

W. A. M. (MIEKE) VAN DER LINDEN, Tilburg

# Law-Making in the Age of New Imperialism (1870–1914)

## The Dubious Question of How the Protectorate Treaty as a Political Instrument Became International Law

*In the Age of New Imperialism (1870–1914), the African continent was partitioned by several European powers, which collided in their ambitions to seize territory. The protectorate treaty, concluded between Africans and Europeans, formed the main mode of acquiring title to land. These treaties put the door ajar to the acquisition of full and all comprehensive sovereignty, and, therefore, the regulation and administration of internal affairs, like the allocation of property rights and landownership. Mainly by way of decrees the Europeans took over the internal administration of the protectorate. The European administration in Africa soon implemented the concession system, expropriated the indigenous population of their lands, and placed the African peoples in reservations. It is assessed whether these practices were in accordance with contemporary legal standards.*

### 1. Introduction

In the “Scramble for Africa,”<sup>1</sup> at the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century, several European powers collided in their ambitions to seize territory. The main actors in this competition were Great Britain, France and Germany, but also Belgium, Portugal, Italy and to a far lesser extent Spain were involved. The motives behind this colonization were multiple; they involved economic exploitation, protection of European

national interests and imposing “superior” Western values. During the Age of New Imperialism, European powers added almost 9,000,000 square miles of African land, approximately 20 % of the whole land mass of the world, to their overseas colonial empires.<sup>2</sup> After the Conference of Berlin (1884–1885),<sup>3</sup> the scramble for Africa really came up to speed. The factual and practical events and consequences, which the partition of Africa implied, were enormous. Border lines were drawn, territory

---

<sup>1</sup> The “Scramble for Africa” is the popular word combination to describe the acquisition of African land and the partition of the continent. Under the same title, Thomas Pakenham published his book, giving a historical description of the European colonial venture in Africa. PAKENHAM, *Scramble for Africa*.

---

<sup>2</sup> For a chronological overview of colonization between 1870 and 1912, see PAKENHAM, *Scramble for Africa* 681–694. See also O'BRIEN, *Atlas of World History* 204–207.

<sup>3</sup> Many literature accounts for the Conference of Berlin (1884–1885), see, among other works, CROWE, *Berlin West African Conference*; FÖRSTER u.a., *Bismarck*; and KOSKENNIEMI, *Gentle Civilizer* 121–127.

was divided and whole peoples<sup>4</sup> were disturbed, split up and assimilated to European civilization. Each European power had its own means and strategies to realize its targets and objects on the territory of Africa. The whole continent was brought under the rule of the European colonizing powers; territorial occupation expanded from settlements and trade posts on the coast to the *Hinterland*, the interior or the heart of Africa. From an international legal perspective, this raises the question of the mode(s) of acquisition of and the legal entitlement to territory, being the central issue of this article.<sup>5</sup>

The European powers mainly used cession and protectorate treaties to acquire title to African territory.

This article involves an analysis of legislative practices after the conclusion of protectorate treaties, especially regarding the relation between territorial sovereignty and private landownership, *imperium* and *dominium*, by Britain, France and Germany during and after the acquisition of African territory. The legislature and its activities of British Nigeria, French Equatorial Africa, and German Cameroon will be addressed. It will be questioned how British, French, and German law-making practices appeared in the overseas African territories during the Age of New Imperialism especially with regard to *imperium* and *dominium*? And how did these law-making practices relate to the concluded protectorate treaties?

First, New Imperialism will be explicated with a particular focus on territorial acquisition and the most often used modes of acquisition,

concluding cession and protectorate treaties, will be addressed (§ 2). Second, the interpretation and execution of the treaties are evaluated by discussing and assessing the legislative practices in British Nigeria, French Equatorial Africa, and German Cameroon are (§ 3). Then, the question whether treaty obligations were violated will be considered (§ 4). At the end, the findings will be summarized and concluded by answering the central questions (§ 5).

## 2. Territorial acquisition by cession and protectorate treaties

Before discussing cession and protectorate treaties and their conclusion between European colonial powers and African rulers, two preliminary remarks have to be made. First, by resorting to the conclusion of cession and protectorate treaties, the European colonial powers acknowledged that Africa was no *terra nullius*:<sup>6</sup>

As an induction from all these instances ... it appears that, on the whole, European States, in establishing their dominion over countries inhabited by people in a more or less backward stage of political development, have adopted as the method of such extension, Cession or Conquest, and have not based their rights upon the Occupation of *territorium nullius*.

