to be negotiated with separately. Bismarck as Chancellor became the central statesman and the German Empire assumed supreme power over the African territories acquired by private companies and associations. Nonetheless, these rights were limited by the privileges granted by imperial charter to the companies and associations. Prominent German trade companies were Woermann, which began its trading activities in 1868 on the Cameroonian territory, and Jantzen & Thormählen, starting its activities in 1875.¹⁸

On 14 July 1884, Nachtigal hoisted the German flag in Cameroon, a territory with a surface of 191,130 square miles.¹⁹ This ceremony signalled the official inception of Germany's colonial venture in the Cameroon, which was to last 30 years. Nachtigal concluded treaties with native rulers, more precisely with the native rulers Bell, Akwa, Dido, Malimba and Lock Priso, to secure commercial interests, to protect German settlers and to pre-empt the British. Nachtigal continued his mission and concluded several treaties with the native rulers of the Bimbia, Malimba, Klein-Batanga, Plantation and Kriby, situated in the south of Cameroon. After Nachtigal had concluded a treaty with King Bell transferring sovereign rights over the Duala territory, the Germans met with resistance from the contenders of King Bell. When the Germans violently crushed the resistance, war ensued.²⁰ Although the Duala War delayed the acquisition process, Cameroon was acquired before the beginning of the Berlin Conference in November 1884.

After his conversion to colonialism in 1884–1885, Bismarck acted quickly and forcefully. He abandoned the policy of using chartered trade companies to acquire and occupy African territory. Bismarck now wanted direct influence over the overseas territories. Germany aimed at opening up the *Hinterland* to

18 These trade companies had their own procedures and were mainly focused on working according to their individual interests. See K. Schlimm, *Das Grundstücksrecht in den deutschen Kolonien* (Leipzig: Hoffmann, 1905), 25–31.

19 W.A. Crabtree, 'German Colonies in Africa,' *Journal of the Royal African Society*, 14 (1914), 1–14.

20 See A. Rüger, 'Die Duala und die Kolonialmacht 1884–1914. Eine Studie über die historischen Ursprünge des afrikanischen Antokolonialismus,' in: H. Stoecker (ed.), *Kamerun unter deutscher Kolonialherrschaft*, vol. ii (Berlin: Rütten and Loening, 1968), 181–258. For personal experiences with the Duala war, see Ardener, *Eye-Witnesses to the Annexation of Cameroon*, 31–40.

facilitate commercial interaction and at imposing German rule on the African population, treating them as second-class German subjects, in contrast to the German settlers, mostly farmers, who were considered first-class German citizens. This transition to direct rule was motivated by the inescapable fact that German chartered trading companies were not up to the task of maintaining law and order in the territories. Following the abolition of slave trade, trade companies bartered European goods such as cloth, arms, gunpowder and liquor for local palm oil, palm kernels, rubber and ivory. Trading, however, was accompanied by unrest and disorder. Native middlemen, who held a monopoly on the trade between the Germans and the natives in the *Hinterland*, fiercely resisted what they considered the German threat to their position. In consequence, the way into the *Hinterland* had to be kept open by German soldiers and violent clashes between natives and traders were not uncommon. In addition to trade between Germans and African natives being precarious, the trading companies wanted to establish their own plantations on the fertile grounds.²¹ As mentioned before, the chartered companies were unsuccessful at maintaining order. Even though it had been the desire to avoid the financial burdens of colonisation which had inspired the deployment of trading companies, this scheme turned out to be a costly affair after all; it was the German government which had to take care of settling of conflicts between the companies and the natives. After it became clear that the private trade companies had failed to carry out their mandate properly, they were initially kept operational artificially, which was a thorn in the flesh of German financiers.²² Finally, in 1889, the chartered companies were dissolved and the German government took over the administration of the colonies, which meant that it had to bear the political and financial responsibilities. From this moment onwards, German authorities ruled the African territories by imposing German law.

In addition to the increasing number of disputes between German traders and African natives, there was another reason for the German government to tighten its control over the Cameroonian territory. Although Bismarck had aimed to use the chartered companies to control the acquired African territory and therefore had had to facilitate them, the interests of the German merchants clashed with those of the government. Political and economic interests differed and eventually the political argument won out. The early explorations of the trading companies did not penetrate the real *Hinterland* of the colony.

21 P. Müllendorff, 'The Development of German West Africa (Kamerun)', *Journal of the Royal African Society*, 2 (1902), 70–92.

22 Wesseling, *Verdeel en Heers*, 164. See also Sippel, 'Recht und Herrschaft in Kolonialer Frühzeit,' 483–484.

'Since the German Government at home discouraged efforts to exploit the *Hinterland* by way of the Niger in competition with the English or by way of the Congo in competition with the French,' Harry Rudin notes, the German governor in the Cameroons 'felt that the best policy was to work gradually from the coast toward the interior and to establish friendly relations with the native kings in the immediate neighbourhood.'²³ Some German traders were clearly unhappy with the political agenda of the German authorities; they preferred to open up the interior to trade.

Another important player on the Cameroon scene was Adolf Woermann, head of the eponymous Hamburg-based company, one of the biggest German trading companies in Africa. As the *Reich's* agent in Cameroon, Woermann had concluded the first treaties, but now Bismarck expected him to control the newly acquired protectorate under imperial charter. He stated that 'Die Besitzergreifung erfolgt sofort, nachdem genannte Firmen die Verträge abgeschlossen haben; dieselbe wird dokumentiert durch Aufziehen der deutschen Flagge in einem jeden der abgetretenen Gebiete sowie durch öffentliche Erklärung, dass das Land nunmehr deutsches Eigentum sei.'²⁴ Here Woermann related the conclusion of a treaty between his company and an African ruler to German acquisition of property rights over the land. Subsequently, Woermann declared that he was a trader, not an administrator, thus declining the German government's mandate. Consequently, the financial consequences of establishing and maintaining colonies would be the *Reich's* responsibility and not that of the traders.

Although the trading companies had no interest in managing the territory and refused to fulfil the responsibility which the German government had imposed on them by way of imperial charter, their influence on the rule of the occupied territory was formative. In addition to the unwillingness of the chartered companies to perform administrative tasks, another factor led to the shift in German policy from indirect to direct rule. States increasingly used their power and resources to make pre-emptive territorial acquisitions, and this exerted pressure on the liberal principles of free trade and market freedom: '[T]here was no longer any thought of keeping the state's role in the economy

23 H.R. Rudin, *Germans in the Cameroons, 1884–1914: A Case Study in Modern Imperialism* (Hamden: Archon Books, 1968), 80.

24 Sammlung sämtlicher Drucksachen des Reichstages, 6. Legislaturperiode, 1. Session 1884/5. Togo-Gebiet und Biafra Bai, Nr. 41 Bl. 31, as quoted in A. Kum'a Ndumbe, *Das Deutsche Kaiserreich in Kamerun. Wie Deutschland in Kamerun seine Kolonialmacht aufbauen konnte, 1840–1910* (Douala, Berlin: AfricaAvenir, Exchange & Dialogue, 2008), 75–76.

and society to a minimum and of holding taxes as low as possible.²⁵ In this way, the colonial venture was endorsed by the German public. Colonial enterprise was no longer considered objectionable as a financial burden to be borne by the German tax payer. Imperialism became a legitimate aspiration of the government and had the support of the public in the motherland.

From the moment the Germans went ashore on Cameroonian territory, which was in fact indirectly controlled by Britain, the race between the two powers commenced, either party trying to acquire as much territory as possible as quickly as possible by concluding treaties with African natives. Britain had trade posts along the coast and rivers, and even possessed a strictly delimited territory, Victoria. In the late 1850s, Alfred Saker, a British Baptist missionary, had bought a piece of land along the Cameroonian coast from King William of Bimbia for GBP 2,000. This new settlement, named after Queen Victoria, came under the protection of the British government and was administered by the Baptist Mission, called the Basler Mission.²⁶ Even when the Germans acquired Cameroon, Victoria remained British. The competition for territory between Britain and Germany led to a race to obtain as many signatures as possible of native rulers and eventually deprived the native populations of a fair share. Both the German and British representatives offered gifts to native rulers to secure their signatures to treaties in which they renounced their sovereign rights to the territory. And both European States accused each other of misleading the native rulers. In Section 3, German treaty practices and the wording of the treaties they concluded will be analysed and discussed in more detail.

At the Berlin Conference there were signs of a gradual rapprochement between Britain and Germany: Britain accepted that Germany had entered the colonial arena and acknowledged the German territories on the African continent. In the end, the British and the Germans came to an understanding on the British trade posts and Victoria: in January 1887, the British pieces of territory were transferred to Germany in exchange for monetary compensation. The British agreed to the German take-over of the territory, because they believed

25 Mommsen, *Imperial Germany*, 72.

26 For a detailed reading on this Mission, see A. Eckert, 'Missions, Land Politics and Real Estate in Colonial Douala,' in: R. Debusmann and S. Arnold (eds.), *Land Law and Land Ownership in Africa. Case Studies from Colonial and Contemporary Cameroon and Tanzania* (Bayreuth: Bayreuth African Studies, 1996), 187–201; C.F. Fisiy, 'Techniques of Land Acquisition: The Concept of "Crown Lands" in Colonial and Post-Colonial Cameroon,' in: R. Debusmann and S. Arnold (eds.), *Land Law and Land Ownership in Africa. Case Studies from Colonial and Contemporary Cameroon and Tanzania* (Bayreuth: Bayreuth African Studies, 1996), 231 and N.B. Wagner, *Die deutschen Schutzgebiete. Erwerb, Organisation und Verlust aus juristischer Sicht* (Baden-Baden: Nomos, 2002), 84–86.

France to pose the greater threat to the British Empire. The French had to be kept out at all costs, even if Britain had to surrender territory to the Germans. The end of the German-British rivalry was sealed by the agreement between the two powers of 1 July 1890. This agreement defined their respective spheres of influence in East, West, and South-West Africa.²⁷ The boundaries of Cameroon were definitively laid down in the treaties concluded with Britain and France in 1893 and 1894 respectively.

German sovereignty was not only contested by European colonial powers, it was also and on several occasions disputed by the natives. This lasted until 1899, when the Germans ultimately defeated the natives and the interior was definitely opened up to trade.²⁸ By 1905, the Cameroonian *Hinterland* had been fairly well explored and had been subjected to German control. However, much work had to be done to control the territory effectively and there still remained the difficult task of delimiting the territory by exactly marking the borders, kilometre by kilometre. After 1905, attention shifted from exploring Cameroon to exploiting it in the sense of its social, economic, and political development.

On 4 November 1911, the territory of German Cameroon was significantly enlarged when France ceded part of French Congo. In return, Germany surrendered its existing rights in Morocco and the territory of Togo in 1914. With World War I, the disintegration of the German Empire began. Between 1914 and 1918, German colonies and protectorates were attacked or conquered by Britain, France and Belgium. Cameroon was subjugated by the British and French and divided between them even before the war on the European continent came to an end.²⁹ After World War I Germany was forced to renounce all of the territories it had acquired in Africa. Cameroon gained independence in 1960, but disputes over boundaries and titles to territory continue to the present day.³⁰

27 With regard to the African west coast, the borderline was drawn between the British Gold Coast colony and the German Togo protectorate, the Volta districts, and the Rio del Rey. Hertslet, *Map of Africa by Treaty*, 694.

28 C.T. Hagberg Wright, 'German Methods of Development in Africa,' *Journal of the Royal African Society*, 1 (1901), 23. See also G. Meinecke, *Deutschland und seine Kolonien im Jahre 1896: amtlicher Bericht über die erste deutsche Kolonial-Ausstellung* (Berlin: Reimer, 1897).

29 See L. Elango, 'The Anglo-French "Condominium" in Cameroon, 1914–1916: The Myth and the Reality,' *The International Journal of African Historical Studies*, 18 (1985), 656–673.

30 See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, 2002, 1CJ Reports 303.

3 Treaties between Germany and Cameroonian Rulers

3.1 *Validity of Treaties*

Although many treaties were concluded between the German and the natives, especially along the coast, the Germans categorized the thinly populated areas of the *Hinterland* as *terra nullius* or *herrenloses Land*, which freed the way for occupation as a legitimate mode of territorial acquisition. Consequently, two types of problems arose, reflecting two distinct stages of territorial acquisition by treaty. The first set of problems concerned the validity of the treaty. The second type concerned the interpretation and execution of the treaties after they had been concluded. Although attention will be mostly on what happened after the treaties between Germans and Cameroonian natives had been concluded, the first phase – treaty negotiations – will be addressed briefly to establish a context.

The first phase in which validity problems arose was the one in which treaty conditions were negotiated. Four problems will be explored. First, the German classification of territory as *herrenloses Land* or *terra nullius* is problematic. Initially, contemporary international legal doctrine understood *herrenloses Land* as completely uninhabited territory 'in denen also kein privatrechtliches Eigentum bestehen konnte.'³¹ *Terra nullius* comprised territory entirely lacking in public or private mastery. However, in the last two decades of the 1800s, when the struggle between European States for titles to African territory came to a head, the scope of *terra nullius* was reinterpreted and reformulated by centralizing the concept of State: 'Als herrenlos im völkerrechtlichen Sinne gilt daher jedes Gebiet, in dem die Staatsgewalt eines völkerrechtlich anerkannten Rechtssubjekts nicht besteht.'³² Non-State territory could be occupied and this rendered cession unnecessary; native habitation was irrelevant and title to territory could be acquired by occupation regardless. Not *terra nullius*, but *territorium nullius* became the condition.

During the first years of the German colonial venture on Cameroonian territory, the explorers would almost always encounter native communities living on the land. Some areas were densely populated, others were almost deserted. In their urge for territorial acquisition, the Germans used the concept of *herrenloses Land* for territories that lacked *Staatlichkeit*. As a consequence, these territories were subjected to the sovereignty of the German Emperor and were

31 C. Bornhak, 'Die Anfänge des deutschen Kolonialstaatsrechts,' *Archiv für öffentliches Rechts* 2 (1887), p. 6.

32 C. Bornhak, 'Die Anfänge des deutschen Kolonialstaatsrechts,' *Archiv für öffentliches Rechts* 2 (1887), p. 7.

even declared Germany's private possession, i.e., *Kronland*. The standard of *Staatlichkeit*, however, and its application implied a broad discretionary power of the German State. In the majority of cases, the imposition of the predicate *herrenloses Land* and the institution of *Kronland* meant direct expropriation of land inhabited by natives. In addition to the sovereign rights over the territory, the German State acquired the proprietary rights to the land without taking into account the existing land rights of the native populations inhabiting the lands. However, the greater part of the Cameroons came under German rule by way of protectorate and *Schutzgebiet* treaties.

The second problem regarding the validity of the treaties concerns the status of the trading companies and the powers delegated to them by the German State. The question is whether these trading companies could conclude treaties with the purpose of acquiring sovereignty rights over Cameroonian territory. Although the companies were protected by the German government – they had been awarded imperial charters – it remains questionable whether these companies, as private actors, could acquire sovereignty transferred to them by native rulers by way of treaty. Contacts between the trading companies and the African natives were first and foremost driven by private interests: the companies wanted to trade, expand their market and make a profit. For that reason, it could even be argued that the various treaties, contracts and other agreements should be regarded as private law transactions concluded for the purpose of acquire land ownership. In other words, rather than sovereignty, property was the object of transfer, as the German jurist Ferdinand Lentner (1841–1919) acknowledged in 1886: 'Alle diese Regalien und Monopolen sind nicht als von der Gesellschaft selbstständig erworbene Hoheitsrechte, sondern nur als dem Grund und Boden anhaftende Privatrechte zu betrachten.'³³ In general, the native rulers implicitly recognized *Passivlegitimation*, i.e., the legal capacity of the German companies to obtain sovereign rights through negotiating and concluding treaties.³⁴

The third problem was that the status of the native rulers and the substance of, their rights and powers were ambiguous. Were these rulers sovereigns

33 F. Lentner, *Das Internationale Colonialrecht im neunzehnten Jahrhundert*, Wien, 1886, p. 91. 'Die innere Verfassung der Kolonialgesellschaften gehört nicht in das Staatsrecht, sondern ist privatrechtlicher Natur.' C. Bornhak, 'Die Anfänge des deutschen Kolonialstaatsrechts,' *Archiv für öffentliches Rechts* 2 (1887), p. 35.

34 C.H. Alexandrowicz, *The European-African Confrontation. A Study in Treaty Making*, Leiden, 1973, p. 43. Alexandrowicz added that '[t]erritory acquired by the Company vested in the European Sovereign under whose law the Company was established.' *Ibid*, footnote 72.

under nineteenth-century 'European' international law? Conceptual differences and misunderstandings between Africans and Europeans, in particular between Cameroonians and Germans, could also affect the validity of the treaties, contracts, and other agreements they concluded. In the majority of cases, natives and Germans held different views on the nature of their legal obligations whose written manifestation often reflected German standards. Eventually, the German understanding and interpretation prevailed and the native perspective disappeared from view. The question remains whether the native rulers would have signed the treaties at all if they had known the practical implications of these legal institutions, which proved disastrous to their subjects? After all, the native rulers were unfamiliar with European contract law, public international law and the legal terms used in the treaties.³⁵

The fourth problem was whether the international legal standards on treaties applied. While the German and later Swiss writer Hermann Hesse (1877–1962) considered the treaties concluded with African natives to be instruments governed by the rules of *Völkerrecht*,³⁶ the German jurist Franz von Liszt (1851–1919) was less generous and argued that the scope of international law had to be interpreted strictly in the sense that it only applied to relations between sovereign States.³⁷ He did not devote a single word to the applicability of international law in reference to the acquisition of territory by means of treaties between State actors such as Germany and non-State entities such as African polities. In German contemporary legal doctrine, African polities were not recognized as subjects of international law: 'Eroberung und Abtretung finden

35 This indeterminacy of territorial acquisition is well described by Eckart Rohde: 'Bis 1888 kam es vorwiegend im für den Plantagenbau hervorragend geeigneten Gebiet am Kamerunberg zu einer Reihe unsystematischer Landerwerbungen, die teilweise auf der Grundlage von Kaufverträgen, teilweise schlicht durch die Okkupation ungenutzten Landes vollzogen wurden. Der zweifelhafte Charakter dieser Erwerbungen, an denen sich auch Gouverneur von Soden bedenkenlos beteiligte, dokumentiert sich, abgesehen vom lächerlich niedrigen „Kaufpreis“ (Schnaps oder Handelswaren, für 1 ha wurde maximal 1 Mark gezahlt), darin, dass die auf afrikanischer Seite als Vertragsunterzeichner figurierenden Dorfoberen wahrscheinlich gewohnheitsrechtlich überhaupt nicht legitimiert waren, Land zu veräußern. ... die Afrikaner keineswegs die europäische Konzeption von Landerwerb, Grundbesitz und den damit verbundenen uneingeschränkten Landrechten teilen.' E. Rohde, *Grundbesitz und Landkonflikte in Kamerun. Der Bedeutungswandel von Land in der Bamiléké-Region während der europäischen Kolonisation*, Hamburg, 1996, p. 70.

36 H. Hesse, *Die Landfrage und die Frage der Rechtsgültigkeit der Konzessionen in Südwestafrrika*, Jena, 1906.

37 Von Liszt adopted a State centric approach in his whole work on international law. See F. von Liszt, *Das Völkerrecht Systematisch Dargestellt* (12th edn.), Berlin, 1925.

nur statt gegenüber einem Staate, der Subjekt des Völkerrechts ist [...] Durch Abtretung kann als Kolonie nur erworben werden das Gebiet einer Macht, die Subjekt des Völkerrechts ist.³⁸ The derivative modes of acquisition, conquest and cession could be effected between two States, i.e., subjects of international law. In practice, however, it was very useful from the German perspective to be able to conclude treaties with Africans in order to realize imperial expansion. It should be noted that the Germans hardly used cession to acquire territorial title on the African continent. They established protectorates, more specifically colonial protectorates or *Schutzgebiete*, through which, as will be argued below, they gradually obtained all-comprehensive sovereignty over the Cameroons. The treaties establishing *Schutzgebiete* substantiated Germany's claims to Cameroonian territory in its relations with other European powers. These treaties effectively served a triangular relationship between Cameroonian natives, Germany and other European States. Whether international legal standards on treaty making applied to the treaties between Europeans and Africans, more specifically Germans and Cameroonians, is a question to which two opposing answers can be given. In theory, the Cameroonian polities were not recognized as subjects of international law, either in German legal doctrine or in German politics. Consequently, treaties establishing *Schutzgebiete* were not considered treaties under international law and transferring sovereign rights from an African native ruler to a European State was therefore considered impossible. The applicability of international law to the treaty negotiations and the resulting treaties between natives and Germans was wholly dependent on Germany's conduct in its relations to rival European States. In practice, however, these treaties were negotiated and concluded under international law as it applied to the members of the family of civilized States, with the intention of transferring sovereign rights, recognized the sovereign status of the Cameroonian ruler concerned and granted European States title to African territory. As will be shown later, this dichotomy between theory and practice also qualifies the answer to the question whether treaties were violated.

Although the validity of the treaties is questionable, they were concluded by Germany with the native rulers and recognized by the other competing European powers as valid territorial claims. These treaties were accepted as a given, as were their factual and legal consequences. However, the interpretation and execution of the treaties were unclear and controversial, in particular when taking the object of transfer – territorial sovereignty and/or private landownership – into account.

38 C. Bornhak, 'Die Anfänge des deutschen Kolonialstaatsrechts,' *Archiv für öffentliches Rechts* 2 (1887), pp. 4 and 5.

3.2 *Treaty Practice*

Before analysing the treaties between the Germany and Cameroonian native rulers, the conceptual and theoretical framework which characterized the German colonization of Africa has to be outlined. On a preliminary note, it should be observed that the Germans made three fundamental distinctions between claims to land and/or territory, namely, *Eingeborenen Land*, *nicht-eingeborenen Land*, and *herrenloses Land*.³⁹ *Eingeborenen Land* comprised land possessed and controlled by natives. Land controlled neither by natives nor by Germans, but occupied by other Europeans was called *nicht-eingeborenen Land*. *Herrenloses Land* was land over which no sovereign power was exercised. *Eingeborenen Land* and *nicht-eingeborenen Land* could be the object to derivative acquisition of title to territory. *Herrenloses Land*, by contrast, was eligible for occupation.

In the context of German imperial expansion, *Schutzgebiet*, *herrenloses Land*, and *Kronland* were key concepts. Although each had its own meaning and connotations, all were closely related. Of these three concepts, the *Schutzgebiet* played a particularly vital role in the German acquisition of Africa. Bismarck preferred establishing *Schutzgebiete* to claiming title. The institution of a *Schutzgebiet* was a political instrument and had no legal foundation. A *Schutzgebiet* was the German interpretation of the colonial protectorate, and implied power or control without political and economic responsibility for the African natives: 'Als staatrechtliches oder koloniales "Protektorat" oder als "Schutzgewalt" über "Schutzgebiete" pflegt man in neuer Zeit sowohl die Landeshoheit über überseeische Kolonien, wie die völkerrechtlichen Befugnisse in der Interessensphäre oder dem Hinterlande zu bezeichnen.'⁴⁰ A *Schutzgebiet* implied the exercise of limited sovereign rights, namely, 'zum Schutze gegen innere und äussere Feinde und zum Zwecke der Rechtsprechung für Europäer beabsichtigt ist.'⁴¹ While in both a *Schutzgebiet* and a traditional protectorate the protected entity officially retained its internal sovereignty rights, there are two differences between the two. First, the protectorate was part of international law and the *Schutzgebiet* – a wholly political construct – was not.⁴² Second, when a *Schutzgebiet* was established by treaty, initially a relationship

39 Schlimm, *Grundstücksrecht in den deutschen Kolonien*, 51–77.

40 F. von Liszt, *Das Völkerrecht Systematisch Dargestellt*, 12th edn. (Berlin: Springer, 1925), 106. See also V. von Poser und Gross-Naedlitz, *Die rechtliche Stellung der deutschen Schutzgebiete* (Breslau: Marcus, 1903).

41 C. Bornhak, 'Die Anfänge des deutschen Kolonialstaatsrechts,' *Archiv für öffentliches Rechts*, 2 (1887), 14.

42 See Wagner, *Deutschen Schutzgebiete*, 204.

of protection was instituted between Germany and the African native ruler, which opened the door to Germany acquiring the native ruler's rights of internal sovereignty too. The German *Schutzgebiet* had to be regarded as a hybrid of a protectorate and a colony, on a par with the British and French concept of the colonial protectorate: in theory a protectorate was established, in practice the treaty was interpreted through colonial legislation as ceding full sovereignty.

At first, German trading companies carrying a mandate of the German government, a *Schutzbrief*, concluded treaties with African natives establishing *Schutzgebiete*. Through these treaties, Germany explicitly acquired external sovereignty rights and implicitly acquired internal sovereignty rights. Initially, the aim was to constitute protectorates, but, as will be seen when discussing German treaty-making practice, the precise scope of sovereignty rights was not articulated, which gave the German authorities discretionary room to interpret and exercise these rights. Germany controlled the external relations and was able to exclude European powers and other foreign entities from the territory without having to establish a central and costly administration. In practice, as will be argued, Germany increasingly intervened in the internal affairs of the protectorate territory and thus came to control internal sovereignty rights as well. Although in theory the distinction between a colony and a protectorate was maintained, in practice the dividing line between the two concepts blurred and finally disappeared.

The second and the third relevant concepts in the context of the German colonial venture, *herrenloses Land* and *Kronland*, are closely connected – a connection that is particularly apparent in the imperial decree (*Verordnung*) of 15 June 1896. This *Verordnung* stated that all unoccupied land, *herrenloses Land* or *terra nullius*, in Cameroon was declared *Kronland*: all unoccupied land would fall within German jurisdiction and would become the property of Germany. The nineteenth-century German jurist Karl Schlimm defined *herrenloses Land* negatively by arguing that it did not involve *Eingeborenen Land* and *nicht-eingeborenen Land*.⁴³ In his definition of *herrenloses Land*, Schlimm emphasized the existence of property rights and he alluded to sovereignty. *Herrenloses Land* could be occupied by the German sovereign State, which empowered Germany to exclude other States or polities from the territories. The territory was considered part of the German Empire and of the space over which the German State could exercise its sovereignty.⁴⁴ Labelling African territory as *Kronland* especially served the interests of trading companies and private associations, because it gave them access to the *Hinterland* and enable

43 Schlimm, *Grundstücksrecht in den deutschen Kolonien*, 21.

44 See *ibid.*, 48.

direct contact, trade and exploitation. The decree referred to above will be considered in more detail later, because it was issued after the territory had been occupied. Only *terra nullius*, which included territory inhabited by nomadic peoples, could be occupied, according to Von Liszt's interpretation of the concept of occupation in the context of international law.⁴⁵ In his view, *terra nullius* or *herrenloses Land* is non-State territory. Concluding treaties with natives inhabiting the territory concerned did not affect its status as *terra nullius*. This limited interpretation of *terra nullius* was, however, questioned.⁴⁶ Although the equation of *terra nullius* with non-State territory primarily served the interests of the German State, it must be noted that the expansion of the German Empire on the African continent was accomplished mainly by concluding bilateral treaties with African rulers and not through occupation. Having clarified the German conceptions and assumptions regarding Germany's acquisition of Africa, the German practice of treaty-making needs to be addressed.

Concluding treaties with native rulers was part and parcel of the German quest for African territory, as it was for Britain and France. Unlike Britain and France, however, Germany had no colonial experience in establishing overseas territories before 1884. As a result, for a number of years the Germans used a single treaty model to acquire African territory. By using this model, the Germans presumed that the native rulers and their peoples subjected themselves and their land to the superiority of the German State: 'Der Besitzergreifung geht jetzt gewöhnlich vorher ein Vertrag mit den eingeborenen Machthabern, durch welchem diese sich der Gewalt des erwerbenden Staates unterwerfen.'⁴⁷ The acquisition proper was a symbolic act, such as hoisting the flag or raising border posts – acts that symbolized the establishment of effective occupation of the territory.

On 12 July 1884, Germany and the African rulers Bell, Akwa and Didos signed a treaty constituting a German protectorate, more precisely a *Schutzgebiet*, over the Cameroonian territory, and on 15 October 1884 the German government communicated its acquisition to the other European powers and the United States. This communication specified the exact extent of the territory on the west coast of Africa that was placed under the protection of Germany. This official statement was made by the German Baron von Plessen to the

45 Von Liszt, *Völkerrecht*, 1925, 158–159.

46 Note that Cameroonian territory was inhabited by native political entities whose individual members possessed the land. See H. Kraus, *Die moderne Bodengesetzgebung in Kamerun 1884–1964* (Berlin, Heidelberg, New York: Springer, 1966), 31.

47 Bornhak, 'Anfänge des deutschen Kolonialstaatsrechts,' 7.

British Earl Granville, both leading their respective country's Ministry of Colonial and Foreign Affairs:

The Government of His Majesty the Emperor, with a view to insure more effectually German commercial interests on the West Coast of Africa, has taken certain districts of this coast under its protection. This has been effected in virtue of Treaties which have been in part concluded by Dr Nachtigal, the Consul-General dispatched to West Africa, with independent Chiefs, and partly in virtue of applications for protection made by Imperial subjects, who have acquired certain tracts by covenants with independent Chiefs.⁴⁸

Treaties transferring sovereign rights from Cameroonian rulers to Nachtigal, who operated in the name of Germany, was the legal basis that supported the title claim of the German State to the Cameroons. It should be noted that the German notification speaks of 'protection' and 'independent Chiefs.' This statement laid the foundation for 30 years of German presence on the territory.

The acquisition of territory was mainly effectuated by German trading companies, which had a governmental mandate to acquire and exercise sovereignty rights. As even the mere possibility of Germany acquiring sovereign rights over African territory through mandated private companies concluding treaties with native rulers is questionable, the validity of the treaties themselves – on which rested Germany's title claim to the Cameroons – is doubtful. The most important reason for these trading companies to participate in this colonial venture and to conclude treaties with natives transferring sovereign rights was to advance their own interests, as can be inferred from an instruction letter the German trader Adolf Woermann wrote to his representative in Cameroon, Eduard Schmidt, on 6 May 1884:

At the same time as the cession of sovereignty, you should by all means get the cession of very extensive lands as private property – especially those suitable for plantations. There is no doubt that, if the country becomes German, there will be many attempts to establish extensive plantations, and so it is always a good thing if the land is already in our private ownership, so that we can re-sell it later. You must naturally try to buy as cheaply as possible. One can get the land for nearly nothing.⁴⁹

48 Hertslet, *Map of Africa by Treaty*, 693.

49 As translated in English by Ardener, *Eye-Witnesses to the Annexation of Cameroon*, 85. For the original German version of the message of Woermann to Schmidt dated 6 May 1884,

Woermann explicitly referred to cession, implying the transfer of all-comprehensive sovereignty rights by treaty from the native ruler to the trading company acting on behalf of the German State. What is also relevant is that Woermann separated the acquisition of territorial sovereignty rights from the proprietary rights to the land. The former were to be acquired by treaty, the latter by contracts of sale. The trading companies went overseas to trade, to expand their markets and to make a profit rather than to manage a territory as an instrument of the German government. They were in Africa for commercial reasons, not to rule the territory.

