Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade

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The Berlin West Africa Conference of 1884-1885 has assumed a powerful symbolic presence in international legal accounts of the 19th century, but for historians of the era its importance has often been doubted. This article seeks to re-interpret the place of the Berlin General Act in late 19th-century history, suggesting that the divergence of views has arisen largely as a consequence of an inattentiveness to the place of systemic logics in legal regimes of this kind.

INTRODUCTION

The Berlin West Africa Conference of 1884-1885 has assumed a canonical place in historical accounts of late 19th-century imperialism[1] and this is no less true of the accounts provided by legal scholars seeking to trace the colonial origins of contemporary international law.[2] The overt purpose of the Conference was

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1 For general accounts of the Conference see J Keltie, *The Partition of Africa* (Edward Stanford, 1893); E Fitzmaurice, *The Life of Granville George Leveson Gower*, vol. 2 (Longmans Green & Co, 1905); A Keith, *The Belgian Congo and the Berlin Act* (Clarendon Press, 1919); S Crowe, *The Berlin West African Conference 1884-1885* (Longmans Green & Co, 1942); R Anstey, *Britain and the Congo in the Nineteenth Century* (Clarendon Press, 1962); S Cookey, *Britain and the Congo Question 1885-1913* (Longmans, 1968); R Gavin & J Betley, *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects 1884/1885* (Ibadan UP, 1973); R Robinson, J Gallagher & A Denny, *Africa and the Victorians: The Official Mind of Imperialism*, 2nd ed. (Macmillan & Co, 1981); S Förster, W Mommsen & R Robinson (eds), *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford UP, 1988); T Pakenham, *The Scramble for Africa: 1876-1912* (Abacus, 1991); M Ewans, *European Atrocity, African Catastrophe: Leopold II, the Congo Free State and its Aftermath* (Routledge, 2002).

2 One might cite here: T Elias, *Africa and the Development of International* Law (Martinus Nijhoff, 1972); R Anand, *New States and International* Law (Vikas, 1972); C Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (Sijthoff, 1973); U

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to ‘manage’ the ongoing process of colonisation in Africa (the ‘Scramble’ as it was dubbed by a Times columnist) so as to avoid the outbreak of armed conflict between rival colonial powers. Its outcome was the conclusion of a General Act[3] ratified by all major colonial powers including the US.[4] Among other things, the General Act set out the conditions under which territory might be acquired on the coast of Africa; it internationalised two rivers (the Congo and the Niger); it orchestrated a new campaign to abolish the overland trade in slaves; and it declared as ‘neutral’ a vast swathe of Central Africa delimited as the ‘conventional basin of the Congo’. A side event was the recognition given to King Leopold’s fledgling Congo Free State that had somewhat mysteriously emerged out of the scientific and philanthropic activities of the *Association internationale du Congo.*[5]

If for lawyers and historians the facts of the Conference are taken as a common starting point, this has not prevented widely divergent interpretations of its significance from emerging. On one side, one may find an array of international lawyers, from John Westlake[6] in the 19th century to Tony Anghie[7] in

Umozurike, *International Law and Colonialism in Africa* (Nwamife, 1979); M Mutua, ‘Why Redraw the Map of Africa?: A Moral and Legal Inquiry’ 16 *Michigan Journal of International Law* (1995) 1113; S Grovgui, *Sovereigns, Quasi-Sovereigns and Africans: Race and Self-Determination in International Law* (Minnesota UP, 1996); Y Onuma, ‘When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective’ 2 *Journal of the History of International* Law (2000) 1; M Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1860-1960* (Cambridge UP, 2002); A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge UP, 2004); C Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, 2005); J Gathii, ‘How American Support for Freedom of Commerce Legitimized King Leopold’s Territorial Ambitions in the Congo’ 37 *Studies in Transnational Legal Policy* (2005) 97.

3 General Act of the Berlin Conference, 26 February 1885, C 4361 1885 (General Act), in E Hertslet, *The Map of Africa by Treaty*, vol. 2, 3rd ed. (HMSO, 1909) 128, 468; Gavin & Betley (1973) 288.

4 France, Belgium, the Netherlands, Germany, Great Britain, Portugal, Spain, the US, Austria, Russia, Italy, Denmark, Sweden and Norway, Turkey. The US reserved the right to decline to accept the conclusions of the Conference. *Department of State Diplomatic Instructions 1801-1906* (National Archives, Washington, 1965) *Germany*, vol. 17 414-15, in F Bontinck, *Aux Origines de l’Etat indépendant du Congo* (Nauwelaerte, 1966) 225.

5 See H Stanley, *The Congo and the Founding of its Free State: A Story of Work and Exploration*, vol. 2 (Harpers, 1885); J Reeves, *The International Beginnings of the Congo Free State* (Johns Hopkins, 1894); F Cattier, *Droit et Administration de l’Etat Indépendent du Congo* (Larcier, 1898); E Nys, *The Independent State of the Congo and International Law* (Lebegue & Co, 1901); H Wack *The Story of the Congo Free State* (Putnams, 1905); R Thomson, *Fondation de L’Etat Independent du* Congo*; un chapitre de l’histoire du partage de l’Afrique* (Office de publicité, 1933); J Stengers, ‘The Congo Free State and the Belgian Congo Before 1914’, in P Duignan & LH Gann (eds), *Colonialism in Africa 1870-1960* (Cambridge UP, 1969) 261.

6 J Westlake, *Chapters on the Principles of International Law* (Cambridge UP, 1894) 129-89.

7 Anghie (2004) 90-97.

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the 21st century, affirming the importance of the Conference and its General Act for having created a legal and political framework for the subsequent partition of Africa.[8] For Anghie, Berlin 'transformed Africa into a conceptual *terra nullius*', silencing native resistance through the subordination of their claims to sovereignty, and providing, in the process, an effective ideology of colonial rule. It was a conference, he argues, 'which determined in important ways the future of the continent and which continues to have a profound influence on the politics of contemporary Africa'.[9]

On the other side, however, one finds more than a few historians who are largely dismissive of the legal significance of the Conference. Sybil Crowe, for example, in one of the early histories of the Conference published in 1943, suggested that the importance of the Conference as a landmark in international law had been grossly exaggerated. Indeed, if anything, it was a failure:

> Free trade was to be established in the basin and mouths of the Congo; there was to be free navigation of the Congo and the Niger. Actually highly monopolistic systems of trade were set up in both those regions. The centre of Africa was to be internationalised. It became Belgian. Lofty ideals and philanthropic intentions were loudly enunciated by delegates of every country ... [and yet] the basin of the Congo ... became subsequently, as everyone knows, the scene of some of the worst brutalities in colonial history.
>
> It was originally stipulated that the conventional Basin of the Congo ... should be neutralised in time of war. Actually it was found necessary to make neutrality optional. Only the Congo Free State opted for neutrality, and this neutrality was violated by Germany in 1914.
>
> Last but not least, and this is the feature of international law most commonly associated with it, the conference made an attempt to regulate future acquisitions of colonial territory on a legal basis. But here again, its resolutions, when closely scrutinised, are found to be as empty as Pandora's box. In the first place the rules laid down concerning effective occupation, applied only to the coasts of West Africa, which had already nearly all been seized, and which were finally partitioned during the next few years; secondly, even within this limited sphere the guarantees given by the powers amounted to little more than a simple promise to notify the

8 See also Miéville (2005) 253 ('the Conference was an important moment in the formalization of the international legal structure of imperialism').