Within living memory, the continent had been covered by (a network of) political entities resembling States, in the European sense, and empires of a great diversity which revealed some similarities and even traces of unity. In

<sup>4</sup> Here “peoples” is used to indicate groups of people; whether they form a tribe, clan, family lineage etc., is not dealt with.

<sup>5</sup> See FISCH, Law as a Means and as an End; and LESAFFER, Argument from Roman Law in Current International Law 25–58.

<sup>6</sup> LINDLEY, Acquisition and Government of Backward Territory 43. See also ALEXANDROWICZ, The Afro-Asian world and the law of nations 172; and BULL, European states and African political communities 99–114.

other words, pre-colonial Africa was covered and inhabited by political communities, which was acknowledged by European States.

At the end of the 19<sup>th</sup> century, common theory existed on the point not to consider Africa *terra nullius*; acquisition of African territory by occupation was impossible.<sup>7</sup> This was evidenced by the elaborate practice of treaty conclusion with native chiefs representing their peoples. The conclusion of treaties was no longer an exclusive competence of and activity between sovereign (European) States, as Lord Lugard subscribed:<sup>8</sup>

They [the king and chiefs] 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 [...].

Consequently, the sovereign rights of the chief of an African native polity were recognized as existing within the international legal order.<sup>9</sup> Put

differently, the possibility of conclusion of treaties confirms the status African rulers as sovereigns or international legal subjects. While theoretically seen international law was not applicable to relations between European States and African natives, the practice of concluding treaties does provide evidence of the applicability of international law, which includes the principles of *pacta sunt servanda* and *bona fides*, on the involved relationships. This practice set precedence to legal doctrine, as Dionisio Anzilotti confirmed that these rulers representing their peoples possessed international personality and that such agreements are consequently international treaties.<sup>10</sup> It was, therefore, possible to conclude treaties with various types of polities which had a territorial base, as long as there was a more or less definable and unified social structure.<sup>11</sup> Later on, in 1975, the International Court of Justice affirmed in its Advisory Opinion on the *Western Sahara* case, that the land belonging to tribal societies was not *terra nullius*.<sup>12</sup>

Although, this recognition was in the interest of the European State and contracting party in his competition with other European States for African territory,<sup>13</sup> it did contribute to the loosening of/departing from the (direct) link between State and sovereignty, which was especially realized by the establishment of protectorates by the conclusion of treaties between Africans and Europeans.<sup>14</sup> Therefore, the introduction of the protectorate treaty formed a turning point in colonial or imperial history. Determinative and essential is the point

<sup>7</sup> See ONUMA, *When was the Law of International Society Born* 49. See also FISCH, *Die europäische Expansion und das Völkerrecht*.

<sup>8</sup> Lord LUGARD, *Treaty Making in Africa* 54.

<sup>9</sup> 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. 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

<sup>10</sup> ANZILOTTI, *Cours de droit international* 129–130.

<sup>11</sup> BROWNLIE, *Expansion of international society* 362.

<sup>12</sup> *Western Sahara*, Advisory Opinion, ICJ Reports 1975.

<sup>13</sup> See, for example, BENTON, *From International Law to Imperial Constitutions* 595–620; and WARNER, *Political Economy of Quasi-Statehood* 233–255.

<sup>14</sup> There is a parallel development with the principle of "The Sacred Trust of Civilization". See ALEXANDROWICZ, *Sacred Trust of Civilization* 149–159.

that the establishment of a protectorate affirmed and recognized the sovereign rights of the native chief regarding internal affairs of his political community. In practice, the policy of indirect rule of the British supports this argument.

The second preliminary remark involves the point that the involved parties and the addressees of the cession and protection treaties have to be taken into account. Although the treaties were concluded between European States and African rulers, the presence of other European States in Africa turned out to be a determinative given. The European contracting party, in the early days of the scramble for Africa, did not have the intention to extinguish pre-existing rights at the moment of signing the treaty. The only thing they intended was to prevent other European powers to acquire the territory. The concept of “scramble” already implies this: New Imperialism concerned competition among European States of being first; they quarreled on the basis of first come first serve. In this sense, the concerned treaties served first and foremost as “receipts” of the acquisition of certain pieces of African territory between concurring European States. In the end, treaty practice in Africa at the end of the 19<sup>th</sup> century involved a tripartite relationship of the contracting European colonial power, the African ruler and other European (rival) States. A bilateral treaty was concluded between a European State and an African ruler, which accounted for the notification of the fact that the territory in question was not available anymore for other European States. This three-dimensional relationship is further strengthened by the fact that European States made agreements among each other to establish spheres of interest and influence in order to

prevent and settle conflicts on the distribution of African territory.<sup>15</sup>

The scramble for territorial titles on the African continent was in first instance not a competition for the occupation of land by original title but a race for obtaining derivative title. It was seen as a necessity that European powers acquired derivative titles according to the rules of international law regarding negotiation and conclusion of treaties. Territory could be acquired by European States from African political entities by bilateral transaction only unless resort was made to war and conquest.<sup>16</sup> Many treaties, contracts and agreements over land and territory were concluded during the Age of New Imperialism between Europeans, whether or not as delegates of the State, and African people(s).