Before the Germans went ashore, the British already controlled the Cameroonian coast. From the 1840s onwards, the British had signed treaties with local rulers that emphasized trade and its benefits, the protection and organization of the territory, and the prohibition and suppression of slave trade. The transfer of sovereignty and private property rights was not explicitly mentioned in these treaties. In these treaties the natives often promised to comport themselves 'as good and faithful subjects, under the penalty of incurring the displeasure of Her Britannic Majesty's Government,' or they agreed that 'Her Majesty the Queen of Great Britain would extend to the natives and the territory under their authority and jurisdiction, her gracious favour and protection.' It is even true, that, in 1881, several Cameroonian rulers asked the British government for annexation.⁵⁰ Britain never replied to this request. The British had concluded treaties with such Cameroonian Kings as Bell, Akwa, and William – the same rulers with whom the Germans, after they had set foot on Cameroonian territory, also concluded treaties. Great Britain had established

see Bundesarchiv Potsdam, Reichskolonialamt, 4447, p. 60 ff. The letter is reproduced in H.-P. Jaeck, 'Die deutsche Annexion: Die Anfänge der Deutschen Kolonialherrschaft,' in: H. Stoecker (ed.), *Kamerun unter deutscher Kolonialherrschaft*, vol. i (Berlin: Rütten and Loening, 1960), 92 ff.

50 A letter, signed by King Akwa, Prince Dido Akwa, Prince Black, Prince Joe Garner and Prince Lawton, was directly addressed to Queen Victoria: 'Dearest Madam, We your servants join together and thoughts its better to write you a nice loving letter which will tell you about all our wishes. We wish to have your laws in our towns. We want to have every faction altered, also we will do according to your consuls word. Plenty wars here in our country. Plenty murder and plenty idol worshippers. Perhaps these lines of our writing will look to you as an idle tale. We have spoken to the English Consul plenty times about having an English government here. We never have answer from you, so we wish to write ourselves. When we heard about Calabar River, how they have all English laws in their towns, and how they have put away all their superstitions, oh we shall be very glad to be like Calabar now.' Ardener, *Eye-Witnesses to the Annexation of Cameroon*, 19–20.

trade posts and settlements on the coast and informally ruled the Cameroons between 1840 and 1884.

In the second week of July 1884, a cluster of treaties was concluded between Germany and several native rulers. Within the scope of this cluster, the Germans considered two documents constitutive of their relationship with Cameroonian natives. The first document was a declaration made by native rulers on 12 July 1884, which expressed their agreement to German presence on their territory if several conditions were met.⁵¹ Although the document did not contain any legal obligations, the Germans felt obliged to respect the rulers' claims and to observe the provisions of the document. The most important claims concerned the maintenance of the rulers' monopoly of interior markets, the supply of monetary means to finance these markets, the continuance of trade, and the non-interference with some local customs. Above all, the rulers required annexation instead of protection, but without taking the land on which they lived and which they cultivated. In other words, the rulers requested that the territory be subjected to German sovereignty and that the proprietary rights of the natives to the land be respected. Consul Schultze signed the document to express Germany's commitment to the rulers' claims.

The second constitutive document was the treaty concluded on 12 July 1884 between the representative of the trade companies of Woermann and Jantzen & Thormählen, Eduard Schmidt, and the rulers of the territory in question, which – in the words of the treaty – established a protectorate.⁵² The preamble to the treaty established that sovereignty, legislative authority and administrative power were transferred by the treaty subject to a number of reservations, of which the preservation of natives' property rights was the most prominent (§3). What is very clear is that the aim was not to constitute a traditional protectorate, but a *Schutzgebiet*. On the one hand, the scope of the transferred sovereign rights remained undetermined, but they comprised more than the exercise of external sovereignty. On the other hand, the Germans explicitly consented (§4) to the native rulers' demands to maintain and regulate their peoples' proprietary rights to land, the rights of the rulers to rule their peoples in accordance with their own customs and laws (§3) and to levy taxes, which

51 For the text of the document, see M. Buchner, *Aurora Colonialis: Bruchstücke eines Tagebuchs aus dem Beginn unserer Kolonialpolitik 1884/85* (Munich: Piloty and Loehle, 1914), 70.

52 Protectoratvertrag vom 12./13. Juli 1884, Reichskolonialamt Nr. 4447, Bl. 3. As reproduced in Stoecker, *Kamerun unter deutscher Kolonialherrschaft*, 259. For the German text, reliance has to be made on a document in which Nachtigal reported Bismarck on the acquisition of sovereign rights from the Duala rulers under several conditions or reservations. See Rudin, *Germans in the Cameroons*, 425.

implied that this treaty did not involve cession of full sovereign rights over the territory. Formulating non-intervention clauses (preserving internal sovereignty) was common practice in writing treaty texts for the purpose of establishing protectorates (§5).

When the German authority notified the British of this treaty, the British Embassy presented the British interpretation of the treaty and its conditions: the treaty was valid subject to the rights of third parties; former treaties of friendship and commerce remained in force; the land of the towns and villages remained the private property of the natives; the rulers continued to levy their dues as before; and the natives retained for the present their customs and usages.⁵³ The British translation of the conditions evidenced the unambiguous nature of these conditions. Although the scope of the object of transfer – sovereignty – was not addressed explicitly in the treaty, the native rulers' competences to rule their peoples, the continuance of private property rights of the Cameroonian natives and the maintenance of their customs and usages were to be respected by the Germans.

Of particular interest is how the 1884 treaty was negotiated and concluded. The treaty itself was negotiated and concluded by the Duala rulers, represented by King Bell, King Akwa and King Dido, and four representatives of the German trading companies Woermann and Jantzen & Thormählen, with Schmidt acted on their behalf.⁵⁴ Nachtigal, the representative of the German State, did not sign the treaty. Sovereign rights were thus directly transferred to the two German companies. It was two days after the treaty had been signed, on 14 July 1884, that the companies handed the treaty to Nachtigal. Nachtigal then circulated a statement informing the British settlers and tradesmen present on the territory of the conclusion of the treaty and the establishment of the protectorate: '[A] Treaty with the Kings and Chiefs of this river has been concluded and lawfully legalized by the German Consul of Gaboon [...]. The character of the Treaty has caused me to hoist the Imperial German flag in this country, and to put it under the suzerainty of His Majesty the Emperor of Germany.'⁵⁵ Nachtigal used 'suzerainty' to indicate the competences of the German authority on the territory, without specifying the precise meaning of this term. German legal doctrine offers no clear definition of suzerainty in the context of the establishment of *Schutzgebiete* on the African continent. Only Von Holtzendorff noted in his *Handbuch des Völkerrechts* (1885) that intervention in the self-government of the protected State by the protecting State is

53 *Ibid.*, 425 and 40–41. See also Kum'a Ndumbe, *Deutsche Kaiserreich in Kamerun*, 78–79.

54 Ardener, *Eye-Witnesses to the Annexation of Cameroon*, 24.

55 Buchner, *Aurora Colonialis*, 74.

justified if such an intervention is necessary to safeguard the protecting State's responsibilities towards foreign nations.⁵⁶ Like the French, the Germans used the term suzerainty in their protectorate treaties to describe their competences within the protectorate, which gave the German authorities the freedom to act at will and to rule the territory and the inhabiting subjects as the Germans deemed necessary.

After the British residing on the territory and rival European States had been notified, the Duala treaty was ratified and entered into force. In day-to-day practice, the chartered trading companies exerted a great deal of influence over the German rule of the Duala area of the Cameroonian territory. The 1884 treaty and its subsequent execution are representative of the conclusion and realization of subsequent treaties between Germany and Cameroonian rulers. The treaties were originally written in German and were signed or marked with crosses by the native rulers after they had been given a translation, or at least an interpretation, in their native languages. The signing of the treaties or contracts was accompanied by symbolic acts such as hoisting the imperial German flag and a ceremonial volley.

One such standardized treaty was negotiated and concluded in the Bimbia area between the rulers of Bimbia, represented by their King William, and delegates of the two largest German trading companies on 11 July 1884.⁵⁷ In the preamble, the treaty explicitly mentioned the transfer of sovereignty, legislative authority and administrative power to the trading companies acting under the mandate of the German State. The non-interference with existing and future property rights to the land was assured (§3) and the rights of the rulers to collect taxes was acknowledged (§4). In contrast to the Duala treaty, the Bimbia treaty did not guarantee rulers control over their territory and peoples in accordance with their own laws and customs.

As was the case with the Duala treaty, the treaty transferring sovereignty over the Bimbia area did not specify the scope of the sovereignty rights. It is clear that not only external sovereignty rights were the object of transfer. On the one hand, sovereign, legislative, and administrative powers were explicitly mentioned as objects of transfer, which could indicate cession rather than establishing a protectorate. On the other hand, sovereign competences, including the power to regulate and allocate property rights, were left to the native rulers. This ambiguity in the treaty text gave the German authorities non-specific

56 F. von Holtzendorff, *Handbuch des Völkerrechts auf Grundlage Europäischer Staatspraxis*, vol. ii (Berlin: Habel, 1885), 102.

57 Copy of Draft Treaty signed at Bimbia, German Factory, 11 July 1884, Foreign Office papers, 403/32. Reproduced in Ardener, *Eye-Witnesses to the Annexation of Cameroon*, 58.

discretionary powers. As will be argued, the Germans would eventually misuse this room for discretion to gain more extensive sovereign rights over territory.

A *Schutz- und Freundschaftsvertrag* was concluded between the ruler of Bethany and Nachtigal on 28 October 1884. In Article 1 of the treaty, the native ruler 'bittet Se. Majestät den deutschen Kaiser, über das von ihm beherrschte Gebiet die Schutzherrlichkeit übernehmen zu wollen' and, in his turn, the German Emperor guaranteed the native ruler 'Seinen allerhöchsten Schutz.' The protective character of the relationship was articulated in Article 9, in which the Germans promised to respect the natives' 'bestehenden Sitten und Gebräuche,' not to act in contradiction of the 'Gesetze und Verordnungen ihres eigenen Landes verstossen würde' and to pay 'Steuern' to the native ruler. This treaty text is very clear on what protection entailed: while the Germans would control the independence of the territory, the native ruler retained his sovereignty rights with regard to the governance of the territory.

On 29 January 1885, an agreement was concluded regarding the sale of the land in the Mahin area. Under the agreement, the King of the Mahin area sold the land to Mr Gaiser, a tradesman from Hamburg. On 11 March 1885, a treaty was concluded and signed by the same King of Mahin, but this time with Nachtigal, the German commissioner and consul-general for the west coast of Africa. The aim of this treaty was to secure the extension of the German protectorate over the territories of Mahin and Mahin Beach. However, this treaty was never approved and recognized by Bismarck. Why Bismarck did not confirm German rule over this territory remains unclear. The British were quick to seize the opportunity and they approached the King of Mahin to conclude a treaty ceding sovereign rights over the territory to the Crown. Both areas, Mahin and Mahin Beach, were ceded to Great Britain on 24 October 1885.⁵⁸

In the Cameroons, the struggle between Germany and Great Britain, and to a lesser extent France, for treaties with native rulers and their peoples led to fragmented territorial acquisition.⁵⁹ Both Germany and Britain controlled small plots or areas of land, which in the majority of cases did not have clear borders. Overlapping claims and misunderstandings in defining and delimiting lands led to conflicts between the Germans and the British. This situation did not only confuse the European powers themselves, it went beyond the understanding of the natives too. As a consequence of this German-British rivalry, the natives inhabiting this part of Central Africa were divided into two camps, a situation that triggered conflicts among native peoples: one camp supported German rule, the other upheld British domination. An example of

58 See Hertslet, *Map of Africa by Treaty*, 694.

59 Jaeck, 'Deutsche Annexion,' 77.

this rivalry was the refusal of the native ruler Lock Priso from Hickory Town to conclude a treaty with the Germans,⁶⁰ because he preferred his territory to be under British rule. Amid this confusion, African natives found they had a measure of influence on the State and rule to which they wanted to be subjected. The original inhabitants had the *de facto* power to play off Britain and German against each another.

A final example of a treaty concluded between Germany and a native ruler is that of 23 October 1885 between H.E. Goering and C.G. Büttner as representatives of the German Emperor and the ruler of the Hereros, Maharero Katyamuaha. Although this treaty was not concluded in Cameroon but in South West Africa, it is representative of the treaties Germany concluded at the time. In Article 1, Maharero asked the German Emperor to convey the 'Schutzherlichkeit über ihn und sein Volk' and the Emperor accepted Maharero's request and promised the native ruler 'seinen Allerhöchsten Schutz.' This relationship of protection was expressed using the same formula as in the treaty between Nachtigal and the ruler of Bethany discussed above. Existing native laws and customs would be respected by the Germans, the Germans promised not to act contrary to native rules and taxes were to be paid to the native ruler (Article 3). In other words, the division of sovereignty rights was clearly articulated in the treaty. As in every protectorate treaty the Germans concluded on the African continent, this treaty contained an exclusivity clause: 'Art. 11. Der Oberhäuptling der Hereros verpflichtet sich, sein Land oder Theile desselben nicht an eine andere Nation oder Angehörige derselben ohne Zustimmung Seiner Majestät des Deutschen Kaisers abzutreten, noch Verträge mit anderem Regierungen abzuschliessen ohne jene Zustimmung.' This provision affirmed the division of sovereignty rights between Germany and the native ruler. It was the Germans who controlled relations with other political entities. Whether in practice this division was upheld and the internal sovereignty rights of the African ruler were respected is a question that will be addressed in the next Section.

To summarize, Germany had no colonial history when it decided to go to Africa in the 1880s. In the context of its imperial expansion, Germany intended to establish colonial protectorates on the African continent. Acquiring African territory by cession or establishing protectorates in the traditional sense, the Germans excluded at forehand. Trading companies played a central role in the creation of the informal empire; they concluded many treaties with native rulers in the name of the German State. While these treaties stated protection as their purpose, in practice, as will be argued later, annexation was

60 See Kum'a Ndumbe, *Deutsche Kaiserreich in Kamerun*, 78.

effectuated. *Schutzgebiet* treaties contained the same ambiguity as the treaties the British and the French concluded with native rulers. The Treaty of 12 July 1884, for example, spoke of the transfer of sovereignty, legislative authority and administrative power, but included a non-intervention clause and a guarantee to preserve natives' property rights to land. Another noteworthy feature of the treaties establishing German protectorates in the Cameroonian area was that within such a protectorate a relationship of suzerainty was established. Eventually, as will be seen next, establishing a *Schutzgebiet* opened the door to annexation.

4 Legislation Following the Conclusion of Treaties

After the conclusion of bilateral treaties between Germans and African natives, indirect rule by the German chartered trading companies proved a failure. This and the emerging resistance of native people caused the German State to intervene directly in ruling the territory and its inhabitants in an attempt to restore law and order. In the turmoil caused by the trading companies that primarily served their own interests, the interests of Germany as well as those of the individuals and peoples living in the overseas territories were neglected. A central authority exercising sovereignty rights had to be instituted to overcome and avoid further deterioration of relations within the acquired territories.

The Germans instituted strict control over the territory and subjected it to German norms and values, as Andreas Eckert's characterization of the German colonial State shows: 'Der koloniale Staat war ein autoritärer Verwaltungsstaat ohne Gewaltenteilung, eine Despotie, die sich auf eine Herrschaftsallianz mit den Kräften des Hinterlandes stützte. [...] Daraus resultierte ein Staat, in dem Macht personengebunden blieb, und Recht ein Instrument, Gehorsam zu erzwingen.'⁶¹ German law was enforced by a central authority and imposed on Germans, other Europeans and African natives inhabiting the territory. Although the Germans never officially considered assimilation part of their colonial policy, as France did, the essence of German rule was to align natives' laws and customs with those of the Germans, fully assimilating the former. Enacting legislation was the main instrument to subject African territory and

61 A. Eckert, 'Verwaltung, Recht und koloniale Praxis in Kamerun, 1884–1914,' in: R. Voigt and P. Sack (eds.), *Kolonialisierung des Rechts* (Baden-Baden: Nomos, 2001), 169. See also Jaeck, 'Deutsche Annexion,' 81–95.

people to German norms and values.⁶² Cameroonian territory was considered to be an extension of the German motherland on the European continent. It was centrally ruled by German authorities without any involvement of the African rulers. As a consequence, native interests were ignored. This caused many difficulties, especially with regard to land ownership. After the first appropriations of Cameroonian territory by the Germans, land ownership came to be regulated by system of concessions, many of which were granted to the *Gesellschaft Süd-Kamerun* and the *Gesellschaft Nordwest-Kamerun*. As will be argued later, the effect of granting these concessions was that native land ownership was disregarded.

Colonial law in Cameroon comprised a mixture of two legal systems, i.e., German-Prussian law and traditional custom-based native law. The core features of colonial law were that it recognized German dominance over the subordinated territory and people of Cameroon and that it underwrote the instrumental, facilitating role of the territory, its resources and peoples in serving Germany's interests.⁶³ The subjected territory became part of and served the European State: internationally, it lost its status as a separate and independent entity. Excluding the African political entity from the international legal order and, in consequence, disapplying international law is the basic premise of the European approach to non-European polities. Nevertheless, some legal scholars pointed to the advantages of colonial law in the sense of creating opportunities and encouraging development: '[C]olonial law not only defined the terms of domination and colonial exploitation; it also introduced new modes of conflict resolutions, notions of individual freedom, and modern property rights, and thus changed the structure of indigenous societies.'⁶⁴ According to these scholars, the introduction of German law and the adaption and suppression of native law and custom not only created problems, but also offered solutions and opportunities.

Irrespective of how territory was acquired, the newly obtained areas needed legal rules and courts. In addition, the substance and application of local customary laws had to be evaluated and categorized. A balance had to be found

62 For a comprise overview and texts of the legislation enacted in Cameroon, see J. Ruppel, *Die Landesgesetzgebung für das Schutzgebiet Kamerun* (Berlin: Mittler, 1912).

63 For a description of the hierarchical nature of German colonial law, see P. Sack, 'Grundzüge,' 43. See also Eckert, 'Verwaltung,' 173.

64 G. Hardach, 'Defining Separate Spheres: German Rule and Colonial Law in Micronesia,' in: H. Hiery and J.M. MacKenzie (eds.), *European Impact and Pacific Influence. British and German Colonial Policy in the Pacific Islands and the Indigenous Response* (London: Tauris, 1997), 231.

between the law of the colonized and that of the colonizer. Inevitably, a dual system of courts emerged on colonial territories, one exclusively administering native law and the other administering the new law, imported by the Europeans. Applying the law in colonial territories did not only involve controlling the territories by means of set rules and procedures, but also demonstrating possession, labour, power and authority.⁶⁵ Law in the overseas territories consisted not only of positive law, institutions and procedures introduced by the Germans; it also had to deal with native customary law and to react to the challenges this confrontation brought about.

As the Cameroonian interior was gradually subjected to German control, mainly through treaties concluded with native rulers, authority was proclaimed by the heads of expeditions, most often representatives of trading companies. In the majority of cases, such an expeditionary leader would govern a particular administrative area as a *Bezirksamtman*. The development of administrative control over the *Hinterland* evolved gradually, accompanied by juridization, unification and centralization of German control over the territory. Like that of the French, German colonial administration was a centralized organization. The territory was administered directly by German officials: the Governor, the Chancellor and two Secretaries with a local council consisting of three merchants. The leading position within the colonial administration in Cameroon was held by the Governor: he controlled the legislative, the executive and the judiciary powers in Cameroon.⁶⁶

German control of Cameroon was mainly effectuated by the Governor issuing decrees, *Verordnungen*. Two of the main subjects of regulation were the seizure and allocation of proprietary rights to land.⁶⁷ Direct rule was introduced to the detriment of native traditions, customs, laws and institutions. Legislative, administrative and judicial bodies were instituted in accordance with the German model and legal system by the *Gesetz betreffend die Rechtsverhältnisse der deutschen Schutzgebiete* of 17 April 1886. This law established that two different legal systems applied to the Cameroonian territory: the imported German law applied to the Germans inhabiting the territory, and traditional customary law, for the time being, continued to apply to the native population. It was characteristic of the colonial legislative, administrative and judicial

65 Eckert, 'Verwaltung,' 174.

66 See Sack, 'Grundzüge,' 47. The Governor's powers were determined by the *Schutzgebietgesetz* from 1 January 1901.

67 Harald Sippel described this transition from the acquisition of territory to the organization and administration of Cameroon and the appropriation and distribution of land rights: Sippel, 'Typische Ausprägungen,' 352.

system that the German Emperor possessed absolute power over legislation and administration, a power conferred on him by §1 of the aforementioned law of 17 April 1886: 'Die Schutzgewalt in den deutschen Schutzgebieten übt der Kaiser im Namen des Reichs aus.' This shows the close relationship between the *Schutzgebiete* and Germany.

The effect of the *Verordnung* of 27 March 1888,⁶⁸ as laid down by Governor Julius Freiherr von Soden (1846–1921), was that ownership of land formerly owned or held by native inhabitants and acquired by means of a treaty would fall under the authority of the German Emperor (§1); ultimate land ownership accrued to the German Emperor. The decree stipulated that land ownership depended on the possessors developing their holdings within four years. Developed land meant land used for mining, building and agriculture: the nomadic way of life – hunting and gathering – was excluded (§4). Dispossession of land was possible only for reasons of public interest: land ownership can be taken 'nur aus Gründen des öffentlichen Wohles für Unternehmen.' Whether dispossession was for the common good was a decision the Governor would take at his discretion: his decision could not be appealed (§8).

Subsequently, the *Verordnung* of 2 July 1888⁶⁹ authorized the German Governor to formulate the conditions under which land was to be acquired by Germans, which regarded both modes of acquisition: treaties with natives and occupation of *herrenloses Land* (§21). Cession and occupation were both legally recognized modes of territorial acquisition by which Germans could obtain proprietary rights to land. Section 21 of the decree stipulated that all land-related regulations were to be approved by the German Emperor and that all lands had to be officially registered in the *Grundbuch*, the central register in which land ownership was laid down and which was based on a system of individual property.

These decrees, issued in March and July 1888, formally introduced German land law in Equatorial Africa – to the detriment of traditional native land law.

68 *Verordnung betreffend den Erwerb und Verlust, sowie die Beschränkungen des Grundeigentums, vom 27. März 1888.* Reproduced in A. Zimmermann, *Die deutsche Kolonial-Gesetzgebung. Sammlung der auf die deutschen Schutzgebiete bezüglichen Gesetze, Verordnungen, Erlasse und internationalen Vereinbarungen, mit Anmerkungen und Sachregister, 1893–1897* (Berlin: Mittler, 1898), 249–251.

69 *Verordnung betreffend den Erwerb und Verlust, sowie die Beschränkungen des Grundeigentums, vom 27. März 1888.* Reproduced in Zimmermann, *Deutsche Kolonial-Gesetzgebung*, 250. See also the Verfügung des Reichskanzlers betreffend die Führung der Grundbücher und das Verfahren in Grundbuchsachen in den Schutzgebieten von Kamerun und Togo, vom 7. Juli 1888. Reproduced in Zimmermann, *Deutsche Kolonial-Gesetzgebung*, 199–206.

In practice, however, the Germans did take into account the formal requirement of the Governor's approval in case of land sale between natives and Germans. The fact that the sale and lease of African land was harmful to natives' interests was not considered an issue until several reports of abuses appeared.⁷⁰ In 1894, it fell to the German Governor of the Cameroons, Eugen Ritter von Zimmerer (1843–1918), to regulate the transfer of land between natives and Germans, because natives refused to accept the unbridled taking of their lands by the Germans – a situation that led to conflicts and clashes between the two parties. Several reports were written on how the Germans misused their position as the dominating power in their relationship with the Cameroonian natives. In response to the abuses and disorder, a *Verordnung* was issued at the end of 1894, which required that all land treaties, contracts, and other agreements between natives and Germans had to be publicized by persons who had been authorized by the Government to do so.⁷¹

However, far from decreasing, the number of conflicts rose. In view of these conflicts over land allocation and speculation, – particularly harmful to the economic prosperity of both German and Cameroonian parties – the German government intervened again in an attempt to resolve land transaction problems. On 15 June 1896 it issued the *Verordnung* known as the *Kronlandgesetz*,⁷² a decree that was crucial to the colonial land policy, or *Grundstücksrecht*, in the *Schutzgebiet* of the Cameroons, because it had to regulate the institution, occupation and use of *Kronland* as well as the seizure and allocation of property in land. Under this decree all unoccupied territory, *herrenloses Land* or *terra nullius*, in the Cameroons was declared *Kronland* (§1), which implied that all unoccupied land was appropriated and categorized as property of the German State:

Vorbehaltlich der Eigentumansprüche oder sonstigen dinglichen Ansprüche, welche Private oder juristische Personen, Häuptlinge oder unter den Eingeborenen bestehende Gemeinschaften nachweisen können, sowie vorbehaltlich der durch Verträge mit der kaiserlichen Regierung

70 See Rudin, *Germans in the Cameroons*, 398.

71 §1 of the *Verordnung* betreffend Grunderwerb in Kamerun, vom 24. Dezember 1894, *Kolonialblatt* 1895, p. 101. Reproduced in Zimmermann, *Deutsche Kolonial-Gesetzgebung*, 133–134.

72 Allerhöchste *Verordnung* über die Schaffung, Besitzergreifung und Veräußerung von *Kronland* und über den Erwerb und die Veräußerung von Grundstücken im *Schutzgebiete* von Kamerun, vom 15. Juni 1896, *Kolonialblatt* 1896, pp. 435 bis 437. Reproduced in Zimmermann, *Deutsche Kolonial-Gesetzgebung*, 232–233.

begründeten Okkupationsrechte Dritter ist alles Land innerhalb des Schutzgebietes von Kamerun als herrenloses Kronland. Das Eigentum daran steht dem Reiche zu.

In order to distribute and allocate the land in a fair manner, land commissions were appointed to identify and delimit the unoccupied lands and to determine private entitlements to land, which could be challenged in court (§4). These land commissions were instituted per district and, in most cases, consisted of four German civil servants and two German settlers. No Cameroonian rulers or subjects sat on these land commissions. When Germans, whether private individuals or trading companies, wanted to settle in the vicinity of native villages, the decree stipulated that enough land was to remain in native hands to meet their needs and even those of a larger population (§3). As a guideline for delimiting native land, the following rule was established and applied: 'at least six hectares of land should be allowed for each hut in addition to the land occupied by the hut and that used for planting.'⁷³ The remaining land was tagged as unoccupied and was automatically categorized as property of the German State. Transferring ownership of or leasing *Kronland* was subject to approval by the Governor in consultation with the German Emperor, who also determined on which conditions land could be sold and leased (§6) and under which terms the government would allow the construction of rails, roads, canals, telegraph, post offices, etc. (§8). If natives were to transfer their land to Germans, whether by sale or lease, for a period longer than 15 years, assent of the Governor was required in order for such a transfer to be valid (§11). According to §12, the Governor had the authority to empower individuals or companies to seek land not yet under the control of or mapped by the land commissions, and to take possession of this land, regardless of whether it was *herrenloses Land*. Subsequently, the Governor would recognize this land as unoccupied land. Detailed interpretation and specific execution of the principles laid down in this *Kronlandgesetz* were the responsibility of the German Governor and the Cameroonian Chancellor (§13). In this respect, the German Emperor's comments on the decree of 15 June 1896,⁷⁴ which explained certain provisions of the decree in more detail for the purpose of facilitating its

73 Rudin, *Germans in the Cameroons*, 401–402. See also Fisiy, 'Techniques of Land Acquisition,' 237.

74 Verfügung des Reichskanzlers betreffend die Ausführung Verordnung vom 15. Juni 1896 über die Schaffung, Besitzergreifung und Veräußerung von Kronland und über den Erwerb und die Veräußerung von Grundstücken im Schutzgebiete von Kamerun, vom 17. Oktober 1896, *Kolonialblatt*, p. 667.

execution, is confusing. Although the decree testifies to the German government's mercilessness in taking land from its original owners, the Chancellor urged to take the natives' position and interests into account (§2). Although the Chancellor recognized the subordinate position of the original inhabitants of Cameroon and the massive appropriation of their lands as a consequence of German presence on the territory, he did not take action to undo and prevent these practices. Natives' proprietary rights to land were consciously ignored by the Germans, and the plight of natives continued to be one of legal uncertainty and insecurity.

As a consequence of the *Kronlandgesetz*, the number and the surface area of plantations possessed by German individuals and companies increased exponentially in the 1890s, as many plots of land were granted under the Governor's authority. This resulted in large-scale dispossessions of natives. The Germans justified taking possession of territory they classified as *herrenloses Land* by arguing that as nobody had any particular rights to the land concerned, the German State was free to seize, distribute and allocate the land in accordance with the principles of reasonableness and usefulness: 'wo keiner ein besonderes Recht hat, der Staat nach Billigkeit und Nützlichkeit verteilen kann.'⁷⁵ From the perspective of the German government, the natives did not have any special rights to the lands they inhabited and they did not succeed in distributing these lands in accordance with *Billigkeit* and *Nützlichkeit*, i.e., cultivation of the land for the sake of economic benefits. As a consequence of the *Kronlandgesetz* classifying unoccupied lands as *Kronland*, natives were forced to cede their property rights to the German State. The German State eventually and effectively acquired ownership of the lands by taking them from the natives.

The German authorities authorized themselves to distribute, allocate and use the land, and they instituted a concession system. At the expense of the original inhabitants' rights to the lands, these lands became the property of German capitalists, such as planters, bankers, and merchants. In exchange, these private actors had to open up the land, to invest in the land, to support German initiatives and companies, and to develop agriculture.⁷⁶ The effects of this trade-off were mass expropriations of native lands and granting huge numbers of land concessions, mainly to such German associations as the *Gesellschaft Süd-Kamerun* and the *Gesellschaft Nordwest-Kamerun*. In 1901, for example, Governor Jesco von Puttkamer (1855–1917) transferred full ownership of

75 Gustav Bansi in Schlimm, *Grundstücksrecht in den deutschen Kolonien*, 47. See G. Bansi, 'Die Gebietshoheit als rein staatsrechtlicher Begriff durchgeführt,' *Hirths Annalen des Deutschen Reich* (1898), 641–692.

76 Kum'a Ndumbe, *Deutsche Kaiserreich in Kamerun*, 118–120.

all unoccupied land to the *Gesellschaft Nordwest-Kamerun*. Large numbers of Cameroonian natives were expelled from their lands and relocated to reserves set up by the German administration. Until 1905, the German government sold more than two million hectares of native land to German private individuals and companies. The profits were used to finance Germany's colonial venture.

