

The Neglected Colonial Root of the Fundamental Right to Property

African Natives' Property Rights in the Age of New Imperialism and in Times Thereafter

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Abstract

This article sheds light on the emergence of human rights as a reaction to colonial suppression, as a response to the external vertical relation between colonizers and colonized. In other words, human rights were not only naturally evoked by peoples in the internal relation to their sovereign to protect themselves against his oppressive conduct. Human rights also have constitutive roots in the relationship between colonizers and colonized peoples – not only within but also between nations. The purpose of this article is to answer the question in which way New Imperialism, i.e., the acquisition

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and partition of Africa at the end of the 19th century, determined the human rights discourse of the 20th and 21st centuries. Territorial sovereignty and private landownership – *imperium* and *dominium* – play a crucial role in dealing with this question. The central argument is that, although developments within the Western world were crucial for the emergence of modern human rights, the influence and determining role of the hierarchical relation between Europeans and Africans, in particular with regard to the fundamental right to property, has to be recognized. Human rights, in other words, are not just an institution introduced by historical events in the West, based on liberal individualism; they originate in the encounter of nations, more specifically, in the confrontation between the West and other parts of the World too. Therefore, it will be argued that the “scramble for Africa” can be considered as not only constitutive for public international law; it also determined the nature and evolution of human rights law in the 20th and 21st century. Individuals and political entities from beyond contributed to the human rights discourse by way of them being confronted with people from the West. The article’s aim is to show that the origins of human rights are spread and divided over time, that they are not a static given and that they evolve depending on their historical contextualization and their interpretation and application in theory and practice. In this sense, the origins of human rights are a matter of both continuity and discontinuity.

I. Introduction

Human rights, as a derivation of natural law, “create an area of freedom where human beings may act in an autonomous fashion, without being enmeshed in an oppressive regime of orders and prohibitions”, as *Christian Tomuschat* describes human rights.¹ “Such a kind of freedom will be used not only for the furtherance of the individual interest, but also for the general weal.”² Human dignity is to be preserved and realized by upholding the core values of equality, inalienability and universality. To use the wording of the Universal Declaration of Human Rights (1948), human rights concern the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” and form “the foundation of freedom, justice and peace in the world”.³ While human beings are entitled

¹ C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. 2014, 6.

² C. Tomuschat (note 1).

³ Preamble of the Universal Declaration of Human Rights (1948), available at: <<http://www.un.org>> (accessed on 2.5.2013).

to the rights, the duties accompanying the realization of human rights form the burden of States and their institutions and agents. And, nowadays, we observe an emerging field of good practices and responsibility of private legal persons such as transnational and multinational corporations in the protection and realization of human rights. Traditionally, the assertion is made that human rights are a Western construct having their origins in the historical events and developments such as Magna Carta (1215), the Enlightenment period of the 17th and 18th centuries, the American Revolution of the 18th century, the French Revolution (1789), and ultimately, the enactment of the Universal Declaration of Human Rights (1948).⁴ In these historical contexts, human rights emerged as a weapon against the suppression of subjects by their sovereign. The creation and evolution of human rights as a consequence of the encounter of nations from the Western world and those from the world beyond is, however, often overlooked. This article sheds light on the emergence of human rights as a reaction to colonial suppression, as a response to the external vertical relation between colonizers and colonized. In other words, human rights were not only naturally evoked by peoples in the internal relation to their sovereign to protect themselves against his oppressive conduct. Human rights also have constitutive roots in the relationship between colonizers and colonized peoples – not only within but also between nations. In opposition to *Samuel Moyn*'s argument which adheres to the idea of a discontinuous nature of human rights and that this disruptive moment was in the 1970s, marking a decisive shift in the development of human rights – already freed of their exclusive connection to revolution after 1945 – in that they became really “international”,⁵ the article shows that the constitutive international nature of human rights is also a continuous process⁶ and already appeared in the earlier

⁴ See *A. Pagden*, Human Rights, Natural Rights, and Europe's Imperial Legacy, *Political Theory* 31 (2003), 171 et seq.

⁵ *S. Moyn*, *The Last Utopia. Human Rights in History*, 2012. Anti-colonialism, according to Moyn, formed the context for the “ideological conditions in which human rights in their contemporary connotations became a plausible and globalizing doctrine after the mid-1970s”. *S. Moyn*, Imperialism, Self-determination, and the Rise of Human Rights, in: *A. Iriye/P. Goedde/W. I. Hitchcock* (eds.), *The Human Rights Revolution. An International History*, 2012, 161.

⁶ See, e.g., *A. Haratsch*, The Development of Human Rights in International Law, in: *T. Marauhn/H. Steiger* (eds.), *Universality and Continuity in International Law*, 2011, 508 et seq.: “In the same manner as the breakthrough of the national protection of human rights during the turmoil of the revolutions of the 18th century has to be understood as a reaction to the absolutistic regime, the evolvement of human rights protection in international law by the middle of the 20th century is based on tangible experiences made under the perverse abuse of the States' power.”

times. To make this claim tangible, it will be temporally and spatially contextualized in the acquisition and partition of Africa at the end of the 19th century, the so-called Age of New Imperialism. Imperialism, in general, concerns the relation between European powers and subjected land and peoples. 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”.⁷ 19th-century imperialism was called “new” because it followed-up the first colonization wave of the 16th and 17th centuries, but was different in kind in comparison to the earlier territorial expansions.

The purpose of this article is to answer the question in which way New Imperialism, i.e., the acquisition and partition of Africa at the end of the 19th century, determined the human rights discourse of the 20th and 21st centuries. Territorial sovereignty and private landownership – *imperium* and *dominium* – will play a crucial role in dealing with this question. The central argument is that, although developments within the Western world were crucial for the emergence of modern human rights, the influence and determining role of the hierarchical relation between Europeans and Africans, in particular with regard to the fundamental right to property, has to be recognized. Human rights, in other words, are not just an institution introduced by historical events in the West, based on liberal individualism; they originate in the encounter of nations, more specifically, in the confrontation between the West and other parts of the world too. Therefore, it will be argued that the “scramble for Africa” can be considered as not only constitutive for public international law; it also determined the nature and evolution of (international and domestic) human rights law in the 20th and 21st century.⁸ In particular, the right to property of land will be elaborated on, because this right is fundamental, as will be argued, to the recognition of human being and human dignity. Human rights are not just a Western construct, but are developed in relation to other parts of the world too. In this respect, the statement of *José-Manuel Barreto* has to be underlined: “If human rights are not a ‘gift of the West to the rest’ it is possible to see that they are an endowment of the Non-West to the world as well.”⁹ Individuals

⁷ *B. Cohen*, *The Question of Imperialism: The Political Economy of Dominance and Dependence*, 1974, 16.

⁸ For an elaborative discussion on the relation between imperialism and the emergence of human rights of the European continent, see *A. W. B. Simpson*, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention*, 2001.

⁹ *J.-M. Barreto*, *Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto*, *Transnational Legal Theory* 3 (2012), 26. See also *L. Camp Keith/A. Ogundele*, *Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial*

and political entities from beyond contributed to the human rights discourse by way of them being confronted with people from the West. The hierarchical relation to which African natives were subjected triggered, so to say, the awareness, emergence and articulation of human rights.¹⁰ To be clear, the article will not choose sides in the “continuity vs. discontinuity debate” on the origins of human rights.¹¹ Its aim is to show that the origins of human rights are spread and divided over time, that they are not a static given and that they evolve depending on their historical contextualization and their interpretation and application in theory and practice. In this sense, the origins of human rights are a matter of both continuity and discontinuity.