9 Anghie (2004) 91.

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> acquisition of any given piece of territory, *after* it had been acquired, surely on every ground a most inadequate piece of legislation.[10]

Pakenham echoes Crowe's doubts:

> There were thirty-eight clauses to the General Act, all as hollow as the pillars in the great saloon. In the years ahead people would come to believe that this Act had had a decisive effect. It was Berlin that precipitated the Scramble. It was Berlin that set the rules of the game. It was Berlin that carved up Africa. So the myths would run.
>
> It was really the other way round. The Scramble had precipitated Berlin. The race to grab a slice of the African cake had started long before the first day of the conference. And none of the thirty-eight clauses of the General Act had any teeth. It had set no rules for dividing, let alone eating, the cake.[11]

One may wonder how to reconcile these competing accounts of the Conference: for Crowe it was all about philanthropy, the internationalisation of territory and free trade; for Anghie about colonisation, exploitation and the subordination of the natives. For Crowe, its legal and political import was negligible; for Anghie, it was significant. And in a sense one may be prompted to think that these differing interpretations force us into a choice between these historical and legal evaluations: was it a success or a failure? Was it pro- or anti-colonial,[12] progressive or regressive?[13] Did it facilitate or forestall partition?[14]

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10 Crowe (1942) 4-5. See also JD Hargreaves, *Prelude to the Partition of West Africa* (Macmillan, 1963) 337 ('The importance of the Berlin Conference has often been misrepresented and exaggerated . . . Nor is it true that the Conference "partitioned Africa"'); H Wesseling, 'The Berlin Conference and the Expansion of Europe: A Conclusion', in Förster et al. (eds) (1988) 527, 531-32; Ewans (2002) 97-98 ('Apart from establishing the (qualified) principle of free trade, the Conference of Berlin was, in fact, of less practical significance than has been generally supposed').

11 Pakenham (1991) 254. What Pakenham is prepared to admit for the Conference is what he calls the 'spirit of Berlin': 'For the first time great men like Bismarck had linked their names at an international conference to Livingstone's lofty ideals: to introduce the "3 Cs"—commerce, Christianity, civilisation—into the dark places of Africa.'

12 See R Robinson, 'The Conference in Berlin and the Future of Africa, 1884-1885', in Förster et al. (eds) (1988) 1, 16. Schmitt describes the contradictory character of the General Act as documenting 'the continuing belief in civilization, progress, and free trade, *and* of the fundamental European claim based thereon to the free, i.e., non-state soil of the African continent open for European land-appropriation'. C Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. GL Ulmen (Telos Press, 2006) 216.

13 J Fisch, 'Africa as *terra nullius*: The Berlin Conference and International Law', in Förster et al. (eds) (1988) 347.

14 See, e.g., J Hargreaves, 'The Berlin Conference, West African Boundaries, and the Eventual Partition' in Förster et al. (eds) (1988) 313.

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There is, of course, the possibility that behind all these choices is simply a difference in interpretive standpoint: the historian's quest for the identification of contingent causal patterns[15] standing in contrast to the lawyer's concern for timeless principle.[16] The way in which the record is read, in other words, may speak only of differences that stand between the historian and the lawyer as to their respective conceptions of the 'legal' and the 'temporal'. It might be possible, thus, to ascribe to Crowe a naïve belief in a semi-mechanistic account of law that understands its operations solely in terms of the metaphorical equivalent of switching a light 'on' or 'off': one either has conformity to the rule or its absence. It might also be possible to ascribe to Anghie an understanding of the General Act that is concerned primarily with its transmissible meaning rather than with the concrete modalities of cause and explanation. Yet such differences, I suspect, are more a matter of emphasis than of method. In any case, my concern is not to accentuate these—nor to posit a decisive delineation between the interpretive standpoints in question—but rather offer a reading of the General Act that accounts, in some ways, for both.

My contention, in brief, is that the choice between reading the General Act as a success or a failure, or as a colonial or anti-colonial tract is largely a false one in that it fails to attend to the relationship between the apparent aspirations embodied in the text and the modalities for their realisation. Berlin was, I suggest, rather like Foucault's famous carceral system,[17] an institution whose effect may be traced through the apparent confounding of its own expectations. It could be viewed, in that sense, as both anti- and pro-colonial, as an instrument that fostered partition while apparently opposing it.[18] The key, however, to these incompatible, or perverse conjunctions as I will argue, is the presence of a systemic logic associated with the putative implementation of the envisaged regime of free trade in central Africa. Colonial rule, to put

15 For an account of the array of possible explanatory causes for partition see J MacKenzie, *The Partition of Africa 1880-1900 and European Imperialism in the Nineteenth Century* (Methuen, 1983). Among the principal causes are included: capitalist imperialism, the scramble for markets and raw materials, imperial diplomacy, xenophobic nationalism, feudal atavism and technological innovation.

16 WR Louis, 'The Berlin Congo Conference', in P Gifford & WR Louis (eds), *France and Britain in Africa* (Yale UP, 1971) 167, 218.

17 M Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A Sheridan (Vintage Books, 1977) 300-01.

18 Cf. Robinson (1988) 32 ('So far as free trade was the purpose of Bismarck's Conference, it defeated its own object').

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it bluntly, arrived as a consequence of the internationalisation of the territory whose overt purpose was to prevent colonisation taking place.[19]

THE CONFERENCE AND FINAL ACT

As most conventional accounts point out,[20] the immediate origins of the Berlin Conference may be traced to a series of exchanges between the German Chancellor Bismarck and the French foreign minister Jules Ferry, from April to October 1884, over the terms of a possible Franco-German *entente* the object of which would be to undermine the expansion of British informal empire. The French were anxious about the supervisory role that had been assumed by Britain in Egypt in the aftermath of the Urabi rebellion of 1882 (particularly insofar as it could endanger access to the Suez Canal). Germany, for its part, was concerned that Britain was hampering the pursuit of its interests in Cameroon, Angra Pequeña, Fiji and New Guinea.[21] Whilst these were the obvious causes of the nascent *entente*, there were at least two more reasons for resort to a multilateral Conference. The first was the conclusion of an Anglo-Portuguese Agreement in 1883[22] the effect of which would have been to recognise Portuguese sovereignty over the mouth of the Congo River, and to close off the vast interior of Central Africa to the traders and factories of other European States. While the British had been forced to concede that this Agreement was effectively dead before the Conference began,[23] the obvious dangers of leaving matters to bilateral negotiation were all too apparent. The second was the growing role played by King Leopold's *Association internationale du Congo* (AIC) (the offspring of the abortive *Comité d'études du Haut Congo*,[24] itself

19 A similar formulation is to be found in I Geiss, 'Free Trade, internationalization of the Congo Basin, and the Principle of Effective Occupation', in Förster et al. (eds) (1988) 263, 279 ('Even if everyone remained silent, tongue in cheek, no one in Berlin cared or dared to challenge the otherwise unspoken consensus—no partitioning of Africa as an *intention*. But the dynamics of the commercial interest and the logic of mechanisms, once set in motion under the impact of industrialization and the competition between colonial/commercial powers, brushed aside all hesitation on that score').

20 See, e.g., Robinson (1998) 3.

21 See, e.g., Bismark to Münster, 1 June 1884, in Gavin & Betley (1973) 385.

22 Hertslet (1909) vol. 2, 713.

23 Robinson (1998) 3. ('Rejected in Paris and Berlin, intrigued against in Brussels, decried by merchants in Manchester and patriots in Lisbon, and the Anglo-Portuguese Treaty had been sabotaged by mid-June'). See generally Anstey (1962); Fitzmaurice (1905) 344-54; Crowe (1942) 23-33.