As mentioned before, German rule was not uncontested. For example, objections were raised by the Basler Mission in Victoria, which stood up for Cameroonian natives by drawing attention to the forced expropriation of land, the relocation to reservations and the lack of suitable land to guarantee basic subsistence levels. The German Governor at the time, Von Puttkamer, ignored the missionaries' complaints and criticism and defended the interests of the plantations, which profited from the concession system.⁷⁷ The protesters, however, stood firm and even succeeded catching the attention of the German administration on the European mainland. *Landraubkrieg* was the term used to describe the plight of the native population.⁷⁸

In 1902, the first land commissions, constituted by the 1896 *Verordnung*, presented their findings with regard to the German land policy and how it was realized in practice. This first report, however, turned out to be highly bureaucratic and prejudiced. First, the reference to the exact amount of land allotted to native peoples evidences the technocratic nature of the land policy. Second, the rapporteurs obviously favoured the German settlers, trading companies and plantations on the African territory by insisting that relocating the natives to reservations was not objectionable. The commissions' findings were not wholeheartedly accepted by the powerless inhabitants of the Basler mission. Although the findings of the land commissions did not contribute to solving the problems that accompanied German land policy in Cameroon, they did

77 Von Puttkamer 'assured that the natives owned only the land that they cultivated, a view opposed by those defending the natives; the latter argued that the land used by the natives for their goats and cattle and for hunting was far more extensive than the land under cultivation. In the final vote it was decided by the council that natives should be placed in village-reservations without any compulsion; that they should not be forced to work on the plantations; that enough land should be given to natives to assure them of an adequate living (no fixed amount of land was named because of the differences prevailing between regions in the character of the soil); that natives were to have fishing and hunting rights, the right to collect and to process natural products and to get fuel in unoccupied land so long as it was not sold or leased to third parties.' Rudin, *Germans in the Cameroons*, 403.

78 A. Rüger, 'Die Entstehung und Lage der Arbeiterklasse unter dem deutschen Kolonialregime in Kamerun (1895–1905),' in: H. Stoecker (ed.), *Kamerun unter deutscher Kolonialherrschaft*, vol. i (Berlin: Rütten and Loening, 1960), 184.

put the land problems in the German overseas territories on the *Reichstag's* agenda and were occasionally discussed, especially in the context of setting and adopting the budget and the ever increasing expenditure in the overseas territories.⁷⁹

Another consequence of the land commissions' reports was that land regulations were elaborated. On 21 November 1902, a decree was enacted by the Chancellor regarding the rights to parcels of land in all German *Schutzgebiete*. The central issues in this decree were the registration of land and the acquisition by Germans of *herrenloses Land* and land inhabited by natives. This decree, as Peter Sack correctly observes, tacitly disregards two fundamental legal principles, namely, the freedom of appropriation and the freedom of contract.⁸⁰ The decree empowered the Emperor to set the conditions for the appropriation of *herrenloses Land* and land inhabited by natives 'soweit das im öffentlichen Interesse notwendig erscheint.'⁸¹ The Chancellor had the right to appropriate and allocate land and rights to these lands at will if such a course of action were in the public interest. Expropriation of native land was thus subjected to the Chancellor's discretionary power of determining when appropriation of land was necessary.

A few months later, on 14 February 1904, restraints to taking unbridled possession of land were put in place through the enactment of the *Enteignungsgesetz* by way of a *Kaiserliche Verordnung*.⁸² This decree stated in §1 that land ownership and the right to occupation of *herrenloses Land* or *Kronland* could only be effectuated on the basis of the public well-being for undertakings, which favoured the execution of the right of expropriation. In exchange, compensation had to be paid.⁸³ Here too, the power to decide whether it was in the public interest to appropriate land was granted to the Governor (§4). The decree was also applicable to the dispossession of natives, albeit on more stringent conditions. There is an essential difference between the *Kronlandgesetz* of 15 June 1896 and the *Enteignungsverordnung*. By constituting *Kronland* the German State acquired ownership of the land. In contrast, in case of

79 See, for example, Rudin, *Germans in the Cameroons*, 401 and 404.

80 Sack, 'Grundzüge,' 56.

81 See *ibid.*

82 Kaiserliche Verordnung über die Enteignung von Grundeigentum in den Schutzgebieten Afrikas und der Südsee, vom 14. Februar 1903, *Kolonialblatt*, p. 121. Reproduced in Kum'a Ndumbe, *Deutsche Kaiserreich in Kamerun*, 176–188.

83 See §1 of the 1903 *Verordnung*. Reproduced in Kum'a Ndumbe, *Deutsche Kaiserreich in Kamerun*, 176. See also E. Rohde, *Grundbesitz und Landkonflikte in Kamerun. Der Bedeutungswandel von Land in der Bamiléké-Region während der europäischen Kolonisation* (Hamburg: LIT, 1996), 73.

Enteignung the German State was merely a third person granting the right to dispossess natives in favour of German settlers. In the light of the *Enteignungsverordnung*, the native's position had to be taken into account as determined by §32: the dispossession 'die aus der Herrschaft oder dem Besitz Eingeborener an Nichteingeborene übergegangen sind, zum Zwecke der Wiedereinsetzung der Eingeborenen in den Besitz insoweit zuzulassen, als die Enteignung nach dem Ermessen der Behörde notwendig ist, um den Eingeborenen die Möglichkeit ihres wirtschaftlichen Bestehens, insbesondere das Recht einer Heimstätte, zu sichern.' The expropriated lands would be classified as *Kronland* and would thus become the property of the German State. This particular provision clearly was not in the best interests of the companies, investors and other German settlers that benefited from German land policy, and the strongly objected to it. In view of this presumed threat to their rights, the German planters and large landowners asserted the absoluteness and inviolability of private land ownership: 'Die Plantagenbesitzer und Konzessionäre, die den Kamerunern bedenkenlos den Grund und Boden geraubt hatten, sprachen jetzt als es um ihre Interessen ging, von der "Heiligkeit des Privateigentums," das auch nicht mit Worten angetastet werden dürfe.'⁸⁴ In theory, this decree enabled the German government to authorize the colonial authorities to dispossess Germans in Cameroon too, and this offended the German landowners. However, the provisions on the dispossession of natives it showed that this particular provision was just a formality which posed no real threat to German landowners in the Cameroons.

The German government's *Kronland* policy was elaborated extensively by the *Verordnung* of 18 April 1910.⁸⁵ It stipulated that German settlers were allowed to purchase *Kronland* from the Government provided that the land was used to erect buildings and provided that the requested area did not extend beyond three hectares. The Governor had the final say: he assessed the purchase request and the purchase price was subject to his approval. If the requested land extended beyond three hectares, it could only be held by lease on condition that they be cultivated. The German government, however, had the right to cancel the lease contract and take the land whenever needed.

This *Verordnung* was issued against the background of the project of segregating the Duala area into European and African districts, and the distinction between urban and countryside law was an important element of German modernization of Cameroon. After 1900, the strains caused by urban

84 Rüger, 'Entstehung,' 190.

85 *Verordnung*, von 18. April 1910, *Kolonialblatt*, 1910, pp. 43–44. Reproduced in Zimmermann, *Deutsche Kolonial-Gesetzgebung*, doc. 298.

development in Duala led to conflicts. As Duala became the main colonial urban centre of Cameroon, the German administration launched a campaign to modernize streets and housing in the main native areas of the city. The native rulers objected to German interference in their trade monopoly, to the fact that they were forced to work for the Germans as wage labourers outside the trade sector, and to having to pay taxes to the Germans. The right to levy taxes, the native rulers claimed, had not been conferred on the Germans by the 1884 treaty.⁸⁶ Subsequently, the Germans imposed their land expropriation schemes, which to the Duala people was the last straw. Duala rulers bombarded the German Governor and *Reichstag* with telegrams, petitions and letters, claiming that the 1884 treaty did not allow expropriation. A typical question was the key question in the telegram of 12 March 1912 addressed to the *Reichstag*, in which the Duala rulers literally asked since when the German State had been the owner of the land: '[S]eit wann ist denn unser ländlicher Grundbesitz Eigentum der Regierung geworden?'⁸⁷ In response, the government tried to appease the rulers and to weaken resistance by privileging the people who did surrender their lands and resettled in the appointed reservations. As to the argument regarding the violation of the 1884 treaty, the German government argued that dispossession was a sovereign right of each and every State.⁸⁸ Whether Germany's argument was valid is a question that will be addressed in §5. What is important to bear in mind is that Cameroonians did passively accept German rule and that they pointed to inconsistencies in the legal justification of German presence on their territory. King Manga Bell involved other Cameroonian rulers in his resistance against the Germans and asked them for support by asserting that the German practices went against the provisions of the 1884 treaty. This alliance even appealed to Britain and France to recognize the illegality of the German acts. This last step, however, proved fatal for King Manga Bell. As the prospect of war in Europe began to loom large, his appeal to Britain and France was interpreted as an attempt to contact Germany's enemies. Consequently, King Manga Bell was arrested and executed for high treason.⁸⁹

In addition to this peaceful attempt to overthrow German authority, violent resistance also erupted. Although the Germans were already actively engaged in the exploration and acquisition of the *Hinterland* of the Adamawa region

86 Rudin, *Germans in the Cameroons*, 409. See also Rohde, *Grundbesitz und Landkonflikte in Kamerun*, 77–79.

87 *Ibid.*, 78.

88 Rudin, *Germans in the Cameroons*, 411.

89 *Ibid.*, 412.

by concluding treaties with local rulers in the 1880s, the Fulani people continued to resist German presence. Several military expeditions were sent into the Cameroonian interior. On 11 September 1899, a peace treaty between the Fulani rulers and the Germans was signed. The Fulani placed their territory under German protection and hoisted the German flag, with the Fulani rulers promising to respect and to comply with German rules and orders. In return, the Germans paid compensation to the Fulani people.⁹⁰

Despite native resistance and critical questions from the *Reichstag*, the German government continued the expropriation process. German colonial rule in Cameroon was characterized by a gradual transition of an agro-rural society to a capitalist market economy, a transition that was also reflected in colonial land law and policy. By constituting *Kronland*, the German State acquired ultimate land ownership over Cameroonian land. In other words, the German settlers and companies did not acquire ownership of the land; they could only obtain concessions from the German government. In the end, all land remained under the authority of the German government and it was the government that had discretionary power and final control over the territory. The German government had the competence to grant or refuse the right to property in land at its discretion. Consequently, the Cameroonian inhabitants were dispossessed, expelled from their lands, and forcedly placed in reservations. The Cameroonian people were subjected to the partiality of the German Governor and stood defenceless against the German settlers. Later, they would be employed on the German plantations to cultivate the lands that had originally belonged to them. Until the Great War commenced, Cameroon remained under German rule.

5 Treaty Interpretation and Execution

Especially after a *Schutzgebiet* treaty had been signed, the failure to respect the distinction between territorial sovereignty and private land ownership became a central issue. From the point of view of German legal scholars, *imperium* and *dominium* were distinct concepts. In the words of Von Liszt: 'Erwerb und Verlust der Gebietshoheit, mithin der Staatsgewalt – also des Imperiums, nicht des Dominiums; der Herrschaft nicht über das Land, sondern innerhalb des Landes über die Leute.'⁹¹ The question is whether and to what extent this

90 See C. Anyangwe, *The Cameroonian Judicial System* (Yaoundé: CEPER, 1987), 26.

91 Von Liszt, *Völkerrecht*, 1925, 149. See also F. Lentner, *Das Internationale Kolonialrecht im neunzehnten Jahrhundert* (Wien: Manz, 1886) and Schlimm, *Grundstücksrecht in den deutschen Kolonien*.

distinction was upheld with regard to the acquisition of sovereignty over territory and the land ownership of native peoples in the context of Germany's imperial expansion in Africa. From the beginning, German treaties with natives explicitly excluded land ownership from cession. Sovereignty rights were the only object of transfer: 'Der Boden darf bei einer eventuellen Souveränitätsübertragung nicht übergeben werden.'⁹² As has been shown, Germany did not acquire African territory by cession and did not establish traditional protectorates in Africa. The Germans attempted to constitute colonial protectorates, or *Schutzgebiete*, as did Britain and France at the later stage of the scramble for Africa. However, transferring external sovereignty rights by means of a treaty establishing a colonial protectorate, allowed the Germans to acquire internal sovereignty in addition to the external sovereign rights which they already possessed. This extension of sovereignty rights over Cameroonian territory occurred by way of the unilateral enactment of legislation. By way of *Verordnungen*, the Germans took over the internal administration of the protectorate. In contrast to Britain and France, this process of acquiring all-comprehensive sovereignty over territory was less gradual. Because the German colonial venture had started late and little time passed between landing on the African continent and taking control over specified territories, the acquisition of territorial sovereignty, including land ownership, was a less subtle process. Often, when *Schutzgebiet* treaties were concluded, the transfer of partial territorial sovereignty rights was presumed to include the appropriation of land ownership. Against this background of time pressure caused by the scramble, the Germans were less reluctant than the British and French to occupy *herrenloses Land* as a means of territorial acquisition and to declare these territories *Kronland*. Having acquired all-comprehensive sovereignty over the territory, which it deemed necessary to maintain law and order, the German State claimed ultimate land ownership, and this was the point of departure for implementing the concession system soon after the treaties had been signed. As a consequence, the native people were dispossessed and were placed in reservations.

Cameroonian natives, however, resisted the establishment and strengthening of German rule. In 1911, the resistance of the Duala population against the German presence on their land was based on the argument that the act of dispossession was contrary to the 1884 treaty. They insisted that only sovereignty rights, whether wholly or in part, had been transferred. In so arguing, they referred to the treaty's non-interference clause. The German government responded by arguing that dispossession was a right that all sovereign States had. The question of course is whether the German State did indeed have the

92 Kum'a Ndumbe, *Deutsche Kaiserreich in Kamerun*, 73.

right to unilaterally overrule these treaty obligations by issuing *Verordnungen*? Did Germany violate protectorate treaties by extending the acquired external sovereignty rights to include internal sovereignty rights and by disregarding the existing native property rights to the land? In short, was *imperium* legally extended to include *dominium*? And could the acquisition of partial sovereignty rights over territory result in the acquisition of full sovereignty, including proprietary rights to land?

There is another example of the natives opposing German rule. In the light of the *Kronland* policy of Germany, an interesting case emerged in a part of the Bamiléké territory, situated at the foot of the Cameroon Mountain and inhabited by the Bamoun and Bamiléké peoples. During the early 1900s, the Bamiléké territory was subjected to and redistributed by the German concession associations. Objecting to this appropriation, the ruler of the Bamoun people wrote a letter on 25 August 1910 to the German authorities in Cameroon regarding the rights to land ownership of his people, which implied the rejection of the status of *Kronland*, as declared by the Germans.⁹³ The Bamoun ruler argued that the territory could not be deemed *herrenlos*, despite the fact that the territory was neither inhabited nor cultivated. The German authorities' initial response was to argue that it was not the density of population or the number of buildings that was the standard for *Kronland* status, but the extent of sovereign powers exercised over the involved territory.⁹⁴ In other words, *herrenloses Land* or *terra nullius* was aligned with the absence of sovereignty and, therefore, with the non-existence of a State: the territory lacked *Staatlichkeit*. The Germans later reviewed their argument and admitted that the *Kronrechte* were indeed not very strong. The Bamoun ruler did exercise sovereignty rights over the territory and the classification of the territory as *Kronland* had not been justified.⁹⁵ Subsequently, the German government and local authorities promised to respect the sovereignty rights over the territory and the land ownership of the Bamiléké people, and considered the holdings of the German concession associations invalid.⁹⁶

Germany's recognition of the unlawfulness of the acquisition of this particular African territory by way of occupation and of its subsequent classification

93 A copy of the letter of 25 August 1910 can be found in the Bundesarchiv Potsdam, Reichskolonialamt nr. 4295, Allgemeine Angelegenheiten des Schutzgebietes Kamerun, Februar-August 1911, Bl. 142, Anlage 6, 1–18. Reproduced in Rohde, *Grundbesitz und Landkonflikte in Kamerun*, 98.

94 *Ibid.*

95 *Ibid.*, 99–100.

96 *Ibid.*, 100.

as *Kronland* undermines the legality of this mode of acquisition in the context of the struggle for African territory. The Germans were well aware of this legally doubtful way of acquiring title to territory and they therefore relied on constituting *Schutzgebiete* by concluding bilateral treaties with native rulers. Germany and its European rivals acquiesced on the point that the acquisition of African territory by occupation had become untenable and could henceforth only be achieved in a derivative manner.

6 Conclusion

The treaties Germany concluded with native rulers to establish a unified *Schutzgebiet* of Cameroon, gave rise to two problems. First, the treaty texts clearly indicated that Germany would not acquire all-comprehensive sovereignty over the territory: sovereignty rights would be divided between Germany and the native ruler. Yet soon after signing the treaty, Germany usurped the sovereignty rights of the ruler too. Did Germany violate the law by failing to respect the sovereignty of the African ruler? Contemporary legal doctrine pointed to the impossibility of two sovereigns ruling one and the same territory and asserted that *de facto* control over the territory was exercised by the German authorities.⁹⁷ Sovereignty was considered indivisible. This premise rests on the presumption that Germany possessed and exercised both external and internal sovereignty over the territory. By asserting this logic, German legal scholarship confirmed that once a *Schutzgebiet* had been constituted, Germany could (and did) intervene in the self-government of the native polities, while *Schutzgebiete* were officially not part of the German dominions. From an international legal perspective and taking the theory of the traditional protectorate into account, it is questionable whether the acquisition of external sovereignty implied obtaining claims to internal sovereignty. If this presumption were part of the international legal order, it would have tremendous consequences for the independence and authority of States and the relations between States.

Second, the exercise of internal sovereignty over territory implied the competence to regulate and allocate property rights to land, which the German did on the basis of the concept of *Kronland*, the introduction of concession

97 Schlimm, *Grundstücksrecht in den deutschen Kolonien*, 46. See also P. Laband, *Das Staatsrecht des Deutschen Reiches* (Tübingen, Leipzig: Mohr, 1901), 273; F. Seelbach, *Grundzüge der Rechtspflege in den deutschen Kolonien* (Bonn: Cohen 1904), 5 and K.F. von Stengel, *Die Rechtsverhältnisse der deutschen Schutzgebiete* (Tübingen, Leipzig: Mohr, 1901), 38.

systems and the registration of land ownership. German policy left virtually no room for native property rights. Did Germany illegally appropriate native lands and proprietary rights? As has been shown, the text of the standard protectorate treaty the Germans used to establish *Schutzgebiete* unambiguously stated the German promise to respect the claim to exclude existing native property and proprietary rights from transfer. German interference with the self-government of the Cameroonian polities involved the enactment of legislation in which ultimate property rights to the land were granted by and to the German State, which implied the expropriation of natives. Subsequently, the German authorities constituted the concession system to gain profits, which were needed to finance the colonial venture.⁹⁸ The German government stood to benefit from acquiring property rights to the protected territory: the sale of the land to German individuals and companies would yield money. In addition, the land was subjected to exploitative activities, i.e., mining, agriculture and construction. The introduction of the notion of individual land ownership served the legal security of the German settlers and was the basis for taxation. Political constructs such as *Kronland* and *Schutzgebiete* served the German interest overseas. Promises made in treaties with native rulers were no obstacle to the German policy of land appropriation and reallocation. Eventually, the Cameroonian peoples lost their lands, either because their territory was considered *herrenloses Land* or by signing a bilateral treaty establishing a *Schutzgebiet*. This premise turned out to be the key for Germany to interfere with the self-government of the Cameroonian political entities, including the regulation and allocation of proprietary rights to land.

Were the protectorate treaties concluded between the German State and African rulers indeed meaningless formalities? Or did these treaties have legal value after all? The next chapter will address the question whether the increased German intervention in the internal affairs of the Cameroonian polities constituted a violation of the *Schutzgebiet* treaty and, more generally, of international law. More generally, it will attempt to answer the question whether the German, British and French colonization of Africa was legal.

98 See Rüger, 'Entstehung,' 182.

Ex facto ius oritur?

The main modes for European States to acquire African territory were bilateral treaties effecting cession and establishing protectorates, more specifically colonial protectorates. Chapter 4 pointed at the diverse forms and different interpretations of the protectorate treaties concluded by European colonial powers, more specifically Great Britain, France and Germany, took different forms and invited a variety of interpretations (Chapter 4). The very existence of these treaties suggests that international law was applied to the European-African confrontation. Within this broader context of international law, case studies of British, French and German treaty-making practices (in Nigeria, Equatorial Africa and Cameroon respectively) shed light on how – and how differently – these treaties were negotiated, worded, concluded and implemented (Chapters 5, 6 and 7). The present chapter looks at the theoretical implications of the reported treaty-making practices by addressing the question whether the cession and protectorate treaties, and by extension international law, were violated in their interpretation and execution. Were the European States unreservedly obliged to comply with the treaties they had entered into or did the civilization argument and the unequal status between the contracting parties justify the European States breaching their contractual obligations? Put another way, on which moral and legal grounds were European State powers bound to honour the treaties they had concluded with African rulers?

To answer this question, this chapter first compares and assesses the colonizers' treaty-making practices and subsequent conduct (§1). Second, it questions the legality of the acquisition and partition of Africa by treaty (§2). Specifically, it discusses whether European States infringed native landownership (§2.1) and whether they respected their treaty obligations and by implication international law (§2.2). Section 3 restates the chapter's main argument and concludes with some transitional comments on redressing historical wrongs, the topic of Chapter 9.

1 International Law in Practice: Treaties between European States and African Polities

Through their legal advisors¹ and judicial institutions² European governments officially recognized that African rulers had the power to transfer sovereignty rights over territory, either wholly or in part, i.e., by way of cession or protectorate treaties respectively. Such treaties were highly formalistic and became standardized during the period when European competition for African territory was most intense. Amid this clash of contending interests, cession lost currency and establishing protectorates became the main mode for European states to acquire title to African territory. Initially, protectorate treaties only transferred external sovereignty, but the extent and content of these sovereignty rights remained undetermined, and as competition for territory intensified the number of open norms increased. This extensive use of vague provisions and concepts – and the resulting widened scope for interpretation – expanded the discretionary competences of the European treaty parties. And as the object of the protectorate treaties was often obscured by the dust kicked up in the scramble for Africa, it was not long before the European treaty parties began to appropriate external sovereignty (including its accompanying rights over territory) as well as proprietary rights to land. In sum, open treaty terms, object indeterminacy and ample discretionary room combined to veil the practical implications of the protectorate treaties and effectively erase the distinction between sovereignty and property.

What happened was that the European treaty party would acquire full sovereignty step-by-step after the protectorate treaty had been concluded, as '[p]rotectorates ripen into sovereignty.'³ The case studies have shown that the reach of the transferred sovereignty differed from protectorate to protectorate; the scope of sovereignty rights was indeterminate. As Anghie observes, 'colonial jurists self-consciously grasped the usefulness of keeping sovereignty undefined in order that it could be extended or withdrawn [...]'.⁴ That the protectorate treaty effected cession of certain sovereignty rights to the European

1 See, for example, the advice of the British lawyers: Law Officers' Opinion 21 April 1886 Foreign Office No 84/2275.

2 *Ol le Njogo and others v The Attorney-General and Others*, 1913, K.L.R. 70 (Appeal to the Court of Appeal for Eastern Africa); *Southern Rhodesia, In re*, 1919, A.C. 211 (Appeal to the Privy Council); and *Amodu Tijani v. The Secretary, Southern Provinces of Nigeria*, 1921, 2 A.C. 399 or 3 N.L.R. 21 (Appeal from the Divisional Court of Southern Nigeria to the Privy Council).

3 McCalmont Hill, 'Growth and Development of International Law,' 262.

4 Anghie, *Imperialism*, 89.

contracting party in itself implied interference with African internal affairs; the protectorate treaty was effectively the first step to European control of the territory. The Europeans did not distinguish between internal and external sovereignty. Although, in theory, it was the African treaty party that held the rights of internal sovereignty, these were hardly, if at all, respected by the Europeans: the Europeans allocated these rights to themselves. Alexandrowicz recognizes the practice of using protectorates to acquire both external and internal sovereignty rights,⁵ and he refers to Article 35 of the Final Act of the Berlin Conference and the apparent tension incorporated in the Final Act between the requirement of effective occupation and the establishment of protectorates.⁶ He argues that, '[P]rima facie a Protectorate could not mean anything else but transfer of external sovereignty to the Protector leaving the internal sovereignty in the Protected State and linking the latter to the Family of Nations. That this interpretation is correct follows from the provision of Article 35 which lays down the principle of effective occupation but does not include Protectorates in the principle.'⁷ Alexandrowicz concludes that '[i]t could not have been otherwise as occupation would have suppressed the internal sovereignty of the Protected State.'⁸ After the external sovereignty rights over territory had been transferred from the native ruler to the European State, the European colonizing power began to encroach on the internal sovereignty rights of the native ruler.

Native transfer of external sovereignty rights by means of a protectorate treaty opened up an opportunity for the colonizing powers to acquire full sovereignty, including the power to regulate and administer internal affairs and allocate property rights and land ownership. The colonial governments under European rule increasingly claimed authority to dispose of land to which

5 Alexandrowicz, *European-African Confrontation*, 111.

6 See Fisch, 'Africa as *Terra Nullius*,' 347–375.

7 Alexandrowicz, *European-African Confrontation*, 4–5.

8 *Ibid.* 'As to the elimination of Protectorates from article 35 of the Berlin Act (which excluded their occupation), most of the international lawyers of the positivist school (apparently relying on State practice) took the view that effective occupation of the Protectorate by the Protector State was within the law. This was an interpretation *contra legem* leading to the establishment of the colonial Protectorate. The latter was obviously a political device without legal significance vis-à-vis African contracting parties. A Protectorate was bound to be governed by the terms of the treaty by which it was brought into existence. Intention of annexation was irrelevant from the point of view of international law. If the Protector State had such an intention but if the intention failed (as in the case of Ethiopia) it was meaningless. If on the other hand the act of annexation could be carried out, it was a breach of the treaty of protection unless the protected entity had agreed to it.' *Ibid.*, 124.

African law applied; using their self-enacted legislative instruments they were able to strengthen their control over the territories.⁹ More specifically, using these instruments European governments could exert influence on forms of land ownership, land use and land distribution on the African continent. These instruments included acquisition of the right of disposal, configuration of land, expropriation of land, increased control of land use through a system of concessions, control of land transfers, land registration for distributive purposes, and reassigning juridical competence to colonial authorities.¹⁰ The Europeans took over the internal administration of the protectorate territory, and this would eventually result in mass dispossession of the native populations and resettling these peoples in reservations established by the European authorities.

In the period following the conclusion of the protectorate treaties two different but related difficulties arose. First, it became increasingly hard to distinguish between a protectorate and a colony: in theory, a protectorate and a colony were two different things, but in practice the protectorate turned out to be a colony, in which full sovereignty was exercised by the European colonial authority.¹¹ Establishing a protectorate rather than a colony gave the European colonial power more room for discretion as well as the opportunity to avoid responsibilities. As Umozorike asserts correctly, '[t]he creation of a status for protectorates different from that of colonies was intended to give the Crown a free hand in dealing with the people in areas the Crown itself designated as "foreign land" under its control. It was a technicality for differential treatment that could hardly be justified.'¹² Initially, as the British consul Hewett wrote to Jaja, the king of Opobo, protection meant that 'the Queen does not want to take your country or your markets, but at the same time is anxious that no other nation should take them. She undertakes to extend her gracious favour and protection, which will leave your country still under your government.'¹³ However, in a memo he wrote to the British foreign secretary Rosebery on 15 April 1886 Hewett redefined the protectorate concept: '[T]he promotion of

9 See Frohnen, 'Problem of Power,' 621.

10 R. Debusmann and S. Arnold (eds.), *Land Law and Land Ownership in Africa. Case Studies from Colonial and Contemporary Cameroon and Tanzania* (Bayreuth: Bayreuth African Studies, 1996), viii–ix.

11 This blurring line between a protectorate and colony was already acknowledged by contemporary scholarship. See, for example, A. Mérignhac, *Traité de droit public international* (Paris: Pinchon and Durand-Auzias, 1905), 181.

12 Umozurike, *International Law and Colonialism*, 48.

13 F.O. 84/1862, see Hewett to Jaja, 1 July 1884, enclosed in Jaja to Salisbury 5 May 1887. Quoted in Anene, *Southern Nigeria in Transition*, 66.

the welfare of the natives of all these territories taken as a whole by ensuring the peaceful development of trade and facilitating their intercourse with Europeans. It is not to be permitted that any chief, who may happen to occupy a territory on the coast should obstruct this policy in order to benefit himself.¹⁴

However, as John Mugambwa correctly notes, there were differences between the German and French policies, on the one hand, and the British policy on the other on jurisdictional rights within protectorates: 'In terms of their [Germany's and France's] interpretation of international law, the assumption of a protectorate over "uncivilised" people automatically entitled the protecting state to exercise jurisdiction over all persons in the territory irrespective of consent of their government or that of the local ruler.' British law officers wrote two reports (in 1887 and 1891) in which they reminded their government that these German and French practices did not comply with the standards of international law.¹⁵ The reminder did not stop the British government from adapting its policy and 'gradually assimilate[ing] its position with that of the other European governments.'¹⁶ In other words, while the British initially argued for the illegality of the French and German colonial practices on the African continent, they eventually adopted the same practices in their African protectorates.

In French protectorate treaties, as has been shown, the term protectorate was often used in combination with suzerainty,¹⁷ a term related to feudalism and vassal relations.¹⁸ The ensuing ambiguity eventually caused sovereignty

14 F.O. 84/1749, no. 4, see Memo by Hewett on Rosebery's letter, 15 April 1886. Quoted in Anene, *Southern Nigeria in Transition*, 74.

15 Salisbury to Count Hatzfeld August 1887 Foreign Office No 412/28, quoted in Mugambwa, 'Treaties or Scraps of Paper,' 86.

16 *Ibid.* 'However, by the close of the century, the official view of the legal significance of the agreements had changed. The British government allowed itself to be convinced by its legal advisers that the extent of the powers and authority assumed in British protectorates was a matter of policy irrespective of express grant in the treaties with the local rulers. This view was subsequently adopted by the British judiciary.' *Ibid.*, 91.

17 The British Lord Chancellor, Lord Selborne, however, did describe the content and competences which a suzerainty in the context of Africa's colonization entailed: 'Suzerainty means that the Suzerain is lord paramount of the people who are subject to it. The control of foreign and Frontier relations essentially distinguishes a paramount Power. No war can be made upon adjoining Native tribes, no treaty can be made with (foreign) Powers except by the authority of (the suzerain) country,' leaving the control over internal affairs to the subjected political entity. Lord Selbourne quoted in Stubbs, 'Suzerainty, Medieval and Modern,' 279–280.

18 On suzerainty, see Kelke, 'Feudal Suzerains and Modern Suzerainty,' 221–223; M. McIlwraith, 'The Rights of a Suzerain,' *Law Quarterly Review*, 12 (1896), 113–115; M. McIlwraith,

rights to be divided and shared between France and the African polities. Most treaties concluded between the French and the natives claimed to establish a protectorate relationship,¹⁹ but the treaties were inconclusive on the scope and limitations of the sovereign rights which the native rulers would retain. On the one hand, there was no cession: France and the African polities entered into traditional protectorate agreements as sovereign entities. On the other hand, references to suzerainty reaffirmed a hierarchical relationship between the French and the natives.²⁰ This paradox is inherent to the phenomenon of colonial protectorates: in theory a protectorate was established, but in practice the treaty was interpreted in colonial legislation as effecting a cession of full sovereignty. The self-contradictory *occupation à titre de protectorat* is often used to characterize the colonial protectorate.²¹ First, France would claim to have established a protectorate on the basis of a treaty with an African native ruler. Second, it underlined the hierarchical relationship by referring to suzerainty. Third, vagueness and indeterminacy characterized the object of transfer. Fourth, the French exercised sovereignty rights. And, fifth, as this course of affairs had to be justified, the construction of the colonial protectorate was fashioned and used in both French politics and legal doctrine. The institution of the colonial protectorate, however, was not only used to retrospectively justify Africa's colonization, its use was first and foremost anticipated.