Although contemporary legal scholars generally agree on the point that the existence of cession and protectorate treaties did not presume equality between parties, in other words, African territories inhabited by natives governed by their rulers were not been considered to be States, there is no rejection that a reciprocal relationship between the European and African parties is established and maintained either. As a consequence of this observation, the question arises what kind of relationship between Europeans and Africans was established by the cession and protectorate treaties. In other words, which value or authority was attached to these documents from a legal perspective? In order to address, this question the phenomena of cession and protectorates are briefly described, as these

<sup>15</sup> For an overview of these European agreements on the division of African territory among each other and the establishment of spheres of interest and influence, see HERTSLET, *Map of Africa*. See also ELIAS, *Africa and the Development of International Law* 17–18.

<sup>16</sup> ALEXANDROWICZ, *European-African Confrontation* 7. See also KOSKENNIEMI, *Gentle Civilizer* 136–143; and SHAW, *Acquisition of Title* 1029–1049.

notions appeared in the context of territorial acquisition on the African continent.

Cession<sup>17</sup> of “backward” territory or territory outside the society of civilized States could be made by the native sovereign, or by an advanced sovereign, such as a modern State, by whom the territory had been previously acquired. The object of cession entailed the full sovereignty rights. Further, cession implied no direct acquisition of property rights by the State; only sovereignty in the sense of regulative powers over subjects was transferred. There was no automatic or necessary extinguishment of private property rights of natives. However, the acquiring State did have the competence to enact legislation in order to acquire property rights to land by the State and to regulate private landownership in the territorial State. In this respect, the general rule was (and still is) that private property shall not be taken for public use without compensation.

Next to cession, although it is not an officially acknowledged means, the most often used instrument establishing territorial title was consolidated in the protectorate treaty. The definition and the scope of the concept of protectorate is, however, not unambiguous. A common definition of a protectorate, provided in the context of contemporary law, read 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.”<sup>18</sup> Or, to use Sir Henry Jenkyns’ words: “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 [...]”<sup>19</sup> A protectorate implied that neither its soil nor its peoples were under European possession. Also the definition given by Alexandrowicz is very appealing, especially by its emphasis on the duty of the protecting State: “The protectorate means a split of sovereignty and its purpose 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.”<sup>20</sup> Of course, the validity of a protectorate treaty, like the cession treaty, was dependent on several conditions.<sup>21</sup> In the situation of the establishment of a protectorate, often by way of a treaty,<sup>22</sup> internal sovereignty rights remained in the

---

<sup>17</sup> It may be by way of exchange, sale or gift. Cession was in most cases effectuated by way of a treaty. This mode of acquisition of territory differs from the first technique of bringing non-Europeans under the ‘realm of international law’, in that its primary purpose is transfer of territory. The first technique, described as treaty practice between Europeans and non-Europeans, was not, in first instance, focused on the transfer of territory.

---

<sup>18</sup> Memo by Lord Selborne, January 3<sup>rd</sup>, 1885, quoted in GIFFORD, LOUIS, *France and Britain in Africa* 209.

<sup>19</sup> JENKYNs, *British Rule and Jurisdiction* 166.

<sup>20</sup> ALEXANDROWICZ, *European-African Confrontation* 62.

<sup>21</sup> 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.

<sup>22</sup> ‘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.’ MULLIGAN, *Nigeria* 293.

hands of the protected entity.<sup>23</sup> In the context of the European entitlement to overseas territories, a protectorate was not considered as a part of the dominions of the European mother land and could not be classified as a European possession.<sup>24</sup> This element is the core difference between a cession and a protectorate.<sup>25</sup> As a