24 The *Comité d'études du Haut Congo* was the executive arm of a syndicate set up by Leopold in 1878 financed by private subscription which included, among others James Hutton, William MacKinnon and a Dutch company Africaansche Handelsvereeniging. The Dutch Company, one of the largest subscribers, went bankrupt in the same year leading to its formal dissolution. N

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an offshoot of the *Association Internationale Africaine*[25]) which had, by that stage, already started to acquire territory in the Congo and whose 'flag' had been recognised by the US on 22 April 1884.[26] The issue here was not merely whether the AIC's claims to sovereignty had to be respected, but whether it could also be entrusted with the task of securing freedom of commerce within the Congo basin on behalf of all European States.[27]

In the course of their various exchanges, Bismarck and Ferry settled upon a definitive agenda for the Conference that was designed to address three matters:

(1) Freedom of commerce in the basin and the mouths of the Congo.
(2) The application to the Congo and Niger of the principles adopted by the Congress of Vienna with a view to preserve freedom of navigation on certain international rivers, principles applied at a later date to the River Danube.
(3) A definition of formalities necessary to be observed so that new occupations on the African coasts shall be deemed effective.[28]

Read strictly, of course, these were limited objectives. Freedom of commerce was envisaged only for the basin and the mouths of the Congo—not for the Niger river, or for other territory in Africa whether already under colonial rule or yet to be colonised. Freedom of navigation on the Niger had already arguably been put beyond the remit of the Conference given Britain's then recently-established authority there,[29] and the concern for effective occupation applied to 'new occupations' and then only on the coastline (of which little remained unclaimed[30]). It was also clear that the multilateral agenda only dealt with some of the latent issues—others would come to be addressed through the

Ascherson, *The King Incorporated: Leopold the Second and the Congo* (Allen & Unwin, 1963) 116-17. See also Anstey (1962) 66; Thompson (1933) 66-67, 74-75.

25 See PA Roeykens, *Léopold II et l'Afrique, 1855-1880* (ARSC, 1958) 13-39; PA Roeykens, *Léopold II et la Conférence Géographique de Bruxelles, 1876* (ARSC, 1956); Anstey (1962) 60.

26 On the AIC see generally J Stengers, 'Leopold II and the *Association Internationale du Congo*', in Förster et al. (eds) (1988) 229.

27 While many States were appreciative of this idea, the British Foreign Office was deeply sceptical. See, e.g., HP Anderson, 'Nature of the King of the Belgians', 2 March 1884, FO 84/1809, 233-35. The fact that the Association's agreement with France in May 1884 appeared to give France a 'right of option' in relation to the assets of the Association only reinforced this view. Hertslet (1909) vol. 1 244-46.

28 See Plessen to Granville, 8 October 1884, C.4205, No 10, in Gavin & Betley (1973) 41-42.

29 See HP Anderson, 'Memorandum: 1, West Africa Conference', 14 October 1884, FO 403/46, No 26-2, in Gavin & Betley (1973) 47-48.

30 See Lister Minute, FO 403/46, No 26, in Gavin & Betley (1973) 46-47.

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conclusion of a series of side agreements that disposed of the various conflicting claims that had already arisen in relation to territory adjacent to the Congo river, and particularly those between Portugal, France and the AIC.[31] There was also, inevitably, the fraught question of the status of the AIC and its claims to sovereignty.

Once convened, the Conference ran over a period of three months between 15 November 1884 and 26 February 1885. The outcome was the adoption of a General Act signed and ratified by all participants (with the exception of the US) the overt purpose of which was to secure 'the development of trade and civilization in certain regions in Africa' while obviating 'the misunderstanding and disputes which might in future arise from new acts of occupation ("*prises de possession*") on the coast of Africa' and 'furthering the moral and material well-being of the native populations'.[32] The General Act contained four 'Declarations' and two 'Acts of Navigation' (relating to the Congo and Niger respectively) arranged in seven chapters and 38 separate articles.[33]

In addition to the two 'Acts of Navigation' (both of which were loosely modelled upon the regimes of navigation for the Danube and Rhine[34]), the General Act had four main features. First it established a regime of free trade in the 'hydrographic' basin of the Congo stretching across the middle of Africa from the Atlantic to the Indian Ocean from 5° North to the mouth of the Zambezi in the South. Any power exercising sovereign rights in relation to such territory would have to allow 'all flags' equal access to the coastline, territories, rivers and lakes in question.[35] They would be prohibited from establishing monopolies[36] or discriminating against

31 See Courcel to Ferry, 30 August 1884, DdF, V, No 385, in Gavin & Betley (1973) 331, 332-33.

32 General Act, preamble.

33 Chapter I Declaration relative to Freedom of Trade in the Basin of the Congo, its Mouths and circumjacent Regions, with other Provisions connected therewith (Articles 1-7); Chapter II Declaration Relative to the Slave Trade (Article 9); Chapter III Declaration Relative to the Neutrality of the Territories Comprised in the Conventional Basin of the Congo (Articles 10-12); Chapter IV, Act of Navigation for the Congo (Articles 13-15); Chapter V, Act of Navigation for the Niger (Articles 26-33); Chapter VI, Declaration Relative to the Essential Conditions to be Observed in Order that new Occupations of the Coasts of the African Continent may be held to be Effective (Articles 34-35); Chapter VII General Dispositions.

34 Whereas Article 17 provided for the establishment of an International Commission charged with execution of the provisions of the Act of Navigation for the Congo (which, in fact, was never established), Britain was held responsible for applying the principles of freedom of navigation on the Niger so far as its waters 'may be under her sovereignty or protection' (Article 30).

35 Article 2 ('Those trading under such flags may engage in all sorts of transport, and carry on the coasting trade by sea and river, as well as boat traffic, on the same footing as if they were subjects').

36 Article 5 ('No power which exercises or shall exercise sovereign rights in the above-mentioned regions shall be allowed to grant therein a monopoly or favour of any kind in matters of trade').

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foreigners,[37] and goods were to be free of all import and transit duties[38] subject only to such taxation as might be levied 'as fair compensation for expenditure in the interest of trade'.[39] Secondly, the powers bound themselves to 'watch over the preservation of the native tribes and to care for the improvement of the conditions of their moral and material well-being'[40] and to assist in the suppression of slavery, 'and especially the Slave Trade'.[41] Thirdly, the powers bound themselves to respect the neutrality of the Congo basin and committed themselves to lend their good offices to enable such territory, in case of war, to be considered as belonging to a non-belligerent state.[42] Finally, the General Act committed any power acquiring coastal territory on the African continent to notify all other such powers of their claim,[43] and establish such authority as was necessary to ensure within those territories the protection of vested rights and, where applicable, free trade.[44]

In one sense at least, historians such as Crowe were entirely right: the General Act of the Berlin Conference did not, on the face of it, partition

37 Article 5 ('Foreigners, without discrimination, shall enjoy protection of their persons and property, as well as the right of acquiring and transferring movable and immovable possessions' and national rights and treatment in the exercise of their professions').

38 Article 4 ('Merchandise imported into those regions shall remain from import and transit dues'). It was also provided, however, that the Powers would determine whether to maintain in place such import duties after the lapse of twenty years.

39 Article 3. Any differential treatment in the imposition of such duties was also prohibited.

40 Article 6. It was further provided that '[t]hey shall, without distinction of creed or nation protect and favour all religious, scientific, or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization'. Article VI also provided for protection of Christian missionaries, scientists and explorers, and guaranteed for all, 'freedom of conscience and religious toleration'. Article 7, furthermore, provided for the application of the Convention of the Universal Postal Union (1878) to the Conventional basin of the Congo, the implementation of which would be incumbent upon the powers exercising rights of 'sovereignty or protection'.

41 Article 7. This was spelt out in more detail in Article 9 ('Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin on the Congo, declare that these territories may not serve as a market or means of transit for the Trade in Slaves, of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal or putting an end to this trade and for punishing those who engage in it').

42 Articles 10-12. The territory itself was not declared to be neutral *per se*, but open to a claim of neutrality on the part of a state exercising rights of sovereignty or protection, and then only on condition that those states 'fulfil the duties which neutrality requires' (Article 10). In case of disagreement, Powers bound themselves to have recourse to mediation and/or arbitration (Article 12).