The difficulties that arose from establishing traditional protectorates prompted the ad hoc creation of the colonial protectorate. Legal positivists argued for the inapplicability of international law between States within the family of civilized nations and other political entities, but as the practice of colonial venture necessitated intervention, the political construct of the colonial protectorate²² was introduced to regulate contacts between European States and African political entities. Westlake defined the colonial protectorate

'Suzerainty: A Reply,' *Law Quarterly Review*, 12 (1896), 228–229; Rutherford, 'Spheres of Influence,' 300–325; Stubbs, 'Suzerainty Medieval and Modern,' 279–318 and C. Sylvest, "'Our Passion for Legality": International Law and Imperialism in Late Nineteenth-Century Britain,' *Review of International Studies*, 34 (2008), 403–423.

19 See the Decree of 11 December 1888, published in the *Journal officiel* of 13 December 1888, which modified the Decree of 26 April 1886.

20 Galtier characterises this inequality: 'Les formes que l'on emploie pour conclure ces traités sont de plus, dit-on encore, trop rudimentaires; un simple signe, une croix prouvent l'adhésion des indigènes, et en retour des avantages concédés, les nations européennes ne donnent rien ou presque rien.' Galtier, *Conditions de l'Occupation*, 80.

21 Fisch, 'Africa as *Terra Nullius*,' 366–367.

22 For a detailed explanation of the concept of colonial protectorate, see Alexandrowicz, *European-African Confrontation*, 124. See also Nozari, *Unequal Treaties*, 260.

as 'a region in which there is no state of international law to be protected, but which the power that has assumed it does not yet claim to be internationally its territory, although that power claims to exclude all other states from any action within it.'²³ Eventually, the colonial protectorate resolved the issue of 'how sovereignty was to be produced through colonial rule.'²⁴ Westlake's description goes to the heart of the matter: the colonial protectorate was a tool to exclude other European competitors for African territory and to colonize the territory later. As a result, there were two realities. On the one hand, all European colonial powers shared the expectation that, in time, they would actually *rule* the territories they had undertaken to protect. On the other hand, in concluding agreements with the native rulers representing their peoples the European powers had *guaranteed* to respect internal sovereignty rights. At the end of the nineteenth century, protectorates became the 'common technique by which European states exercised extensive control over non-European states while not officially assuming sovereignty over those states.'²⁵ It was the Berlin Conference which marked a turning point: the protectorate as traditionally conceived was transformed into the colonial protectorate.²⁶ In sum, the construct of the colonial protectorate served to justify the colonization of Africa both before and after the fact.

After the Berlin Conference, hundreds of protectorate treaties were concluded which guaranteed African rulers their internal sovereignty. Moreover, all of these protectorates had been promulgated internationally and none of them contained any reference to annexation. But in practice and in the course of time, the African rulers would lose both external and internal sovereignty rights: the Europeans treated the territories and native peoples as they would have in traditional colonies. To all intents and purposes, the colonial protectorate was a political instrument, not a legal institution. Alexandrowicz too points to the political nature of the colonial protectorate and stated that it was 'an arrangement adopted behind the scenes of the Berlin Conference by which the signatory powers gave each other carte blanche to absorb protected States, which led to a deformation of the Protectorate as such.'²⁷ He argues that 'such an arrangement could not affect the validity of the treaties of protection with Rulers, for *pacta tertiis nec nocent nec prosunt*. The colonial protectorate is the

23 J. Westlake, *International Law. An Introductory Lecture* (Cambridge University Press, 1888), 123–124.

24 Craven, 'Invention of a Tradition,' 388.

25 Anghie, *Imperialism*, 87.

26 See Shaw, 'Acquisition of Title in Nineteenth Century Africa,' 1047–1048.

27 Alexandrowicz, *European-African Confrontation*, 80.

outcome of a para-legal metamorphosis and has no place in international law as a juridical justifiable institution. It was at most a political expedient.²⁸ As early as 1909, the French jurist Jean Perrinjaquet argued that ‘greed and the wish for exploitation without administrative and policy costs had led European countries to employ hypocritical techniques of annexation without sovereignty. Colonial protectorates had become a regular feature in the French realm (Cambodia, Annam, Tunisia).’²⁹ European politicians used the colonial protectorate to conceal and justify the annexation of great parts of the African continent. Moreover, international legal scholars, thinking along positivist lines, adopted the notion of colonial protectorates to legitimize European colonial practices and effectively tried to ‘debase’ protectorate treaties.³⁰ This of course raises the question whether the political deployment of the colonial protectorate could indeed overrule the actual guarantees the European had given the natives in the protectorate agreements. Answering this question requires addressing the second difficulty that arose after the protectorate treaties had been concluded.

This second difficulty concerns the question whether the step-by-step acquisition of full sovereignty rights by the European contracting party after the protectorate treaty had been concluded was permitted under nineteenth-century international law. As the previous chapters have shown, most treaties contained clauses in which the contracting European power explicitly undertake to respect the property and the property rights of the native populations. Legislation enacted unilaterally by the European authorities often implied mass dispossession of natives. Were the European State powers entitled to do so or did they have to comply with the treaties they had concluded with African rulers? Were European States acting in compliance with nineteenth-century international law when they issued decrees that effectively negated their treaty obligations? Did European States violate protectorate treaties by extending the transferred external sovereignty rights to include the internal element of sovereignty, which in turn caused failure to respect native property and native property rights? Were *imperium* and *dominium* used in accordance with the law? In short, were these protectorate treaties, and with them international law, violated? To answer these questions, the general findings on the practices of both cession and protectorate treaties will have to be discussed separately.

28 *Ibid.*, 80–81. See Anghie, *Imperialism*, 89–90. See also Alexandrowicz, ‘Afro-Asian World and the Law of Nations’, 193, 200 and 209–210.

29 Perrinjaquet paraphrased in Koskenniemi, *Gentle Civilizer*, 151.

30 Fisch, ‘Africa as *Terra Nullius*’, 367.

Cession treaties transferred both external and internal sovereignty over territory from African native rulers to European States. Theoretically, no property rights were involved in these transfers, a proviso that was often explicitly stipulated in the treaties. The central issue here is not whether extending external sovereignty rights to include internal sovereignty rights complied with legal; the main question is rather whether the right to dispose of private land ownership was transferred along with territorial sovereignty rights. From the perspective of international law applying to and between the members of the family of civilized nations, Westlake answered this question in the negative. He argued that 'the state which afterwards becomes sovereign will be bound to respect such right and give effect to it by its legislation, morally bound if only its own subjects are concerned, but if the previous right of property existed in a subject of another state, there can be no doubt but that respect to it would constitute an international claim as legally valid as any claim between states can be.'³¹ In the broader context of the law of nations, however, Westlake answered the question in the affirmative, pointing to the cultural differences between Europeans and African natives. He stated that 'it is possible that a right of property may be derived from treaties with natives, and this even before any European sovereignty has begun to exist over the spot.'³² Westlake justified the appropriation of natives' land after they had ceded their sovereign rights over the territory to the European contracting party, by making a distinction between civilized States and non-civilized entities. When all-comprehensive sovereignty was ceded from one sovereign State to another, the receiving State was both morally and legally bound to respect existing rights to land as much as possible. However, when a native ruler ceded sovereignty to a European State, the continuity principle did not apply, or so Westlake argued. The crux is of course whether the non-applicability of the continuity principle to cession relationships between European States and African native rulers can be justifiably based on the civilization argument.

As has been shown, the civilization argument, discriminating as it does between the civilized and the non-civilized world, is controversial, especially because it was a political and scholarly expedient for the justification of Africa's colonization. Cession implied no direct acquisition of property rights by the European State: only sovereignty in the sense of regulative powers over subjects was transferred. As the continuity principle dictated, there was no automatic or necessary extinguishment of native private property rights. This principle was generally accepted as a principle of international law in

³¹ *Ibid.*

³² Westlake, *Chapters*, 145.

the context of State succession.³³ The acquiring State did, however, have the competence to enact legislation to enable it to acquire property rights to land and to regulate private land ownership in its territories. The general rule was (and still is) that private property must not be taken for public use without compensation. The rule of the continuity of existing rights after cession was customary and respected in the family of civilized nations, and even in the actual European-African confrontation, the continuity principle was initially observed. Yet when the struggle for African territory intensified, the principle was more honoured in the breach than in the observance.

Although the question on the legal nature of the customary rule of the continuity principle and its applicability to cession between Europeans and African natives cannot be answered at this stage, it is at stage worth repeating that the cession treaties between European States and African rulers often contained provisions on respecting existing property rights to the land over which sovereignty was transferred. In the second half of the nineteenth century, almost all cession treaties concluded between European powers and native rulers contained provisions stipulating that native customs and rights

33 The general principle that cession does not impair private property rights is especially enunciated in the 19th-century case law of the United States. In the landmark case of the *United States v. Percheman* (1833), Chief Justice of the Supreme Court Marshall stated the following: 'It is very unusual even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? [...] A cession of territory is never understood to be a cession of the property belonging to its inhabitants. [...] The cession of a territory is by its name from one sovereign to another [...] would be necessarily understood to pass the sovereignty only, and not to interfere with private property.' F.B. Sayre, 'Change of Sovereignty and Private Ownership of Land,' *American Journal of International Law*, 12 (1918), 480. Francis Sayre concluded that the American 'body of law seems so reasonable and so equitable that it is gratifying to note that the principles upon which it is founded are not confined to this side of the Atlantic.' In support of his argument, Sayre refers to case law in Britain, to the Argentine historian and statesman Carlos Calvo (1822–1906) who argued that the continuity principle was a rule of international law, to the work of the French jurist Gilbert Gidel (1880–1958), to the treatise on *Staatenpraxis* of the Swiss lawyer and diplomat Max Huber (1874–1960) and to passages of *Droit International* of the Italian jurist Pascal Fiore (1837–1914). *Ibid.*, 495–497.

would be respected and that European settlers were under an obligation to pay indemnities³⁴ for appropriating the land.³⁵ In practice, however, cession often brought about dispossession of African natives. Land ownership fell under the control of the European authority, which conferred full sovereignty rights as well as land ownership on itself. The Europeans did not comply with their promise to respect the customs, rights and properties of natives; they failed to take into account the personal, collective and inalienable nature of native land ownership. Rather, the Europeans imposed their own legal system and inherited concepts. It is fair to say then that while the continuity principle was deemed applicable to earlier cession relationships between Europeans and African natives and was often laid down in the treaties they concluded, the rule was not applied and respected. To justify this departure the Europeans invoked the cultural differences between themselves and African natives. The legality of this practice after cession treaties had been concluded is questionable. African natives were dispossessed, expelled from their lands and forced to live in areas designated by the European colonizers. Moreover, it was not only the applicability of the continuity principle to cession of sovereignty by the African ruler to the European State that was greatly reduced; cession treaties were used less and less. Protectorate treaties became the main instrument for Europeans to acquire African territory.

Protectorate treaties, whose meaning changed from a legal institute to the political instrument of the colonial protectorate, were deployed as 'springboards for annexation.'³⁶ This indicates that they were not a goal in themselves

34 'Individual confiscation of property without indemnity undoubtedly falls short of the international standard of civilized society, because it violates the sense of equity of the civilized world, on which its deepest legal convictions rest, which is at the root of all legislation on expropriation, and which has been ratified by a long international custom.' G. Kaeckenbeeck, 'The Protection of Vested Rights in International Law,' *British Yearbook of International Law*, 17 (1936), 16.

35 Many of these treaties contain stipulations to the effect that transfer of sovereignty would not affect the private legal rights of natives in territory the sovereignty over which was transferred to a European power. An example of such a stipulation can be found in the Congo treaties concluded between 1889 and 1891. It states that 'the Chief and his people (keeping the property of their lands) will be able to sell them or let them to foreigners, whatever their nationality, and to collect rent.' Alexandrowicz, *European-African Confrontation*, 102. The original treaty used the following words: 'ils pourront les vendre ou les louer à des étrangers de n'importe quelle nationalité et percevoir les redevances ...' Consequently, reference in treaties to the preservation of property rights was made in order to 'strengthen the conviction that transfer of sovereign rights meant a transaction within the realm of international law.' *Ibid.*, 103.

36 *Ibid.*, 111.

but a means to acquire full control over a specific territory, including rights of land ownership.³⁷ Here too, the Europeans explain this instrumental nature of protectorate treaties is against the background of cultural differences, as Thomas Baty made clear when referring to the ‘denaturalised conception of protection’:

The “protected State,” in fact, is not a State at all. And thus, in these cases, it is the neologism alone that is used; we speak only of “protectorates,” and never of “protected States.” Not only virtually, but actually, European Powers have annexed those territories, while shrinking from the consequences of that incorporation, and asserting that they are protecting States where there are obviously no States to protect.³⁸

Protectorate treaties thus became the main instrument to acquire first external and then internal sovereignty rights over a territory, as was recognized by nineteenth-century doctrine.³⁹ It was these treaties that led the Europeans to presume that these rulers and their peoples subjected themselves and their lands to the superior European State.⁴⁰ The treaties were mainly used as proof of title to territory in relation to other European competitors: a protectorate treaty declared the protected territory off limits to rival States, an objective that was also expressed in Article 34 of the Final Act of the Berlin Conference. Crawford recognizes that in the Final Act of the Berlin Conference colonies and protectorates were assimilated, ‘requiring for both effective occupation and notification to other powers.’⁴¹ He observes that ‘[e]ven though many protectorate agreements over what came to be regarded as colonial protectorates were treaties in international law form made with recognized African States

37 Alexandrowicz, ‘Juridical Expression of the Sacred Trust of Civilization,’ 155. See Alexandrowicz, ‘Afro-Asian World and the Law of Nations,’ 193.

38 Baty, ‘Protectorates,’ 114. See also Alexandrowicz, ‘Role of Treaties,’ 55: ‘This interpretation of protection just before the Berlin Conference of 1885 contains a clear distinction between external and internal sovereignty of the ruler, and provides for limitation of the first only so as to enable the protector to introduce the protected entity into the wider framework of the universal family of nations. But state practice after the Berlin Conference revealed a tendency to deform the original classic concept of the protectorate and to convert it into an instrument of colonialism. In fact, international lawyers of that period called the protectorate “colonial protectorate” with a new connotation.’

39 J. Perrinjaquet, ‘Des annexions déguisées de territoires,’ *Revue générale de droit international public*, 16 (1919), 316–367.

40 See, for example, Bornhak, ‘Anfänge des deutschen Kolonialstaatsrechts,’ 7.

41 Crawford, *Creation of States*, 301.

[...], tribes with a certain legal status [...], the continuous accretion of powers by usage and acquiescence to the protecting State was – by virtue of the Berlin Act procedure – opposable to the parties to that Act and in practice a matter at the protecting State's discretion.⁴² The Final Act did indeed act as a catalyst for the tensions between European colonial powers in that they were urged to rule overseas territories directly and effectively. However, time and resources to realize this effective and direct rule were in short supply. This explains why to the Europeans the colonial protectorate proved a welcome solution to and justification of the European territorial expansion in Africa. The European States mutually accepted the applicability of the colonial protectorate in their struggle for African territory. What remains to be seen is whether in European-African relations the partition of Africa complied with international legal standards.

2 The Legality of the Treaty-based Acquisition and Partition of Africa

In nineteenth-century international legal doctrine, private property of land and territorial sovereignty occupied quite different levels of discourse in the context of the territorial State; territorial sovereignty did not interfere with private land ownership; *imperium* could coincide with *dominium*. This was also considered true for the confrontation between civilized nations and non-civilized nations, as the Prussian jurist Jean-Louis Klüber (1762–1836) acknowledged by stating that ‘no nation is authorized, whatever its qualities, including a higher level of culture, to divest another nation of its property, not even savages or nomads.’⁴³ Whether civilized or not, sovereignty did not mean property and *vice versa*. International legal theory, however, did not align with the reality of treaty-making on the African continent in the late nineteenth and early twentieth centuries, when *dominium* and *imperium* were evidently used inaccurately and inconsistently. Although during negotiations and in the treaty texts *imperium* and *dominium* were clearly recognized as separate institutions, there does seem to have been a friction between text and intention on the one hand and the interpretation and execution of the treaties on the other. In other words, a discrepancy appeared between theory and practice: on paper, in the form of written treaties, the distinction between *dominium* and *imperium* was taken as a general rule of law, but the execution of and compliance with treaties belied this separateness. Effectively then, the doctrinally

42 *Ibid.*

43 J.L. Klüber, *Droit des gens moderne de l'Europe* (Stuttgart: Cotta, 1819), 124.

and contractually separate domains of *dominium* and *imperium* were merged by the European treaty parties. Evidently, the observed dichotomies – private *versus* public, property *versus* sovereignty and *dominium versus imperium* – were not as rigid in practice as they were in theory.⁴⁴ The next sections will argue that, in the context of the acquisition and partition of Africa in the late nineteenth century, European States acted unlawfully in both the private and the public legal spheres.

2.1 *Interference with Natives' Land Ownership*

In 1896, Sir Harry Johnston (1858–1927), the British colonial administrator of the Oil Rivers Protectorate, stated the following: ‘The white man’s presence in these countries was in the highest degree justifiable, since it had resulted in no confiscation of the black man’s land, but in his being taught to develop its resources and since it had been followed by the steady suppression of the slave trade and the diffusion of liberty.’⁴⁵ This section questions whether Sir Johnston was right in arguing that African natives were justifiably dispossessed. The longer competition for African territory lasted, the more vehement and rude it became. Fearful of losing what they could gain, European States struggled to obtain paramount title to as much African territory as possible. In parallel to this hardening of the struggle, European States increasingly opted for protectorate treaties instead of cession treaties. This choice was as essential as it was deliberate, as is evidenced by the explicit considerations of the European colonial powers.⁴⁶ As has been shown, cession implied the transfer of full sovereign rights and consequently the possibility of enacting legislation. These sovereign powers could be, and indeed were, exercised mainly by the executive of the European State on the foreign territory. As a result, these executive acts were often not open for judicial intervention and assessment; the Act of State doctrine prohibited judicial review.⁴⁷ In the case of protectorates, however, these controlling mechanisms between governmental branches did not apply, because the protecting power only acquired sovereign rights over the foreign relations of the protected entity. Internal affairs, such as enacting

44 J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 5th edn (Oxford: Clarendon Press, 1955), 150.

45 These words reflect the British view on their subjection of African territory and peoples, as they were expressed by Sir Johnston, who addressed the Royal Colonial Institute on 8 December 1896, quoted in Mulligan, ‘Nigeria,’ 299.

46 On the difference between a cession treaty and a protectorate treaty, see Baty, ‘Protectorates,’ 109–114.

47 See O’Connell, *State Succession*, 105, 251–252.

legislation, remained within the ambit of the protected sovereign's power.⁴⁸ By concluding protectorate treaties with African native rulers, the European powers recognized, either implicitly or explicitly, the internal sovereignty of the native rulers, as well as the power of these rulers to regulate existing and future proprietary within their territories.

What remains to be seen, however, is whether the European State powers did in fact respect the sovereign rights of the native rulers and the private property rights of the native inhabitants. Although Europeans and non-Europeans frequently concluded treaties and, at least before the age of New Imperialism, the principles of *pacta sunt servanda* and *bona fides* did apply to these treaties, the European contracting parties more often than not acted in contravention of the rights of the African peoples and their own treaty obligations. It was especially in the second half of the nineteenth century, when positivist legal thought was at its peak, that the construct and ideal of the sovereign, territorial State was held to be the central and sole subject of European-style international law and the civilization argument was the dominant political justification of European conduct in Africa. This explains why the rights and interests of the original inhabitants, in particular their proprietary rights to land, went unheeded. The question remains whether European States had a right to act in this way. More specifically, were cession and protectorate treaties interpreted and executed correctly?

In this context, the distinction between cession and protectorate treaties is fundamental: cession was a traditional mode of territorial acquisition, while establishing a colonial protectorate was not. When taking the cession of African territory by treaty into account, a legal acquisition mode which was abandoned during the scramble, the question is whether the transfer of sovereign rights over territory also implied the transfer of ownership of the land and whether such transfer was effected in keeping with valid legal norms.

As to protectorate treaties, the preliminary questions are whether the European colonial power was entitled to extend the external sovereignty it had acquired to include full sovereignty by means of legislative, administrative and judicial action, and whether such conduct can be considered to have contravened treaty obligations. Under the protectorate treaties, the contracting European States guaranteed to help and assist the African entity it had undertaken to protect, and this commitment implied the crucial duty to defend the territorial integrity of African natives. Although it now fell to the European

48 In this context, a difficulty arises, namely, how to interpret the relation between internal sovereignty and effective occupation. The Berlin Conference of 1884–1885 and the wordings of the Final Act will be further analysed on this point.

protectors to maintain external relationships, it was incumbent on them to respect the internal autonomy African political entities. However, practice shows that they showed no such respect. In most cases, the internal autonomy of the protected entity was not respected in an absolute sense; the very transfer of external sovereignty implied possibilities of extending it to competences that were within the scope of the internal autonomy of the protected entity. Lord McNair hinted at this expansion: 'It seems probable that the rule of law to the effect that annexation automatically terminates treaties affecting the annexed territory, while the establishment of protectorates does not affect them, has at times led to the annexation of a protected State as a means of getting rid of troublesome treaties.'⁴⁹ Some legal authors even explain this development as a natural consequence of a territory having become a protectorate. The question of course is whether the metaphor of the protectorate as the 'springboard for annexation' is an accurate reflection of nineteenth-century law.

When sovereign rights over territory were transferred from an African ruler to a European State, did native proprietary rights to the land, including the power to allocate and regulate these rights, devolve on the European contracting party?⁵⁰ Answering this question requires that the relationship between the private right of property and the public right of sovereignty be properly articulated. More specifically, the relationship between native African ownership of land and European sovereignty over the territory in which these natives exercised their proprietary rights requires closer scrutiny. Legal scholars in the common law tradition recognized and developed five approaches to the transfer of sovereign rights from the African ruler to the European State and the maintenance of existing rights to land:⁵¹ the doctrine of legal vacuum, the doctrine of radical discontinuity, the doctrine of continuity, the doctrine of common law dispossession, i.e., the doctrine of recognition or the Act of State doctrine,⁵² and the doctrine of aboriginal or native title.⁵³ The question now

49 McNair, *Law of Treaties*, 628.

50 In his *Jus Gentium Methodo Scientifico* (1764), Christian Wolff argued that the transfer of sovereignty rights did indeed include property rights: C. Wolff, *Jus Gentium Methodo Scientifico*, new edn., transl. by J.H. Drake (Washington: Carnegie Institute, 1934), 140–141, 152 and 147–148.

51 B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (University of Saskatchewan Native Law Centre, 1983), 1. With regard to the succession of sovereignty rights and the consequences for (existing) treaties, see A.D. McNair, 'The Effects of Peace Treaties upon Private Rights,' *Cambridge Law Journal*, 7 (1939–1941), 379–398.

52 For an elaborate definition and explanation of these four approaches, see Slattery, *Ancestral Lands*, 12.

53 More on aboriginal or native title, see R. Bartlett, 'Native Title: From Pragmatism to Equality Before the Law,' *Melbourne University Law Review*, 20 (1995–1996), 282–310; Gilbert.

is which of these doctrines the Europeans used and empowered in the treaties at the time of the acquisition of African territory and the subjection of its inhabitants.

The applicability of the doctrine of legal vacuum can be discarded out of hand as Africa was not considered to be *terra nullius*. For the same reason, the doctrine of aboriginal title, recognized elsewhere,⁵⁴ does not apply to Africa and its peoples either. The remaining approaches are the doctrine of radical discontinuity, the doctrine of continuity and the doctrine of recognition. These doctrines were all used during the colonization of Africa in the second half of the nineteenth century in parallel to the intensity of the scramble. Before the race for African land started and at the time of the first land acquisitions in the 1870s, the doctrine of continuity was the leading theory in the international legal order. It was very unusual, even in the case of conquest, as O'Connell argues, 'for the conqueror to do more than to displace the sovereign and assume dominion over the territory.'⁵⁵ He continues his argument in favour of recognition of the principle of continuity by referring to custom which became international law: 'The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.'⁵⁶ O'Connell then observes that the 'people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.'⁵⁷ He concludes his argument by asserting that 'the State is constituted of two elements, the formal and the fictitious element of sovereignty and the real element of society. The former is affected by State succession but the latter is not. Hence rights and duties which

Indigenous Peoples; P.G. McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004); McNeil, *Common Law Aboriginal Title* and Reynolds, *Aboriginal Sovereignty*.

54 As in Australia, for example. See *Mabo v. Queensland (No. 2)*, (1992) 175 CLR 1.

55 O'Connell, *State Succession*, 240. 'Although the concept of "acquired rights" had not been propounded as such, the authors throughout the nineteenth century had taken it for granted that private property rights were unaffected by change of sovereignty. Wheaton had mentioned that the successor State must pay compensation if, subsequent to the change, it confiscates private property.' *Ibid.*, pp. 242–243. With regard to the dominant jurisprudence, O'Connell referred, among others, to the theories of Édouard Deschamps, Frantz Despagne, Pasquale Fiore, Louis Selsosse, and Henry Wheaton.

56 *Ibid.*, 242.

57 *Ibid.*, 243.

inhere in the people are continuous.⁵⁸ As the continuity principle dictates, the transfer of sovereignty rights over territory does not affect proprietary rights of the people inhabiting the territory. Sovereignty and property were considered to be separate institutions and the transfer of existing property rights was not the natural or necessary concomitant of the transfer of sovereignty rights: ‘Change of sovereignty implies nothing more than the substitution of one such competence for another. The successor State in no sense “continues” the sovereignty of its predecessor; neither is it necessarily responsible for the judicial consequences of its predecessor’s acts. The territory, the people, the complex of legal relations existing between them, all remain unaffected by the change.’⁵⁹ The continuity principle was recognized in the theory and practice of early nineteenth-century international law. The French jurist Paul Fauchille (1858–1926), for example, explicitly discussed the continuity doctrine, observing that while private rights remain untouched in a situation of sovereignty transfer, the public rights of sovereignty do not.⁶⁰ Other nineteenth-century jurists, such as the Italian Pasquale Fiore (1837–1914),⁶¹ the American Henry Wheaton (1785–1848)⁶² and the Belgian Pierre Descamps,⁶³ had argued that private individuals who were deprived of their property by the public authorities should be compensated. Moreover, as the previous chapters have shown, most cession treaties concluded between European States and African rulers included the obligation to refrain from encroaching on any private property ‘unless the value is agreed upon’ by the African owner and the receiving European.

In the final two decades of the nineteenth century, when protectorate treaties became the main method to acquire title to African territory, it was the Act of State doctrine or the discontinuity principle that was increasingly used

58 D.P. O’Connell, ‘State Succession and the Theory of the State,’ in: C.H. Alexandrowicz (ed.), *Grotian Society Papers 1972. Studies in the History of the Law of Nations* (The Hague: Martinus Nijhoff, 1972), 22.

59 O’Connell, *State Succession*, 26. See also on *terra nullius*: L.B. Ederington, ‘Property as a Natural Institution: The Separation of Property from Sovereignty in International Law,’ *American University International Law Review*, 13 (1997–1998), 263–331.

60 P. Fauchille, *Traité de droit international public*, vol. i (Paris: Rousseau, 1922), 317, cited in O’Connell, *State Succession*, 104.

61 P. Fiore, *Trattato di diritto internazionale pubblico*, 3rd edn (Turin: Unione, 1887–91), 221.

62 H. Wheaton, *Elements of International Law*, 5th edn by C. Phillipson (London, New York: Stevens and Sons, Baker, 1916), Section 31.

63 P. Descamps, ‘La définition des droits acquis. Sa portée générale et son application en matière de succession d’état à état,’ *Revue générale de droit international public*, 15 (1908), 385.

in the European quest for territorial expansion. British politicians in particular relied on it to defend and justify the British conduct in the colonies. The discontinuity doctrine was formulated explicitly in *Vajesingji Joravarsingji v. Secretary of State for India in Council* (1923), which was brought before the Indian Appellate Court.⁶⁴ In its judgment, the Court argued that the principle applied to succession of sovereign powers, regardless of whether the territory had been acquired by conquest, occupation or cession. The Court described the principle as follows: 'Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts.'⁶⁵ The Court added that the 'right to enforce remains only with the high contracting powers.'⁶⁶ This formulation gave rise to a variety of interpretations of the doctrine. Most frequently, the doctrine was understood to mean that the rights that before the succession of sovereignty were vested in the subjects who fell within the jurisdiction of the preceding sovereign would no longer exist at all after the succession.⁶⁷ In the practice of international law, the discontinuity principle stipulated that the change of sovereignty by cession must not affect private property, but no municipal court or tribunal had the authority to enforce such an obligation.⁶⁸ But what did the discontinuity

64 *Vajesingji Joravarsingji v. Secretary of State for India*, 1923, L.R. 51 I.A. 357. See also *Nyali Ltd v. Attorney-General*, 1955, 1 All E.L.R., 646 and 652.

65 *Vajesingji Joravarsingji v. Secretary of State for India*, 1923, L.R. 51 I.A. 357, p. 360.

66 *Ibid.*

67 O'Connell, *State Succession*, 252. He argued that '[t]he case that was originally responsible for this interpretation was *Cook v. Sprigg*, which was decided in connexion with the annexation of Great Britain of certain territory in South Africa. It was held that a treaty of cession, or annexation, made by the Crown, and its results, are not within the cognizance of municipal courts.' *Ibid.*

68 This point of view is confirmed by the Judicial Committee of the Privy Council in its successive judgments. See *Amodu Tijani v. The Secretary of the Southern Provinces of Nigeria*, 1921, 2 A.C. 399 or 3 N.L.R. 21; *Sobhuza II v. Allister M. Miller and others*, 1926, Annual Digest 1925–1926, No. 28 and *Adeyinka Oyekan and others v. Musendiku Adele*, *Journal of African Law*, 1 (1957), 186–192. In the context of the French colonization of Africa, this assumption was confirmed by the Cour de Cassation in the *John Holt et C^o c. Cie Coloniale de l'Ogooué*, Cour de Cassation (Chambre civile), 30 March 1905, in: P. Dareste (ed.), *Recueil de législation, doctrine et jurisprudence coloniales*, vol. xiii (Paris: Sirey, 1905), 97–102. Although no case law is available in the German situation, the Germans acted according

principle imply in the context of the transfer of sovereignty over African territory and native land ownership?

Although the acquiring State was under a contractual obligation to respect private property rights that had been created before the transfer of territorial sovereignty, it did have the legal power to enact legislation to regulate property rights within its territory,⁶⁹ namely through an Act of State. These acts were not open to judicial review. As the case studies on British Nigeria, French Equatorial Africa and German Cameroon have shown, the acquisition and partition of Africa was considered to be effectuated by Acts of State, and these acts were not open to judicial review. Having concluded cession treaties, the European States were effectively at liberty to expand their sovereign powers over African territory. In the course of the colonization of Africa, the continuity principle was not observed and the discontinuity principle was radicalized. After sovereign rights over African territory had been ceded to them, the Europeans neglected existing native rights to land and seized on the opportunity to allocate and exercise regulatory control property rights. African natives were dispossessed of their lands and of their rights to these lands.