---

<sup>23</sup> See BATY, *Protectorates and Mandates* 109–121. Baty described four stages of development in the history of the protectorate: ‘1. *The Medieval conception of Suzerain and Vassal*: involving a certain, but definite, impairment of sovereignty on the part of the latter, and setting up “real” rights residing in the former. “Protection” was the specific term by which one important duty of the suzerain was known; 2. *The Renaissance conception of Protection* as a relation of pure contract, a promise of protection in return for solid advantages, implying no interference with domestic affairs (except so far as the admission of a garrison might be concerned), conferring in principle no right *in rem*, and leaving the protected State free to have relations with foreign Powers; 3. *The denaturalised conception of a protected State* as a State deprived of foreign relations, cut off from the interest of the sister nations, and almost necessarily incorporated (internationally speaking) in the protecting State. Styled in this extreme a “protectorate”; definitely marking its failure to attain State rank; 4. *The application of the word Protectorate* to territories which are not States, but in which it is desired to establish the same combination of control with repudiation of annexation as is attempted to be set up in 3.’ BATY, *Protectorates and Mandates* 114–115.

<sup>24</sup> In the light of defining the protectorate, the following quote of Lucas may not be withheld from the reader: “In the British Empire the difference between a Crown Colony and a Protectorate is that the soil of a Crown Colony is British soil, and the inhabitants of a Crown Colony are British subjects.” LUCAS, *Partition and Colonization* 17.

<sup>25</sup> “Where so much power has been exercised it seems difficult to draw a line between a protectorate and a British possession. If the whole sovereignty is assumed the territory is really part of the dominions. Apparently the only difference is that in a British possession responsibility is assumed for the whole of the internal government, i.e. for the government of the natives of the protected states *inter se*, and, further, all those natives become British subjects wherever they may be. A further consequence of the territory becoming part of the British dominions would be that English law would *prima facie* apply,

matter of fact, the European protector controlled the international relations of and exercises its jurisdiction over the foreign territory. The protecting power only acquired sovereign rights over the relations with other States or political entities of the protected entity; internal affairs, like the enactment of legislation, stayed in the hands of the protected sovereign.<sup>26</sup> In theory, the conclusion of protectorate treaties between European powers and African native chiefs implied that the Europeans recognized, implicitly or explicitly, the internal sovereignty of the native chief, which also acknowledged the power of this same chief to regulate existing and future property and subsequent rights within his territory.

### 3. The aftermath of cession and protectorate treaties

In the period after the conclusion of the protectorate or cession treaty between a European and an African chief, the respect or disrespect of the distinction between territorial sovereignty and private land ownership became a central issue. *Imperium* and *dominium* were clearly separated from the European legal scholars’ point of view.<sup>27</sup> It is the question whether and to what extent this distinction was upheld with regard to the acquisition of territory and the landownership of indigenous peoples.

---

although the consequences can be avoided by the provision of an Order in Council excluding it.” JENKYNs, *British Rule and Jurisdiction* 192–193.

<sup>26</sup> 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 analyzed on this point.

<sup>27</sup> “*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.*” VON LISZT, *Völkerrecht*. See also LENTNER, *Internationales Colonialrecht*; and SCHLIMM, *Grundstücksrecht in den deutschen Kolonien*.

From the beginning, European treaties with natives explicitly excluded landownership from cession and declared to respect native property; sovereignty rights were the object of transfer.<sup>28</sup> However, these treaty provisions turned out to be meaningless. Practice showed that natives' landownership and other related property rights were disrespected and that natives were expropriated, sent from their land, and placed in reserves, as established by European authorities. In this respect, the indeterminateness of the scope of sovereignty rights, as object of transfer, has to be considered as the main cause. In almost every treaty, the exact object of cession was not articulated. This vagueness was employed and misused by the Europeans, who acquired step-by-step full sovereignty rights, as can be obtained in the situation of British Nigeria, French Equatorial Africa, and German Cameroon, by the imposition of legislative acts. Apart from the alleged rights transferred by the treaties, there the British introduced statutes regulating land tenure in the southern part of Nigeria. Legislation, mainly in the form of Orders of Council, was established and instituted for the sake of the prevention and suppression of land speculation in order to ensure subsistence in production and a continuous supply of the market. Orders of Council had to regulate the competition for land or land grabbing and make clear the legal relations between competitors and the titles to the territories. British Parliament intervened more and more and the governance in Nigeria became increasingly direct. As an inevitable consequence of this direct rule was that the British Houses of Parliament grew out, in practice, an international legislature.

---

<sup>28</sup> "Der Boden darf bei einer eventuellen Souveränitätsübertragung nicht übergeben werden." NDUMBE, Deutsches Kaiserreich in Kamerun 73.