43 Article 34.

44 Article 35.

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Africa. Nor, indeed, did it survive as a formal instrument much beyond 1919. By that stage it had already been supplemented by the Brussels General Act of 1890,[45] which sought to suppress the slave trade in the entirety of Africa and placed restrictions on the trade in firearms and liquor.[46] An appended declaration also amended the terms of Article 4 of the Berlin General Act by permitting the imposition of duties on imports.[47] While the Berlin General Act was, for a period, to be routinely invoked in disputes with the Congo Free State over matters of commercial freedom and the treatment of natives, and was also a point of discussion shortly prior to the annexation of the Congo by Belgium,[48] its 'formal' life seemed largely to come to an end with the ratification of the treaty of Saint-Germain-en-Laye[49] of 1919, which purported to supersede the General Act in its entirety[50] (endorsed, controversially, by the Permanent Court of International Justice in the *Oscar Chinn* case).[51]

At the same time, even if the General Act did not, *per se*, provide for African partition, that is not to say that the Conference was irrelevant to that process. In the first place, it is apparent that the act of convening the Conference had itself encouraged prospective participating powers to extend their claims as far as possible in order to strengthen their respective hands. France had arguably led the way with its (controversial) ratification of the Brazza-Makoko treaty in 1882,[52] but it was followed swiftly by other powers. Germany proceeded to proclaim protectorates over Togoland (5 July 1884) and Cameroon

45 CTS 173, 293.

46 The Liquor regime was modified again on 8 June 1899. CTS, 187, 346.

47 Declaration respecting Import Duties, 2 July 1890, in Hertslet (1909) vol. 2, 517. Under the same authorisation, a separate scheme was established in relation to the Eastern Zone of the Conventional Basin of the Congo by agreement between Britain, Germany and Italy. Ibid 518. This was to survive until 1901.

48 The British Foreign Office produced a 265-page brief accusing King Leopold of having violated the 'spirit of the Berlin Act'. FO 371/117. See generally Cookey (1968).

49 Article 13 of the Treaty of St Germain, 10 September 1919 ('Except in so far as the stipulations contained in Article 1 of the present Convention are concerned, the General Act of Berlin of February 26th, 1885, and the General Act of Brussels of July 2nd, 1890, with the accompanying Declaration of equal date, shall be considered as abrogated, in so far as they are binding between the Powers which are Parties to the present Convention').

50 The provisions relating to the navigation on the Niger, however, were later denounced in the Act Relating to Navigation and Economic Cooperation between States of the Niger Basin (1963). 587 UNTS 8506.

51 See M Sorensen, 'The Modification of Collective Treaties without the Consent of all the Contracting Parties' 9 *Nord TIR* (1938) 150.

52 BMS to FO, 23 March 1882, and Enclosed De Brazza Treaty, copy, FO84/1802. Controversy stemmed from the fact that de Brazza had not been afforded full powers at the time of concluding the agreement.

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(14 July 1884) and 'established its authority' in Angra Pequeña.[53] Britain, for its part, belatedly dispatched Colonel Hewitt on a treaty-making mission to the Niger delta,[54] and even while the Conference was sitting, the explorer Joseph Thomson was working his way through Northern Nigeria making treaties on behalf of the National African Company (later to become the Royal Niger Company) in Sokoto and Gandu.[55] Carl Peters, meanwhile, was busy concluding treaties in East Africa in the name of the Society for German Colonisation (*Gesellschaft für Deutsche Kolonisation*) with a view to eventually acquiring a Charter from the German government.[56]

More significantly, perhaps, two 'side agreements' were also concluded and appended to the text of the General Act—between the AIC and, respectively, France[57] and Portugal[58]—both of which contained significant provisions delimiting respective frontiers between their colonial possessions.[59] Supplementing those agreements was a host of 'Declarations' and 'Conventions' that were finalised during the course of the Conference and provided, in one form or another, for the recognition of the AIC[60] such that, by the time the General Act came to be signed, the AIC itself was able to adhere belatedly to the General Act itself. This was a move that not only formalised the

53 See W Mommsen, 'Bismarck, the Concert of Europe, and the Future of West Africa, 1883-1885', in Förster et al. (eds) (1988) 151, 158-60. See also Note from the German Embassy, 15 October 1884, Documents Diplomatiques Français, 1st Ser., vol. 5, No 431, in Gavin & Betley (1973) 347.

54 HP Anderson, 'On Events Connected with the West African Conference', 21 October 1884, FO 403/46, No 55, in Gavin & Betley (1973) 58-59.

55 J Thomson, *Joseph Thomson, African Explorer* (Samson Low, Marston & Co, 1896) 137, 143, 160.

56 See A Perras, *Carl Peters and German Imperialism 1866-1918. A Political Biography* (Clarendon Press, 2004).

57 Convention (France-IAC), 5 February 1885, in Hertslet (1909) vol. 2, 152, 564.

58 Convention (Portugal-IAC), 14 February 1885, in Hertslet (1909) vol. 2, 169, 591.

59 Further delimitation of boundaries on the coastline of West Africa continued in subsequent years. See Hargreaves (1988) 314-17.

60 See, e.g., Convention between the German Empire and the International Association of the Congo, 8 November 1884, in Gavin & Betley (1973) 266-27; Convention between Her Britannic Majesty's Government and the International Association of the Congo, 16 December 1884, in Gavin & Betley (1973) 269-71. These provided the model for subsequent agreements with Austria-Hungary (Declarations of 24 December 1884, in Hertslet (1909) vol. 2, 543), Denmark (Convention of 23 February 1885, in Hertslet (1909) vol. 2, 561), France (Convention of 5 February 1885, in Hertslet (1909) vol. 2, 564), Italy (Convention of 5 February 1885, in Hertslet (1909) vol. 2, 564), Netherlands (Convention of 27 December 1884, in Hertslet (1909) vol. 2, 589), Portugal (Convention of 14 February 1885, in Hertslet (1909) vol. 2, 591), Russia (Convention of 5 February 1885, in Hertslet (1909) vol. 2, 598), Spain (Convention of 7 January 1885, in Hertslet (1909) vol. 2, 599), Sweden and Norway (Convention of 10 February 1885, in Hertslet (1909) vol. 2, 601), and the US (Declarations of 22 April 1884, in Hertslet (1909) vol. 2, 602).

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participation of the main beneficiary of the Conference but arguably cemented the reputation of the Conference as having organised African partition. The government of the Congo Free State—as the AIC was to become on 19 July 1885—was thereafter able to claim and exercise sovereignty over the vast proportion of the 'conventional basin of the Congo'.[61]

THE IDEOLOGY OF BERLIN

For members of the nascent international legal profession, the significance of the General Act was never confined to the conditions under which it was, or remained, formally effective. Almost from the outset, the Conference initiated widespread reflection upon the legal conditions that governed the acquisition of colonial territory both within Africa and beyond.[62] If, immediately, the terms of the General Act opened out the possibility of being examined as a particular instance of practice from which could be deduced the general rules governing colonial transactions around the world,[63] it also allowed the Conference later to be read as providing an ideology (*vis* 'legitimating cover') for the continued expansion of colonial rule.[64] In the latter guise, it was to

61 The precise borders of the Free State only came to be definitively defined through a series of later agreements. See generally Keltie (1895) 215-18.