In the age of New Imperialism the relation between sovereignty and property was put to the test in the relationship between the European power and the African natives immediately after the transfer of sovereign rights over territory in which these natives possessed land. As Craven observes, '[c]olonialism was not just about acquiring things as property, but about turning things into property.'⁷⁰ As will be shown next, this 'turning things into property' was done illegally.

2.2 *Violation of International Law*

Now that it has been established that European State powers competing for African territory in the late nineteenth century failed to respect native land ownership, the next question is whether the Europeans also failed to comply with their obligations articulated in the cession and protectorate treaties they

to this point of view, as the discussion of conflict on the Bamiléké territory in Chapter 7 showed.

69 'That law is not, except in form, derived from sovereign will, but is generated by the needs and aspirations of society, and is therefore based on a rational and not a voluntarist principle. Removal of the one sovereign and its replacement by another can have no other effect upon the existing legal order than to substitute one authority competent to enact legislation for another. Hence only those legal institutions which relate fundamentally to the constitutional powers of the sovereign can be presumed to lapse.' O'Connell, 'State Succession and the Theory of the State,' 22.

70 Craven, 'Colonialism and Domination,' 888.

concluded with African natives. In the case of cession of sovereignty over African territory by treaty, the answer to this question can be both 'yes' and 'no,' depending on whether treaty contained an explicit provision on respecting native property and property rights. In theory, the European State that acquired all-comprehensive sovereignty over territory had the capacity to allocate and control land and proprietary rights to land. In practice, existing native rights to land were ignored and natives were dispossessed. Whether the continuity principle had to be respected and whether the increasing use of the discontinuity principle during the scramble for Africa was legal are questions that will remain unanswered here, because cession of sovereign rights over African territory to European States lost much of its relevance as a mode of acquisition. As long as the treaty provisions did not explicitly stipulate that the property and property rights of African natives had to be protected or respected, cession of sovereignty over African territory must be considered legal. If, however, the treaty stipulated such as duty of protection, as most cession treaties did, subsequent appropriation of native property and property rights by the European contracting party would contravene its treaty obligations. European colonial powers were aware that this situation limited their room for manoeuvre and it follows that the decision to use protectorate treaties instead was quickly made.

However, this move, establishing protectorates by treaty, does not preclude breach of contract. In fact, since under protectorate treaty only external sovereignty rights were transferred from the African rulers to the European States and the European contracting parties explicitly undertook not to interfere with native property and property rights, it can be concluded that once the European States began to extend their sovereign rights to include the authority to govern their relations with the native subjects, they acted in breach of their treaty obligations. The European contracting parties failed to respect the internal sovereignty of the African rulers and appropriated their role as the supreme authority of and over the polity. By doing so – appropriating the sovereign rights controlling the relationship between native rulers and their subjects and dispossessing natives of their land – the Europeans failed to comply with the obligations they had undertaken to perform and that were explicitly stated in the protectorate treaties. This argument is valid for both the traditional, or international, protectorate and the colonial protectorate, because the basis of both institutions was a treaty establishing a relationship of protection, which implied the transfer of rights of external sovereignty over territory only.

The next question is whether, in breaching the cession and protectorate treaties, the European contracting parties acted in violation of nineteenth-century international law. In other words, were Europeans bound to respect their treaties with African native rulers? Were they legally obliged to observe

the treaty provisions or were they free to break their promises? In other words, were their treaties legally binding instruments?

2.3 Customary International Law Impaired

As has been shown in Chapter 4, before European acquisition of title to African territory was at its height the practice of treaties being concluded between Europeans and non-Europeans was a common one and considered to accord with nineteenth-century international law, in order to establish and maintain friendly relations between two nations. The foundational international legal principles of *pacta sunt servanda* and *bona fides* regulated these treaty relationships, as these were principles shared by both European and African contracting parties. This broad treaty practice and the applicability of the principles of *pacta sunt servanda* and *bona fides* in the context of the law of and between nations are evidenced by the extensive studies of Alexandrowicz.⁷¹ At the Conference of Berlin, the American delegate Kasson recognized and emphasized this treaty-making between Western and non-Western nations as established practice within the scope of international law.⁷² In this respect, the conclusion of and compliance with treaties between Europeans and African natives were considered to be governed by customary international law,⁷³ in accordance with its constitutive elements of the objective requirement of State practice and the subjective condition, introduced in the nineteenth century,⁷⁴ of *opinio iuris sive necessitatis*.⁷⁵ In other words, treaties had binding force because they met the Western definition and criteria of customary law. Custom as a legal

71 C.H. Alexandrowicz, 'Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries,' *Recueil des Cours*, 100 (1960), 231–235; Alexandrowicz, *Introduction to the History of the Law of Nations*, 85–86; Alexandrowicz, 'The Afro-Asian World and the Law of Nations,' 145–148; and Alexandrowicz, 'Empirical and Doctrinal Positivism in International Law,' 288–289. See Onuma, 'When was the Law of International Society Born,' 56.

72 Minutes of the 8th session of 31 January 1885, in: G.F. von Martens, *Nouveau Recueil général de traits*, vol. x (Göttingen: Dieterich, 1885–1886), 335–336.

73 See B. Stern, 'Custom at the Heart of International Law,' *Duke Journal of Comparative and International Law*, 11 (2001), 89–108.

74 P. Guggenheim, 'L'Origine de la notion de "l'opinio iuris sive necessitatis" comme deuxième élément de la coutume dans l'histoire du droit des gens,' in: J. Basdevant (ed.), *Homage d'une génération de juristes au Président Basdevant* (Paris: Pedone, 1960), 259–260.

75 See *Lotus (France v. Turkey)*, Judgment, 1927, PCIJ (Series A) No. 9, at 18, 28; *Asylum (Colombia v. Peru)*, Judgment, 1950, ICJ Reports 265, at 276–277; *Right of Passage (Portugal v. India)*, Judgment, 1960, ICJ Reports 6, at 42–43 and *North Sea Continental Shelf (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. Netherlands)*, Judgment, 1969, ICJ Reports 3, at 44.

rule results from a 'general and consistent practice' that States adhere to out of 'a sense of legal obligation.'⁷⁶

Since before the age of New Imperialism there had been a sustained practice of treaty-making between Europeans and African natives, in which the principles of *pacta sunt servanda* and *bona fides* were duly respected by both treaty parties. This practice rested on the will of both European and African treaty parties that such treaties establish legal relations; the treaties manifested a will to give rise to legal relations.⁷⁷ The *opinio iuris* was mainly based on the security the treaties were intended to offer: the mutual benefits of economic transactions and friendly and peaceful relations between Europeans and African natives had to be safeguarded. Both parties engaged in concluding treaties out of a sense of legal obligation.⁷⁸ International law was created and evolved under the influence of long-established relations between European and African private and public entities. Before the nineteenth century, these treaty relations were both respected and observed. The treaties between Europeans and non-Europeans were legally binding instruments, not merely political expressions of goodwill that were only morally enforceable.⁷⁹ The scramble

76 A.E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation,' *American Journal of International Law*, 95 (2001), 758. This view is made explicit in the case of *North Sea Continental Shelf*, Judgment, 1969, 1CJ Reports 3, at 44. See also M. Akehurst, 'Custom as a Source of International Law,' *British Yearbook of International Law*, 47 (1974–1975), 1–53; M. Byers, *Custom, Power, and the Power of Rules* (Cambridge University Press, 1999); M. Mendelson, 'The Formation of Customary International Law,' *Recueil des Cours*, 272 (1998), 155–410; R. Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law,' in: K. Wellens (ed.), *International Law: Theory and Practice* (The Hague: Martinus Nijhoff, 1998), 161–178; M. Villiger, *Customary International Law and Treaties: A manual on the Theory and Practice of the Interrelation of Sources* (Dordrecht: Martinus Nijhoff, 1985) and K. Wolfke, *Custom in Present International Law*, 2nd edn (Dordrecht: Martinus Nijhoff, 1993).

77 Akehurst, 'Custom as a Source,' 53.

78 A.A. D'Amato, *The Concept of Custom in International Law* (Ithaca, London: Cornell University Press, 1971), 89.

79 Compare with J. Mossner, 'The Barbary Powers in International Law,' in: C.H. Alexandrowicz (ed.), *Grotian Society Papers 1972. Studies in the History of the Law of Nations* (The Hague: Martinus Nijhoff, 1972), 218. That the violation of a (protectorate) treaty implied a violation of international law was already emphasized by Vattel: 'He who violated his treaties, violates at the same time the law of nations; for he disregards the faith of treaties, – that faith which the law of nations declares sacred; and, so far as depends on him, he renders it vain and ineffectual. Doubly guilty, he does an injury to his ally, he does an injury to all nations, and inflicts a wound on the great society of mankind.' De Vattel, *Law of Nations*, II.15.221.

for Africa was a radical break with centuries of legal theory and practice. In this light, it can even be argued that the European States violated the principle of estoppel,⁸⁰ in that they were not consistent in their conduct towards African polities, and in that this inconsistency which was detrimental to the stability and predictability of the international legal order as a whole.⁸¹

By not complying with their obligations articulated in the cession and protectorate treaties concluded with African rulers, the Europeans violated customary international law. By interfering with the property rights to land and land law of African polities and, by extension, with the sovereign rights of the native rulers, the European contracting parties did not observe their obligations under the treaties. European States that signed such treaties were bound to comply with the treaty provisions, as these treaties were based on the customary norms of the law of nations regulating the relations between European and non-European nations, most prominently the principles of *pacta sunt servanda* and *bona fides*. In this respect, the conclusion must be that in the last two decades of the nineteenth century, when African territory was acquired by and divided between European States on the basis of mainly protectorate treaties, these European States violated international law. In other words, the colonization of Africa by European States in the age of New Imperialism did not accord with the then valid legal standards. The scramble for Africa rested on illegal grounds.

3 Theory *versus* Practice: What was International Law in the Nineteenth Century?

The international law practice of treaty-making between Europeans and African natives in the nineteenth century contradicted theoretical axioms and political constructs. In practice, African rulers and their peoples were recognized, elements of international law were applied to relations between African natives and Europeans, and treaties between contracting parties from

80 On the doctrine of estoppel, see T. Cottier and J.P. Müller, 'Estoppel,' in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007). See also C. Brown, 'A Comparative and Critical Assessment of Estoppel in International Law,' *University of Miami Law Review*, 50 (1995), 369–412; D'Amato, *Concept of Custom*, 468–513; McNair, *Law of Treaties*, 485; I. Sinclair, 'Estoppel and Acquiescence,' in: V. Lowe and R. Jennings (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996), 104–120; and B. Stern, 'Custom,' 89–108.

81 See A. Cassese, *International Law*, 2nd edn (Oxford University Press, 2005), 156–169.

different continents created legal relations between them.⁸² The dualist world view of civilized *versus* non-civilized nations was disrupted by the international legal practice of Europeans and African natives entering into treaties. Positivists tried to contain the legal difficulties of the European-African confrontation and to justify the tentative conduct of European States on the African continent.⁸³ Ultimately, positivist legal scholars failed to align these colonial practices with international law. While positivists claimed to look at actual practices of international society, in reality they were theorists constructing policy-based justifications⁸⁴ for the conduct of European States on the African continent. In response to the problems concerning the legal nature of the colonization of Africa, such ad hoc instruments as the colonial protectorate (as opposed to the traditional, or international, protectorate) and the civilization argument served to buttress the colonial venture. International legal theory, however, could not account for the reality of international law, which was that international law was effectively violated. The observation that there was a discrepancy between international law in theory and in practice, between law in the books and law in action, raises the question what valid international law was in the nineteenth century.

Nineteenth-century international law consisted of and was applied to treaty relations between two or more foreign nations, and treaty law itself was based on customary international law. Custom preceded and determined the formation of international law, instead of the recognition by a select group of civilized nations determined the creation and application of international law in and to the relation between nations, as international legal doctrine proclaimed.⁸⁵ In the nineteenth century, customary international law fractured the dichotomy between theory and practice. It offered an alternative solution to the long-standing dilemma of *ex facto ius oritur* or *ex injuria ius oritur*. Did the law derive from facts, or did the law arise from unlawfulness? Did facts

82 See Andrews, 'Concept of Statehood,' 130.

83 On the presumption that laws should correspond to reality, see B. Cheng, 'Custom: The Future of General State Practice in a Divided World,' in: R.S.J. Macdonald and D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (The Hague, Boston, Lancaster: Martinus Nijhoff, 1983), 513–554.

84 Alexandrowicz argued that positivism became doctrinal and did not adhere to its empirical roots. Positivists rejected non-European source material which was instrumental to building a new European (pseudo-universal) international law. Alexandrowicz characterized positivism as being doctrinally Euro-centric and bound to falsify history. Alexandrowicz, 'Empirical and Doctrinal Positivism in International Law,' 289.

85 See, for example, D. Dörr, 'Die "Wilden" und das Völkerrecht,' *Verfassung und Recht in Übersee*, 24 (1991), 391.

create the law or was it the other way round? This dilemma prompted the question whether both treaty parties were bound by the treaty and, more broadly, whether there were international legal norms beyond the will of States. What made international law binding? This question divided legal scholarship roughly along the lines of positivist and natural law thinking. According to the natural law approach, there were natural legal principles, such as *pacta sunt servanda*, and there was man-made law, which had to accord with the principles of natural law and which was applied in practice. For positivists there were only two factors: law posited by mankind and the application of this law in the reality of international relations.⁸⁶ To natural law scholars the binding nature of international law derived from norms beyond the general consensus of opinion among the subjects of international law, while positivists denied this external point of reference. In the nineteenth century, customary international law offered a way out of this impasse. The customary law nature of the treaty-making practice between Europeans and African natives both integrated the general consensus of opinion among the subjects of international law and implemented such higher norms as the principles of *pacta sunt servanda* and *bona fides*, in addition to positive international law as laid down in legislation, case law and doctrine. Customary international law thus simultaneously implied bringing international law into practice – by way of contractual relationships between nations – and realizing higher norms on which this practice was based. It showed that international law was not only created by facts, but also emerged from unlawfulness and in this sense mediated between factual events and theoretical and legal constructs. While customary international law reconciled positivist and natural law approaches, it emphasized the primacy of the application of law between nations and showed that international legal theory was ill-equipped to deal with legal deficits that arose in the field. Moreover, the customary law nature of relations between nations confirms that international law did not only have European roots. International law was not only created and imposed by European States; it had evolved through confrontations between a variety of nations over the course of time. In other words, the narrative of a European-style international law which was imposed on the rest of the world and claimed to introduce universal standards is a half-truth. Nineteenth-century international law did not only have a civilizing mission; it also sought to promote toleration between European and non-European nations. It joined theory and practice together: custom brought fundamental

86 On the positivist perspective on customary international law, see Shaw, *International Law*, 75–76.

principles into practice, and this practice in turn created and imposed the law of and between nations.

4 Conclusion

Summing up, three points must be considered. First, a close look at the cession and protectorate treaties which the European States concluded with African rulers has made it clear that there is a fundamental difference between the two phenomena in answering the question whether the acquisition and partition of Africa was legal or not. Although it remains unclear whether the continuity principle was violated or not, cession of sovereignty over African territory occurred legally – provided that the treaty did not stipulate the obligation to respect native land ownership. Protectorate treaties, however, turned out to be annexation instruments. On the basis of these treaties, European colonizing powers extended the external sovereign rights they had acquired by treaty to include rights of internal sovereignty. Positivist legal doctrine and politicians attempted to justify this gradual appropriation of African territory by introducing ambiguity into treaties, the civilization argument and the political construct of the colonial protectorate. These ad hoc instruments, however, could not alter the illegal nature of Africa's colonization by means protectorate treaties in the late nineteenth century. Protectorate treaties concluded between European and non-European nations required full observance, not just moral observance.⁸⁷ European colonizers did not respect native land ownership, impaired the sovereign rights of the native rulers, breached their own treaty obligations and violated international law.

Second, from a theoretical point of view, nineteenth-century international society was reduced in size, because of the emergence of positivist thought in international legal doctrine.⁸⁸ The transition from traditional, or international, to colonial protectorates is a case in point. However, the sustained practice, established and developed in previous centuries, of entering into mutual relationships by means of treaties between European and non-European nations⁸⁹ combined with the belief that these relationships were and created

87 These treaties fell within valid international law. Jörg Fisch denies this. See Fisch, 'Africa as *Terra Nullius*', 366.

88 See Alexandrowicz, *Introduction to the History of the Law of Nations*.

89 See Belmessous, 'Paradox of an Empire by Treaty,' 262. 'In the end it is this ambition to constitute a society that explains the appeal of the treaty relationship in settler societies established by colonization. It reflects by a desire on all sides to legitimize the sovereignty

law supports the conclusion that the scramble for Africa was a radical break with what had for centuries been commonly conceived as customary, and this break anticipated a violation of international legal norms. Nineteenth-century international law was simultaneously exclusive and inclusive. Positivist legal doctrine, influenced by the political reality of the day,⁹⁰ built its theories on the assumptions of the sovereign territorial State and the family of civilized nations. International law only applied to and between the members of this exclusive group of European and a handful of non-European States. This development of the exclusive nature of the international society implied the incorporation of political arguments in international legal discourse. The entanglement of politics and law thus became, and still is, the fundamental weakness of international law.

Third, treaty-making practices between European and non-European nations well before and during the nineteenth century confirm the inclusive nature of international law.⁹¹ The widespread practice of interactions and transactions between Europeans and nations from Africa, Asia, Canada, Oceania and South America created and applied the law that governed international relations and is proof that the scope of international law was not monopolized by sovereign, territorial States. Twentieth-century legal doctrine and politics would recognize this wider scope of international law. Even in the hey-day of the territorial sovereign State, the State as the sole subject of international law turned out to be a construct that did not adequately capture the reality of international legal practice. It was this practice, as it unfolded in the last two decades of the nineteenth century, which helped restore the notion of an international legal order and community in twentieth-century international legal thought and law – a notion that had first been introduced by natural law theory in the seventeenth and eighteenth centuries and been ousted by nineteenth-century positivism. International legal practice was a catalyst for the further development of international law, both in theory and in practice. Whereas the customary nature of international law testifies to the existence and creation of a true law of and between nations, nineteenth-century international law was constructed and imposed by European legal scholars and

of these settler societies by reference to the consent, however belated or hypothetical, of the Indigenous peoples on whose lands they were established.' *Ibid.*, 267–268.

90 Many European professors served their country by being involved in national and international politics. See P. Macalister-Smith and J. Schwietzke, 'Bibliography of the Textbooks and Comprehensive Treatises on Positive International Law of the 19th Century,' *Journal of the History of International Law*, 3 (2001), 78.

91 See Keene, 'Case Study of the Construction of International Hierarchy,' 334.

politicians, and Euro-centrism until quite recently persisted as a constitutive feature of modern international law.

This chapter has addressed the question whether the cession and protectorate treaties and, by implication, international law, were violated in their interpretation and execution. The main issue has been whether the European States were obliged to comply with the cession and protectorate treaties they entered into, or whether they were free to break their promises, based on the civilization argument and the unequal status of the contracting parties. In short, why European State powers had to comply with the treaties they concluded with African rulers, not only on moral but also on legal grounds? As has been shown in Chapter 4, the European-African confrontation did not take place in a legal vacuum: the very existence of treaties between Europeans and Africans shows that international law applied to these relationships. The current chapter has assessed the compatibility of this international law in practice with international legal theory and has determined what nineteenth-century international law entailed. More specifically, it has revealed the theoretical assumptions underlying the conclusion of bilateral treaties between Europeans and non-Europeans, more specifically European States and African nations.

To determine the connection between the theory and practice of international law, this chapter has addressed the questions whether the rights of African natives were impaired, whether the Europeans breached their treaty obligations and, consequently, whether international law was violated. The chief question was whether European States were under a duty to observe international law in their relations with non-European nations. All these questions have been answered in the affirmative. Under customary international law, which had long been established and which had evolved well into the nineteenth century, European States were bound to observe their obligations towards and the rights of African nations. European States had a legal duty to observe the obligations they had undertaken in cession and protectorate treaties with African rulers. This chapter has shown that the European contracting parties failed to meet their obligations and, as a result, violated international law in two ways. First, European colonial powers breached specific clauses in cession treaties stipulating European observance of native property and property rights. Second, international law was violated by the extent to which protectorate treaties were implemented, and this implementation itself rested on an over-extensive interpretation of the treaties. The political construction of the colonial protectorate, used to justify the unbridled extension of European sovereign rights over African territory, clashed with the formal meaning of the treaties establishing a relationship of protection between the European colonial power and the African political entity.

Having established that Africa's acquisition and partition by European States on the basis of protectorate treaties was illegal, the question that remains concerns the responsibility and remedies for these wrongful international actions. If *imperium* was understood too extensively and, in consequence, applied illegally by the Europeans at the expense of native African *dominium*, the European treaty parties acted in breach of their treaty obligations and, by implication, in violation of international law. Did the treaties specify consequences of such breaches and, if they did, what remedies were provided for? Were there remedies available under general international law outside the treaty provisions? And are remedies available under current international law? Chapter 9 attempts to answer these questions by addressing the general issue of redressing historical wrongs under international law.

A Reflection on the Nature of International Law: Redressing the Illegality of Africa's Colonization

1 Introduction

European colonial powers impaired the sovereignty of native African rulers, breached the obligations they had undertaken to perform under the treaties they had concluded with native polities, and violated customary international law. Under customary international law, European States were bound to observe their obligations towards African nations and respect native African rights. More specifically, European States had a legal duty to observe the obligations they had consented to in cession and protectorate treaties with African rulers. But they failed to do so. The extensive interpretation and use of native sovereign rights by the European colonial powers after they had concluded cession and protectorate treaties disregarded the sovereignty and, subsequently, property of the original population of Africa. African rights of *dominium* yielded to European rights of *imperium*.

This study's finding that the European colonization of Africa in the late nineteenth century was illegal because cession and protectorate treaties were violated answers the first of the two 2001 Durban Conference issues – whether Africa's colonization was in accordance with international law valid at that time. This chapter addresses the second conference issue, and issue that revolves around two questions. Can responsibility for a historical wrongful act, more specifically Africa's colonization, be established under international law? If so, are there remedies available under the original treaties and under nineteenth-century and current international law to redress this historical wrong? This chapter attends to the remedies issue from the perspective of current international law, because it is an issue that comes up time and again in debates on redressing colonial wrongs in the context of international law. As the analyses of the text of treaties concluded between European States and African natives have shown, these treaties did not provide for remedies in case of non-compliance with treaty obligations. If African natives found their way to colonial courts to claim their rights, the courts were reluctant to decide on the legality of colonialism, because the concluded treaties were Acts of State, and such acts were not open to judicial review. And on the international level, there were no possibilities for African polities to claim their rights.

The chapter first addresses the origins of the problematic of establishing responsibility for historical wrongs under the doctrine of inter-temporal law (§2). It then discusses the two main difficulties in establishing responsibility for Africa's colonization (§3). Next, the chapter advocates an alternative to responsibility, namely, recognizing the wrongfulness of Africa's colonization under international law and encouraging reflection on the nature of international law (§4). In the final section, the main argument is summarized and conclusions are drawn (§5).

2 The Inter-temporal Rule

Time, in particular the lapse of time, raises various problems and is sometimes even experienced as an obstacle in establishing the law in its historical context. Against this backdrop of a problematic lapse of time and whether past actions can be assessed by contemporary standards the question to be answered is under which conditions a claim of responsibility for international wrongful actions can be lodged. Between committing such acts at the end of the nineteenth century and filing a claim for responsibility of former European colonial States lie more than a hundred years and several generations of human society. Parties which had been directly affected by international wrongful acts had passed away, and that makes it impossible to bring claims for responsibility and reparations on their behalf. They are succeeded by generations that live in their own temporary societies and are usually little aware of the historic wrongs done to their ancestors. Lawyers, political philosophers and historians argue that it is impossible and undesirable to seek to re-evaluate the remote past: they claim that the past cannot be altered and that bygones should be bygones.¹ The lapse of time coincides with changing circumstances and the supersession of historical wrongs, and this has the effect of gradually dissolving redress claims of victims and their descendants. Moreover, the maxim *interest rei publicae ut finis litium sit* – it is in the public interest that legal procedures should have an end, better known as the principle of finality – is often invoked to argue that old sores should be forgotten.² The innate reflex of legal scholars and practitioners to the issue of responsibility for historical wrongs is, and should be, to rely on the inter-temporal rule doctrine.

1 See J. Waldron, 'Superseding Historic Injustice,' *Ethics*, 103 (1992), 4–28. See also De Baets, 'Historical Imprescriptibility,' 142.

2 *Ibid.* See also Kohen, *Possession*, 183–200 and R. Higgins, 'Time and the Law: International Perspectives on an Old Problem,' *International and Comparative Law Quarterly*, 46 (1997), 511.

The next three subsections outline the doctrine of inter-temporal law (§2.1), explore how the ICJ understands and applies the doctrine (§2.2), and asserts the importance of correctly interpreting historical facts in the context of international law (§2.3).

2.1 *General Features of the Inter-temporal Rule*

In territorial conflicts – often rooted in colonialism – the main issue is how to ascertain and evaluate legal rights and obligations existing at a relevant time in the past. Here, the inter-temporal rule doctrine offers a balanced instrument of appraisal. The formal³ origins of this doctrine trace back to the *Island of Palmas* case (1928),⁴ in which arbitrator Huber had to decide a rather common dispute. The United States, as successor to the rights of Spain over the Philippines, based its claim to sovereignty over the Island of Palmas primarily on its discovery of the island. The Netherlands, however, claimed that at the time of cession in 1898 it possessed title to the island by way of effective occupation. In his ruling, Huber articulated the inter-temporal rule in response to the problem of changing conditions and circumstances related to international law and its principles after a certain period of time has lapsed: '[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.'⁵ Subsequently, he stated the following:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.⁶

The doctrine of inter-temporal law thus articulated consists of two components. The first one, better known as the non-retroactive application of rules, entailed that rights should be understood and assessed in the light

3 Before the explicit formulation of the inter-temporal rule by Huber in 1928, the rule was already a recognized principle in international law. See H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), 284.

4 *Island of Palmas (Netherlands v. United States of America)*, 1928, 2 RIAA 829.

5 *Ibid.*, 831 and 845.

6 *Ibid.*

of contemporary law, i.e. the law valid at the time of their creation.⁷ The second component qualifies the first one by stipulating that the evolution of law must be taken into account when assessing the continued existence of a right. As Elias explained, ‘rights acquired in a valid manner according to the law contemporaneous with that creation may be lost if not maintained in accordance with the changes brought about by the development of international law.’⁸ Or, in the words of Khan, ‘acts must be assessed against the law of the time when performed but at the same time the claimant must keep up with the law in the course of the centuries in order to maintain their title.’⁹

It was the second element of the inter-temporal rule in particular that elicited criticism, which was voiced prominently by Phillip Jessup. He pointed out that in the context of determining the precise title to territory ‘[e]very state would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition.’¹⁰ Jessup concluded his argument by stating that chaos would reign. With his argument, arbitrator Huber articulated the equilibrium between the acquisition and the maintenance of a title to territory.¹¹ Paul Tavernier rejects only mentioning one of the two rules, ‘either the first rule which evokes the well-known adage *tempus regit actum*, or the second rule which spells out the distinction between creating and maintaining a right. The choice to mention one without the other is evidently not neutral.’¹² Therefore,

7 R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963), 28. For a detailed reading on the non-retroactive application of international law, see J.T. Woodhouse, ‘The Principle of Retroactivity in International Law,’ *Transactions of the Grotius Society*, 41 (1955), 69–89. Woodhouse also shows that the acknowledgement of the existence of the principle of non-retroactivity has already a long history. *Ibid.*, 69.

8 T.O. Elias, ‘The Doctrine of Intertemporal Law,’ *American Journal of International Law*, 74 (1980), 286.

9 D.-E. Khan, ‘Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations,’ *European Journal of International Law*, 18 (2007), 167.

10 P.C. Jessup, ‘The Palmas Island Arbitration,’ *American Journal of International Law*, 22 (1928), 740.

11 Huber’s findings were not uncontroversial, as has been mentioned already. However, Johnson puts this commentary in perspective by stating that ‘many of these criticisms answer themselves provided it be understood that, whilst every title under international law must undergo a continuous process of “maintenance” or “manifestation” required varies in accordance with the circumstances. In particular, it depends upon the absence or presence of competing claims.’ D.H.N. Johnson, ‘Consolidation as a Root of Title,’ *Cambridge Law Journal*, 13 (1955), 224.

12 P. Tavernier, ‘Relevance of the Intertemporal Law,’ in: J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility. Oxford Commentaries on International Law* (Oxford University Press, 2010), 397.

Tavernier claims, when mentioning the inter-temporal rule both counterparts deserve equal attention.

The problem of applying and interpreting rules over time is one of the most elusive in all legal systems and is not limited to the issue of the acquisition of territory. The non-retroactivity¹³ of norms of international law has been and still is a fundamental principle. What must be determined whether new rules apply to facts, acts, or situations whose commencement predates these new rules. Similarly, applying rules to factual conditions raises the issue whether these rules must be interpreted in the light of contemporary standards or whether an 'evolving' interpretation is permissible. The issue that arises in the latter situation could be interpreted as retroactive application of law. In this regard, Edward McWhinney states that inter-temporal law presents

both the contemporary conflict between the 'old' and the 'new' in legal doctrine – representing, on the one hand, the more traditional forces oriented to preservation of the political and economic status quo of yesterday, and also the newer political forces oriented to changing law in accord with changing society; and also the opportunities and challenge of judicial policy-making [...] in behalf of a new and more nearly representative, in ethnic-cultural terms, World public order system, reflecting the new and more pluralistic World Community of today.¹⁴

13 For an detailed reading on inter-temporal law and retroactivity, see O. Bachelet, 'Face à l'alternative "rétroactivité ou immédiateté": la Cour européenne ne récidive pas,' *Revue trimestrielle des droits de l'homme*, 18 (2007), 233–245; D. Bindschedler-Robert, 'De la rétroactivité en droit international public,' in: *Recueil d'études de droit international en hommage à Paul Guggenheim* (University of Genève Press, 1986), 184–200; A. Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case before the ECHR,' *Journal of International Criminal Justice*, 4 (2006), 410–418; R. Higgins, 'Some Observations on the Inter-Temporal Rule in International Law,' in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski* (The Hague: Martinus Nijhoff, 1996), 173–181; Higgins, 'Time and the Law'; E. McWhinney, 'The Time Dimension in International Law, Historical Relativism and Intertemporal Law,' in: J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague, Boston, Lancaster: Martinus Nijhoff, 1984), 179–199; R. Provost, 'Reciprocity in Human Rights and Humanitarian Law,' *The British Yearbook of International Law*, 65 (1994), 383–454 and P. Tavernier, 'Recherches sur l'application dans le temps des actes et des règles en droit international public. Problèmes de droit intertemporel ou de droit transitoire,' *Revue internationale de droit comparé*, 22 (1970), 9–54.

14 McWhinney, 'Time Dimension in International Law,' 180. Shaw also makes the paradox on the need for stability and flexibility of international law in relation to the inter-temporal law. See Shaw, *International Law*, 508.