The French oversee territories were considered as extended territories of the European mother country; the colonies were integral parts of the French Republic.<sup>29</sup> With regard to legislation in the African protectorate, a centralized organization, which was incorporated into the French system, had the preference. Legislation in the colonies existed for the greater part of one-sided decrees, ordered and imposed by the French authority. This legislative system by way of decrees was considered as a rapid and very elastic manner to control the territories. Decrees regarding concessions and the determination of public domain in French Equatorial Africa were needed to organize the territory and possession of lands in order to establish legal security regarding transactions of real estate as well as decrease transaction costs, which especially conformed to the needs of the trade companies. The African native was lost out of sight in the whole legislative, administrative and judicial control of the African territories under French rule.<sup>30</sup>

Like the French, the German colonial administration in Cameroon was a centralized organization.<sup>31</sup> An evolving German intervention could be obtained by the issuing of *Verordnungen* by the Chancellor,<sup>32</sup> especially with regard to land policy. *Verordnungen* were the legal instruments of the Chancellor to effectuate German authority over the territory and the people of Cameroon and concerned one-sidedly imposed orders or decrees. As a matter of fact, legal policy was used as an important

---

<sup>29</sup> For a more elaborative reading on France and its relation to international law at the end of the 19<sup>th</sup> century, see KOSKENNIEMI, *Gentle Civilizer* 266–352.

<sup>30</sup> See ROBERTS, *History of French Colonial Policy* 155.

<sup>31</sup> For a detailed reading on Germany and its place in the international legal order at the end of the 19<sup>th</sup> century, see KOSKENNIEMI, *Gentle Civilizer* 179–265.

<sup>32</sup> See SACK, *Grundzüge der Rechts- und Verwaltungsordnung*.

means of governing the native populations.<sup>33</sup> German-Prussian law on land, which was based on the notion of individual property rights, was imposed on and applied to Cameroonian polities, organized according to a mere communal property rights system. *Verordnungen* on land tenure were mainly enacted to settle and prevent conflicts on landownership and to strengthen the legal position of German settler.<sup>34</sup>

#### 4. Breach of treaty

At the end of the 19<sup>th</sup> century, Africa underwent in a short time period of a couple of years a total subordination by and institution of European legal and political institutions. As main players in the field, Britain, France, and Germany acquired in a quick pace African territory and imposed their legislative, executive, and judicial institutions on the territory and its inhabitants. Treaties between the Europeans and Africans often formed the institutional basis. These treaties were formalistic, but evident on the distinction between sovereignty and property. Although, in first instance, only external sovereignty was transferred, the extent and content of these sovereignty rights stayed undetermined.

The longer the competition for African territory lasted, the more vehement and rude the scramble became. European States were in close combat with each other, being afraid of losing what they could gain, namely, title to African territory. Parallel with this hardening of the struggle, European States chose increasingly for the conclusion of protectorate treaties instead of cession treaties. This essential choice was made

consciously, which became clear from the explicit considerations of the European colonial powers. As has been shown above, cession implied the transfer of full sovereign rights and, thus, the possibility of enacting legislation. These sovereign powers could be and indeed were carried out mainly by the executive power of the European State on the foreign territory. Consequently, these acts were often not open for review by the judiciary; the act of State doctrine prohibited judicial review. In the case of protectorates, however, these mechanisms were not applicable, because the protecting power only acquired sovereign rights over the relations with other States or political entities of the protected entity; internal affairs, like the enactment of legislation, stayed in the hands of the protected sovereign.<sup>35</sup> The conclusion of protectorate treaties between European powers and African native chiefs implied that the Europeans recognized, implicitly or explicitly, the internal sovereignty of the native chief, which also acknowledged the power of this same chief to regulate existing and future property and subsequent rights within his territory. Even a former British governor of Nigeria, Sir Alan Burns questioned the legality of the European presence in Africa and its quest for territory: 'No European nation had the right to assume sovereignty over the inhabitants of any part of Africa, and the claims put forward by the various Governments at the Berlin Conference in 1885 took little account of the rights of the people who lived in the territories claimed.'<sup>36</sup>

---

<sup>33</sup> See SCHAPER, *Law and Colonial Order*.

<sup>34</sup> For the description and comparative analysis of the legislative enactments, developments and consequences in the involved African territories, see VAN DER LINDEN, *Dominium and Imperium*.

---

<sup>35</sup> 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 analyzed on this point.

<sup>36</sup> BURNS, *History of Nigeria* 277.