62 See, e.g., E Engelhardt, 'Conférence de Berlin – Origin des Actes de Navigation du Congo et du Niger' 18 *Revue de Droit International et de Législation Comparée* (1886) 96; E Engelhardt, 'Etude sur la Déclaration de la Conférence de Berlin Relative aux Occupations' 18 *Revue de Droit International et de Législation Comparée* (1886) 433, 573; F de Martens, 'La Conférence du Congo à Berlin et la politique coloniale des Etats modernes, 18 *Revue de Droit International et de Législation Comparée* (1886) 113, 244; J Hornung, 'Civilisés et barbares' 18 *Revue de Droit International et de Législation Comparée* (1886) 188, 281; J Jooris, 'De l'occupation des territories sans maître sure la côte d'Afrique. La Question d'Angra Pequena', 18 *Revue de Droit International et de Législation Comparée* (1886) 236. For later discussions of the question of territorial sovereignty and the importance of Berlin in formulating a view of that question see P Fiore, *Nouveau droit international-public suivant les besoins de la civilisation moderne*, 2nd ed., trans. C Antoine (A Durand et Pedone-Lauriel, 1885); G Jéze, *Étude théoretique et practique sur l'occupation comme mode d'acquérir les territoires en droit international* (V Giard & E Brière, 1896); A Rivier, *Programme d'un cours de droit des gens* (G Mayolez, 1889); E Nys, *Le droit internarional: les principes, les théories, les fiats*, vol. 2 (M Weissenbruch, 1912); C Salomon, *L'occupation des territoires sans maitre* (A Giard, 1889).

63 For the role of the General Act in shaping subsequent designs for the Mandate system see WR Louis, *Great Britain and Germany's Lost Colonies* (Clarendon Press, 1967) chs 3, 4.

64 See, e.g., Fisch (1988) 360 ('Strictly speaking, the colonial acquisition of Africa needed no justification. The Europeans had the necessary strength and, even within Europe, the right of conquest was widely accepted both in theory and state practice . . . It was understood, however, that there should be proper justification'); Onuma (2000) 44-45 ('It was thus evident that in the General Act the concept of civilization and its formulation in terms of international law played a critical role in justifying European colonization of Africa in two ways: by balancing conflicting interests among the European powers, and by legitimating their "effective authority," i.e., European colonial rule in Africa').

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become an enduring symbol of late 19th-century imperialism, and a point of reference for critiques of the international legal framework that appeared to underpin it. Berlin, as Judge Ammoun was later to assert, was nothing other than a 'monstrous blunder' erasing the pre-colonial reality of native sovereignty.[65] Anand, in similar vein, complained of Berlin having contrived the 'unnatural division of Africa', ignoring, in the process, all ethnic, tribal or national interests,[66] and Umozurike simply denounced Berlin for the 'immoral, inhuman and unjust' law that it purveyed.[67] It was, after all, a conference purporting to determine the future of Africa in which no African was involved.[68]

If Berlin came to represent, for such scholars, a symbol of a degraded legality that was to be firmly contained within its own historical conditions, its visible ideological content was provided as much by what the General Act seemed to suppress, or leave unsaid, as by what was to be found in the text itself. Attention was drawn, in the first place, less to the provisions relating to the war on slavery, the promotion of neutrality or freedom of commerce and navigation, than to the two provisions that related to the acquisition of territory:

> Article 35. Any Power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which being hitherto without such 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 order to enable them, if need be, to make good any claims of their own.
>
> Article 36. The Signatory Powers of the present Act recognize the obligation to insure 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 transit under the conditions agreed upon.

As Fisch points out, however, these provisions spoke only of the conditions underpinning the maintenance of claims to sovereignty on the coastline of Africa, making no mention of the apparently more fundamental question of why the powers were authorised to occupy African territories or assume

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65 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), Separate Opinion of Vice-President Ammoun, ICJ Reports (1971) 55, 86.

66 Anand (1972) 33.

67 Umozurike (1979) 26. See also Mutua (1995) 1130-31.

68 Fisch points out that Zanzibar was not invited even though its 'full sovereignty was acknowledged at the time by all the important European States'. Fisch (1988) 347.

protectorates over them in the first place.[69] That being said, it was always apparent that Articles 34 and 35 only made sense if certain background assumptions were held in place. And it was to those assumptions that the attention of jurists was duly drawn.

As had been specified at the outset, the general purpose of Articles 34 and 35 was to ward off the possibility of open conflict between colonising powers by requiring mutual notification of the taking of new possessions (Article 34) and by insisting that occupation be effective[70] rather than purely symbolic (Article 35). While these provisions did not, in themselves, provide the basis for partition, the language employed—'occupation' or the 'taking of possession'—implied that African territory had a status equivalent to *terra nullius* (either in the strict sense of being 'empty' or as 'ownerless') and that European sovereignty could be established at will over territories not yet occupied.

Nevertheless, the contrast offered by these articles between 'occupation' on the one hand, and 'protection' on the other (a distinction which had been actively promoted by the British in the discussion of Article 35[71]) suggested a division between title that might be regarded as original (occupation) which had to be demonstrably 'effective', and title that was essentially derivative (protection) in which there existed only an obligation of notification.[72] In other words, that the General Act spoke of territory occupied or 'taken into possession' (*prise de possession*) as distinct from the territory which was to be subject to protection, was to imply two discrete avenues for the establishment of colonial rule: one was simply to claim and administer territory; the other to acquire certain rights in relation to territory through concession under treaty.[73]

The complexity of this arrangement, as Fisch points out, was twofold. First of all, it is clear that at the time of the Conference neither of these conceptual

69 Ibid.

70 Schmitt rightly observes that Article 35 does not, strictly speaking, refer to 'effective occupation' but proceeds from the idea that 'a liberal interpretation of property and economy' would enable 'a guarantee of progress, civilization, and freedom'. Schmitt (2003) 219.

71 See generally R Johnston, *Sovereignty and Protection* (Duke UP, 1973) 167-86.

72 See, e.g., Granville to Malet, 14 January 1885, FO 403/49, No 92, in Gavin & Betley (1973) 103-04 ('There is an important distinction between annexations and Protectorates. Annexation is the direct assumption of territorial sovereignty. Protectorate is the recognition of the right of the aborigines, or other actual inhabitants, to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duties of the protecting Power').

73 It is perhaps revealing that the General Act routinely employs the phrase 'rights of sovereignty or protectorate' (e.g. in Articles 7, 8, 10, 11 and 30). In contrast, in Articles 6 and 9 the phrase 'sovereign rights or influence' is employed. The contrast alluded to, thus, is between 'sovereignty' and some other (*de facto*?) form of legal authority.

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categories—occupation and protection—had stable, or precise, content.[74] If, on one side, 'occupation' appeared to encompass everything from conquest/annexation to cession and settlement, the status and implications of the various 'treaties of protection' that the powers had been concluding were, for their part, obscure.[75] In a revealing memorandum issued just before the Conference began, Percy Anderson (the old 'Africa Hand' in the British Foreign Office) suggested not only that practice was diverse, but that the British, in particular, were still largely undecided as to the legal ramifications of their treaties of protection:

> The first question to be decided (and which seems to me to call for decision at once) is what interpretation we put on those Treaties. They contain, besides their stipulations for freedom of trade, provisions for placing the territory under British protection, forbidding Treaties with other Powers without our assent, and conferring on our Consular officers a position similar to that of Resident. They do not, like the French Treaties, mention the word 'suzerainete', but they are believed to be much on the same lines as the German Treaties. The Germans, as we know, interpret these as conferring an exclusive German Protectorate; what view should we say that we take of ours?[76]

Anderson's puzzlement, in this respect, was illustrated by an exemplary 'draft' treaty annexed to his memorandum of the kind that Hewett had been concluding with local sovereigns in the Niger delta (modelled, it seems, on the agreement concluded in 1884 with the 'Kings and Chiefs of Old Calabar'). The draft agreement purported to offer to those authorities Her Majesty's 'gracious favour and protection' (Article I), in return for which, the local sovereigns were to agree not to enter into correspondence or agreements with foreign powers (Article II), and assented to the exercise, by British consular authorities, of 'full and exclusive jurisdiction, civil and criminal, over British subjects and their property' or to foreign subjects enjoying British protection (Article III). No mention is made of Britain assuming 'sovereignty' over the territory concerned, and the jurisdiction asserted clearly fell someway short of that which it was accustomed to exercise over its colonies and dominions.