However, the question remains whether a contemporary or an evolutionary interpretation prevails or should prevail. Although these components seem to be contradictory – the first component advocates a static and non-retroactive application or interpretation of international law, while the second reflects a dynamic and evolutionary perspective on international law – they are not. In 1975, the *Institut de Droit International* adopted a resolution on the phenomenon of inter-temporality in international law,¹⁵ which underlines the interplay of the non-retroactive and evolutionary application of international law.¹⁶ The non-retroactivity of rules is essential for the existence and application of international law,¹⁷ but to be able to respond to the needs of current actors of and within international law an evolutionary interpretation of international law is unavoidable. These two components of legal security and development both complement and limit each other.¹⁸ They are interdependent and reciprocal.¹⁹ Although rules should not be applied retrospectively, they are created and have to function within ever-changing human societies. The evolutionary approach and the retro-active application of rules do not necessarily exclude each other.

In sum, resolving a responsibility or reparations claim for historical wrongs requires determining the law applicable to acts and acts whose commencement or conclusion lies in the past. But what does the inter-temporal rule, comprising both the non-retrospective and the evolutionary component, signify for the particular question of the legality of the acquisition and partition

15 'The Inter-Temporal Problem in Public International Law, Resolution adopted by the Institut de Droit International at its Wiesbaden Session,' *Annuaire de l'Institut de Droit International*, 56 (1975), 537.

16 '[T]he legality or illegality of historical events must be judged according to the law in force at the time in question, but the continuing effects of these events can be judged by more recent standards.' D. Shelton, 'Reparations for Indigenous Peoples: The Present Value of Past Wrongs,' in: F. Lenzerini, *Reparations for Indigenous Peoples* (Oxford University Press, 2008), 63.

17 The non-retroactive application of international law is a customary rule and codified in, for example, Article 4 of the Vienna Convention on the Law of Treaties (1969). See *ibid.* Not only the law of treaties underwrites the non-retroactive application of law, but also in the field of international criminal law and human rights law the rule is fundamental. See, for example, K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009) and G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press, 2013), 107–108.

18 Elias, 'Doctrine of Intertemporal Law,' 291.

19 See *ibid.*, 292.

of Africa? What, if any, implications does the doctrine of inter-temporal law have for the central question of the responsibility claim for the colonization of Africa at the end of the nineteenth century? The applicability of the doctrine depends on the preliminary question whether the act of colonization was legal. What must be established is whether the conduct of European States could be considered wrongful under contemporary international law. Were their acts legal or illegal under the law valid at the time when these acts were performed? If the illegality of these acts can be established, they do not have to be interpreted and assessed retroactively; in that case, the behaviour of European colonial powers was against the law in the international legal context during the colonial era. Moreover, the illegal nature of Africa's colonization in the late nineteenth century would not have been annulled by the evolution of the law: these past acts are still in contravention of international law.²⁰ In other words, under the straightforward application of the inter-temporal rule Africa's colonization was an act which did not meet the standards of international law.

In the context of Africa's colonization in the age of New Imperialism, applying the inter-temporal rule is not particularly precarious. There are legal grounds on which responsibility of former European colonial powers for the illegal acquisition and partition of African territory can be based. As the previous chapter has shown, the Europeans failed to respect native land ownership and sovereignty, breached their treaty obligations and violated international law. Under nineteenth-century international law, the conduct of European States could be considered wrongful; their acts were illegal by the legal standards in force when they were performed. Retroactive legal evaluation of the factual conditions is therefore not required.

20 Nowadays, the unilateral extension of sovereign rights over territory by a State at the cost of the sovereignty of another State is a controversial issue and is rejected by most international legal actors. See Crawford, *Creation of States*; Jennings, *Acquisition of Territory*, 37; Shaw, *International Law*, 197–216 and 492–495 and Starke, 'Acquisition of Title to Territory', 413. In addition to that, the principle of non-intervention in the internal or external affairs of other States is fundamental for the existence of the international (legal) order – which had a determining role in the history of international law – and has a prominent place in Article 2 (4) of the UN Charter. For a general elaboration on the principle, see Cassese, *International Law*, 53–54 and Shaw, *International Law*, 211–214. See also M. Jamnejad and M. Wood, 'The Principle of Non-Intervention,' *Leiden Journal of International Law*, 22 (2009), 345–381 and P. Kunig, 'Prohibition of Intervention,' in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007).

However, applying the inter-temporal rule can be problematic in of emerging fields of international law. The rule has to be employed in cases of, for example, human rights violations. For example, the current arsenal of human rights instruments, such as the Universal Declaration of Human Rights (1948, UDHR) and the International Covenant on Civil and Political Rights (1966, ICCPR), cannot be used to assess the colonial activities of the European States on the African continent and the subjection of African native peoples and lands to European power in the late nineteenth century. In addition, neither the International Law Commission's Vienna Convention on the Law of Treaties (1969),²¹ which partly reflects customary law²² and forms the fundament of discussions on the nature, content and procedures of treaties, nor the Articles on the Responsibility of States for International Wrongful Actions (2001, ARSIWA) can be used to assess the legality of treaties between Europeans and African natives or the possibility of invoking the responsibility of former European colonial States. Here, international courts play a vital role. In the context of international adjudication and the understanding and application of the inter-temporal rule, the ICJ has delivered judgment in cases in which it had to assess the validity of treaties or interpret treaty provisions.

2.2 *The ICJ and the Inter-temporal Rule*

The ICJ has had to deal with the problem of inter-temporal law in a number of cases, notably *Kasikili/Sedudu Island* (1999)²³ and *Cameroon v. Nigeria* (2002).²⁴ It is especially in the latter case, the conflict between Cameroon and Nigeria

21 See D. Greig, 'The Time of Conclusion and the Time of Application of Treaties as Points of Reference in the Interpretative Process,' in: M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (Leiden, Boston: Martinus Nijhoff, 2007), 163–218.

22 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971, ICJ Reports 16, 47 and *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgment, 1973, ICJ Reports 3, 18 and 55. See also Shaw, *International Law*, 902–955 and Villiger, *Customary International Law and Treaties*.

23 *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, 1999, ICJ Reports 1045. See J.T. Gathii, 'Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia),' *Leiden Journal of International Law*, 15 (2002), 581–622; Greig, 'Time of Conclusion and the Time of Application of Treaties,' 209–215; and P. Tavernier, 'Observations sur le droit intertemporel dans l'affaire de l'île de Kasikili/Sedudu (Botswana/Namibie), Cour internationale de Justice, arrêt du 13 décembre 1999,' *Revue Générale de Droit International Public*, 104 (2000), 429.

24 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 2002, ICJ Reports 303.

that the ICJ has applied the inter-temporal rule and indirectly addressed the legality of the acquisition of a specific part of Nigeria by Britain. As will be argued, the ICJ has pronounced and explained its judgment from a legal perspective that reflects neither contemporary law, i.e., the law in force at the time when the relevant events occurred, nor contemporary practice.

Nigeria and Cameroon came into conflict over the title to a particular piece of territory. The source of the conflict was a cession treaty concluded between Britain and a native ruler in 1884. One of the main issues the ICJ had to resolve was the precise spatial coordinates of the national boundary between Cameroon and Nigeria.²⁵ In the process of answering that question, the Court had to decide whether Britain had been entitled to transfer title to a particular piece of territory under Articles XVIII–XX of the Anglo-German Agreement of March 1913. This issue called for an examination of the colonial history of the territory concerned, the Bakassi peninsula. Cameroon and Nigeria disagreed on the status and effect of the Anglo-German cession treaty of 1913. Cameroon argued that this treaty determined the boundary between Britain and Germany in the area concerned, which implicated that the Bakassi peninsula fell under German authority and that upon independence the peninsula became Cameroonian territory on the basis of the *uti possidetis* principle. Nigeria, while recognizing that the 1913 treaty intended to hand the area to Germany, argued that the treaty could not effectuate such a transfer, because at the time of the cession Britain had no sovereign rights over the peninsula and could therefore not transfer it. The reason for Britain's lack of power of disposition, so Nigeria argued, was that the protection treaty concluded between Britain

25 For an analysis of the whole case, see M.D. Evans and J.G. Merrills, 'Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening), Merits, Judgment of 10 October 2002,' *International and Comparative Law Quarterly*, 52 (2003), 788–797. See also J.N. Anyu, 'The International Court of Justice and Border-Conflict Resolution in Africa: The Bakassi Peninsula Conflict,' *Mediterranean Quarterly*, 18 (2007), 40–55; N.J. Bekong, 'International Dispute Settlement: Land and Maritime Boundary Between Cameroon and Nigeria: Origin of the Dispute and Provisional Measures,' *African Journal of International and Comparative Law*, 9 (1997), 287–310; D.D. Caron and P.H.F. Bekker, 'Land and Maritime Boundary Between Cameroon and Nigeria,' *American Journal of International Law*, 97 (2003), 387–398; B. Kwiatkowska, 'The Contribution of the 2002 Land and Maritime Boundary between Cameroon and Nigeria Judgment,' *Hague Yearbook of International Law*, 17 (2005), 95–135; E.M. Mbah, *Land/Boundary Conflict in Africa. The Case of Former British Colonial Bamenda, Present-Day North-West Province of the Republic of Cameroon, 1916–1996* (Lewiston: Mellen, 2008), 24–34; Milano, *Unlawful Territorial Situations in International Law*, 75–77; Shaw, 'Acquisition of Title in Nineteenth Century Africa,' 1045–1047 and N.J. Udombana, 'The Ghost of Berlin still haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria,' *African Yearbook of International Law* 10 (2002), 13–61.

and the Kings and Chiefs of Old Calabar in September 1884 had only conferred limited rights on Britain – it had most certainly not transferred sovereignty over the territory. Nigeria concluded that sovereign rights remained vested in the Kings and Chiefs of Old Calabar.

The Court held that the cession of the Bakassi peninsula to Germany in 1913 was effective even though it appeared to breach the terms of the earlier protectorate treaty between Britain and the Kings and Chiefs of Old Calabar. First, the Court observed that the 1884 treaty did not specify the territory to which Britain was to extend protection, 'nor did it indicate the territories over which the kings and chiefs exercised powers.'²⁶ According to the Court, Britain had intended this non-specificity. The ICJ concluded that in the light of general European practice in Sub-Saharan Africa at the time the 'Treaty of protection' was not an agreement that recognized or maintained the sovereignty of the Kings and Chiefs of Old Calabar.²⁷ It stated that

many factors point to the 1884 Treaty signed with the Kings and Chiefs of Old Calabar as not establishing an international protectorate. It was one of a multitude in a region where the local Rulers were not regarded as States. Indeed, apart from the parallel declarations of various lesser Chiefs agreeing to be bound by the 1884 Treaty, there is not even convincing evidence of a central federal power. There appears in Old Calabar rather to have been individual townships, headed by Chiefs, who regarded themselves as owing a general allegiance to more important Kings and Chiefs. Further, from the outset Britain regarded itself as administering the territories in the 1884 Treaty, and not just protecting them.²⁸

Considering the status and effect of the protection treaty of 1884, the Court observed that there were two types of protection treaties. The first of these created protected States whose sovereign rights under international law were not alienated. The second type, establishing colonial protectorates, was in essence a means of acquiring title to territory. Eventually, the ICJ concluded that there was no evidence that the British protection treaty of 1884 could be considered to fall in the first category. In support of its conclusion the Court referred to the

²⁶ P.H.F. Bekker, 'Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening),' *American Journal of International Law*, 97 (2003), 390.

²⁷ Craven, 'Introduction,' 19.

²⁸ *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Judgment, 2002, ICJ Reports 103.

Island of Palmas case (1928), in which Arbitrator Huber stated that a treaty of protection ‘is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of the autonomy of the natives [...] And thus suzerainty over the native States becomes the basis of territorial sovereignty as towards other members of the community of nations.’²⁹ Continuous meetings and debates between Britain as protector and local rulers of the protectorate were characteristic of international protectorate relationships. Nigeria, however, failed to provide evidence for the existence of these relationships.³⁰ The Court therefore held that the 1884 treaty, transferring sovereignty over the Bakassi peninsula to Britain and establishing a colonial protectorate, was a legal means to acquire title to territory.

The Court’s conclusion, which asserted Britain’s acquisition of sovereignty over the Bakassi peninsula, is predicated on the 1884 treaty between Britain and the Kings and Chiefs of Old Calabar and on the African treaty parties lacking sovereign powers. The Court rejected Nigeria’s arguments that the 1884 treaty rendered the Anglo-German treaty of 1913 defective³¹ and concluded that under contemporary law Great Britain had been entitled to establish an agreement with Germany on the determination of the boundary between Nigeria and Cameroon.

Interestingly, Judges Koroma and Ajibola dissented by arguing that the Court had wrongly decided that the Bakassi peninsula fell under Cameroonian authority, and that the Court should have accepted Nigeria’s arguments regarding the nature and content of the 1884 protection treaty. Judge Koroma criticized the Court for ‘recogniz[ing] and consecrat[ing] political reality’ instead of applying the law to the dispute brought before it.³² He supported Nigeria’s arguments by elaborating on the nature and implications of the 1884 protection treaty and on the principle of *pacta sunt servanda*.³³ Koroma argued that the transfer of the Bakassi peninsula to Germany violated the internationally recognized legal principle of *pacta sunt servanda* and the rights of the people of Old Calabar. Although Judges Rezek and Al-Khasawneh agreed with the arguments of the two dissenting Judges, they did not join with them in their

29 *Island of Palmas (Netherlands v. United States of America)*, 1928, 2 RIAA, 858–859.

30 *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Judgment, 2002, ICJ Reports, para. 203–209.

31 *Ibid.*, para. 193–199 and 201.

32 Dissenting Opinion of Judge Koroma in *Land and Maritime Boundary Dispute Between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Judgment, 2002, ICJ Reports 303, 474, para. 3.

33 See the *ibid.*, 480, para. 15.

dissent, because they held that the Kings and Chiefs of Old Calabar had demonstrated their consent to a transfer of sovereignty by their subsequent conduct and by the absence of protest against the effectuation of the protection treaty after the treaty had been concluded.

Although the ICJ clearly tried to apply the inter-temporal rule correctly, the case between Nigeria and Cameroon, as Craven notes, 'also exposes the limits of this kind of historical enquiry.'³⁴ The Court saw it as its task to interpret the treaty between Britain and the rulers of Old Calabar and to assess the status of the treaty by standards of treaty interpretation current in the late nineteenth century rather than by modern standards. As regards method and approach, the ICJ made a step in its reasoning which can only be understood from the Eurocentric perspective.³⁵ Craven analyses this line of argumentation as follows:

Working from the apparent assumption that international law was largely Eurocentric in outlook, and actively facilitated the process of colonisation rather than resisted it, the Court seemed to conclude that relevant actors at the time would not have recognised the sovereignty and treaty-making capacity of the King and Chiefs, and hence that the treaty was not 'governed by international law' and did not affect the capacity of Britain to subsequently dispose of the territory.³⁶

In other words, the Court regarded the African treaty parties as being non-sovereign and interpreted the treaty as being irrelevant in the context of what it saw as valid international law at the time when the treaty was concluded. That the African rulers with whom Britain concluded a treaty lacked sovereignty the Court presumed without any explanation. Eventually, the Court held that the 1884 treaty did not establish an international protectorate in the traditional sense of the word, but a colonial protectorate, i.e., a relationship of protection between a sovereign nation and a non-sovereign political entity.

This conclusion, however, was³⁷ and remains questionable. As has been argued, while protectorate treaties primarily served to demonstrate to other

34 Craven, 'Introduction,' 20.

35 See P. Singh, 'From "Narcissistic" Positive International Law to "Universal" Natural International Law: The Dialectics of "Absentee Colonialism,"' *African Journal of International and Comparative Law*, 16 (2008), 56–82.

36 *Ibid.*

37 Craven refers to Koskienniemi, who points out that nineteenth-century legal opinion was far from undivided on the question of the status of colonial treaties. Whilst there were those (such as Westlake and Rolin) who regarded such treaties as irrelevant

European powers that a relationship of authority or control had been established, the very fact that these treaties were concluded between European powers and African native rulers implies that the Europeans recognized, either implicitly or explicitly, that the native rulers had internal sovereignty, which included the power to regulate existing and future proprietary rights within their territories. The Europeans concluded these treaties with the intention of acquiring rights of internal sovereignty over the territory too after the conclusion of the treaty of protection with the African rulers. It was the principle of *nemo dat quod non habet* that would have led the Europeans to assume that the African rulers did possess sovereign rights over territory, rights which they could therefore transfer by treaty.

On this view, the Court took an ahistoric approach: it interpreted the treaty and the status of the Kings and Chiefs of Old Calabar on the basis of the theoretical premise of cultural differences, i.e., the dualist world view. The Court would probably not have adopted this one-sided or Eurocentric perspective if it had conducted, for example, an analysis of the intentions of both treaty parties when they were negotiating the treaty. If the ICJ had considered international law as it was applied in practice – treaty practice shows that African rulers were considered sovereign – it would likely have concluded that the protectorate treaty only transferred rights of external sovereignty and that Britain had not validly acquired all-comprehensive sovereignty over the contested territory.³⁸ The Court might then have judged that the later colonization of the Bakassi peninsula by the British was illegal by the international legal standards valid at the time, because, as has been shown in the previous chapters, the colonial protectorate was not a legal means to acquire territorial sovereignty, but rather a political construct to justify the European colonization of Africa after the fact. If the ICJ had declared Africa's colonization illegal on the basis of all available facts, acts and laws, the outcome of the case would probably have been very different and no difficulties with regard to the inter-temporal rule would have arisen.

2.3 *International Law in Its Historical Context*

History and international law are inextricably and necessarily connected.³⁹ Lapse of time confronts legal theorists and practitioners with two interrelated problems, that of providing evidence of causal relations and that of the

to international law, there were also those (such as Bonfils and Fauchille) who assigned considerable significance to them. Craven, 'Introduction,' 20.

38 See Gilbert, *Indigenous Peoples*, 53–54.

39 See Lesaffer, 'Grotian Tradition Revisited,' 103–139.

legitimacy of counterfactual reasoning in determining what the present might have looked like if the original illegal act had not occurred. Both causality and counterfactuals⁴⁰ become increasingly indeterminate and complex in the course of time, because circumstances change as a result of internal and external intervening factors. Increasing remoteness of historical wrongful acts runs parallel to an increasing complexity in establishing a claim for responsibility. For lawyers, historical awareness is therefore a preliminary requirement when they seek to understand the facts of a case. Especially in the field of international law, the necessity of a sound knowledge of historical developments is a constitutive condition for understanding and dealing with problems and conflicts. Before conflicts erupt, they have often been smouldering for many years, sometimes decades, or even centuries. These conflicts have long and complex histories and they left their mark on society long before they were characterized as legal conflicts and eventually brought before an international court or tribunal.⁴¹ David Bederman characterizes this interrelatedness of international law and history as follows:

International law as a discipline appears to be rooted in historical trends and realities to a far larger degree than other realms of law and jurisprudence, but the relationship between the domains of international law (as both an academic study and professional practice) and historiography remain cloudy and uncertain.⁴²

As the reasoning of the ICJ in *Cameroon v. Nigeria* shows, the inter-temporal rule and its application in the context of international law bring home the point that assessing the past by current standards and knowledge is a delicate matter. Someone like the legal philosopher Ronald Dworkin might conceivably have pointed out the vital importance of judicial interpretation being based on the historical and social characteristics of the contemporary legal order.⁴³ This is especially true for lawyers operating internationally. Those who use historic materials in the pursuit of some legal objective, the ICJ prominently

40 See C. Kukathas, 'Responsibility for Past Injustice: How to Shift the Burden,' *Politics, Philosophy and Economics*, 2 (2003), 165–190.

41 See Kohen, *Possession*, 183–200.

42 D.J. Bederman, 'Foreign Office International Legal History,' in: M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (Leiden, Boston: Martinus Nijhoff, 2007), 43.

43 R. Dworkin, *Law's Empire* (London: Fontana, 1986), 245.

among them, should take into account the three 'enduring truths' articulated by Bederman:

The first of these is that legal history and legal truth are not always the same thing, and they certainly cannot be ascertained by the same means and modalities.

The second truth that international lawyers have to understand is that, no matter how hard one tries, the historic record is often sparse and incomplete, at least on the issues that matter for the lawyers or judge.

And that leads to a third enduring truth, and that is that even in cases of abundant historical materials, the historic record can still be ambiguous or contradictory.⁴⁴

Recognizing the significance and seriousness of historical inquiry in international legal proceedings is a fundamental issue, especially with regard to the questions whether the European acquisition and partition of African territory in the late nineteenth century was illegal and whether responsibility for these colonial acts can be established. However, lawyers should always be wary of the fallacy of presentism:⁴⁵ the anachronistic application of present-day norms and values to interpret and evaluate actions that occurred a long time ago. Although anachronism should be avoided, interpretation and determination of historical facts should not.⁴⁶ What must be borne in mind is that the inter-temporal rule does not apply in the particular case of violations of treaties and property rights by the European colonial powers in the late nineteenth century, because these acts were, as has been argued above, illegal under contemporary law.

To conclude, as *Cameroons v. Nigeria* evidences, historical consciousness of international lawyers, the judges of the ICJ included, is a vital but delicate matter in establishing the illegality of acts that were performed a long time ago and the possibility of redressing these historical wrongs. As has been shown, the question whether colonization, more specifically the acquisition and partition

44 Bederman, 'Foreign Office International Legal History,' 63.

45 See T. Govier and W. Verwoerd, 'The Promise and Pitfalls of Apology,' *Journal of Social Philosophy*, 33 (2002), 7. See also De Baets, 'Historical Imprescriptibility,' 145; P. Burke, 'Triumphs and Poverties of Anachronism,' *Scientia Poetica*, 10 (2006), 291–292 and 298; D.H. Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (New York: Harper, 1970), 132–142 and H. Ritter, 'Anachronism,' in: D. Woolf (ed.), *A Global Encyclopedia of Historical Writing* (New York: Garland, 1998), 30–31.

46 See De Baets, 'Historical Imprescriptibility,' 146.

of Africa, was illegal can only be answered if it is established that the colonial acts were in contravention of the law as it stood at the time. Now that it has been established that the acquisition and partition of Africa violated the legal standards in force at the time of colonization, applying the inter-temporal rule is relatively uncomplicated. Evaluating the legal nature of colonialism does not require retrospective or evolutionary application of international legal norms. The factual reconstruction of colonialism, the analysis of nineteenth-century international law and the finding that European States acquired African territory illegally create the grid to answer the question whether the former colonial States can be held responsible for infringing native proprietary rights and violating international law.

3 Impossibility of Establishing Responsibility?

Establishment legal responsibility for the historical wrong of colonization and identifying viable redress options under current national, regional and international law is fraught with difficulties. The lapse of time and the resulting remoteness of the wrongful acts make it hard to fulfil the conditions to hold a party responsible for what happened in the past. When international lawyers try to establish responsibility for Africa's colonization as a breach of law, the two main complications they face are the non-identity problem and the supersession of legal norms. The following sections discuss both difficulties and attempt to answer the question whether these hurdles can be overcome to establish responsibility for what happened in Africa 150 years ago.

3.1 *Non-identifiable Parties*

The first difficulty is to identify the injured party and the responsible party.⁴⁷ Under international law, who can lay the blame for the illegal colonization of Africa at whose door? First, the injured party has to be determined. The former European colonizing powers interfered with the sovereign rights of the African rulers, failed to respect native land ownership, did not comply with their treaty obligations and violated customary international law. The parties

47 On this issue, see L.H. Meyer, 'Einleitung,' in: L.H. Meyer (ed.), *Justice in Time. Responding to Historical Injustice* (Baden-Baden: Nomos, 2004), 12. See C. Kukathas, 'Who? Whom? Reparations and the Problem of Agency,' *Journal of Social Philosophy*, 37 (2006), 330–341 and P. Patton, 'Colonization and Historical Injustice – The Australian Experience,' in: L.H. Meyer (ed.), *Justice in Time. Responding to Historical Injustice* (Baden-Baden: Nomos, 2004), 159–172.

thus prejudiced were the native rulers, the African political entity as a whole and the members of the polity. As many of these African polities no longer exist (or have materially changed) and the persons involved have passed away, a host of questions arise regarding the legitimate representation of these entities. On what grounds can persons or entities today file claims on behalf of parties that were disadvantaged in the distant past? What forms of relationship can be attributed to descendants of natives who suffered colonial wrongs? To what extent can a direct relationship be presumed between those wronged and subsequent generations? Can native, indigenous, or minority groups be considered to have standing to represent their ancestors in legal proceedings? As to the specific issue of the illegal colonization of Africa, are potential claimants sufficiently continuous with the parties that were directly impacted by the colonization? Can successive generations of injured African natives hold former colonial States to account for not complying with international law? Can present-day African States be identified as the successors to the former political entities that concluded cession and protectorate treaties with European States? Up till now, unambiguous and uniform responses turned out to be particularly complicated if not impossible. The indeterminateness of the injured party makes establishing responsibility for colonization as a wrongful act unattainable. The core issue cannot be resolved: can current entities – whether nations, States or other organized groups of people – be identified as legitimate representatives of the African rulers and peoples who suffered at the hands of the European colonizers in the late nineteenth century?

In addition, identifying a current African State with rulers and natives who were wronged in the colonial past is barred by the argument that the injured party was and is considered to be a non-State actor. This argument follows from the ICJ's reasoning observed in *Cameroon v. Nigeria*.⁴⁸ according to the Court, the African entities with which the European powers concluded treaties could not be considered States. This observation precludes a present-day African State from claiming to be the legitimate successor to an injured African treaty party in the new imperialist era. In other words, a present-day State cannot be considered a legitimate substitute for a historical non-State entity. As a result, present-day States cannot be considered to succeed the rulers who concluded the cession and protection treaties.⁴⁹

48 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment, 2002, ICJ Reports 303. The view of the ICJ was, however, criticized. See, for example, Craven, 'Introduction,' 19–20.

49 Although it is a formal given that a current State cannot be considered as a substitute of a political entity in the past, this does not mean that current States claim to be

Yet another problem is that the lapse of time only adds to the complexity of the non-identification problem. So much time has passed since the colonial wrongful acts were committed that today it is virtually impossible to identify legitimate successors to native rulers and peoples that suffered these acts. Being a legitimate claimant, or being recognized as such, is heavily dependent on the amount of time that has passed and on the extent to which the world has changed in the meanwhile. While the existence and identity of future generations can be argued to depend on the decisions and actions of current generations,⁵⁰ the consensus among legal scholars is that a continuous and un-disruptive chain of generations is likely to be the exception rather than the rule and is extremely difficult to prove. This is especially so if a wrongful act came to a clear end in the past, because this implies that the only claim succeeding generations may pursue is that they suffered the wrongful act indirectly.⁵¹

successors of historical polities, as the debate at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban (2001) evidenced, for example.

50 'A political community is constituted not only by the actions of those in the present, but also by those in the past, through the construction and maintenance of its identity over time. The anchors of legitimacy in a democracy are thus not exclusively present-centered, but also tied to the past – not only through legal practices such as precedent, but through ideals and norms associated with constitutional “foundings.” D. Ivison, 'Historical Injustice,' in: J. Dryzek, B. Honnig and A. Philipps (eds.), *Oxford Handbook to Political Theory* (Oxford University Press, 2006), 18.

51 The Durban debate, however, made clear that the question whether colonization as a wrongful act has indeed ended in the past is answered differently depending whether you are in the block of, on the one hand, European States and the United States or, on the other hand, the African States, supported by Asia, Latin America, and the Caribbean. The main question is whether and to what extent there is a (in)direct link between historical dispossession and present violations of international law. Africa's current dispositive status, as is put forward, is a consequence of the European dominance and suppression at the end of the nineteenth century. It is, however, the question to what extent colonialism is a continuous injury and which disadvantaged features can really be ascribed to as being consequences of colonialism? Put differently, did colonization have an end, and if so, what and when demarcates this finishing point?

Causal relations become increasingly indeterminate in the course of time, caused by internal and external intervening factors. Increasing remoteness of historical wrongful acts runs parallel with an increasing complexness of determining the direct relation between acts and consequences, wrongs and injury. In this respect Dinah Shelton observes the following: 'Causation is a complex issue in every legal system, where the extent of liability for remote events and the consequences of intervening causes may vary considerably from one area of the law to another.' D. Shelton, 'Remedies and Reparation,' in: M. Langford, W. Vandenhoe, M. Scheinin and W. van Genugten (eds.), *Global Justice, State*

Identifying the responsible party is also problematic and controversial. How can present-day persons or States be held responsible for the past wrongs of others, in particular when these present-day parties were not themselves directly involved in committing these historical injustices? Several political philosophers⁵² advocate the intergenerational justice approach to this

Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law (Cambridge University Press, 2013), 385.

Africa of the twentieth century pictures a continent of colonization and decolonization, war and peace, suppression and freedom, dictatorship and democracy, etc. To blame colonization for Africa's economic, political, legal and social disposition on the whole, cannot be substantiated. In other words, direct causal relations between Africa's subjection to European powers and its present underdeveloped position cannot be proved. The lasting disadvantaged position of Africa as a developing part of the world may not be ascribed to its European subjection solely; it has other intervening causes too. Again, elapse of time and the concomitant difficulty of establishing causal relations make it complex to point out the cause of Africa's *status quo* and to hold people responsible for its disadvantaged position.

However, some consequences of the European 'civilizing mission' during the Age of New Imperialism are undeniably definite. In the vast majority of cases the amount and extent of native peoples were dramatically reduced when Europeans went into Africa's *Hinterland*, caused by exploitative labour conditions, diseases, appropriation of traditional lands, and conflicts with settlers. Alongside reduction of natives, they were relegated to socially minor positions. The consequences of dispossession, displacement, systematic discrimination and policies to enforce assimilation had a determining, if not devastating effect on the African continent and its populations. See P. Patton, 'Colonization and Historical Injustice – The Australian Experience,' in: L.H. Meyer (ed.), *Justice in Time. Responding to Historical Injustice* (Baden-Baden: Nomos, 2004), 159. Especially, the taking of property (rights) to land had a crucial impact on the living standards of Africans, in particular if one considers property of land as the most basic right to fulfil primary needs of life. See Van Banning, *Human Right to Property*; Gilbert, *Indigenous Peoples Land Rights* and D. Lea, *Property Rights, Indigenous People and the Developing World* (Leyden: Brill, 2008). And, up till today, Africans continue to suffer higher rates of disease, mortality, low living standards, unemployment and criminalization, while remaining neglected or under-represented in political and legal institutions on the international level.