First, a closer look will be paid to the acquisition of and entitlement to territory within the context of New Imperialism. Treaties of cession between and the establishment of protectorates by Europeans and African natives formed the main mode employed by the Europeans to acquire sovereignty rights over African territory (§ 2.1). In this light, the relation between territorial acquisition and property rights in land will be dealt with (§ 2.2). Then, the European treaty practice will be addressed in connection to the question whether African natives’ property rights were infringed (§ 2.3). Subsequently, the colonial roots of human rights in relation to current international law are discussed in the context of imperialism, European sovereignty and African property (§ 3). Finally, the main arguments will be summarized and conclusions will be drawn (§ 4).

Influences on Human Rights, HRQ 29 (2007), 1065 et seq.; A. L. Conklin, Colonialism and Human Rights, a Contradiction in Terms? The Case of France and West Africa, 1895-1914, *American Historical Review* 103 (1998), 419 et seq.; J. Donnelly, Human Rights: A New Standard of Civilization?, *Int’l Aff.* 74 (1998), 1 et seq. and B. Ibbawob, *Imperialism and Human Rights*, 2007.

¹⁰ For the 1960s and 70s, see Chapter 3 on “Why Anticolonialism Wasn’t a Human Rights Movement” of S. Moyn’s, *Last Utopia* (note 5).

¹¹ See P. Alston, *Does the Past Matter? On the Origins of Human Rights*, *Harv. L. Rev.* 126 (2013), 2043 et seq.; M. A. Glendon, *A World Made New*, 2001; J. M. Headley, *The Europeanization of the World: On the Origins of Human Rights and Democracy*, 2007; L. Hunt, *Inventing Human Rights: A History*, 2008; A. Iriye/P. Goedde/W. I. Hitchcock (eds.), *The Human Rights Revolution. An International History*, 2012; J. Martinez, *The Slave Trade and the Origins of International Human Rights*, 2012; S. Moyn, *Last Utopia* (note 5) and B. Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law*, 1997.

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II. New Imperialism, Treaty Practice and Property Rights

1. New Imperialism: Acquisition of Territory

Africa was one of the main battlefields during the Age of New Imperialism. In the “Scramble for Africa”,¹² at the end of the 19th century and the beginning of the 20th century, several European powers collided in their ambitions to seize territory. The main actors in this competition were Great Britain, France, Belgium and Germany, but also 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, including religious, values. During the Age of New Imperialism (1870-1914), European powers added almost thirty million square kilometres of African land to their overseas colonial empires. After the Conference of Berlin (1884-1885),¹³ 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 was divided and whole peoples were disturbed, split up and assimilated to European civilization. Each European power had its own means and strategies to achieve its targets and objects on the territory of Africa. Nevertheless, in many cases, the arrival of the Europeans did not start off with conquest and subordination, but with various kinds of interactions with the indigenous people(s) and their rulers, which were based on equality or even on a subordinate position of the Europeans.¹⁴ What in the end distinguished New Imperialism from the former period of European colonization are the dominant senses of nationalism, protectionism and, thus, competition resulting in the scramble for Africa, in which 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 of Africa. From an international legal perspective, this raises the question of the mode(s) of acquisition of and the legal entitlement to territory.

¹² See *T. Pakenham*, *The Scramble for Africa*, 2009.

¹³ For a detailed report on the Conference of Berlin, see *S. Förster/W. J. Mommsen/R. E. Robinson*, *Bismarck, Europe, and Africa*, 1988.

¹⁴ *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/J. A. de Moor* (eds.), *European Expansion and Law*, 1992, 20. See also *C. H. Alexandrowicz*, *The European-African Confrontation. A Study in Treaty Making*, 1973 and *R. C. H. Lesaffer*, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, *EJIL* 16 (2005), 25 et seq.

The major part of the African territory was acquired by the Europeans by the conclusion of cession and protectorate treaties with African native rulers. In respect of the practice of the acquisition of Africa by treaty, two general conclusions have to be drawn.¹⁵ First, the provisions on the observance of natives' proprietary rights to land included in the cession treaties were disrespected by the European colonizing power. In theory, the European State which acquired all-comprehensive sovereignty over territory had the capacity to allocate and control land and proprietary rights thereto. In practice, existing rights to land were neglected and natives were dispossessed, which was not permitted according to the letter and nature of cession treaties. Second, protectorate treaties were denaturalized – the traditional protectorate disappeared and the colonial protectorate was introduced – and used as “springboards to annexation”¹⁶ by the European “protector”. Protectorate treaties became the most important instrument to acquire in first instance external and then internal sovereignty rights over a territory, which was recognized by 19th-century doctrine and politics. Not only issues with regard to external relations and defence, but also internal affairs became part of the European State's jurisdiction. In this light, the colonial protectorate as an instrument in the hands of politicians – an Act of State not being eligible to judicial review – proved to conflict with the actual meaning and content of the traditional protectorate. In the case of the establishment of protectorates by treaty, the compelling question is whether European contracting powers breached their treaty obligations.

The cession and protectorate treaties concluded in the Age of New Imperialism have a constitutive nature for the international world order and legal system as it stands today. Especially *Antony Anghie* supports this view, when he states 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”.¹⁷

¹⁵ For an extensive analysis and assessment of the conclusion of cession and protectorate treaties between Europeans and Africans at the end of the 19th century, see *M. van der Linden*, *The Acquisition of Africa (1870-1914): the Nature of Nineteenth-Century International Law*, Diss. 2014.

¹⁶ *C. H. Alexandrowicz* (note 14), 111.

¹⁷ *A. Anghie*, *Imperialism, Sovereignty and the Making of International Law*, 2005, 3 and *A. Anghie*, *Francisco de Vitoria and the Colonial Origins of International Law*, in: E. Darian-Smith/P. Fitzpatrick (eds.), *Laws of the Postcolonial*, 1999, 89 et seq. See also *J. Crawford*, *The Creation of States in International Law*, 2006; *M. Koskeniemi*, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, 2002, 98 et seq.; and *M. Kosken-*

He further argues that “in the field of international law, the civilizing mission was animated by [...] the question of ‘cultural difference’”,¹⁸ which instituted a superior vs. inferior hierarchy within international law. This idea that fundamental cultural differences divided the European and non-European worlds dominated the civilizing approach of the Europeans and manifested itself, according to *Anghie*, in several ways, for example, “the characterization of non-European societies as backward and primitive legitimized European conquest of these societies and justified the measures colonial powers used to control and transform them”.¹⁹ European scholarship and politicians created two worlds in which international law served within the European world a toleration mission, while in the non-European world a civilizing mission was employed. This approach of the Europeans towards non-European world instituted an inequality in which the further evolution of international law is grounded.²⁰

2. Territorial Acquisition and Property Rights in Land

The predominant opinion regarding the Age of New Imperialism was that in this period of time a movement can be observed from communally held lands, to individual rights of using this land, to, finally, individual proprietary rights with regard to specific pieces of land. In the 16th and 17th centuries, contractual thinkers, of which *Thomas Hobbes* (1588-1679), *John Locke* (1632-1704) and *Jean-Jacques Rousseau* (1712-1778) were the most prominent, placed the institution of property within the political realm and emphasized the origin and development of property from commonly to privately owned objects; from *de facto* to *de iure* possession. With the State and its subjects entering into the social contract, the private property of the subjects became a legal institution protected by the State. Landownership was considered as a primary need of the individual to be protected by the State and an absolute, formalized institution. Private property, therefore, forms the fundament on which the building of public authority and power, i.e., sovereignty, rests. In the 19th century, the concepts of property and sovereignty were formally separated, were categorized as being private and

niemi, *International Law in the World of Ideas*, in: J. Crawford/M. Koskenniemi (eds.), *The Cambridge Companion to International Law*, 2012, 54.