From studies such as those of Alexandrowicz,<sup>37</sup> Hesse,<sup>38</sup> and Lindley<sup>39</sup> it can be learned that in these agreements a distinction was applied between the transfer of public sovereignty (*imperium*) and of private property (*dominium*). Hesse

underlines that the agreements concluded by them are transactions in public international law and not in private law. What was transferred was not property of the land but sovereignty. This decided for once and for all the question whether the contracting German Companies obtained the ownership of the land. Treaties of cession of territory do not effect private rights in the ceded territory though of course a new sovereign can by the regime of private law and real property.<sup>40</sup>

Contemporary legal doctrine subscribed this distinction between the sovereignty and property. Lindley is very clear and short on this point: 'Sovereignty and property being distinct and different entities, there is no necessary reason why circumstances that affect the one should have any influence upon the other'.<sup>41</sup> In the case of protectorates, the transfer of external sovereignty only does not entitle the protecting power to deal with the property within the protected territory. As regards full sovereignty over territory passes, in ancient times, conquest was the recognized mode of extending sovereignty.

However, more and more open norms, which were amenable for various interpretations, were included in the treaties. The importation of these

open norms led to an increase of discretionary competences for the European treaty party. The description and determination of the object of the cession or protectorate treaties was caught up in the fog of the scramble. Vague and open treaty terms veiled the practical implications of the treaty regarding the distinction between sovereignty and property. At the end, sovereignty and property were called in one and the same breath.

The actual state of affairs was that full sovereignty was acquired step-by-step after the conclusion of the protectorate treaty. As noted before, the reach of the transferred sovereignty differed from protectorate to protectorate; the extent of the sovereignty rights was undetermined. The fact that certain sovereignty rights were ceded to a certain European contracting party as the protectorate treaty provided for, implicated already interference with African internal affairs. The distinction between internal and external sovereignty blurred and was even abandoned. Or, put differently, the internal element of sovereignty, which was, theoretically seen, in the hands of the African treaty party, was hardly and in many cases not respected by the Europeans: the Europeans allocated these rights to themselves.

The transfer of external sovereignty rights by the conclusion of a protectorate treaty put the door ajar to the acquisition of full and all comprehensive sovereignty, and, therefore, the regulation and administration of internal affairs, like the allocation of property rights and landownership. As a matter of fact, colonial governments under British as well as under French and German rule increasingly claimed to dispose of land still subject to African law as they provided by their self-enacted legislative instruments. Consequently, the European governments could thereby indirectly exert influence on forms of land ownership and land use on the African continent. Instruments used

<sup>37</sup> ALEXANDROWICZ, *European-African Confrontation*.

<sup>38</sup> HESSE, *Landfrage*.

<sup>39</sup> LINDLEY, *Acquisition and Government of Backward territory*.

<sup>40</sup> Hermann Hesse paraphrased in ALEXANDROWICZ, *European-African Confrontation* 39.

<sup>41</sup> LINDLEY, *Acquisition and Government of Backward Territory* 337.

to effectuate this influence were the acquisition of the right of disposal, configuration of land, expropriation of land, increased control of land use through a system of concessions, influence on land distribution was brought to bear by control of land transfers, land registry to administer land distribution, and shift in juridical competence to colonial authorities.<sup>42</sup> The Europeans took over the internal administration of the protectorate territory, which finally resulted in mass expropriation of the native populations of their lands and the placing of these peoples in reservations, established by the Europeans.

When taking cession treaties in consideration, we can obtain that they transferred full sovereignty over territory from native chiefs to the Europeans. Theoretically seen, no property rights were involved in these transfers, a matter which was explicitly stipulated in the concluded treaties too. The central issue with cession treaties does not regard the question whether the extension of external to internal sovereignty rights was legitimate or not. The main question with which cession treaties are concerned is whether private land ownership is transferred along territorial sovereignty rights or not. These treaties almost all contain the provision stipulating the respect for the habits and customs of the natives and the necessity for the European powers who want to settle themselves on the territory, to pay indemnities for the taking of the land. In practice, African natives were deprived of their land ownership. Landownership fell under the control of the European authorities, which attributed full sovereignty rights and land ownership to themselves. The Europeans did not comply with their promise to respect customs, rights and properties of natives; they failed to take into

account the personal, collective and unalienable nature of native landownership. Instead of respecting the native perspective, the Europeans imposed their own legal system and inherited concepts.

## 5. Conclusion

Obviously, the Europeans did not keep their promise and did not live up to the concluded cession and protectorate treaties with the African natives, in which they explicitly declared to respect the rights and property of the African inhabitants. Still, the preliminary questions whether the European colonial power had the right to extend the received external sovereignty to the pursuance of full sovereignty by legislative, administrative and judicial practice, and whether this can be considered as a treaty violation are kept unanswered. Additionally, for the case of cession treaties, it is the question whether the transfer of sovereignty was aligned with that of land ownership and whether this was legitimate or not.