52 See E. Barkan, *The Guilt of Nations. Restitution and Negotiating Historical Injustices* (New York: Norton, 2000); D. Butt, *Rectifying International Injustice. Principles of Compensation and Restitution Between Nations* (Oxford University Press, 2009); M. Freeman, 'Past Wrongs and Liberal Justice,' *Ethical Theory and Moral Practice*, 5 (2002), 201–220; R.A. Hill, 'Compensatory Justice: Over Time and Between Groups,' *Journal of Political Philosophy*, 10 (2002), 392–415; D. Ivison, 'Political Community and Historical Injustice,' *Australasian Journal of Philosophy*, 78 (2000), 360–373; Ivison, 'Historical Injustice,' 1–26; C. Kukathas, 'Responsibility for Past Injustice: How to Shift the Burden,' *Politics, Philosophy and Economics*, 2 (2003), 165–190; D. Miller, 'Holding Nations Responsible,' *Ethics*, 114 (2004), 240–268; G. Sher, 'Ancient Wrongs and Modern Rights,' *Philosophy and Public Affairs*, 10 (1981), 3–17; R. Sparrow, 'History and Collective Responsibility,' *Australasian Journal of*

issue.⁵³ This approach starts from the assumption that a 'polity is a political society that persists through time and across generations: an organized entity capable of acting as an agent and taking responsibility for its actions.'⁵⁴ Nations, States, tribes and other political entities are, therefore, continuous projects which go beyond generations: '[S]ome people may have to bear responsibility for past injustice of lines of responsibility can clearly be drawn. This is most likely when certain kinds of corporate agents persist over generations, even after original members of such corporations have ceased to exist.'⁵⁵ Since a political entity is intergenerational, it has 'an identity that persists through the generations: a historical past and continuing future. As an agent it is assumed to have responsibilities in respect to both its past and future.'⁵⁶ As a matter of justice, polity members have 'duties to and in respect to past generations,' which consequently implies that 'each generation has a duty to ensure, so far as it can, that the burdens their successors must bear to maintain institutions of justice

Philosophy, 78 (2000), 346–359; J. Thompson, 'Historical Obligations,' *Australasian Journal of Philosophy*, 78 (2000), 334–345; J. Thompson, 'Historical Injustice and Reparation: Justifying Claims of Descendants,' *Ethics*, 112 (2001), 114–135; J. Thompson, *Intergenerational Justice. Rights and Responsibilities in an Intergenerational Polity* (New York/London, 2009) and R. Tinnevelt, 'Collective Responsibility, National Peoples, and the International Order,' *Rechtsfilosofie & Rechtstheorie*, 38 (2009), 147–158. See also M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, London: Transaction, 1997) and J. Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century* (Westport: Praeger Security International, 2009).

- 53 Irrespective whether the concerned generations succeed or overlap each other. See D. Butt, 'Nations, Overlapping Generations, and Historic Injustice,' *American Philosophy Quarterly*, 43 (2006), 357–367.
- 54 Thompson, *Intergenerational Justice*, 1. It has to be noted that also the intergenerational approach also cannot escape the non-identity problem. In the end, the plea for intergenerational responsibility comes down to the rejection of the exclusion principle – individuals or collectives are entitled to reparation only if they were the ones to whom the injustice was done – and the introduction of the idea of making entitlement dependent on inheritance rather than causation of harm: descendants of the injured African natives at the end of the nineteenth century should ground their claim on the assertion of being deprived of their inheritance. See Thompson, 'Historical Injustice and Reparation,' 114–135.
- 55 Kukathas, 'Responsibility for Past Injustice,' 165. See Miller, 'Holding Nations Responsible,' 243.
- 56 Thompson, *Intergenerational Justice*, 5. 'Associations that endure over time confer upon present members benefits that are the product of earlier expropriation.' Kukathas, 'Responsibility for Past Injustice,' 183.

[...] will not be greater than its own.⁵⁷ The core idea behind the argument for intergenerational responsibility is that political entities commit to obligations that are continuous and transcend generations. In trying to circumvent the supersession thesis (see below),⁵⁸ supporters of intergenerational justice argue that membership of an intergenerational political entity, such as a nation, implies civic responsibility for society fulfilling its duties, regardless of whether these duties are past, present or future ones. Supporters of the intergenerational approach argue that many political entities, States included, can be held responsible for past injustices because as intergenerational continuators they were themselves involved directly in committing these wrongs.⁵⁹ However, the intergenerational perspective on past injustices is not undisputed.⁶⁰ One of the strongest objections to the intergenerational justice approach, – as expressed in Jeremy Waldron's supersession thesis – is that political entities such as States or nations change in the course of time and in most cases radically. This makes determining the addressees of a responsibility claim a matter of immense intricacy. The intergenerational approach to identifying responsible parties might be less problematic than it would be in Waldron's view. As will be shown in the next section, Waldron would argue that pinpointing the responsible party is in some cases impossible and undesirable.

Considering that so much has happened and changed over the past 150 years, linking members of the current generation to a remote generation of injured and responsible parties severely limits the feasibility of establishing responsibility for Africa's colonization. Indeed, such identification may well be too complicated, but does this indeterminacy also vitiate the rights and obligations involved? Is the passing of time an insurmountable hurdle?

57 Thompson, *Intergenerational Justice*, 12. See *ibid.*, 79. See also Ivison, 'Historical Injustice,' 19; L.H. Meyer, 'Einleitung,' in: L.H. Meyer (ed.), *Justice in Time. Responding to Historical Injustice* (Baden-Baden: Nomos, 2004), 24 and J. Thompson, 'Collective Responsibility for Historical Injustices,' in: L.H. Meyer (ed.), *Justice in Time. Responding to Historical Injustice* (Baden-Baden: Nomos, 2004), 101–115.

58 See Sher, 'Ancient Wrongs,' 16.

59 See Ivison, 'Historical Injustice,' 17–22. Daniel Butt goes one step further in arguing that not to fulfil one's compensatory or restitutive duties to wrongs in the past constitutes itself an act of injustice. D. Butt, *Rectifying International Injustice. Principles of Compensation and Restitution Between Nations* (Oxford University Press, 2009) and D. Butt, 'Nations, Overlapping Generations, and Historic Injustice,' *American Philosophy Quarterly*, 43 (2006), 357–367.

60 J. Waldron, 'Redressing Historic Injustice,' in: L.H. Meyer (ed.), *Justice in Time. Responding to Historical Injustice* (Baden-Baden, 2004), 55–77. See also Waldron, 'Superseding Historic Injustice,' 4–28.

3.2 *Supersession*

Since the European colonial powers violated international law and failed to respect the property rights of African natives, the populations involved and contextual conditions have changed drastically. As a consequence, old titles and rights expired and new ones were created. It was not only the parties that changed, so did their rights and obligations. It is in this context that Waldron uses the example of property rights to land.⁶¹ He argues that titles and rights to property of land are particularly sensitive to the passage of time and changes of circumstances. The entitlement of the original owners of land will decrease in strength over time if their title is separated from that land. Claims to land may fade over time as circumstances change; property rights are not imprescriptible. Kukathas confirms the transitional or temporary validity of property rights by stating that ‘it is at best unclear how far the claims present people have to properly stem from the original rights of their ancestors. Property rights regimes change over time. The law changes. And if this is so, it is not clear that a plausible claim can be made now on the basis of rights or entitlements which were in existence 100 years ago.’⁶² If this is true, the supersession thesis creates a moral hazard in that it generates an incentive to hold on to stolen land and to benefit the person who illegally acquired property rights to land. Waldron counters by stating that ‘the argument is that claims about justice and injustice must be responsive to changes in circumstances.’⁶³ He agrees that the rule of restitution⁶⁴ is a fundamental rule and that it applies in the sense that appropriators must return that which they have taken illegally. There are, however, certain time limits by which claims for restitution are bound. Waldron therefore argues that the illegal nature of historical acts cannot and should not be addressed after a certain period of time has passed.

What does this imply for the dispossession of African natives in the late nineteenth century? Claims to restitution of arrogated property rights over land should be treated very carefully, should be limited, and should in some

61 *Ibid.*, 68–71. David Lyons also asserts that property rights are not necessarily stable rights. D. Lyons, ‘The New Claims and Original Rights to Land,’ *Social Theory and Practice*, 4 (1977), 249–272.

62 C. Kukathas, ‘Responsibility for Past Injustice: How to Shift the Burden,’ *Politics, Philosophy and Economics*, 2 (2003), 171–172.

63 Waldron, ‘Redressing Historic Injustice,’ 70.

64 Restitution within the context of international law can be effectuated in two ways, namely by (1) *restitution integrum*, implying the restoration of the former legal situation; or by (2) *restitution in natura*, which means the returning of the object wrongfully taken to its original owner.

instances be rejected.⁶⁵ The supersession thesis must be taken seriously and can indeed, as Waldron indicates, have the effect that claims arising from an illegal act lose their validity because of changed circumstances. The scope and substance of property rights are highly dependent on the context in which they were created and were meant to have the intended effect(s). Over time, arrogated land has often been transferred repeatedly. And there would be little justice in landing the current owner, who has acquired and possesses his property in good faith, with the responsibility for illegal acts that were committed more than a century ago. On balance, it seems reasonable that restitution for historical acts of dispossession should not be effectuated if such restitution interferes with the property rights of current land owners. Wrongs should not be redressed by committing further wrongs. The principle of legal security requires that the supersession thesis applies. Rights and obligations have a contingent nature, which necessarily limits the scope for exercising them. Paradoxically, supersession of rights and obligations is essential to legal certainty. This makes prescription a fundamental mode of acquisition under both private law and public law, and both nationally and internationally. It should be noted, however, that the supersession thesis must not be applied in general, but should be used on a case-by-case basis.

As a consequence of the supersession of people and their rights and obligations, responsibility for the historical wrong of Africa's colonization by European States as a unified and general event cannot be established. Yet, this does not mean that in particular cases and circumstances responsibility of former colonial powers can be claimed successfully. The indeterminacy of the parties, rights and obligations involved cannot be resolved and this makes awarding claims for responsibility impossible. Nor is offering apologies a viable option, because apologies presume responsibility. Apologies differ from explanations and justifications in that apologies imply responsibility as well as blameworthiness.⁶⁶ While under international law apologies are recognized as a formal

65 See G.S. Alexander, 'The Limits of Property Reparations,' *Cornell Law Faculty Publications* (2003), Paper 24. Available at: < http://scholarship.law.cornell.edu/lrsp_papers/24 > [accessed on 16 May 2014], 1–18. Alexander brings two reasons why reparations in the form of specific restitution for unjustly property should be awarded only in exceptional cases. He asserts that '[s]pecific restitution is a unique form of reparations. It is neither the only nor the best means of recognizing the legitimacy of claims brought by the many victims of atrocities committed in the past half-century.' *Ibid.*, 18.

66 E.A. O'Hara and D. Yarn, 'On Apology and Consilience,' *Washington Law Review*, 77 (2002), 1132.

remedy for violations of the law,⁶⁷ in the political arena formal and public apologies are rare.⁶⁸

Does the narrative end on the rather sobering note that the illegal colonization of Africa cannot be redressed? Are there alternatives to establishing responsibility for such a major event? These questions are particularly pressing in view of the impact of colonization and the notion of cultural differences on the evolution of international law.⁶⁹ The colonization of Africa in the late nineteenth century, and more specifically its illegality, was constitutive of the creation and development of the international legal order and its law. Recognition of the illegal nature of the European acquisition and partition of Africa and its impact on the evolution of international law may contribute to rectifying the wrongfulness of this historical event and inspire reflection on the nature of international law.

4 Recognition

The virtual impossibility of identifying injured and responsible parties and the supersession of rights and obligations over time are unavoidable and insuperable obstacles to establishing responsibility for the illegal European acquisition

67 R.B. Bilder, 'The Role of Apology in International Law,' in: M. Gibney, R.E. Howard-Hassmann, J.-M. Coicaud and N. Steiner, *The Age of Apology. Facing Up to the Past* (University of Pennsylvania Press, 2008), 17. Richard Bilder enumerates several reasons why States might choose to apologize. *Ibid.*, 24–26. See also E. Latif, 'Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions,' *Boston University Law Review*, 81 (2001), 289–320.

68 The main reason for this reluctance of States is that these statements under certain circumstances may 'constitute evidence of state practice and therefore (1) contribute to the formation of customary international law; (2) constitute a source of interpretation for the purpose of determining the content of obligations arising from treaty law; and (3) serve as a unilateral declaration that is at least binding on the state that issued the apology.' M. Gibney and E. Roxstrom, 'The Status of State Apologies,' *Human Rights Quarterly*, 23 (2001), 915. Examples of public apologies for past wrongs made by State representatives are, for example, to be found in R.R. Weyeneth, 'The Power of Apology and the Process of Historical Reconciliation,' *Public Historian*, 23 (2001), 9–38.

69 Anghie, *Imperialism*, 3 and A. Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law,' in: E. Darian-Smith and P. Fitzpatrick (eds.), *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999), 89–107. See also Crawford, *Creation of States*; Koskenniemi, *Gentle Civilizer*, 98–178 and M. Koskenniemi, 'International Law in the World of Ideas,' in: J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 54.

and partition of Africa. Yet this *fait accompli* does not preclude recognizing the illegal nature of Africa's colonization. The wrongfulness of this historical event has to be recognized under international law and by its agents, because the scramble for Africa had a decisive impact on the creation and evolution of international law. As has been argued, nineteenth-century international law not only had a civilizing mission but also one of furthering toleration between European and non-European nations. In the course of Africa's colonization doctrine and day-to-day practice simultaneously imposed and created international law. As has been argued in the context of the intertemporal rule, international law and its agents ought to be aware of the embeddedness of international law in the illegal colonization of Africa. Recognizing this entrenchment, i.e., formally acknowledging it,⁷⁰ may contribute towards a reflection on the nature of international law. Such contemplation ideally consists of three components. First, the Eurocentric perspective in international law should be abandoned, or at least avoided as much as possible. Second, international lawyers should generate knowledge on the history of international law to be able to understand the origins of disputes and developments in current international law. And third, international lawyers seeking to evaluate historical international law for present-day purposes should adopt an objective or critical position and consciously set aside particular interests or politics. As will be argued, reflecting on the nature of international law first and foremost serves (and requires) independence and impartiality.

The next question that arises is how international law recognition of the illegality of Africa's colonization in the late nineteenth century can be effectuated. Two complementary elements can be proposed. First, the United Nations General Assembly might request the ICJ to issue an Advisory Opinion⁷¹ on the question whether European States violated international law when they acquired and partitioned Africa in the late nineteenth century. Second, the finding the European acquisition and partition of Africa was illegal could be used in disputes brought before national, regional and international courts. Both elements will now be discussed in more detail.

70 Jennings, *Acquisition of Territory*, 36.

71 On the advisory jurisdiction of the ICJ, see K.J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Leyden: Sijthoff, 1971); D. Pratap, *The Advisory Jurisdiction of the International Court* (Oxford: Clarendon Press, 1972) and F.B. Sloan, 'Advisory Jurisdiction of the International Court of Justice,' *California Law Review*, 38 (1950), 830–859.

The first element is that the UN General Assembly requests the ICJ to issue an Advisory Opinion⁷² on the question whether the European colonizers failed to respect African natives' property rights, interfered illegally with the sovereign rights of the native rulers, breached their treaty obligations and violated customary international law. The fragility of this solution is that it relies on the endorsement of the individual Member States of the General Assembly, a fully fledged political body whose members make political choices and act in their own interests.⁷³ Yet, even though considering a request for an Advisory Opinion might be resisted by former colonial States, such a course of action could also be considered an opportunity for these States to acknowledge that the acquisition and partition of Africa was wrong and that this had repercussions in international law. Indeed, such a request for an Advisory Opinion may⁷⁴ be an opportunity for modern States to draw a line under Europe's colonial past in Africa.⁷⁵

For a request to be considered by the Court, it must present a 'legal or justiciable' question.⁷⁶ This requirement, however, is not an obstacle. As has been shown, New Imperialism did indeed involve legal questions and was not only about politics and economics. The previous chapters have revealed the legal dimensions of the partition and subjection of Africa and have argued that given the treaties concluded between European States and native African rules the European colonization of Africa was illegal. In view of these findings, the ICJ might (if so requested) address the following two questions in an Advisory Opinion on the legality of Africa's colonization. First, were the cession and protectorate treaties between European States and African polities in the second

72 Article 96 of the United Nations Charter and Article 65 of the Statute of the Court serve for the legal basis for the request of an Advisory Opinion.

73 See R. Higgins, 'Policy Considerations and the International Judicial Process,' *International and Comparative Law Quarterly*, 17 (1968), 58–84. See also M. Pomerance, 'The ICJ and South West Africa (Namibia): A Retrospective Legal/Political Assessment,' *Leiden Journal of International Law*, 12 (1999), 425–436.

74 Before a request for an Advisory Opinion can be brought before the ICJ, an extensive debate has to take place in the General Assembly of the United Nations on the exact questions and on the question whether the ICJ is the right (judicial) institution to answer the questions. If agreement can be reached, an Advisory Opinion can contribute to ending the debate on the illegality of Africa's colonization. There is, however, a danger that the ICJ will become part of the political conflict, which will enhance the conflict instead of weakening or solving it.

75 See J. Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge University Press, 2004).

76 Prapat, *Advisory Jurisdiction*, 121. See also article 96 UN Charter and article 65 ICJ Statute.

half of the nineteenth century valid and observed? Second, was the colonial protectorate a legally valid mode to acquire territory? The effect of recognition by way of such an Advisory Opinion should not be underestimated. Although ICJ Advisory Opinions, unlike ICJ judgments, are not binding,⁷⁷ the respect their contents command is similar to that of the Court's judgments.⁷⁸

Here the second, complementary element of achieving international law recognition manifests itself. An ICJ Advisory Opinion recognizing the illegality of the acquisition and partition of Africa under international law needs to be concretized. Although responsibility cannot be established, the argument that Africa's colonization was illegal can be used in cases brought before international, regional and national courts. The colonization of Africa and, in particular, the treaties concluded between European States and African rulers underlie many current disputes over territory and borders⁷⁹ as well as lawsuits in which native people claim their original and fundamental rights.

Recognizing the illegality of Africa's colonization may have a notable impact on territorial and border disputes.⁸⁰ Many conflicts⁸¹ on demarcating boundaries and the geographical parameters of territory on the African continent can be traced to the treaties concluded between European States and African rulers in the second half of the nineteenth century. Relevant examples include the Arbitral award cases of *Bulama Island* (1870) and *Delagoa Bay* (1875).⁸² In addition, the findings that native property rights were not respected, that the sovereignty of native rulers was ignored, that protectorate treaties were not observed and that customary law was violated can have significant consequences

77 This non-binding character of advisory opinions is confirmed by the Court itself in *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania*, Advisory Opinion, 1950, ICJ Reports, at 71 and *South West Africa (Liberia/Ethiopia v South Africa)*, Preliminary Objections, 1962, ICJ Reports, 337.

78 On the nature of the Court's advisory opinions, see Sloan, 'Advisory Jurisdiction,' 850–855.

79 See I. Brownlie, *African Boundaries*, 14–21.

80 See A.L.W. Munkman, 'Adjudication and Adjustment,' 1–116; B.T. Sumner, 'Territorial Disputes at the International Court of Justice,' *Duke Law Journal*, 53 (2004), 1779–1812 and C.G. Widstrand (ed.), *African Boundary Problems* (Uppsala: Scandinavian Institute for African Studies, 1969).

81 It has to be emphasized that not all boundary and territorial conflicts are rooted in Africa's colonial past. See Mbah, *Land/Boundary Conflict in Africa*, 2.

82 *Bulama Island (Great Britain v. Portugal)*, Arbitration, 1870, 139 C.T.S. 21 and *Delagoa Bay (Great Britain v. Portugal)*, Arbitration, 1875, 149 C.T.S. 363. For more recent cases, see *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, 1999, ICJ Reports 1045 and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 2002, ICJ Reports 303.

for the outcome of present and future disputes on territory and boundaries.⁸³ This is (and has been) particularly true for cases that involve the consolidation of historical titles to territory, the application of the principle of the indisputability of borders (i.e., the principle of *uti possidetis juris*),⁸⁴ the consequences of decolonization and the principle of self-determination.⁸⁵ While the compatibility of the *uti possidetis* principle and the self-determination principle⁸⁶ is heavily debated,⁸⁷ recognizing the illegal nature of Africa's colonization cannot and should not affect existing rules of international law such as the *uti*

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- 83 Continuous conflicts exist, for example, between Chad and Libya, Ethiopia and Somalia, Ghana and Togo, Malawi and Tanzania, Namibia and South Africa, Niger and Benin, Western Sahara. For a detailed address of these disputes, see A.J. Day, *Border and Territorial Disputes* (Essex: Longman, 1982), 95–177 and D. Downing, *An Atlas of Territorial and Border Disputes* (London: New English Library, 1980), 58–83. See also N. Hill, *Claims to Territory in International Law and Relations* (London: Oxford University Press, 1945), 7–53.
- 84 *Frontier Dispute (Burkina-Faso v. Republic of Mali)*, Judgment, 1986, 1CJ Reports 554 and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 2002, 1CJ Reports 303. On the *uti possidetis* principle, see M.N. Shaw, 'Peoples, Territorialism and Boundaries,' *European Journal of International Law*, 8 (1997), 478–507 and M.N. Shaw, 'Introduction,' in: M.N. Shaw (ed.), *Title to Territory* (Aldershot: Ashgate Dartmouth, 2005), xxii ff.
- 85 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971, 1CJ Reports 16 and *Western Sahara*, Advisory Opinion, 1975, 1CJ Reports 4.
- 86 It has to be noted that there is no general right to self-determination. There is a principle supported by some concrete rights. Only if the minority population within the borders of a State is suppressed by the majority, this can legitimate a secession by the minority. There is, thus, no real tension between the principles of *uti possidetis* and self-determination. See A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge University Press, 1995), 190–193.
- 87 See S.K.N. Blay, 'Self-Determination Versus Territorial Integrity in Decolonization,' *New York University Journal of International Law and Politics*, 18 (1985–1986), 441–472; A. Cassese, 'The International Court and the Rights of Peoples to Self-Determination,' in: V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996), 361–362; J. Crawford, 'The General Assembly, the International Court and Self-Determination,' in: V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996), 603; K.H. Kaikobad, 'Some Observations on the Doctrine of Continuity and Finality of Boundaries,' in: M.N. Shaw (ed.), *Title to Territory* (Aldershot: Ashgate Dartmouth, 2005), 299–321; S.R. Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States,' *American Journal of International Law*, 90 (1996), 590–624 and Udombana, 'Ghost of Berlin,' 1–71.

possidetis principle, because the problem of non-identification and the super-session thesis make this impossible and objectionable.⁸⁸

Within and outside Africa there is case law on how to reconcile the colonial past and on how to deal with entitlement to land created as a result of colonization. The South-African *Richtersveld* case,⁸⁹ the Australian *Mabo v. Queensland* case⁹⁰ and the Canadian cases of *R v. Van der Peet*⁹¹ and *Delgamuukw* have set a precedent.⁹² In these cases, the common-law doctrine of aboriginal or native

88 Conflicts and legal insecurity are and will be the result of questioning and disregarding existing rules on the allocation and division of (State) territory. Exemplary are the current situations of Kosovo and South Sudan in which independence was proclaimed unilaterally.

89 *Richtersveld Community and Others v Alexkor Ltd and Another*, Judgment, 2001, 4 All SA 563; *Richtersveld Community v Alexkor Limited*, Judgment, 2003, 6 SA 104 and *Richtersveld Community v Alexkor Ltd and Others*, 2003, 12 BCLR 1301. On aboriginal title in South Africa, see, for example, T.W. Bennett and C.H. Powell, 'Restoring Land: The Claims of Aboriginal Title, Customary Law and the Right to Culture,' *Stellenbosch Law Review*, 16 (2005), 431–445; Bennett, *Customary Law in South Africa*; L.A. Hoq, 'Land Restitution and the Doctrine of Aboriginal Title: *Richtersveld Community v Alexkor Ltd and Another*,' *South African Journal on Human Rights*, 18 (2002), 421–443 and H. Mostert and P. Fitzpatrick, 'Law against Law: Indigenous Rights and the *Richtersveld* Cases,' *Law, Social Justice and Global Development Journal*, 2 (2004), 1–17.

90 *Mabo v Queensland* (No. 2), Judgment, 1992, 175 CLR 1. On aboriginal title in Australia, see, for example, I. Hunter, 'Natural Law, Historiography, and Aboriginal Sovereignty,' *Legal History*, 11 (2011), 137–168; S. Motha and C. Perrin, 'Deposing Sovereignty after Mabo,' *Law and Critique*, 13 (2002), 231–238; H. Reynolds, *The Law of the Land* (Melbourne: Penguin, 1987); H. Reynolds, *Aboriginal Sovereignty* (Sydney: Allen and Unwin, 1996) and G. Simpson, 'Mabo, International Law, *Terra Nullius* and the Stories of Settlement and Unresolved Jurisprudence,' *Melbourne University Law Review*, 19 (1993–1994), 203–210.

91 *R v Van der Peet*, Judgment, 1996, 2 SCR 507. On aboriginal title in Canada, see, for example, M. Asch and P. Macklem, 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*,' *Alberta Law Review*, 29 (1991), 498–517; K. McNeil, 'The Meaning of Aboriginal Title,' in: M. Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997), 135–154; B. Slattery, 'Understanding Aboriginal Rights,' *Canadian Bar Review*, 66 (1987), 727–783 and B. Slattery, 'Aboriginal Sovereignty and Imperial Claims,' *Osgoode Hall Law Journal*, 29 (1991), 681–703.

92 *Delgamuukw v British Columbia*, Judgment, 1997, 3 SCR 1010. See J. Borrows, 'Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*,' *Osgoode Hall Law Journal*, 37 (1999), 537–596 and K. McNeil, 'Aboriginal Title as a Constitutionally Protected Property Right,' in: O. Lippert (ed.) *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: Fraser Institute, 2000), 55–75.

title is introduced and developed.⁹³ Although these cases do not recognize the illegal nature of the colonization by the European State concerned (Britain), they do answer the question how to deal with the consequences of colonization in this day and age.⁹⁴ Using and refining the doctrine of native title and even extending it to civil law⁹⁵ jurisdictions may well be a way to address the illegal dispossession of African natives. Although the doctrine is still in its infancy and has its limitations,⁹⁶ it opens the door to redressing the historical wrong of colonization. In addition to cases that have been decided, an interesting development is that of precedent being created by, for instance, New Zealand in dealing with its colonial past of British domination, the Treaty of Waitangi and native entitlement to land.⁹⁷ The future evolution of the doctrine of aboriginal title may well be influenced by the finding that the colonization of Africa was illegal. More generally, this finding may inspire research into the legality of European colonization of territories in other parts of the world. In addition, the finding that Africa's colonization was illegal because the European colonial powers violated their treaty obligations aligns with the concerns of the United Nations Special Rapporteur Miguel Alfonso Martínez over the validity and legality of treaties between States and indigenous peoples.⁹⁸

93 Gilbert, *Indigenous Peoples*; McHugh, *Aboriginal Societies*; McHugh, *Aboriginal Title* and McNeil, *Common Law Aboriginal Title*.

94 See Kukathas, 'Responsibility for Past Injustice,' 186.

95 See Bennett and Powell, 'Restoring Land,' 431–445.

96 See J. Gilbert, 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title,' *International and Comparative Law Quarterly*, 56 (2007), 597–598.

97 See M.S.R. Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008). See also, T. Bennion, 'Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi,' *Victoria University of Wellington Law Review* (2004), 1–35 and A. Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s*, 2nd edn (Oxford University Press, 1997).

98 Findings of the former United Nations Special Rapporteur on Treaties with Indigenous Peoples, 22 June 1999, E/CN.4/Sub.2/1999/20. Martínez completed his work after the former United Nations Special Rapporteur, José R. Martínez Cobo, made recommendations on this topic in his *Study of the Problem of Discrimination against Indigenous Peoples*, E/CN.4/Sub.2/1986/0, §§ 388–392. In 1987, these recommendations led the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to decide to commission a 'Study on treaties concluded between indigenous peoples and States' (2 September 1987, E/CN.4/Sub.2/1987/17). In 1988, the Human Rights Commission extended this study with the 'Study on the significance of treaties, agreements and other constructive arrangements for the promotion and protection of the human rights and fundamental freedoms of indigenous populations,' 9 March 1988, E/CN.4/RES/1988/56.

By making explicit the relationship between the treaties and the consequences for the rights of natives he bridges the gap between past events and present implications. He notes that these treaties have played ‘a negative role with respect to indigenous rights. On many occasions they have been intended – by the non-indigenous side – to be used as tools to acquire “legitimate title” to the indigenous lands by making the indigenous side formally “extinguish” those and other rights as well.’⁹⁹ Extending the Special Rapporteur’s concerns, the concerned finding may be used to support the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (2007, UNDRIP).¹⁰⁰ These are, however, speculative prospects whose achievement depends on a wide range of human choices and circumstantial uncertainties.

Effectuating the recognition of the illegal nature of the European colonization of Africa has two purposes, one pragmatic or realistic, the other theoretical or ideological. First, specific disputes and cases that originate in a failure to respect native land ownership and sovereignty, non-compliance with protectorate treaties, or violation of customary international law must be addressed and settled. Second, given its historical roots the nature of international law requires reflection. Agents of international law – courts, scholars, States or other entities making and applying international law – must be (made) aware of the emergence and development of international law in the wake of the confrontation between Europeans and African natives in the late nineteenth century.

99 Martínez, *Study on Treaties*, §282.

100 See the Committee on Rights of Indigenous Peoples of the International Law Association presented its Interim Report at the 2010 biennial ILA meeting in The Hague and its Final Report at the 2012 biennial ILA meeting in Sofia. Both reports can be found at the ILA website: www.ila-hq.org/en/committees/index.cfm/cid/1024 [accessed on 28 May 2014]. For the declaration itself, see www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [accessed on 28 May 2014]. See also W.J.M. van Genugten, ‘Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems,’ *American Journal of International Law*, 104 (2010), 29–65. It has to be noted that Article 37 of the UNDRIP, which addresses the issue of treaties between indigenous populations and States, reflects customary law. This Article provides in its first Section that ‘Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States of their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.’ The second Section adds that ‘[n]othing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.’ See the Interim Report of the Committee on Rights of Indigenous Peoples of the International Law Association, 2010, 51.

As a result of the scramble for Africa, the presumption of cultural differences has introduced three deficits into international law. The proposed reflection on international law aims to encourage agents of international law to recognize these deficits and to remedy them. Only renunciation of Eurocentrism, heightened historical awareness and a critical mindset can contribute towards the nature of international law being reflected on in any meaningful way. And it is only the recognition of the illegal nature of colonization and its determinative influence on the nature of international law that can help provide closure.

The illegal act of colonization and its consequences should be recognized globally, especially when considering that in an ever globalizing world inherently encourages a more integrative approach to international law and human rights law. This approach is particularly nourished and strengthened by the broadening scope of international legal subjects. The distinction between public international law and human rights, never an easy or perspicuous one, is rapidly becoming fictitious and outdated. Collective rights, which go beyond State borders and negate the State-centric world view, are coming to the fore. Developmental rights of minorities and indigenous peoples as well as environmental rights and duties claim a place on the world stage. Public international law and human rights law will need to forge ties to ensure that global actors exercise their rights and perform their duties. Creating a level playing field for all, instead of a hierarchical world as colonialism did, is the way forward. And this objective can be achieved by the legal subjects of the global community as a whole working together, ranging from States to international organizations, from NGOs to individuals, and from multinational corporations to small businesses.

Anghie underlines that ‘colonialism was central to the constitution of international law – including, most importantly, sovereignty doctrine – were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.’¹⁰¹ The civilizing mission based on cultural differences created and justified a superior *versus* inferior hierarchy within international law. This idea of fundamental cultural differences separating the European and non-European worlds dominated the colonial era. The resulting inequality was to define the evolutionary course of international law.