¹⁸ *A. Anghie*, *Imperialism* (note 17), 3.

¹⁹ *A. Anghie*, *Imperialism* (note 17), 4.

²⁰ For an equal but more moderate argument, see *E. Jouannet*, *Liberal-Welfarist Law of Nations: A History of International Law*, 2012.

public law, and got their own place in the new codifications of the national law of European States. Property rights were considered to be created by the State on the basis of the State's territorial sovereignty. Paradoxically, in order to give sovereignty and independent position vis-à-vis property, legal doctrine used the model of property and its determining characteristics to shape sovereignty as an institution. This parallel became particularly apparent in the context of the articulation of rules between sovereign States and the development of international law. After the break with feudality at the end of the 18th century, property, more specifically ownership – the most comprehensive property right a human being can have allowing owner to enforce his will with regard to all aspects of the control and use of the object – became an absolute institution within the private law systems of the various States of continental Europe.²¹ In Great Britain, host of the common law tradition, property rights kept their feudal origins with its variety of forms of property rights to land.

The 19th century was also the era of colonial, territorial expansion. Economic and political motivations together with the opportunities the Industrial Revolution offered drove Europeans to cross their national borders and open up the world. Encounters with non-Europeans not only implied confrontations on the level of private individuals, but also of political entities and legal systems. Especially with regard to property rights to land, more specifically landownership, differences in understanding by and conflicts between legal systems were the order of the day. The European colonizers were confronted with Africans having another understanding of property rights to land. African natives considered their lands as the primary living condition. Although their property rights to land were predominantly communal, customary and based on religious convictions and ancestral relations, the Europeans had already – in foregoing centuries of contacts – influenced the way property rights were interpreted and regulated within African political communities. Although communal tenure of land formed the day-to-day practice in which African natives live, private landownership was not unknown to them.²²

Despite the differences in the understanding of property in general and landownership in particular, private landownership 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. An important

²¹ *U. Mattei*, *Basic Principles of Property Law*, 2000, 13 et seq.

²² *M. Chanock*, *A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa*, *J. Afr. Hist.* 32 (1991), 70.

factor of this imperial sovereignty is that late 19th-century international legal doctrine overemphasized the external dimension of sovereignty. The identification of States by their independence²³ in relation to other States and political entities got priority over the internal and vertical relationship they had with their subjects.²⁴ Sovereignty in its internal sense implies that the sovereign's authority is original, absolute and indivisible vis-à-vis its subjects within a political entity. Internal sovereignty entails the authority relation within a political organization between ruler and subjects, which is often defined in the constitution of that particular entity. The French jurist *Maurice Costes* who delivered his main works during the first two decades of the 20th century, emphasized the personal nature between sovereign and subjects by defining internal sovereignty as “*une sorte de maîtrise sur les personnes et sur 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*”.²⁵ Often, internal sovereignty is associated with authority or supremacy, while external sovereignty signifies the autonomy of the polity. The institution and protection of the subjects' property rights falls under the internal sovereignty power of the State. Sovereignty in its external sense comprises the status of a political entity in relation to other political entities and regulates their interactions. In most cases it involves the control over foreign affairs and the defence of the territory. Within the modern context external sovereignty regards the international legal order in which States in relation to each other have (mutual) rights, duties, powers, competences and titles. Independence of and equality between States are the governing principles in relation to each other. In short, with the notion sovereignty, the supremacy and independence of (the government of) a State are assumed.

²³ “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.” *J. Westlake*, Chapters on the Principles of International Law, 1894, 87.

²⁴ 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”. *R. Lansing*, Notes on Sovereignty in a State, *AJIL* 1 (1907), 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”. *R. Lansing* (note 24).

²⁵ *M. Costes*, Des Cessions de Territoires, 1914, 43.

Three general patterns with regard to this relation between European territorial acquisition and native land tenure can be discerned, according to *Heinz Klug*, ranging from the complete denial of land rights to the recognition of “*customary tenure*”.²⁶ The first pattern distinguished by *Klug*, represents the situation in which the colonizing party just negated native land rights under the presumption that the land in issue was *terra nullius*. The second pattern entails situations where colonizers in first instance recognized the territorial rights of the natives as being sovereign, but subsequently denied the existence of native property rights. *Klug* discerns a third pattern characterizing the relation between European and African with regard to land, namely, situations in which certain “lesser” native property rights were acknowledged:

“Where the colonial power was able to assert sovereign authority but lacked the power to dominate colonized society completely the recognition of ‘property rights’ involved the ‘creation’ of customary law in a process of ‘dialogue between the colonial state and its African subjects’.”²⁷

Especially the second and third patterns were employed in the case of the European-African encounter.

The second and the third pattern can be considered as two degrees of territorial entitlement and, in that sense, run parallel with the use of, in first instance, cession and, later on, protectorate treaties by the Europeans to acquire African territory. Rights of sovereignty over territory were acquired by the conclusion of bilateral treaties between African rulers and European States. Cession and protectorate treaties formed the instrument to transfer sovereignty, either in whole or in part, from the African ruler to the European contracting party. Treaties between Europeans and African natives, transferring sovereignty rights over territory, were highly formalistic and became standardized during the period the European competition for African territory reached its climax. In this context of growing struggle and tensions between European States, the use of cession treaties to transfer all-comprehensive sovereignty rights over territory decreased and the establishment of protectorates became the main “mode” of acquiring title to African territory. Although, in first instance, protectorate treaties only transferred external sovereignty, the extent and content of these sovereignty rights stayed undetermined. *Klug*’s categorization of colonialism in the second and third pattern is, thus, reflected in the European treaty practice.

²⁶ *H. Klug*, *Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law*, *J. Legal Pluralism* 27 (1995), 124.

²⁷ *Klug* quotes *Martin Chanock* in *H. Klug* (note 26), 126.

3. Treaty Practice and the Infringement of African Natives' Property Rights

At the end of the 19th century, Africa underwent in a short time period of a couple of years a total subordination by and establishment 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 Europeans and Africans, transferring sovereignty rights over territory, were formalistic, as evidenced by the distinction between sovereignty and property. As the competition for territory intensified, more and more open norms, which were amenable for various interpretations, were included in the treaties. The introduction 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 protectorate treaties was caught up in the fog of the scramble. Subsequently, not only external sovereignty and its accompanying rights over territory, but also proprietary rights to land fell in the hands of the Europeans.