74 See further Johnston (1973) 172-73.

75 For an argument that Stanley's treaties on behalf of the AIC did not purport to confer sovereignty see T Jeal, *Stanley: The Impossible Life of Africa's Greatest Explorer* (Yale UP, 2007) 281-88. But see Stanley (1885) vol. 2, 379. A selection of treaties concluded in the name of the *Comité d'études* is found in Wack (1905) 487-91. See more generally S Touval, 'Treaties, Borders and the Partition of Africa' 7 *Journal of African History* (1966) 279; J Stengers, 'King Leopold and Anglo-French Rivalry, 1882-1884', in Gifford & Louis (eds) (1971) 121, 129-31.

76 Anderson, 'Memorandum' (1884).

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That the British treaties of protection seemed to allow only for the exercise of consular jurisdiction (following, in that sense, the terms of the Foreign Jurisdiction Act of 1843)[77] was a practice that the other powers were determined to challenge at Berlin, and it was the main cause for the demand that all occupations be demonstrably 'effective'.[78] That the British representatives were able, ultimately, to stave off this requirement in the case of protectorates is often seen as a key diplomatic triumph.[79] But the British achievement, here, was made possible only by way of the (momentary) stabilisation of these two categories not merely through their distinction from one another, but through the production of new juridical forms of each.

If occupation had hitherto largely been accepted as a ground for sovereignty in case of uninhabited, or 'uncultivated' territory,[80] the Conference proceedings were to suggest it could also extend to land inhabited by people on the grounds that it was not already 'an object of sovereignty'. Martitz's subsequent re-articulation of the phrase '*res nullius*' as '*territorium nullius*' was a symbolic marker of this shift.[81] Similarly, the category of protection was arguably re-cast in new terms allowing the colonial power not merely to exercise rights in relation to the conduct of foreign relations, but to claim territory as if it had effectively been ceded to the metropolitan power.[82] The concept of the 'colonial protectorate' (as distinct from the 'protected state') was thus to be born at the Conference in Berlin.[83]

In the second place, and more problematically, the theoretical grounds underpinning the categories of protection and occupation were, on the face of it, incompatible with one another. If occupation assumed land to be free of any claims to sovereignty, the establishment of a treaty protection, in contrast,

77 Selbourne to Pauncefote, 23 January 1885, FO 403/49, No 183, in Gavin & Betley (1973) 108, 109. See generally Johnston (1973) 32-53.

78 See, e.g., Courcel to Ferry, 30 August 1884, in Gavin & Betley (1973) 331, 333.

79 See, e.g., Crowe (1942) 186-91; Louis (1971) 211-14.

80 See, e.g., E De Vattel, *The Law of Nations or Principles of Nature Applied to the Conduct and Affairs of Sovereigns*, vol. 1 (S Campbell, 1796) vii, s. 209.

81 F Martitz, 'Occupation des territoires: Rapport et projet de resolutions presents à l'Institut de droit international' 19 *Revue de droit international* (1887) 371. On this see A Fitzmaurice, 'The Genealogy of Terra Nullius' 129 *Australian Historical Studies* (2001) 1, 10-11; A Fitzmaurice, *Sovereignty, Property and Empire: 1500*-2000 (Cambridge UP, 2014) 285-90; Koskenniemi (2001) 150-51.

82 Fisch (1988) 354-60.

83 J Westlake, *International Law*, vol. 1 (Cambridge UP, 1910) 123-24; Fisch (1988) 364-69. For a contemporary interpretation of this history (that assumes the 'colonial protectorate' to have already been an established category in 1884) see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment), ICJ Reports (2002) 303, 399-407.

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assumed the legal competence of the native agencies entering into the agreement. 'You do not', as Judge Dillard was later to observe in the *Western Sahara* case, 'protect a *terra nullius*'.[84] That the Scramble had increasingly been operationalised through the conclusion of treaties with native sovereigns (even if many, it seems, fell short of full grants of 'sovereignty') was, in itself, to put in question the legitimacy of non-consensual annexation as a ground of title. For John Kasson, one of the American delegates at the Conference, the answer was straightforward: 'modern international law', he maintained, was leading to the recognition 'of the right of native tribes to dispose freely of themselves and of their hereditary territory', and that principle was to be 'extended' to require the 'voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression'.[85] When asked for advice on the same question by anxious British Foreign Office officials, however, Sir Edward Hertslet prevaricated: 'Such consent would not appear to be necessary on all occasions. But there is a great difficulty in these days in making a clear distinction between annexation and protection.'[86]

It is unsurprising, then, that the question of consent was to be the central theme in subsequent debates on the legal implications of the Conference both within the *Institut de droit international*[87] and beyond. On one side, were those such as Engelhardt,[88] Salomon,[89] Jèze[90] and Nys[91] who privileged consensual transfer, and for whom the validity of occupation (or annexation without

84 *Western Sahara* (Advisory Opinion), Separate Opinion Judge Dillard, ICJ Reports (1975) 116, 124.

85 Protocol of 31 January 1885, Parliamentary Paper, c. 4361, 209; Gavin & Betley (1973) 240. Kasson added that this should constitute 'the minimum of the conditions which must necessarily be fulfilled in order that the recognition of an occupation may be demanded', and that 'it should be well understood that it is reserved for the respective signatory powers to determine all the other conditions from the point of view of right as well as of fact which must be fulfilled before an occupation can be recognised as valid'.

86 'Memorandum on the Formalities necessary for the effective Annexation of Territory', 18 December 1884, FO 84/1818. See R Louis (1988) 209.

87 On the work of the *Institut* in this respect see Koskenniemi (2001) 98-178; Fitzmaurice (2014) 271-301.

88 E Engelhardt, Intervention in Plenary Discussion, X *Annuaire de Institut de Droit International* (1888-1889) 177-79, 181-82 (proposing that the institute should declare that 'arrangements avec les chefs indigènes' should become the rule in cases of occupation of non-civilised territory).

89 Salomon (1889) 217-42.

90 Jèze (1896) 115.

91 Nys (1901) 20 ('There could not have been there occupation pure and simple. The taking of possession had to be done with the consent of the native authority. This consent must be free, done with knowledge, and according to the usages of the country. In reality an appropriation as the result of a treaty was required; a cession was necessary').

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consent) as an *a priori* title was problematic. On the other, were those such as Westlake who, echoing Martitz, concluded that treaties with 'uncivilised tribes' could not, on their own, be treated as adequate to establish title over territory since if sovereignty was lacking, so also was the capacity to confer it upon others: '[a] stream', as he was to put it, 'cannot rise higher than its source'.[92] Treaties of protection could, at best, confer a form of 'moral title to such property or power as they understand'.[93]

Despite the later tendency to view the advocates for native agency as working in a more general humanist cause,[94] it is clear that this was by no means the immediate implication. Indeed, for some, such as Nys and Arntz, it was an argument primarily employed to sustain the claims made by the AIC in the founding of the Congo Free State. For them, the Congo Free State had been formed in virtue of the conferral of sovereignty upon it by the native communities in the Congo[95] rather than by the combined authority of the powers at Berlin. It was not, thus, liable to the later modification of its obligations by those same powers.[96] For many, however, the argument that the authority of the Congo Free State was founded upon its treaties with local sovereigns was only to affirm its anomalous character.[97] In one direction, it was to raise the question as to how a private association might, in principle or practice, acquire rights of sovereignty (as opposed to mere rights in property).[98] In another, it was to cast doubt upon the character of the recognition afforded to the

92 Westlake (1894) 144.

93 Ibid 145.

94 See, e.g., Alexandrowicz (1974) 150-63.

95 See, e.g., Stanley (1885) vol. 2, 379. ('The Association were in possession of treaties made with over 450 independent African chiefs, whose rights would be conceded by all to have been indisputable, since they held their lands by undisturbed occupation, by long ages of succession, by real divine right. Of their own free will, without coercion, but for substantial considerations, reserving only a few easy conditions, they had transferred their rights of sovereignty and of ownership to the Association').