The violations of the cession and protectorate treaties by the European contracting parties constituted wrongful acts, and this implies that the continued evolution of international law was founded on illegitimate actions and

101 Anghie, *Imperialism*, 3.

introduced inequality: In the artificially created hierarchy of the international legal order, Africa and its inhabitants were wrongfully relegated to an inferior position.¹⁰² It is for the sake and future of international law that its subjects must come to terms with its foundations. A lesson to be learned from the age of New Imperialism and the European treatment of African natives is that international law should be based on the inclusion of subjects, not on exclusion, as exemplified by the 'standard of civilization' and its degrading concepts of 'barbarian' and 'savage.'¹⁰³ The emphasis should be on equal rights for all subjects of international law in order to erase the premise of inequality underlying twentieth century international law. African legal subjects (in the broadest sense; not only African States), should be recognized and acknowledged as equal players on the global level by and for the international community as a whole. The global human rights regime must truly include nations and peoples that have as a consequence of colonialism been marginalized in the current world order.

Moreover, the international community has to be understood as comprising not only States, but also international organizations, non-governmental organizations, multinational corporations and private individuals. Since the partition of Africa in the late nineteenth century went beyond the level and boundaries of the State and was carried out by a multiplicity of players, it is a multiplicity of actors that must now try to ameliorate some of the consequences. As colonialism involved so many private and public persons, organizations and societies, it would be undesirable and impossible to hold particular individuals, organizations, or societies accountable. This would result in arbitrariness.

It could even be argued that the violation of the cession and protection treaties by the Europeans were violations of all members of the international community. This is what Karl Strupp concedes in his *Das völkerrechtliche Delikt* (1920). He argues that it is possible, in theory, to consider the violation of any treaty a violation of the fundamental principle of *pacta sunt servanda*, which

102 In this sense, Butt was right when he argued that if the response to the injustice was morally inadequate, then a second act of injustice was committed. D. Butt, *Rectifying International Injustice. Principles of Compensation and Restitution Between Nations*, Oxford, 2009, p. 6. The failure to fulfil restitutive and/or compensatory obligations with regard to the violation of African natives' property rights and extensive amounts of treaty violations could itself be seen as a wrongful act, which is inherent and constitutive to the nature and further development of international law.

103 See Koskeniemi on 'The myth of civilization: a logic of exclusion-inclusion' in Koskeniemi, *Gentle Civilizer*, 127–132.

implied ‘a violation of all members of the community of states.’¹⁰⁴ When applied in the context of Africa’s colonization, Strupp’s argument implies that the violation of cession and protectorate treaties concluded between Europeans and Africans can be considered violations of obligations *erga omnes*. This would be a compelling reason to argue for the moral responsibility of the international community as a whole¹⁰⁵ for the sake of international law and the common good.¹⁰⁶ Recognizing the illegality of Africa’s colonization can and should be considered an *erga omnes* obligation¹⁰⁷ on the international, or more correctly, the global level. Such recognition would in fact be in the interest of the entire international community, as the ICJ confirmed in a 1970 decision: ‘In view if the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.’¹⁰⁸ However, obligations *erga omnes* do not only affect States, but also all current and future subjects of international law; the dualist world view should be abandoned in favour of serving the collective interests of the international community.¹⁰⁹

104 K. Strupp, *Das völkerrechtliche Delikt* (Stuttgart: Kohlhammer, 1920), 9–11.

105 ‘[T]he term “international community as a whole” is now a well-accepted phrase. States remain central to the process of international law-making and law-applying, and it is axiomatic that every state is as such a member of the international community. But the international community includes entities in addition to states, and their role can be legally significant. [...] Thus our conception of “international community as a whole” needs to be an inclusive and open-ended one. But this only underlines the point we cannot conceive of these obligations as owed “to” a wide and disparate group, as it were singularly or separately.’ J. Crawford, ‘Responsibility to the International Community as a Whole,’ in: J. Crawford, *International Law as an Open System. Selected Essays* (London: Cameron May, 2002), 351–352. See also A.-L. Vaurs-Chaumette, ‘Other Entities: Peoples and Minorities,’ in: J. Crawford, A. Pellet, and S. Olleson, *The Law of International Responsibility* (Oxford University Press, 2010), 1000–1002.

106 M. Craven, ‘For the “Common Good”: Rights and Interests in the Law of State Responsibility,’ in: M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (Oxford, Portland: Hart, 2004), 105–128.

107 *Barcelona Traction, Light and Power Company, Limited*, Second Phase, ICJ Reports 1970, p.3, p. 32, at para. 33 and 34.

108 *Barcelona Traction, Light and Power Company, Limited*, Second Phase, ICJ Reports 1970, p.3, p. 32, at para. 34.

109 In the context of *erga omnes* obligations, the question arises whether the scope and invocability of responsibility should be broadened: The bilateralism inherited in the current system of State responsibility seems to be unable to meet nowadays conditions and challenges. See, for example, P.-M. Dupuy, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility,’ 13 *European Journal of International Law* 5 (2002), pp. 1053–1081; and I. Scobbie, ‘The Invocation of Responsibility for the Breach of “Obligations under Peremptory

Bruno Simma characterizes the rise of community interests 'permeating' the body of international law: 'International law is finally overcoming a legal, as well as moral deficiencies of bilateralism and maturing into a much more socially conscious legal order. Thus, a rising awareness of the common interests of the international community, a community that comprises not only States, but in the last instance all human beings, has begun to change the nature of international law profoundly.'¹¹⁰

In sum, the constitution and evolution of international law and the legal order in which it is used is based on illegal actions by European colonial powers directed against Africans and the international community as a whole. However, New Imperialism did mark the end of the absoluteness of the traditional perspective on the international legal order as consisting of the bilateral relations between territorial States. On this view, the international community as a whole is under a moral duty to settle a historical debt, because several of its members benefited from subordinating a whole continent and its peoples. This global obligation involves recognizing and improving Africa's disadvantaged territories and peoples on the basis of equality, and this includes realizing Africa's full participation on the international legal forum as well as developing and protecting a wide range of rights: civil and political rights, social and economic rights, minority and indigenous rights, collective rights, development rights, etc. The global rehabilitation of Africa and its subjects benefits both Africa and international law, because it is through this process of reflection, recognition and rehabilitation that the subjects of international law can (and must) come to terms with its historical legal roots origins in order to move forward. That is the responsibility the international community has to bear.

5 Conclusion

This chapter has examined whether responsibility can be established for the unlawful acquisition and partition of Africa and whether remedies are available to redress this historical wrong. First, the responsibility issue was problematized by analysing and showing the consequences of the passing of time and the application of the inter-temporal rule in international law. The interpretation and application of the inter-temporal rule – the non-retroactive

Norms of General International Law," 13 *European Journal of International Law* (2002), pp. 1201–1220.

110 B. Simma, 'From Bilateralism to Community Interest in International Law,' 250 *Hague Recueil des cours* (1994), p. 234.

application of law, but at the same time an evolutionary interpretation of law – is not obvious, though crucial, as is shown by the reasoning of the ICJ in *Cameroon v. Nigeria*. If the Court had used an objective and historic interpretation of the inter-temporal rule, it might not have concluded that a colonial protectorate was a legal means for European States to acquire title to African territory. Instead, the Court might have argued that the colonial protectorate was a political instrument to justify Africa's colonization after the fact, that Britain had breached its treaty obligations and that the transfer of territorial sovereignty over the Bakassi peninsula from the rulers of Old Calabar to Britain did not accord with nineteenth-century international law. The doctrine of inter-temporal law therefore underlines the close and necessary relationship between international law and a proper understanding and awareness of the history of international law in general and of legal disputes in particular.

Second, it has been shown that establishing responsibility for the illegality of Africa's colonization faces two difficulties: the identification of the injured and responsible parties and the supersession of rights and obligations. The passage of time has been shown to be an insurmountable hurdle; establishing responsibility, in general, for the historical wrong of colonialism is too complex. Establishment such responsibility would also impair legal certainty, create injustice and violate the law. The inevitable conclusions are that responsibility cannot be established, that no remedies are available and that formal apologies need not be offered.

In addition, a case has been made for an alternative to responsibility in order to enable international law to be reconciled with its colonial origins, namely, recognition of the illegal nature of the European acquisition and partition of Africa. Until recently, as has been shown in the first chapter of this book, the determinative impact of the acquisition and partition of Africa by European colonial powers on the nature, creation and evolution of international law has not been not acknowledged by its agents. This is unfortunate, because it has meant that the civilization or cultural differences argument has continued to underlie and justify international law. Legal scholars and professionals should recognize that the dualist world view has affected the evolution of international law. Such reflection may encourage international law agents to reflect on and abandon the biased and ahistoric nature of international law.

Finally, two complementary ways have been proposed to effectuate this recognition. First, the United Nations General Assembly should request the ICJ to issue an Advisory Opinion on the question whether the European treaty-based acquisition and partition of Africa was legal by nineteenth-century international standards. Second, international, regional and national courts ought to consider the illegality argument in deciding cases that trace back to Africa's

colonization. Here too, the aim of recognizing the illegal nature of Africa's colonization is to encourage reflection on the biased character of international law. Both legal practitioners and legal scholars have a role to play in reshaping international law as an inclusive body of law. The Eurocentric approach in international law should be abandoned; international lawyers should be (made) aware of the historical roots and evolution of international law, and they should be critical in assessing and applying international law. By recognizing the illegality of Africa's colonization, members of the current international legal order can draw a line under cultural differences between nations as the basis of international law and develop a non-hierarchical international law, both in theory and in practice. Although responsibility for the illegal acquisition and partition of Africa by European States in the late nineteenth century cannot be established, this does not mean that the international law legacy of this historical wrong cannot somehow be rectified.

Evaluative Summary and Conclusion

The stand first of a newspaper article in the British newspaper *The Telegraph* of 9 July 2009 catches the eye: ‘Barack Obama tells Africa to stop blaming colonialism for problems’ In the article President Obama is quoted as saying ‘Ultimately, I’m a big believer that Africans are responsible for Africa. I think part of what’s hampered advancement in Africa is that for many years we’ve made excuses about corruption or poor governance, that this was somehow the consequence of neo-colonialism, or the West has been oppressive, or racism [...] I’m not a believer in excuses.’ Although President Obama is right in pointing to the flawed logic of causally linking the colonization of Africa to its current social, political and economic problems, Western imperialism – not only as a social, political and economic phenomenon, but also as a legal one, as the Durban debate shows – did have a constitutive impact on the creation and development of international law and order.

The legacy of the age of New Imperialism for international law is that it was in that era that international law was founded on the premise of the world being divided into civilized and non-civilized nations, a notion introduced by European legal doctrine and politics to justify the acquisition and partition of Africa. Euro-centrism in international law and the at best modest historical contextualization and critical evaluation of international law by its agents combined to ensure that the nature of international law was determined by cultural differences. New Imperialism, and more specifically the acquisition and partition of African territory in the late nineteenth century, was constitutive of the creation and development of international law. Europeans did impose international legal norms, but international law was also shaped by the European-African confrontation. In this sense, international law evolved as the product of a process of mutual influence in the confrontation between political entities. Recognizing that the European colonization of Africa had a major impact on the evolution of international law may add a dimension to the biography of international law and initiate a process of reflection on the nature of international law as an impartial body of law.

The biased nature of international law can be considered one of New Imperialism’s main offshoots. But what else have New Imperialism and the colonization of Africa bequeathed to international law? Their impact has made itself felt in at least six ways. First, the process of acquiring and partitioning Africa demonstrates that theoretical categorizations in nineteenth-century

international legal doctrine are flawed. Traditionally, New Imperialism, both the age and the phenomenon, is characterized by dichotomies, oppositions and divisions – civilized versus non-civilized, European versus non-European, sovereign versus non-sovereign, public versus private, sovereignty versus property, centre versus periphery, theory versus practice, law versus politics, formal versus informal, advanced versus backward, domination versus sub-ordination, positivism versus naturalism, we versus them, and, in missionary terms, toleration versus civilization. The scramble for Africa, however, evidences how these dualities were exploited arbitrarily and how they became unworkable, invalid and out of touch with reality. In fact, the European acquisition and partition of African territory can be, and should be, understood as an emancipatory force in international law that upset this view of the world as being composed of binary opposites. Although international law retained its biased character, the scramble for Africa was a catalyst for the diversification and universalization of international law in the twentieth and twenty-first centuries.

Second, New Imperialism shows that Africa's colonization did not occur in a legal vacuum and that the law of nations was a living body of law. In nineteenth-century international legal doctrine, these dualities were used to explain and justify international relations. Moreover, until quite recently it was this dualistic world view that informed mainstream European international legal doctrine. This established canon prioritized the theoretical explanation and justification of colonialism over the empirical evidence, i.e., what happened on the ground. The premise on which legal doctrine based its views and arguments was that international law only applied to and between the members of the family of civilized nations, i.e., a select group of nations in Europe, America, the Ottoman Empire, Japan, China, Siam and Persia. Admission to membership of this family depended on being recognized as a sovereign State by the other family members. Although it is true that norms of international law only applied to and between the members of the family of civilized nations, it was the more general law of nations that regulated the relations between nations beyond the family of civilized nations and between members and non-members of the family. The practice of concluding cession and protectorate treaties beyond the realm of the family of civilized nations strongly suggests that the law of nations was a functioning body of law before and during the European scramble for Africa.

Third, New Imperialism belies the presumption that the private and the public spheres were disconnected environments. New Imperialism demarcates a period in the common history of Africa and Europe in which the political and economic forces of society became entangled: the boundaries between public and private spheres blurred, as did those between the legal concepts

of sovereignty and property. This intermingling is an outgrowth of the liberal approach of defining and organizing society in a persistent longing for progress. This liberalism introduced a strain of cosmopolitanism that was inherently paradoxical: its goal of a tolerant – Kantian – cosmopolitan world rested on the assumption that there was a non-civilized part of the world to waiting be converted. This cosmopolitanism neither respected nor tolerated other nations, but imposed itself on them. It was this brand of liberalism that contributed to making the world a smaller place, underlay the civilized-non-civilized divide and was the basis of positivism. As the privileged status of being a civilized nation depended on being recognized as such by the members of the family of civilized nations, this coveted and exclusive position was open only to a select group of States.

Fourth, New Imperialism challenges the plausibility of the State-centric model as the foundation of international law. In nineteenth-century international legal doctrine, the colonial encounter was a confrontation between European States and African political entities. Assuming that the non-European world lacked sovereignty, enabled positivists to construe this encounter as an arena in which the sovereign – by definition a European State – made, interpreted and enforced the law. In other words, the colonial encounter enabled positivists to construct a system of international law that imposed European norms and values on non-European lands and peoples. Although positivist theory envisioned a harmonious world defined by international society, sovereignty, and civilization, the reality of the scramble for African territory turned was one of conflict and disorder, reinforcing the dualistic world view. Nineteenth-century international legal doctrine created two worlds: one of sovereign States, whose relations were governed by international law, and one of non-civilized nations, where international law had no place. *Imperium* as the unifying notion of territory and sovereignty became the realm of the State, the civilized European State to be precise. It was only at the end of the nineteenth century, as a result of doctrinal attempts to legitimize the colonization of Africa, that territory coincided with sovereignty and became a constitutive condition for statehood. In practice, however, African political entities were perfectly capable of transferring sovereignty, whether wholly or in part, over their territory by treaty. Although they did not possess statehood – i.e., they were not recognized as States by the members of the family of civilized nations – they were considered sovereign. This reality confirms the fictitious nature of the dualist and State-centric legal order, a reality which helped shape international law in the Post Modern Age (1914-present), an era characterized by the pluriformity of international legal entities and the gradual, globalization-induced detachment of sovereignty and territory.

Fifth, New Imperialism confirms the central role of sovereignty and property in instituting legal order and maintaining it. The concepts of sovereignty and property, more specifically territorial sovereignty (*imperium*) and private ownership of land (*dominium*), are the most fundamental regulatory principles of human society. This universality notwithstanding, their application is relative to their interpretation and realization in the given historical, geographical, cultural and socio-political context. What did the right to property of land and territorial sovereignty mean in Europe and Africa in the age of New Imperialism? One of the main findings of this study is that *dominium*, *imperium* and the differences between these two legal concepts were recognized by both the European colonizing powers and the African native polities. More fundamentally, the core legal issue of the European acquisition and partition of Africa was the compatibility of the right to control objects and the right to control subjects, and it is clear that the European construct of the modern State is one of a number of ways to express and apply the concepts of sovereignty and property. Unlike these two universal concepts, however, the State is a product of its time. The European-African confrontation in the late nineteenth-century shows the limits of the State, both as a concept and as an instrument of geopolitical organization.

Sixth and more fundamentally, New Imperialism raises the question what the nature of international law was in the nineteenth century. How must international law be conceived: as a man-made construct deductively imposed or as a product of encounters between nations inductively applied? In attempting to reinterpret the acquisition and partition of Africa by European powers in the last two decades of the nineteenth century, this book has not taken the modern State as its starting point, but rather the concepts of property and sovereignty, which go beyond the State. And in abandoning the State-centric model, it has also discarded the erroneous presumption of a divided world, a presumption that has had a lasting impact on international law. Instead of the theoretical premises of international law, it was international law in practice that has formed the point of departure for this book. This approach has made it possible to assess the colonial venture from a perspective that is not, or at least to a lesser extent, informed by preconceived notions. What happened in practice is that Europeans came into contact with African native communities. As these contacts endured, they needed regulating, but the conceptual framework of the modern State was ill-suited to account for the reality of the scramble for Africa.

These general claims about the impact of New Imperialism on international law are founded on the answers to the three central questions of this book. Did the European colonial powers acquire private property rights to

land along with territorial sovereignty by concluding cession and protectorate treaties with African rulers in the age of New Imperialism (1870–1914)? Did the European colonial powers comply with their treaty obligations and their international legal obligations? If treaties and international law were violated, which consequences and remedies were and are available under these treaties and under international law respectively? Three case studies – on British Nigeria, French Equatorial Africa and German Cameroon – have clarified the historical context in which these treaties were negotiated, concluded and implemented. Put differently, the case studies address the question whether the objectives, the text and the interpretation of these treaties aligned. They show that it is essential to reconstruct international law as it stood at the time of the scramble for Africa on the basis of a contextual analysis. The three case studies also bring home the reality of the acquisition and partition of Africa by means of cession and protectorate treaties between European powers and African rulers.

As has been argued, the scramble for Africa constitutes a radical break with a centuries-long tradition of international law. In the relatively short period of half a century, international relations and colonialism underwent several fundamental transitions: from economic to political relationships, from indirect to direct rule, from original to derivative modes of acquisition, from cession to protectorate treaty and, eventually, from traditional to colonial protectorates. These far-reaching transitions occurred in the second half of the nineteenth century, a period when positivist legal thinking was at its apogee, the sovereign State was the creator, subject and enforcer of international law – as it applied to and between the members of the family of civilized nations – and territory became the prime objective in the European drive towards expansion.

Effectively, New Imperialism on the African continent was a European struggle for title to territory within a period of less than twenty years at the end of the 1800s. The premise underlying the appropriation by European States of foreign territories was that legal acquisition of territory confirmed the legality of the subsequent title to that territory. The legal instruments most commonly used to create European titles to African territory were bilateral cession and protectorate treaties between European States on the one hand and African rulers representing their peoples on the other hand. The fact that these treaties were concluded implies that the European confrontation with nations in the non-civilized part of the world did not occur in a legal vacuum. In this European-African confrontation, concepts from European international law, which in principle only applied to and between members of the family of civilized nations, were used to regulate contacts with foreign nations and the acquisition of overseas territories. The reality of nineteenth-century

international law is that bilateral treaties were concluded between European States and African political entities, and this reality shows that African rulers had the capacity, or competence, to conclude treaties and possessed sovereign powers. Cession and protectorate treaties were considered to be treaties between two sovereign contracting parties. This also implies that the capacity to conclude treaties did not require European-style statehood. In sum, international legal practice does not support the strict dualist perspective and confirms the existence and applicability of the law of nations.

The legality of the cession and protectorate treaties hinges on the meaning and role of territory in the context of the European treaty-based acquisition and partition of Africa as well as on the status of these treaties in nineteenth-century international law. Were cession and protectorate treaties concluded between European States and African rulers in the late nineteenth century merely pieces of paper without any legal value, a status constructed by nineteenth-century legal positivists and upheld by twentieth-century international legal scholarship? Or did these documents have legal value? In other words, were these cession and protectorate treaties sources of law? This book presents three in-depth comparative case studies of treaty compliance to clarify what happened after the treaties had been signed.

The case studies address two central questions. First, what role did property and sovereignty play in treaties and agreements transferring sovereign rights over territory that Europeans and Africans concluded in the second half of the nineteenth century? Second, how were existing sovereignty and property rights affected after these treaties had been signed? Although the three case studies report substantial differences in terms of how African territories were acquired and ruled, two general conclusions can be drawn. First, the European colonizing power manifestly failed to observe provisions in the cession treaties on the observance of natives' proprietary rights to land. In theory, the European State which acquired all-comprehensive sovereignty over territory had the capacity to allocate and control land and proprietary rights to this land. In practice, existing rights to land were neglected and natives were dispossessed – a strategy that accorded neither with the letter nor with the spirit of the cession treaties. Second, the European protectors denaturalized protectorate treaties and used them as springboard for annexation. Protectorate treaties became the most important instrument for European powers to acquire, first, external and, later, internal sovereignty rights over territories, a procedure recognized by nineteenth-century doctrine and politics. The European protectors not only had jurisdiction over external relations and defence, but also over internal affairs. As a result, European politicians could use colonial protectorates as they saw fit – Acts of State not being subject to

judicial review – and such use was at odds with both the essence and purpose of the traditional protectorate.

This practice raises the intriguing question whether European contracting powers, acting as they did, breached their treaty obligations. Since by treaty only external sovereignty rights were transferred from the African ruler to the European State and the European contracting party explicitly committed itself not to interfere with natives' property and related rights, it can be concluded that the European State concerned, by extending its external sovereign rights to include the authority to rule the native population, breached its obligations under the protectorate treaty. The European contracting party failed to respect the internal sovereignty of the African ruler and arrogated the latter's role as supreme authority of and over the native polity. By appropriating the sovereign rights controlling the relationship between native ruler and native subjects and by dispossessing natives of their land, the Europeans failed to comply with the obligations they had undertaken to perform and that had been explicitly stated in the protectorate treaties. On this view, the acquisition of all-comprehensive sovereignty after signing a protectorate treaty was not a logical consequence or natural process, but an illegal act.

In sum, these treaties were indeed sources of law and, more importantly, the objectives, texts, interpretations and implementation of these treaties were unaligned: *imperium* and *dominium* were not used in accordance with the law of nations. These findings give rise to the question whether in breaching cession and protectorate treaties the European contracting parties violated nineteenth-century international law. In other words, were Europeans bound to respect their treaties with African rulers? Were they legally obliged to observe the treaty provisions or were they free to break their promises? Were their treaties with African rulers legally binding instruments? All of these fundamental questions must be answered in the affirmative. European States were obliged to comply with the cession and protectorate treaties and had to keep their promises, despite the civilization argument and despite the unequal status of the contracting parties. In short, European State powers were legally obliged to honour the treaties they concluded with African rulers.

By not complying with their obligations as articulated in the cession and protectorate treaties concluded with African rulers, the Europeans violated customary international law. By interfering with the property rights to land and land law of African polities and, by extension, with the sovereign rights of the native rulers, the European contracting parties failed to observe their obligations under the treaties they had concluded. By signing a treaty, the European State concerned was bound to execute the treaty as agreed based on the customary norms of the law of nations regulating the relations between

European and non-European nations, the most prominent of which were the principles of *pacta sunt servanda* and *bona fides*. In the final analysis then the European treaty-based acquisition of African territory in the final two decades of the nineteenth century was in contravention of international law. In other words, the colonization of Africa by European States in the age of New Imperialism did not accord with legal standards that were considered valid at the time: the scramble for Africa lacked legality.

As has been argued, the perceived divide between the civilized and the non-civilized world part was disproved by the international legal practice of European and Africans concluding treaties. International legal theory was unable to account for this reality of international law. This clear discrepancy between international law in theory and in practice – law in the books versus law in action, so to speak – raises the question what constituted valid and therefore binding international law in the nineteenth century? This question revealed a division amongst legal scholars along the positivist-naturalist fault line, but customary international law offered a way out of this gridlock. The customary law nature of the treaty-making practices between Europeans and Africans both integrated the consensus of the subjects of international law and put into effect such norms of the law of nations as the principles of *pacta sunt servanda* and *bona fides* alongside positive international law as laid down in legislation, case law and doctrine. In other words, customary international law simultaneously brought international law into practice and realized norms of the law of nations on which this practice was based. It showed that international law was not only created by facts, but also emerged from unlawfulness; it mediated between, on the one hand, factual events and, on the other hand, theoretical and legal constructs. While it reconciled positivist and natural law approaches, customary international law emphasized the primacy of the application of law between nations and showed that international legal theory was not up to the task of dealing with legal deficits created in the field. The customary law nature of international relations also showed that international law was not just ‘European’: international law was not only imposed by European States, it also evolved through the confrontations between nations. In other words, the narrative of ‘European’ international law imposing itself the rest of the world and introducing universal standards is a half-truth. Nineteenth-century international law not only had a one-directional civilizing mission but also one of mutual toleration between European and non-European nations. Custom brought fundamental principles into practice which in turn both imposed and created the law of and between nations.

Furthermore, the practice of European and non-European nations concluding treaties well before the nineteenth-century testifies to the inclusive nature

of the law of nations. The widespread practice of interactions and transactions between Europeans and nations from Africa, Asia, Oceania and South America was instrumental in creating the law that applied the law between these nations, and it evinces that the scope of international law was not limited to sovereign, territorial States. The customary nature of international law is testament to the creation and existence of a true law of and between nations. Even so, in the nineteenth century European legal scholars and politicians constructed and imposed a distinctly European brand of international law, and until quite recently Euro-centrism persisted as a constitutive feature of international law.

The finding that the European acquisition and partition of Africa was illegal raises the issues of responsibility and reparations. Can responsibility be established for a past wrongful act, more specifically the colonization of Africa? If it can, what remedies were available under the cession and protectorate treaties and under nineteenth-century law, and what remedies are available under current international law? Given the temporal aspect of these questions, the inter-temporal rule comes into play. How does the inter-temporal rule, involving components of both the non-retrospective and the evolutionary application of rules, impact on the issue of the legality of the acquisition and partition of Africa? What implications does the doctrine of inter-temporal law have for the central issue of European responsibility for the late nineteenth-century colonization of Africa? The applicability of the doctrine depends on the preliminary question whether the act of colonization was legal, and that question must be answered on the basis of contemporary international law: did the European States act in contravention of the law that was in force when they colonized Africa? If they did, if their conduct is found to be illegal, retroactive interpretation and assessment is redundant, because the conduct of the European colonial powers was contrary to international law in force at the time. Moreover, the illegal nature of Africa's colonization in the late nineteenth century has not been reversed by the evolutionary path international law has since taken: the colonial conduct of the European powers in Africa in the late nineteenth century remains contrary to international law. In conclusion, the inter-temporal rule offers a compelling argument that the colonization of Africa was an act which did not, and does not, meet the standards of international law.

In sum, in the context of the colonization of Africa in the age of New Imperialism, the application of the inter-temporal rule is relatively straightforward. Responsibility of former European colonial powers for the illegal acquisition and partition of African territory can be based on legal grounds. The Europeans failed to respect native ownership of land and sovereignty, breached treaty obligations and violated international law. On a proper understanding of

nineteenth-century international law, the colonial conduct of European States can be qualified as wrongful; the European States' acts contravened the law in force when these acts were performed, and retroactive legal evaluation of the factual circumstances is therefore unnecessary.

However, problems regarding the application of the inter-temporal rule may arise in emerging fields of international law. Here, courts play a vital role. In the context of international adjudication and the understanding and application of the inter-temporal rule, the ICJ has delivered judgment in cases in which it had to assess the validity of treaties or interpret their provisions.

There is no clear-cut answer to the question whether responsibility for past colonial wrongs can be established, and whether reparations can be awarded, under current national, regional and international law. The passing of time and the ensuing remoteness of the wrongful acts make it hard to fulfil the conditions for assigning responsibility for past events. Establishing responsibility for the illegality of Africa's colonization faces two difficulties: the identification of the injured and responsible parties and the supersession of rights and obligations. This study shows that the passage of time is an insurmountable obstacle: it renders the pursuit of establishing responsibility too complex to be feasible. Establishing such responsibility would itself impair legal security, create injustice and violate the law. As responsibility cannot be assigned, there is no case to be made for awarding reparations or offering formal apologies. The same is true if obligations are superseded.

Does the story end here: the colonization of Africa, while illegal, cannot be redressed? Is there an alternative to establishing responsibility for an event that had such an impact on the history of both Africa and international law? No, and yes. There is a way to assign Africa's colonization its proper place in the history of international law. This alternative route, which bypasses establishing responsibility and awarding reparations, is recognizing that Africa's colonization was illegal. The pervasive impact the European acquisition and partition of Africa has had on the evolution of international law has largely gone unnoticed. This is an unfortunate oversight, because it has meant that the civilization or cultural differences argument has continued as a mainstay of international law. What should be acknowledged is that the dualistic world view not only helped clear the way for the colonization of Africa, but has also shaped the evolution of international law. Such recognition may encourage agents of international law to interpret international law in its historical context and to reflect on the biased nature of international law.

To facilitate this recognition, this study has proposed two complementary courses of action. The first of these is that the ICJ issue an Advisory Opinion on the legality or illegality of the treaty-based European acquisition and partition

of African territory by nineteenth-century international law standards. Second, international, regional and national courts, as well as individual judges, ought to take into account the illegality of Africa's colonization in deciding cases that trace back to the time when European States acquired and partitioned Africa.

Times have changed and societies have progressed since the Europeans colonized Africa, but international law still rests on a historically biased footing. Both legal practitioners and legal scholars can contribute towards making international law an inclusive body of law. International law should lose its Euro-centric outlook, and international lawyers, once aware of the historical roots and evolution of international law, ought to critically assess and apply international law in their day-to-day work. Ultimately, international law can only achieve the status of an impartial, unbiased and universal body of law if it disposes of its fundamental – and fundamentally flawed – presumption of cultural differences. Past events cannot be undone, but their legacies can.

Chronological List of Treaties and Other Agreements

Archives

Archives Nationales d'Outre-Mer, Aix-en-Provence, France.

Archives privées – Général Louis Archinard (60 APC, 1880–1911)

Archives privées – Alfred Durand (61 APC, 1891–1913)

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- 19 February 1842, Treaty of cession between France and King Peter of Grand Bassam, De Clercq, vol. iv, 615.
- 18 March 1842, Treaty of cession between France and King Louis of Gabon, De Clercq, vol. iv, 616.
- 30 March 1842, Treaty of cession between France and the rulers of Batanga, De Clercq, vol. iv, 617.
- 1843, Treaty of cession between France and King Koako, A.C., vol. iv, 439. See Alexandrowicz, 98 and Paulin, 6.
- 28 March 1844, Treaty of cession between France and King Glass of Gabon, De Clercq, vol. v, 165.
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- 1 June 1862, Treaty of cession between France and the rulers of Cape Lopez, De Clercq, vol. vii, 413.
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