The treaty of 14.2.1868 between the French captain *Bougarel* and the ruler of Bilogue, *Eyano*, for example, contained just a few sentences, with as its main purpose the establishment of "la protection française".²⁸ In short but clear wordings a French protectorate over the Bilogue territory was instituted. In general, however, indefinite or ambiguous formulation of the treaties' provisions characterized the treaties increasingly in the transition from cession to protectorate treaties. Especially when the scope of transferred rights had to be established words failed. On the one hand, the French intended to establish protectorates and categorized the treaties effectuating this as protectorate treaties. On the other hand, the subsequent French conduct suggested that all-comprehensive sovereignty rights over the territory were transferred. In the majority of cases, the subject of natives' proprietary rights regarding the land was addressed and ruled explicitly in the treaties. In this respect, formulations such as "Les chefs et tous les indigènes conservent l'entière propriété de leurs terres" are common in French protectorate treaties.²⁹ A last comment to be made is that a majority of the treaties concluded in the 1860s were signed by official representatives of the French government, often in a military function. This indicated the public nature of

²⁸ H. Klug (note 26).

²⁹ Article 3 of the protectorate treaty between France and the rulers of the Konga territory of 12.10.1888. A. J. H. de Clercq/J. de Clercq, *Recueil des Traités de la France*, Vol. xviii, 1893, 120 et seq.

the French colonial venture, which can be explained on the basis of the French policy of direct rule.

Another example of the ambiguous character of the treaties between European colonial powers and African natives on the transfer of (partial) sovereignty, is the notion of “suzerainty”, on which the French were keen to employ. On 12.3.1883, the French concluded a treaty with the King of Loango, *Manimacosso-Chicusso*, which placed the concerned territory under the protection of France.³⁰ The treaty’s main provision 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.³¹ Although the establishment of a protectorate and the reference to a suzerainty relation is not contradictory, this combination of terms can and did cause confusion. On the one hand the term suzerainty suggested the establishment of a hierarchical relationship between France and the African polity. On the other hand, the establishment of a protectorate presumed the existence of reciprocal obligations between the two contracting parties. Despite (or because) this ambiguity, this kind of treaty formulations enabled France to divide sovereignty rights between itself and the native ruler.³² Like the French, the Germans employed 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 to the extent the Germans deemed necessary.³³

³⁰ For the text of the treaty, see *E. Rouard de Card, Traité de Protectorat*, 183 et seq.

³¹ Treaties containing this combination of suzerainty and protection regarded the territories of Haback (21.4.1880), Candiah, Maneah and Tombo (20.6.1880), Loango (12.3.1883), Bramaya (14.6.1883), Bangone and Betimbe (5.9.1883), Ouvia (23.8.1884), Djolof (18.4.1885), Caniak (2.2.1887), Impfondo (21.9.1887), Bougombo (6.10.1888), Bozolo (8. and 9.10.1888), Bozangné (11.10.1888), Badjongo (11.10.1888), Konga (12.10.1888), Bodjo (19.10.1888), Boyelé (21.10.1888), N’Goma (22.10.1888), Mondjimbo (23.10.1888), Bollembé (30.10.1888) and Longo (4.11.1888). See *E. Hertslet, Map of Africa by Treaty*, 3rd ed., Vol. ii, 1967, 634 et seq.

³² See *C. H. Alexandrowicz* (note 14), 80.

³³ See Protectoratvertrag vom 12./13.7.1884, Reichskolonialamt Nr. 4447, Bl. 3. As reproduced in *H. Stoecker, Kamerun unter deutscher Kolonialherrschaft*, Vol. i, 1960, 259. See also *M. Buchner, Aurora Colonialis: Bruchstücke eines Tagebuchs aus dem Beginn unserer Kolonialpolitik 1884/85, 1914*, 74; *F. von Holtzendorff, Handbuch des Völkerrechts auf Grundlage Europäischer Staatspraxis*, Vol. ii, 1885, 102 and *H. R. Rudin, Germans in the Cameroons, 1884-1914: A Case Study in Modern Imperialism*, 1968, 425.

Vague and open treaty terms causing indeterminacy of the object of transfer and (too) much room for discretion veiled the practical implications of the treaty for the distinction between sovereignty and property. In the end, the principal distinction between sovereignty and property was neglected for the sake of the European interest; both conceptual institutions were called in one and the same breath. *Jeremy Gilbert* described this practice as follows:

“[E]ven though colonial treaties appeared as proof of a clear dialogue between indigenous nations and colonial States, with the documents being the historical record of such dialogue, it was often based on an illusion for the indigenous peoples, as such treaties have rarely been honored and often resulted in the extinguishment of their territorial entitlements.”³⁴

This included both public and private entitlements to the territory; African natives lost both sovereign and proprietary rights to their land.

a) Treaties Establishing Protectorates

The actual state of affairs was that full sovereignty was acquired step-by-step after the conclusion of the protectorate treaty, as “[p]rotectorates ripen into sovereignty”.³⁵ The case studies showed that the reach of the transferred sovereignty differed from protectorate to protectorate; the extent of sovereignty rights was undetermined. In the words of *Anghie*, “colonial jurists self-consciously grasped the usefulness of keeping sovereignty undefined in order that it could be extended or withdrawn [...]”.³⁶ That certain sovereignty rights were ceded to a European contracting party by the protectorate treaty, already implicated interference with African internal affairs; the protectorate treaty was the first step to European control of the territory. The Europeans did not follow the distinction between internal and external sovereignty. Although, in theory, the rights of internal sovereignty were in the hands of the African treaty party, they were hardly or not respected by the Europeans: The Europeans allocated these rights to themselves. *Charles Henry Alexandrowicz* recognized the practice of using protectorates to acquire both external and internal sovereignty rights³⁷ and re-

³⁴ *J. Gilbert*, *Indigenous Peoples’ Land Rights under International Law. From Victims to Actors*, 2006, 43.

³⁵ *S. McCalmont Hill*, *The Growth and Development of International Law in Africa*, L.Q.R. 16 (1900), 262.

³⁶ *A. Anghie*, *Imperialism* (note 17), 89.

³⁷ *C. H. Alexandrowicz* (note 14), 111.

ferred 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.³⁸ He argued 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.”³⁹

Alexandrowicz concluded his argument by observing that “[i]t could not have been otherwise as occupation would have suppressed the internal sovereignty of the Protected State”.⁴⁰ After the transfer of external sovereignty rights over territory from the native ruler to the European State, the internal sovereignty rights of the same native ruler were increasingly threatened by the European colonizing power.

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, including the allocation of property rights and land-ownership. The colonial governments under European rule increasingly claimed to dispose of land still subject to African law; by way of their self-enacted legislative instruments they were able to strengthen their control over the territories.⁴¹ European governments could thereby exert influence on forms of property to land on the African continent. Instruments used 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 effectuated by the control of land transfers, land registry to administer land distribution, and shift in juridical competence to colonial authorities.⁴² The Europeans took over the internal administration of the protectorate territory, which finally resulted in mass dispossession of the native populations of

³⁸ See *J. Fish*, Africa as *Terra Nullius*, in: S. Förster/W. J. Mommsen/R. E. Robinson (note 13), 347 et seq.

³⁹ *C. H. Alexandrowicz* (note 14), 4 et seq.

⁴⁰ *C. H. Alexandrowicz* (note 14), 4 et seq. and 124.

⁴¹ See *B. P. Frohmen*, A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective, *Transnat'l L. & Contemp. Probs.* 20 (2012), 621

⁴² *R. Debusmann/S. Arnold* (eds.), *Land Law and Land Ownership in Africa. Case Studies from Colonial and Contemporary Cameroon and Tanzania*, 1996, viii-ix.

their lands and the placing of these peoples in reservations, established by the European authorities. Two interrelated difficulties arose in this period after the conclusion of the protectorate treaties, namely, first, the blurring difference between a protectorate and a colony and, second, the questionable legality of this practice of unbridled extension of sovereign rights over territory. Both issues will be dealt with separately.

b) Protectorate and/or Colony?

