CHAPTER 1

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

1 Introduction

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

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

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

2 New Imperialism

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

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

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

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

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

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

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

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

6 Gathii, 'Imperialism,' 1014.

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

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

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

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

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

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

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

Between 1880 and 1914 the whole of Africa was divided between rival European powers, leaving only Liberia and Ethiopia independent of foreign rule.[11] The speed of the process was unprecedented: most of Africa's landmass and most of its peoples were parcelled out in about ten years after 1880. Although the contest for title to territory had been in full swing before the Conference of Berlin,[12] the Conference is often considered to have acted as a catalyst for the fierce rivalry over African territory. As Malcolm Shaw observes, '[t]he Berlin Conference can be seen as a turning-point in European-African relations. Although the conference did not itself partition Africa, it did involve an institutionalisation of the process of acquiring territory in the African continent.'[13] Among other legal scholars, Makau wa Mutua is not convinced of the constitutive value of the Conference in the sense of affecting the factual situation. He notes that the Berlin Conference 'only retroactively "ratified" and allocated existing "spheres of influence,"' and was 'in effect an attempt to seek legal shelter for an illegality already committed.'[14] For Matua then, the true significance of the Conference is that it concealed the illegal nature of the European colonial venture in Africa. At its close, namely, the Conference accepted a Final Act which in Articles 34 and 35[15] laid down the central provisions on acquisition of territory.

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

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

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

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

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

Otto von Bismarck (1815–1898), Chancellor of Germany between 1870 and 1890, opened the Conference, in which fourteen States participated,[16] on 15 November 1884. The Conference had not been convened to discuss claims on the sovereignty of the African continent, nor to divide it. Rather, the ostensible primary purpose[17] of the Conference was to find a solution for the brutal subjugation of the Congo and to open up Africa for free trade through European co-operation and harmony.[18] The original conference agenda had not included the introduction of rules for new territorial acquisitions and the discussion of existing agreements and control of the African interior. However, the regulation of the acquisition of African territory turned out to be the critical issue, prompted, initially, by economic interests, because rules had to be formulated to secure and stabilize commercial activities. As none had been invited, no African rulers attended the Conference, but their absence did not prevent the participating States from specifying, in Article 6 of the Final Act, how European civilization would be to the Africans' advantage.

The Final Act stipulated that a State occupying a new territory[19] or establishing a protectorate had to give notice to the other contracting parties and had to make sure that the new territory or protectorate was under 'effective occupation, authority, control, or rule.'[20] Although the Final Act, which had been negotiated during the plenary conference sessions, seemed inconclusive and cautious, much had happened behind the scenes in the corridors of the conference. These informal talks outside the conference room heightened tensions between the European colonial powers and increased their sense of urgency

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

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

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

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

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

20 Wesseling, *Verdeel en Heers*, 152.

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

3 New Imperialism in International Legal Discourse

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

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

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

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

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

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

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

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

25 Anghie, *Imperialism,* 3.

26 *Ibid*.

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

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

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

However, this doctrinal approach to international law is only one side of the story. The complementary and constitutive role of international legal *practice* – i.e., international law on the ground or international law in action – is quite substantial too. In disregarding the practical use of international law, the work of many legal scholars remains Euro-centric and implicitly upholds a traditional concept of sovereignty. This Euro-centrism originated in nineteenth-century international legal doctrine, was adopted by legal scholars writing on international law at the time, and echoes in present-day scholarship. Such contemporary international legal scholars as Matthew Craven,[31] James Crawford,[32] Wilhelm Grewe,[33] Marcelo Kohen,[34] Martti Koskenniemi,[35] and Malcolm N. Shaw[36] base their arguments first and foremost on doctrine, and they do not pay much attention to international legal practice. As these and other authors mainly read nineteenth-century international legal doctrine, which is almost exclusively Western in orientation, they implicitly perpetuate the older dualist

29 *Ibid.,* 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The overall objection to be raised to the work of past and present international legal scholarship is that in general its scope is too narrowly restricted to international legal doctrine. This means that its elaborate arguments are out of touch with reality. This scholarship tends to disregard the historical context in which international law played a determinative role in the day-to-day lives of people inhabiting colonized territories. The abstract[43] and theoretical elements of late nineteenth-century international law are remarkably

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

42 See Anghie, *Imperialism,* 94.

43 See, for example, *ibid.,* 64–65.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 *Dominium* and *Imperium*

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

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

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

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

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

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

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

61 *Ibid.*

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

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

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

63 *Ibid.*, 56.

64 *Ibid.*, 55.

65 Elden, *Birth of Territory*, 329.

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

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

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

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

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

of Alexandrowicz and Hermann Hesse[67] show that in these treaties the distinction between public sovereignty (*imperium*) and private property (*dominium*) was strictly observed. Often, the treaties stipulated explicitly that transfer of sovereignty would not affect the private legal rights of natives in territory over which the sovereignty was transferred to a European power. However, this distinction between sovereignty and property was not strictly upheld in the interpretation and execution of the treaties.[68] It is commonly accepted in literature that these delineations were not always respected by the colonizing powers and that the transfer of sovereignty often implied the apprehension of native property rights over land too. In other words, sovereignty transfer was used to usurp private property rights.

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

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

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

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

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

5 Legal and Social Relevance

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

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

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

70 *Ibid.*

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

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

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

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

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

72 *Ibid*., 380.

73 See *ibid*.

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

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

This study seeks to fill a lacuna in previous research, that of the absence of a systematic study of the execution and interpretation of treaties concluded between European States and African political entities. In doing so, the study situates itself within the broader field of the place of colonialism in the history of international law. Following a survey of previous scholarly work on New Imperialism, it will be shown that while some authors, notably Antony Anghie,[75] explain that colonization and the idea of cultural difference (developed to defend colonialism) were constitutive features of the international legal order and still exert their influence today, these works do not pay sufficient attention to nineteenth-century legal practice. What will also be identified is a paucity of critical reflection on the empirical material in previous studies on nineteenth-century treaty-making. The study adopts a critical approach to the pervasive Euro-centrism[76] of international legal scholarship,[77] but it is also critical of exaggerated, post-structuralist scholarship on colonialism. It seeks to steer a course between the extremes of practice without theoretical embeddedness[78] and purely scholarly discourse.

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

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

75 Anghie, *Imperialism*.

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

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

78 Alexandrowicz, *European-African Confrontation*.

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

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

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

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

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

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

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

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

6 Methodology and Case Studies

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

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

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

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

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

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

80 *Ibid*., 751.

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

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

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

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

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

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

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

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

84 See Kohen, *Possession*, 183–200.

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

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

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

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

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

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

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

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

90 *Ibid.*, 34–35.

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

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

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

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

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

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

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

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

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

7 Plan

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

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

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

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

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

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