96 Nys (1901) 14-15, 54-56. See generally Koskenniemi (2001) 157-66.

97 Koskenniemi (2001) 165. Schmitt remarks that its recognition 'opened the door to the confusion, whereby an international colony was treated as an independent state. The core concept of the traditional interstate European international law thus was thrown into disorder'. Schmitt (2003) 217.

98 See, e.g., J Reeves, 'The Origin of the Congo Free State Considered from the Standpoint of International Law' 3 *American Journal of International Law* (1909) 99, 101-02. The same issue was to arise in relation to the treaties concluded by Goldie's National African Company in which it was decided that a protectorate had to be established over the Niger delta prior to the grant of any Charter. See generally, Johnston (1973) 187-96.

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AIC in the first place.[99] Needless to say, even if sovereignty was deemed to have been conferred upon the Congo Free State by the local inhabitants, it was a sovereignty intelligible only at the moment in which it was negated.

Whilst Articles 34 and 35 of the Berlin Conference were to stimulate such reflections and encourage the articulation of ever more subtle accounts of the existing and emergent rules relating to the acquisition of colonial territory and native sovereignty, they spoke only through their relative silence on the questions that seemed to be of most pressing importance for international lawyers. They did not, in the obvious sense that Crowe was demanding, provide a direct explanation for what was later to become the fate of the Congo basin. If they did, it was only by disclosing inferentially the apparent ideological conditions under which colonial expansion could take place.

A CONSTITUTION FOR CENTRAL AFRICA

Thus far, the accounts of the Conference would appear to be divided between those who ascribe to its terms, limited legal effect and, as a consequence, tend towards the view that the effective causes of partition are to be found in events that lay beyond Berlin, and those who understand the General Act as bringing into view a set of background assumptions, the unearthing of which discloses the discursive conditions under which subsequent partition would assume the character of legality. Neither of these accounts, importantly, places much store upon the formal terms of the General Act itself or indeed speculates as to the relationship between the 'humanitarian' and 'philanthropic' agendas set out in the General Act, and the ensuing processes of partition and bloody colonial rule that were to follow. At best, 'free trade', 'anti-slavery' and 'neutrality' were to be treated as mere ideological screening devices that enabled attention to be diverted from the concrete processes of partition and rule that were to occur in their shadow.[100]

A very different account of the General Act, however, is to be found in the separate opinions of Judges van Eysinga and Schücking of the Permanent Court of International Justice in the *Oscar Chinn* case of 1934[101] for whom the provisions on neutrality and free commerce were of central importance. In that

99 For Pauncefote, in the British Foreign Office, the Association had not being recognised as a state at all, but simply as the representative government of 'certain "Free States" created by Treaties with "legitimate Sovereigns" in the basins of the Congo and adjacent territories'. Memorandum by Sir Julian Pauncefote, 2 December 1884, in Gavin & Betley (1973) 77.

100 See Gathii (2005) 101-04.

101 *Oscar Chinn Case (UK v Belgium)* (Judgment), PCIJ Reports Series A/B No 63.

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case, the Court had been asked to determine whether the financial aid that had been offered to a Belgian, state-owned, enterprise, operating a commercial shipping business along the Congo river, violated the terms of the Treaty of St Germain-en-Laye of 1919. Van Eysinga and Schücking disagreed not so much with the substance of the majority decision—which was to defer to the Belgian government—but with the reliance that the majority had placed upon the Treaty of St Germain. It was not the Treaty of St Germain that should have been the governing law, in their view, but the General Act of the Berlin Conference, which assumed the character of 'a statute or a constitution' for Central Africa.[102]

While reliance upon the General Act was, for van Eysinga and Schücking, a means by which the reasoning of the majority might be questioned, what is of particular interest are the conditions under which they were to view the General Act as possessing this constitutional aura. What drew their attention were not the provisions relating to the acquisition of territory, but in fact all of the others: in their view, the General Act sought to institute for central Africa 'a highly internationalized regime' forged in the interests of peace and commerce.[103] What they were referring to were not only the provisions internationalising the Congo and Niger rivers, but the regime of neutrality and free commerce envisaged for the 'conventional' basin of the Congo. On one side, as Schmitt was to suggest, it appeared to create an Amity line in reverse—preserving not war, but peace, beyond the line—providing a neutral domain in which commerce could operate without threat of war.[104] On the other side, commerce would be organised along the principles of the 'open door'—no import or export restrictions were to be permitted; no import or transit tariffs could be imposed on goods bar those 'as fair compensation for expenditure in the interest of trade'; and all monopolies were prohibited as were any commercial regulations of a discriminatory character.

102 Ibid, Separate Opinion of van Eysinga, paras 286-96; ibid, Separate Opinion of Schücking, paras 337-41. For a similar view, emphasising the General Act's status as a 'universal colonial charter' see G de Courcel, *L'influence de la Conférence de Berlin de 1885 sur le droit colonial international* (Les Editions internationals, 1935) 161.

103 *Oscar Chinn*, Separate Opinion of van Eysinga, paras 286, 287 ('the Berlin Act presents a case in which a large number of States, which were territorially or otherwise interested in a vast region, endowed it with a highly internationalized statute, or rather a constitution established by treaty, by means of which the interests of peace, those of "all nations" as well as those of the natives, appeared to be most satisfactorily guaranteed').

104 Schmitt (2003) 219-21. His complaint, thus, was that it treated African territory as if it was European, and thereby eroded the spatial structure of the European nomos.

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Underpinning this constitutional vision for Central Africa, however, was a basic contradiction in the dynamics of late 19th-century capitalism.[105] As early theorists of imperialism were to observe,[106] various changes in the political economy of Europe—the collapse in commodity prices and under-consumption,[107] the over-supply of industrial goods and labour,[108] and the emergence of trusts, cartels and monopolies associated with the rise of 'high finance'[109]—had encouraged increased speculative interest in overseas investment (in trade, mining, ports, railways, telegraph systems, etc.). This, furthermore, seemed to encourage a competitive logic of acquisition: colonies and protectorates would have to be acquired in order to 'protect' overseas trade and investment from the dangers posed by the monopolistic or protectionist policies of rival colonial powers.[110]

Yet there were also two powerful counter-tendencies. In the first place, the rise of classical political economy (and the accompanying critique of mercantilism) had, under the influence of Smith, Hutcheson, Malthus and Ricardo, encouraged the emergence of a new rationality of government (*laissez-faire*) organised around the idea of the self-regulating market and the institution of free trade.[111] The move towards trade liberalisation—marked in Britain by the winding up of the old Charter companies, the abolition of the Navigation Acts, and the repeal of the Corn Laws in 1846, and in Europe, more generally, by the institution of a network of free trade arrangements on the back of the Cobden-Chevalier Agreement of 1860—was furthered through an alliance with an increasingly fervent anti-colonial free-trade lobby led by figures such as

105 See generally J Gallagher & R Robinson, 'The Imperialism of Free Trade' 6 *Economic History* Review (1953) 1; B Semmel, *The Rise of Free Trade Imperialism: Classical Political Economy and the Empire of Free Trade and Imperialism 1750-1850* (Cambridge UP, 1970).

106 See generally A Brewer, *Marxist Theories of Imperialism: A Critical Survey* (Routledge, 1980); B Semmel, *The Liberal Ideal and the Demons of Empire* (Johns Hopkins UP, 1993); L Gann, 'Reflections on Imperialism and the Scramble for Africa', in Duignan & Gann (eds) (1969) 100.