First, the distinction between a protectorate and a colony became increasingly hard to draw: In theory protectorate and colony were distinguished, in practice, however, the protectorate turned out to be a colony, in which full sovereignty was exercised by the European colonial authority.⁴³ The establishment of a protectorate instead of a colony gave the European colonial power more room for discretion and the avoidance of responsibilities. As *Umozorike* argued,

“[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.”⁴⁴

Initially, protection meant, as the British consul *Hewett* wrote to *Jaja*, the king of Opobo, 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.”⁴⁵

However, *Hewett* redefined the protectorate concept in a memo he wrote to the British foreign secretary *Rosebery* on 15.4.1886:

“[T]he promotion of 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

⁴³ This blurring line between a protectorate and colony was already acknowledged by contemporary scholarship. See, for example, *A. Mérignhac*, *Traité de droit public international*, 1905, 181.

⁴⁴ *U. O. Umozurike*, *International Law and Colonialism in Africa*, 1979, 48.

⁴⁵ Foreign Office No. 84/1862, see *Hewett to Jaja*, 1.7.1884, enclosed in *Jaja to Salisbury*, 5.5.1887. Quoted in *J. C. Anene*, *Southern Nigeria in Transition 1885-1906. Theory and Practice in a Colonial Protectorate*, 1966, 66.

to occupy a territory on the coast should obstruct this policy in order to benefit himself.”⁴⁶

There were, however, differences with regard to jurisdictional rights within protectorates between, on the one hand, the German and French policy, and on the other hand, the British policy, as *John Mugambwa* notes:

“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.”⁴⁷

In this respect, the British law officers wrote two reports (1887 and 1891) for their government in which they reminded the politicians that these German and French practices did not comply with the standards of international law.⁴⁸ Despite this warning of the law officers, the British government adapted its policy and “gradually assimilated its position with that of the other European governments”.⁴⁹ The British, thus, initially argued for the illegality of the French and German colonial practices on the African continent, but, then, adapted the same practices in “their” African territories.

As a consequence of the French use of the term protectorate in combination with suzerainty – a term related to feudalism and vassal relations⁵⁰ – ambiguity entered the protectorate treaties. This ambiguity, eventually, involved the divide and share of sovereignty rights between France and the African polity. The majority of the treaties concluded between the French and the natives claimed to establish a protectorate relationship between the parties.⁵¹ They were, however, inconclusive on the scope and limitations of

⁴⁶ Foreign Office No. 84/1749, no. 4, see Memo by *Hewett* on *Rosebery’s* letter, 15.4.1886. Quoted in *J. C. Anene* (note 45), 74.

⁴⁷ *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), 86.

⁴⁸ *Salisbury* to *Count Hatzfeld* August 1887 Foreign Office No. 412/28, quoted in *J. Mugambwa* (note 47), 86.

⁴⁹ *J. Mugambwa* (note 47), 86 and 91.

⁵⁰ On suzerainty, see *W. H. W. Kelke*, *Feudal Suzerains and Modern Suzerainty*, *L.Q.R.* 12 (1896), 221 et seq.; *M. McIlwraith*, *The Rights of a Suzerain*, *L.Q.R.* 12 (1896), 113 et seq.; *M. McIlwraith*, *Suzerainty: A Reply*, *L.Q.R.* 12 (1896), 228 et seq.; *G. W. Rutherford*, *Spheres of Influence: An Aspect of Semi-Sovereignty*, *AJIL* 20 (1926), 300 et seq.; *W. Stubbs*, *Suzerainty Medieval and Modern, 1881-1882*, 279 et seq. and *C. Sylvest*, *Our Passion for Legality: International Law and Imperialism in Late Nineteenth-Century Britain*, *Rev. Int’l Stud.* 34 (2008), 403 et seq.

⁵¹ See the Decree of 11.12.1888, published in the *Journal officiel* of 13.12.1888, which modified the Decree of 26.4.1886.

the sovereign rights which the native rulers would retain after treaty conclusion. On the one hand, no cession took place as a traditional protectorate was established, as between two sovereigns. On the other hand, the hierarchical relationship between the French and the natives was underscored through the reference to suzerainty.⁵² This paradox is inherent to the phenomenon of the colonial protectorate: In theory a protectorate was established, in practice the treaty was interpreted in colonial legislation as a cession of full sovereignty. The contradiction “occupation à titre de protectorat” is often used to characterize the colonial protectorate.⁵³ First, France claimed to have established a protectorate on the basis of a treaty with an African native ruler. Second, it underlined the hierarchical relation by referring to suzerainty. Third, the French exercised sovereignty rights. And, fourth, this course of affairs had to be justified and, therefore, the construction of the colonial protectorate was invented and used in both French politics and legal doctrine. The institution of the colonial protectorate, however, was not only used as a retrospective justification of Africa’s colonization, it was first and foremost anticipated to avoid, first, the extent of responsibility a colony implied and, second, the limited discretionary power connected to a “classical” protectorate.

In the light of the difficulties arising with regard to the establishment of protectorates in the traditional sense, the *ad hoc* instrument of the colonial protectorate was introduced. Legal positivists argued for the inapplicability of international law between States within the family of civilized nations and other political entities. The practice of colonial venture, however, urged for intervention. The political construct of the colonial protectorate⁵⁴ was introduced in order to regulate the contact between European States and African political entities. The 19th-century British legal scholar *John Westlake* defined the colonial protectorate 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”.⁵⁵

⁵² See *O.-Cb. Galtier*, *Des Conditions de l’Occupation des Territoires dans le Droit International Contemporain*, 1901, 80.

⁵³ *J. Fish* (note 38), 366 et seq.

⁵⁴ For a detailed explanation of the concept of colonial protectorate, see *C. H. Alexandrowicz* (note 14), 124. See also *F. Nozari*, *Unequal Treaties in International Law*, 1971, 260.

⁵⁵ *J. Westlake*, *International Law. An Introductory Lecture*, 1888, 123 et seq.

Eventually, the colonial protectorate was the answer to the question “how sovereignty was to be produced through colonial rule”.⁵⁶ Here, *Westlake* described the essence of the colonial protectorate: It was a tool to exclude other European competitors for African territory and to colonize the territory later. There were, thus, two realities. On the one hand, there were the European colonial powers which recognized the expectation from each of them to rule the territory effectively on a later point in time. On the other hand, there were the agreements with the native rulers representing their peoples to which European powers guaranteed (the respect for) internal sovereignty rights. At the end of the 19th 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”.⁵⁷ The Berlin Conference (1884-1885) marked the turning-point from the use of the classical conception of the protectorate to the colonial protectorate.⁵⁸ In sum, the construct of the colonial protectorate served both as *a priori* and *a posteriori* justification of the colonization of Africa: In first instance, the colonial protectorate was used by the Europeans as an excuse for not establishing effective control over the territories acquired and averted their responsibilities. In second instance, however, the Europeans used the colonial protectorate to establish direct rule over the transferred territory, leaving no room for native sovereignty and property.

After the Berlin Conference, hundreds of protectorate treaties were concluded guaranteeing to African rulers their internal sovereignty. And, all these protectorates were internationally notified and none of them contained any reference to annexation. But in practice and with time, the African ruler lost both external and internal sovereignty rights; the Europeans treated the territory and native peoples as in the case of a traditional colony. The colonial protectorate was a political instrument and not a legal institution. In this respect, *Alexandrowicz* also pointed at 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”.⁵⁹ He continued arguing that

⁵⁶ *M. Craven*, *The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law*, in: L. Nuzzo/M. Vec (eds.), *Constructing International Law. The Birth of a Discipline*, 2012, 388.