By the protectorate treaty, European States guaranteed help and assistance to the protected, implying the crucial duty of the defence of the territorial integrity of the Africans. Although the maintenance of external relationships fell into European hands, African political entities' internal autonomy had to be respected. However, practice shows that this did more or less not happen. In the majority of the situations, the internal autonomy of the protected entity was not respected in absolute sense; the transfer of external sovereignty already implied possibilities of extending it with competences falling under the internal autonomy of the protected entity. Even McNair underwrote this a matter of fact: "It seems probable that the rule of law to the effect that annexation automatically terminates treaties affecting the annexed

---

<sup>42</sup> DEBUSMANN, ARNOLD, *Land Law and Land Ownership in Africa* viii–ix.

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.”<sup>43</sup> In this respect, some legal authors even explained this development as a natural consequence of a protectorate. It is the question whether the metaphor of the protectorate as the “springboard to annexation”<sup>44</sup> is indeed legitimate.

It is the question whether the European claims of the transferred territorial sovereignty by the concerned treaties also implied the transfer of sovereignty rights regarding internal affairs of the concerned African territory, in particular the regulation of property rights over land. The core problem is the accurate articulation of the relation between the private right of property and the public right of sovereignty. Especially within the context of the practice of imperialism at the end of the 19<sup>th</sup> century on the African continent, this core problem is laid bare: the concepts of territorial sovereignty and private landownership were used arbitrarily in the framework of treaty-making practices between European colonial powers and African rulers, which eventually resulted in a breach of law. European States did not comply with their treaty obligations and, thus, violated international law on the basis of the principles of *pacta sunt servanda* and *bona fides*.<sup>45</sup>

<sup>43</sup> MCNAIR, *Law of Treaties* 628.

<sup>44</sup> ALEXANDROWICZ, *European-African Confrontation* 111.

<sup>45</sup> 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.” VATTEL, *Law of Nations* II.15.221.

To conclude, it has to be observed that the introduction of political constructs like the colonial protectorate, the sphere of influence, the *Hinterland* doctrine and the civilization argument<sup>46</sup> do not account for the legality of Africa’s colonization. European States did not live up to their treaty obligations and, thus, violated international law on the ground of the principles of *pacta sunt servanda* and good faith, both constitutive for the existence of international law and the international legal community. Moreover, native property rights were in several occasions forced into a corner within the European urge for territorial expansion. It is a fact that treaty promises were not lived up to and contemporary legal doctrine put aside. Valid legal norms at the time with regard to the protection and maintenance of native property rights were neglected, because of the political interests of European powers during the Age of New Imperialism. This article has shown that the commonly upheld fiction of the legality of the scramble for Africa, as it was created by politics and subsequently adopted by legal doctrine, cannot suffice any longer in its legal account for Africa’s colonization.

## Korrespondenz:

Mieke van der Linden  
Tilburg University, Tilburg Law School  
Department of Public Law, Jurisprudence and Legal History  
Montesquieu building, Room 403, P.O. Box 90153,  
5000 LE Tilburg, The Netherlands  
W.A.M.vdrLinden@tilburguniversity.edu

<sup>46</sup> Martti Koskenniemi denoted the civilization argument as the ‘myth of civilization: a logic of exclusion-inclusion’. KOSKENNIEMI, *Gentle Civilizer* 127–132.