⁵⁷ *A. Anghe*, *Imperialism* (note 17), 87.

⁵⁸ See *M. N. Shaw*, *The Acquisition of Title in Nineteenth Century Africa: Some Thoughts*, in: P.-M. Dupuy/B. Fassbender/M. N. Shaw/K.-P. Sommermann (eds.), *Common Values in International Law. Essays in Honour of Christian Tomuschat*, 2006, 1047 et seq.

⁵⁹ *C. H. Alexandrowicz* (note 14), 80.

“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 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.”⁶⁰

Already in 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).”⁶¹

The political notion of the colonial protectorate was used by European Statesmen to cover up and justify the practical annexation of great parts of the African continent. Moreover, international legal scholars adopted the notion of colonial protectorates to legitimize European colonial practices. In this respect, they tried to “debase” protectorate treaties as much as possible.⁶² The question is, however, whether the political construct of the notion of colonial protectorate could indeed overrule the actual treaty guarantees the European had given the natives in the protectorate agreements. Before answering this question, the second difficulty that arose after the conclusion of the treaties has to be addressed.

c) Legality of Africa’s Colonization

The second difficulty with regard to the legality of the European-African treaties and the subsequent conduct involved the question whether the practice of the step-by-step acquisition of full sovereignty rights after the conclusion of the protectorate treaty was permitted according to 19th-century international law. The majority of the concluded treaties contained clauses in which the particular European power clearly promised to respect the property and the property rights of the native populations. Legislation, enacted unilaterally by the European authorities, often implicated the dispossession of natives’ landed property and rights thereon. It is, however, the question whether European State powers had to comply with the treaties they concluded with African rulers. Did European States act according to

⁶⁰ C. H. Alexandrowicz (note 14), 80 et seq. See A. Anghie, *Imperialism* (note 17), 89 et seq. See also C. H. Alexandrowicz, *The Afro-Asian World and the Law of Nations (Historical Aspects)*, RdC 123 (1968), 193, 200 and 209 et seq.

⁶¹ *Perrinjaquet* paraphrased in M. Koskenniemi (note 17), 151.

⁶² J. Fish (note 38), 367.

19th-century international law when they overruled their treaty obligations by decrees? Did European States violate protectorate treaties by extending the transferred external sovereignty rights to include the internal element of sovereignty, which, consequently led to the disrespect of the property and the property rights of the native population? Were *imperium* and *dominium* applied in accordance with the law or not? In short, were these protectorate treaties and, thus, international law violated? In order to answer these questions, the general findings on the practices of cession and protectorate treaties have to be discussed separately.

In the case of cession treaties, both external and internal sovereignty over territory from African native rulers to the European States were transferred. Theoretically seen, no property rights were involved in these transfers, a matter which was often explicitly stipulated in the concluded treaties. The central issue involved in cession treaties was not the question whether the extension of external to internal sovereignty rights was in accordance with legal norms or not. The main question in the case of cession treaties was whether the right to regulate private landownership is transferred along with territorial sovereignty rights or not. On the one hand, *Westlake's* answer was negative when taking into account international law applicable to and among the members of the family of civilized nations. *Westlake* 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”.⁶³

On the other hand, *Westlake* answered the question in the affirmative in the broader context of the law of nations, as he based his argument on the cultural difference 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”.⁶⁴ With this statement, *Westlake*, thus, confirmed the existence of natives' property rights before the conclusion of protectorate or cession treaties between Europeans and Africans. Further, he justified the appropriation of natives' land after the cession of their sovereign rights over the territory to the European contracting party. He made a distinction between cession between civilized States and non-civilized entities. With cession of

⁶³ J. Fish (note 38), 367.

⁶⁴ J. Westlake (note 23), 145.

all-comprehensive sovereignty between sovereign States, the receiving State was both morally and legally bound to respect existing rights to land as much as possible. In the situation of the transfer of sovereignty from a native ruler to a European State, however, the continuity principle – in the case of cession, there was no inevitable or necessary annulment of natives' private property rights – was not applicable, according to *Westlake*. Could he, however, justify the non-applicability of the continuity principle to cession relationships between European States and African native rulers on the basis of the civilization argument? In answering this question, an important distinction has to be made between the transfer of sovereignty by way of cession (§ 2.3.4) and the establishment of a protectorate (§ 2.3.5).

d) Cession and the Continuity of Property Rights to Land

Cession implied no direct acquisition of property rights by the State; only sovereignty in the sense of regulative powers over subjects was transferred. The continuity principle prescribed that there was no automatic or necessary extinguishment of private property rights of natives. In other words, cession does not impair private property rights. This principle was commonly accepted within international law in the context of State succession.⁶⁵ The acquiring State did, however, 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.⁶⁶ The rule of the continuity of existing rights after cession was customary and respected in the family of civilized nations. In the practice of the European-African confrontation, the continuity principle was, in first instance, applied too. When the struggle for African territory became more severe, the principle was applied and respected less frequently.

Although the question on the legal nature of the continuity principle and its applicability to cession between Europeans and African natives cannot be answered at this stage, it has to be noted that the cession treaties between European States and African rulers often contained provisions on the respect of existing property rights to the land over which sovereignty was

⁶⁵ The general principle that cession does not impair private property rights is especially enunciated in the 19th-century case law of the United States. See the case of *United States v. Percheman* (1833). See *F. B. Sayre, Change of Sovereignty and Private Ownership of Land*, AJIL 12 (1918), 495 et seq. For case law on inter-state cession, see *F. B. Sayre* (note 65), 481.

⁶⁶ *T. R. G. van Banning, The Human Right to Property*, 2002, 44.

transferred. During the second half of the 19th century, cession treaties were concluded by European powers with native rulers, which, as has been mentioned before, almost all contained the provision stipulating the respect to the customs and rights of the natives and the obligation for the European powers who wanted to settle themselves on the territory, to pay indemnities⁶⁷ for the taking of the land.⁶⁸ In practice, however, African natives were often deprived of their landownership too. Landownership fell under the control of the European authority, which attributed full sovereignty rights as well as land ownership to itself. 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 inalienable nature of native landownership. Instead of taking into account the native perspective, the Europeans imposed their own legal system and inherited concepts. The conclusion can be drawn that, although the continuity principle was deemed applicable to earlier cession relationships between Europeans and African natives and was often laid down in the treaties between them, the rule was not applied and respected. In order to justify this, Europeans invoked the cultural difference between them and African natives. The legality of this practice after the conclusion of cession treaties is questionable. It has to be observed that African natives were dispossessed, chased off their lands and had to live on by the European colonizer appointed places. Moreover, not only the applicability of the continuity principle to cession of sovereignty by the African ruler to the European State decreased, but also the frequency of the use of cession treaties dropped. Protectorate treaties became the instrument for Europeans to acquire African territory.

⁶⁷ G. Kaeckenbeeck, *The Protection of Vested Rights in International Law*, BYIL 17 (1936), 16.

⁶⁸ 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. See, for example, the cession treaty between Great Britain and Okeodan on 17.7.1863 and the cession treaty between France and Kotonou on 19.5.1868. These treaties can, respectively, be found in *E. Hertslet* (note 31), Vol. i and ii, 97 et seq. and 249.

An example of a stipulation regarding the respect for natives' property rights 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". *C. H. Alexandrowicz* (note 14), 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". *C. H. Alexandrowicz* (note 14), 103.

e) Protectorates and Continued Rights of Land Property?

Protectorate treaties, the meaning of which changed from a legal institute into the political instrument of the colonial protectorate, were not a goal *an sich*, but they were put into action as a means in order to acquire full control over determined territory, including rights of landownership.⁶⁹ This instrumental nature of protectorate treaties is, again, explained against the background of cultural difference, as *Thomas Baty* made clear. He spoke of the “denaturalised conception of protection” and explained its application:

“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.”⁷⁰

Protectorate treaties, thus, became the most important instrument to acquire, in first instance, external and, in second instance, internal sovereignty rights over a territory, which was recognized by 19th-century doctrine.⁷¹ By these treaties, the Europeans presumed that these rulers and their peoples subjected themselves and their land to the superior European State.⁷² *James 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”.⁷³ He continued by stating 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 [...], 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.”⁷⁴

⁶⁹ *C. H. Alexandrowicz*, The Juridical Expression of the Sacred Trust of Civilization, *AJIL* 65 (1971), 155. See *C. H. Alexandrowicz* (note 60), 193.

⁷⁰ *T. Baty*, Protectorates and Mandates, *BYIL* 2 (1921-1922), 114. See also *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*, 1975, 55.

⁷¹ *J. Perrinjaquet*, Des annexions déguisées de territoires, *RGDIP* 16 (1919), 316 et seq.

⁷² See, for example, *C. Bornhak*, Die Anfänge des deutschen Kolonialstaatsrechts, *AöR* 2 (1887), 7.

⁷³ *J. Crawford* (note 17), 301.

⁷⁴ *J. Crawford* (note 17).

The Final Act had indeed a catalysing effect on the tensions between European colonial powers in that they were urged to rule overseas territories directly and effectively. Time and resources to realize this effective and direct rule were, however, lacking. It remains the question whether the partition of Africa took place according to international legal standards when taking into account the European-African relations.

III. Colonial Origins of Human Rights

In the light of this legality question, the rest of this article will be dedicated to answering it from only one field of interest, namely, the human rights perspective. More specifically, the focus will be on the relation between the emergence of human rights in the second half of the 20th century as a reaction to colonial suppression, i.e., a response to the external vertical relation between colonizers and colonized. Although it is true that the human rights discourse arose after the horrifying practice of World War II which made clear that the rights subjects of a State needed to be respected, protected and fulfilled by this same State, this was not the only background against which human rights got hands and feet.⁷⁵ The hierarchical or vertical relation between Europeans and Africans was characterized by the dispossession of African natives of their lands by Europeans. Here the fundamental nature of the right to property of land comes forward. The wrongs committed by the Europeans deprived African natives of their primary needs and rights, embodied in the right to property of land, which changed Africans' living conditions radically, back then and for the future.

1. New Imperialism, Sovereignty and Property

As has been argued above, New Imperialism, more specifically, the acquisition and partition of African territory at the end of the 19th century was constitutive for the creation and development of international law. The partition of Africa, however, did not only set forth the blue print for international law, it also rooted the human rights discourse of the 20th century. Three aspects underwrite this claim. First, New Imperialism confirmed the central role of sovereignty and property in instituting legal order and main-

⁷⁵ “[R]ights finally lost their long connection with revolution.” *S. Moyn*, *Last Utopia* (note 5), 212.

taining it. The concepts of sovereignty and property, more specifically *imperium* and *dominium*, are, in general, considered to be the most fundamental regulatory principles of every human society. Although they appear within the boundaries of every political entity, their application is relative in the sense that the interpretation and realization of sovereignty and property depends on the context in which they have to function. This context is spatially, temporally and humanly determined. In answering the question of what the right to property of land and territorial sovereignty entailed from the European and African perspective within the spatial and temporal context of the Age of New Imperialism, the main point to observe is that the existence of *dominium* and *imperium* and the differences between the two legal institutions was recognized by both the European colonizing power and the African native polities. In this respect, the European construct of the modern State is just one way to apply and give expression of sovereignty and property. Property and sovereignty go beyond the existence of the State. The European-African confrontation at the end of the 19th-century showed the limits of the concept of the State and its application.

Although territorial sovereignty and the property right to land are inextricably connected – by both empirical facts and legislative acts, property is not a creation of the State but a means of existence of human beings. Because African natives were illegally deprived of their property rights to land, they also lost the capacity to form political communities invested with sovereign status, according to the traditional understanding of international law. And, according to this international law, dispossessed and non-territorial populations are not regarded as subjects of international law. As a consequence, the dispossession of natives' land is not only an illegal act, but constituted also unequal disposition for Africans on the international level: without soil no status – a view based on State-centrism, an unjust presumption which is unfortunately still present in international law in the sense of the persistent marginalisation of African actors on the international level and the unjust system of rights to territory.⁷⁶ As a matter of fact, this constitutes a marginalized position for former colonized natives, who are often outcasts of society and form minority groups within African States without equal rights and opportunities. The dispossession of Africans of their lands as a consequence of the European scramble for African territory had a determinative effect on the position of African individuals and peoples in the

⁷⁶ See C. Nine, *Global Justice and Territory*, 2012, 93.

international legal order. Africans remain neglected or under-represented in political and legal institutions on the international level.⁷⁷

2. Africans' Human Right to Land Property

In extension to the first point on the colonial roots of human rights, the second observation has to be put forward. Not only on the level of international law, Africans possess a disadvantaged position, they are also fighting a losing battle within the human rights discourse. The failure to recognize African natives' land rights had a constitutive impact on their future in which Africans became the most dependent and vulnerable people on the international level. In the current world order, their quest and struggle for human rights is most fundamental, i.e., a question of life and death. The realization and protection of civil and political rights, social and economic rights, minority and indigenous rights, collective rights, development rights are most immanent to the African continent and its inhabitants. This continuous disadvantaged position of Africans and their lack of means to realize their basic rights as one of the main consequences of the loss of their property rights to land at the end of the 19th century, evidences the fundamentality of the right to property and the seriousness of the Europeans' wrongs, as underwritten by the participants – both former colonizing and colonized States partake in the meeting – to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban (2001) in para. 158 of the Final Declaration:

“[T]hese historical injustices [slavery and colonization] have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries.”

Especially in the case of Africa, a much heard voice is that colonialism still casts its shadow on the African continent and its inhabitants. In this light, 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 subordinated status, as is put forward, is a consequence of the European dominance and suppression at the end of the 19th century. It is, however, the question to what extent colonialism is a continuous inju-

⁷⁷ See *M. F. Ndahinda*, Historical Development of Indigenous Identification and Rights in Africa, in: K. Sing'Oei/R. Laher (eds.), *Seeking Empowering Paradigms: Exploring Indigenous Peoples and Minority Rights in Africa*, 2012, 11 et seq.

ry 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? These questions are hard if not impossible to answer. Causal relations become increasingly indeterminate in the course of time, due to internal and external intervening factors. Increasing remoteness of historical wrongful acts runs parallel with an increasing complexity of determining the direct relation between acts and consequences, wrongs and injury.⁷⁸ Africa of the 20th 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. 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. Despite the fact that causal relations are hard to retrieve, it should be recognized that New Imperialism shaped international law and the world order in which it has to function, i.e., past and present are inextricably connected:

“The entry of our era into the recognition paradigm means that we can no longer be rid of the question of historical wrongs related to mass crimes based on the denial of the identities of individuals that still affects the present.”⁷⁹

3. The Dual World View: A Fiction

A third observation to be made regarding the relation between New Imperialism and human rights, is that colonialism broke through the bilateral conception of the world order. New Imperialism already questioned the plausibility of the State-centric model as the foundation of international law. From the perspective of 19th-century international legal doctrine, the colonial encounter was a confrontation between a European State and an African political entity. The assumption that the non-European world was de-

⁷⁸ See *D. Shelton*, Remedies and Reparation, in: M. Langford/W. Vandenhole/M. Scheinin/W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, 2013, 385.