## Literatur:

- Dionisio AZILOTTI, *Cours de droit international* (Paris 1929).
- Charles ALEXANDROWICZ, *The Afro-Asian world and the law of nations (historical aspects)*, in: *Recueil des Cours* 123 (1968) 121–214.
- Charles ALEXANDROWICZ, *The juridical expression of the Sacred Trust of Civilization*, in: *American Journal of International Law* 65 (1971) 149–159.
- Charles ALEXANDROWICZ, *The European-African Confrontation: A Study in Treaty Making* (Leyden 1973).
- Anthony ANGHIE, *Imperialism, Sovereignty and the making of International Law* (Cambridge 2005).
- Thomas BATY, *Protectorates and Mandates*, in: *British Yearbook of International Law* 2 (1921–1922) 109–121.
- Lauren BENTON, *From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900*, in: *Law and History Review* 26 (2008) 595–620.
- Conrad BORNHAK, *Die Anfänge des deutschen Kolonialstaatsrechts*, in: *Archiv für öffentliches Rechts* 2 (1887) 3–53.
- Ian BROWNLIE, *The expansion of international society: the consequences for the law of nations*, in: Hedley BULL, Adam WATSON (Hgg.), *The Expansion of International Society* (Oxford 1984).
- Hedley BULL, *European states and African political communities*, in: Hedley BULL, Adam WATSON (Hgg.), *The Expansion of International Society* (Oxford 1984) 99–114.
- Alan BURNS, *History of Nigeria* (London 1978).
- Sybil CROWE, *The Berlin West African Conference 1884–1885* (London 1942).
- Robert DEBUSMANN, Stefan ARNOLD (Hgg.), *Land Law and Land Ownership in Africa. Case Studies from Colonial and Contemporary Cameroon and Tanzania* (Bayreuth 1996).
- Taslim ELIAS, *Nigerian Land Law* (London 1971).
- Taslim ELIAS, *Africa and the Development of International Law* (Dordrecht-Boston-London 1988).
- Jörg FISCH, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart, 1984).
- Jörg 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: Wolfgang MOMMSEN, Jaap DE MOOR (Hgg.), *European Expansion and Law* (New York 1992) 20–38.
- Stig FÖRSTER, *Bismarck, Europe, and Africa* (New York 1988).
- Prosser GIFFORD, William LOUIS (Hgg.), *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (New Haven 1971).
- Edward HERTSLET, *The Map of Africa by Treaty*, 3 Bd. (London 1967).
- Hermann HESSE, *Die Landfrage und die Frage der Rechtsgültigkeit der Konzessionen in Süd-West Afrika* (Jena 1906).
- Henry JENKYN, *British Rule and Jurisdiction beyond the Seas* (Oxford 1902).
- Martti KOSKENNIEMI, *The Gentle Civilizer of Nations* (Cambridge 2002).
- Ferdinand LENTNER, *Das Internationale Colonialrecht im neunzehnten Jahrhundert* (Wien 1886).
- Randall LESAFFER, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, in: *European Journal of International Law* 16 (2005) 25–58.
- Mieke VAN DER LINDEN, *Dominium and Imperium in the Treaty Practice of the Age of New Imperialism (1870–1914) in the Heart of the African Continent* (Diss.), forthcoming.
- Mark LINDLEY, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London 1926).
- Franz VON LISZT, *Das Völkerrecht Systematisch Dargestellt* (Berlin 1925).
- Charles LUCAS, *The Partition and Colonization of Africa* (Oxford 1922).
- Frederick LUGARD, *Treaty Making in Africa*, in: *Geographical Journal* (1893) 53–55.
- Arnold MCNAIR, *The Law of Treaties* (Oxford 1961).
- Michael MULLIGAN, *Nigeria, the British Presence in West Africa and International Law in the 19<sup>th</sup>*

- Century, in: *Journal of the History of International Law* 11 (2009), 273–301.
- Kum'a NDUMBE, *Das Deutsche Kaiserreich in Kamerun. Wie Deutschland in Kamerun seine Kolonialmacht aufbauen konnte, 1840–1910* (Berlin 2008).
- Yasuaki ONUMA, *When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective*, in: *Journal of the History of International Law* 2 (2000) 1–66.
- Patrick O'BRIEN, *Atlas of World History* (Oxford 1999).
- Thomas PAKENHAM, *The Scramble for Africa* (London 2009).
- Stephen ROBERTS, *The History of French Colonial Policy 1870–1925* (London 1963).
- Peter SACK, *Grundzüge der Rechts- und Verwaltungsordnung*, in: Rüdiger VOIGT, Peter SACK (Hgg.), *Kolonialisierung des Rechts* (Baden-Baden 2001) 54–62.
- Ulrike SCHAPER, *Law and Colonial Order: Legal Policy in German Cameroon between Civilising and Public Peace*, in: *Comparativ Zeitschrift für Global geschichte und vergleichende Gesellschaftsforschung* 19 (2009) 17–33.
- Karl SCHLIMM, *Das Grundstücksrecht in den deutschen Kolonien* (Leipzig 1905).
- Malcolm SHAW, *The Acquisition of Title in Nineteenth Century Africa: Some Thoughts*, in: Pierre-Marie DUPUY u.a. (Hgg.), *Common Values in International Law. Essays in Honour of Christian Tomuschat* (Kehl 2006) 1029–1049.
- Emer DE VATTEL, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Sovereigns* (Washington 1916).
- Thomas WALKER, *A Manual of Public International Law* (Cambridge 1895).
- Carolyn WARNER, *The Political Economy of 'Quasi-Statehood' and the Demise of 19<sup>th</sup> Century African Politics*, *Review of International Studies* 25 (1999) 233–255.