⁷⁹ *E. Tourme-Jouannet*, What Is a Fair International Society?, 2013, 198.

prived of sovereignty put legal doctrine – dominated by positivist thinking – in the position to construct this encounter as an arena in which the sovereign made, interpreted and enforced the law. In other words, the colonial encounter made it possible to positivists to construct a system of international law, based on being included in or excluded from the family of civilized nations by imposing European norms and values on non-European lands and peoples. Although, in theory, the positivist view created a harmonious world defined by international society, sovereignty, and civilization, the practice of the scramble for African territory turned to conflict and disorder, resulting in an accentuation of the divided world. 19th-century international legal doctrine constructed a dualist world with a realm in which international law applied to relations between sovereign States and another in which international law had no place. *Imperium* as the unifying notion of territory and sovereignty became the realm of the State, more precisely the civilized European State. It was only at the end of the 19th century, as a consequence of the attempts of legal doctrine 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 capable to transfer sovereignty, whether in whole or partial, over their territory by treaty. Although they did not possess statehood, i.e., they were not recognized as such by the members of the family of civilized nations, they were considered sovereign. Here, the fictitious character of the dualist and State-centric legal order already appeared and became increasingly clear in and determinative for the (development of) international law in the Post Modern Age (1914-present), which is characterized by the plurality and diversification of legal subjects on the international level and the gradual detachment of sovereignty and territory by globalization.

The scope of international legal subjects broadened and diversified at the expense of the State. This weakened position of the state on the international level became particularly apparent in the employment of protectorate treaties. Protectorate treaties introduced divisibility of sovereignty and, thus, evidenced that the state and sovereignty were not necessarily two sides of the same coin anymore. With concluding protectorate treaties, European states recognized, whether implicit or explicit, that African rulers, being non-states according to the European perspective, had sovereignty rights, which they could transfer partially or in whole to European states. New Imperialism made, thus, an end to the absoluteness of the traditional perspective on the international legal order of consisting of the bilateral relations between territorial States.

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The claim that the emergence of the human rights discourse of the 20th century was greatly influenced by what happened in the Age of New Imperialism is, thus, based on three observations: First, a strict line between the public and the private – sovereignty and property – could not be drawn any longer – regardless of the question of whether it had existed at all. This led to the appropriation of both public and private rights of African natives by a handful of European States. Second, the continuous disadvantaged position of Africa in the world order and in the realm international law, (partially) caused by European dominance over the continent and its peoples – based on the persistent idea of a hierarchical divided world –, made Africans one of and even the greatest claimers of their rights as human beings. New Imperialism also determined Africans' fate of being dependent on the realization of their human rights, which they are not able to effectuate themselves.⁸⁰ Third, with human rights “hanging in the air” the process of the transformation of the position and role of the modern State within the international legal system became irreversible. States did not possess the monopoly on legal personality on the international level any longer. Already during the Age of New Imperialism, private actors entered the international legal scene – most importantly African nations and European trade companies – by referring to, relying on and behaving according to rules which went beyond national borders. In the practice of international law unfolding at the end of the 19th century, States recognized these private actors, which already then implied the increase of the extent international legal subjects and which trend continued in the 20th century. With this entrance of private (groups of) individuals in the international arena, acting outside the modern State system, a demand for rights and their respect, protection and fulfilment was born: Human rights were not only a product and means – human rights emanated from the suppression of individuals in order to protect the individual's rights – in the hierarchical relationship between the State and its subjects, but also between States and private actors – though not under the international *lex lata* – operating across national borders and the dividing line between the civilized and uncivilized world.

IV. Conclusions

New Imperialism and the mass expropriation of African natives of their land by the European colonial powers created a constellation in which hu-

⁸⁰ C. Ake, *The African Context of Human Rights*, *Africa Today* 34 (1987), 5 et seq.

man rights protection was and still is very needed. Although the developments in the Western world with regard to the human rights discourse were constitutive, the influence and determining role of the hierarchical relation between Europeans and African – colonizer and colonized – regarding the establishment and development of human rights, in particular the fundamental human right to property is not to be neglected. Human rights are not just a Western construct, but have their origin in the encounter between the West and the world beyond. Traditionally, human rights are considered to emerge in the internal relation between a sovereign and its subjects; human rights serve as a means to protect the subjects against the suppressive power their sovereign is able to exercise. However, often the formative role of New Imperialism as a hierarchical relation between European colonial power and African native with regard to the human rights discourse of the 20th and 21st centuries is neglected. The vertical and oppressive relation between colonizer and colonized is a main source for the existence, nature and features of current human rights. By illegally appropriating Africans of their lands and rights, Europeans themselves paved the way for African natives' future as subordinated and developing peoples. Eventually, as one of the main consequences of this dispossession, Africans' human right to land property was and still is undermined – the current practice of land grabbing, in which both Western governments and corporations are involved.⁸¹

The wrongs committed by the European colonial powers did not only determine future international law and relations, they also cast their shadow on the current political position, rights and well-being of the African individuals and peoples. As has been shown, property – and the right thereto – is a constitutive given in the existence and evolution of human beings and their position within society. Dispossession of African natives of their lands implied a neglect of recognition of their being human. It is a fact that they are the most vulnerable and subordinated human beings of the world, who are struggling for their basic rights and needs, and are the most important applicants of human rights. Colonialism on the African continent created an important cause and source for the establishment and development of human rights in the 20th and 21st centuries. The partition of Africa instituted inequality between individuals and peoples of the world, which created the need to establish and realize human rights. Apparently, the insight that these were serious human rights violations came later and triggered the conceptualization in the quest for (the respect, protection and fulfillment of) human rights. To come back to the words of *Barreto*: Human rights are not only a

⁸¹ J. von Bernstorff, *The Global "Land Grab", Sovereignty and Human Rights*, ESIL Reflections 2 (2013), 1 et seq., available at: <<http://www.esil-sedi.eu>> (accessed on 3.5.2015).

“gift of the West” but also a result of the West’s behavior in their confrontation with the rest of the World, more specifically Africa, in historical times. In this sense, human rights cannot be regarded as a pure Western construct, which underwrites their universal nature.

Writing on the history of human rights is something very delicate, complex and controversial. Human rights are a product of time, context and human intervention. They are both continuous and discontinuous, action and reaction, static and dynamic. The past, present and future of human rights are both delimited and porous compartments; they are solid and fluid at the same time. The debate on the origins of human rights should, therefore, not be based on the claims about the continuous or discontinuous nature of human rights, but on, in first instance, an accurate and reliable historical contextualization of human rights and, in second instance, the evolutionary interpretation of these rights. Only then a complete and consistent biography of human rights can be written.