107 R Luxemburg, *The Accumulation of Capital* (Routledge, 2003).

108 L Wolff, *Empire and Commerce in Africa* (George Allen & Unwin, 1920) 21-49.

109 J Hobson, *Imperialism: A Study* (J Pott, 1902); R Hilferding, *Finance Capital: A Study in the Latest Phase of Capitalist Development*, trans. M Watnick & S Gordon (Routledge, 1981); V Lenin, *Imperialism, the Highest Stage of Capitalism: a Popular Outline* (International Publishers, 1939) [1916].

110 Gallagher & Robinson (1953) 13 ('The usual summing up of the policy of the free trade empire as "trade not rule" should read "trade with informal control if possible; trade with rule when necessary"').

111 M Foucault, *The Birth of Biopolitics*, trans. G Burchell (Palgrave Macmillan, 2008) 27-74.

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Cobden and Bright.[112] Colonies were routinely decried by such radical reformers not only for holding back the onward march of free trade but for imposing unnecessary burdens on the exchequer and for threatening to corrupt public life.[113] In that context, if economic expansion was to take place, it was not immediately obvious that it should do so through the medium of colonial rule.[114]

In the second place, the emergence of nationalism within Europe was also to have a chilling effect upon the desirability of colonial expansion. Whether prompted as a palliative to the collective anomie of an increasingly urban, industrialised workforce, or as a project associated with the creation of a skilled and mobile labour force,[115] 'nationalism' not only spoke about the intrinsic, or instrumental, value of ethnic or linguistic homogeneity,[116] but also about the desirability of government by consent ('*un plébiscite de tous les jours*', as Renan was to put it[117]). If, in a moderate sense, this was to underpin Kasson's call for 'native consent', it also, and more radically, pointed to the impossibility of the full integration of colonial territories within the juridico-political conception of the nation-state. Since a conquering power, as Arendt later pointed out, would 'have to assimilate rather than to integrate, to enforce consent rather than justice',[118] no nation-state, she argued, 'could with clear conscience ever try to conquer foreign peoples', since the imposition of law upon others was fundamentally inconsistent with its own conception of law as 'an outgrowth of a unique national substance'.[119]

These tendencies in political thought had a number of palpable consequences on the organisation of relations with the non-European world. To begin with, they encouraged the development of regimes of control falling short of direct colonial rule. Consular jurisdiction, which had long marked relations with the Ottoman Empire, became a more general form of informal rule in China, Siam and Japan, especially once it had been coupled with tariff

112 See R Cobden, *The Political Writings of Richard Cobden* (Fisher Unwin, 1903); Semmel (1970) 158-75.

113 See B Porter, *Critics of Empire: British Radicals and the Imperial Challenge*, 2nd ed. (IB Taurus, 2007).

114 See Robinson et al. (1981) 164ff.

115 See E Gellner, *Nations and Nationalism*, 2nd ed. (Wiley Blackwell, 2006).

116 See J Mill, *Considerations on Representative Government* (Parker, Son & Bourne, 1861) 287-97.

117 E Renan, *Qu'est-ce qu'une nation?*, 2nd ed. (C Lévy, 1882) 27.

118 H Arendt, *The Origins of Totalitarianism* (Harvest, 1968) 125.

119 Ibid 126-27.

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restrictions and control over the customs administration.[120] They also shaped the mode of colonial rule itself—evident not only in the emergence of protection as opposed to annexation as the favoured mode of acquisition,[121] but also in the subsequent development of techniques of indirect rule[122] and the gradual morphing of unitary colonial empires into federal amalgams.[123] Another, almost perverse, dynamic was to provide the conditions for the re-appearance of Charter companies: the British momentarily believing that by handing over responsibility for the administration of the Niger to the Royal Niger Company, it could avoid direct responsibility for implementation of the Niger Act of Navigation.[124]

Yet, if one may read all of these initiatives as efforts to provide the conditions for commercial expansion and free trade without corrupting the ideals of self-rule at home, then the General Act, as described by van Eysinga, offered a novel third option. The internationalisation of territory could serve as a medium for securing the conditions of commercial expansion through the creation of a regime which would control the colonising impulses of the imperial powers not by any outright prohibition, but by rendering it, in its normal sense, essentially futile.

The key to this idea of internationalisation was to be found in the provisions of the General Act that circumscribed the ability of any colonial power to adduce revenue by way of tariffs or taxation. It was clear, to begin with, that the powers assuming sovereignty over the conventional basin of the Congo had to assume a range of obligations that were not otherwise incumbent on colonial powers. In addition to the establishment of 'effective' jurisdiction and committing themselves to improving the conditions of the moral and material well-being of the native population and respecting acquired rights, they were also to assume primary responsibility for pursuit of the 'new' war on slavery—namely,

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120 In the case of China, British control over the administration of the maritime customs service eventually mutated into responsibility for the Chinese public debt. See, H van de Ven, *Breaking with the Past: The Maritime Customs Service and the Global Origins of Modernity in China* (Cambridge UP, 2014).

121 Anderson, 'Memorandum' (1884). On British practice see Johnston (1973) 312-13.

122 See, e.g., F Lugard, *The Dual Mandate in British Tropical Africa*, 5th ed. (Blackwood, 1965).

123 See, e.g., through the introduction of Dominion status and responsible self-government in the British Empire. See also AB Keith, *Responsible Government in the Dominions* (Clarendon Press, 1928).

124 It was later decided, however, that a Protectorate was required before a Charter could be offered. The difficulty, however, being that Goldie's treaties often ceded more authority to the Company than could be assumed under the terms of a Protectorate. See generally Johnston (1973) 187-96.

the internal, or overland, trade in slaves for which Arab traders (as opposed to the Europeans) were largely held responsible.[125]

If, however, the responsibilities of colonial rule in the Congo basin were to be that much greater, the benefits of establishing a colony or protectorate were to be that much less. In the first place, the prohibitions on monopolies and discriminatory commercial regulation meant that the usual prerogatives of colonial rule, namely the effective control of all commerce and trade, were ruled out. In the second place, it was also clear that the ability of any resident power to defray the administrative costs of colonial rule would be fatally undercut by the controls over the imposition of import and transit tariffs. This was to close off the most obvious source of public income (it being apparent that no measure of general taxation would have sufficed as an alternative source of revenue given the relatively small numbers of Europeans present in the Congo and the absence of a monetarised economy).[126] In closing off the possibility of recuperating the costs of administering a colony in Central Africa, let alone providing for the development of a commercial infrastructure, the regime seemed designed to achieve the objective of securing peace by ensuring that any colony would lack viability.

FROM FREE TRADE TO THE COLONY

If the success of the regime envisaged for the Congo basin seemed to hinge upon it remaining an internationalised 'non-sovereign' space, then the subsequent establishment of King Leopold's Congo Free State—later to become the object of colonial reform campaigns and vitriolic criticism in both Britain and France[127]—might be regarded as the principal mark of its failure. In place of van Eysinga's 'highly internationalised regime' governed by principles of freedom of commerce and neutrality, was to emerge a notoriously brutal regime marked by violence, slavery and the institution of public monopolies.

Yet there is another available account here, and one that does not rely upon a narrative of failure. As Ferry had noted from the outset,[128] there was always an enduring tension between, on the one hand, the desire to promote

125 See L Gann, 'The Berlin Conference and the Humanitarian Conscience', in Förster et al. (eds) (1988) 321, 325 ('Article 9 constituted a declaration of war against the Swahili-speaking Muslims and their civilisation').

126 See Lambermont, Protocol No. 4, Meeting of 1 December 1884, in Gavin & Betley (1973) 159.

127 See generally A Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (Houghton Mifflin Co, 1998); R Anstey, *King Leopold's Legacy: The Congo under Belgian Rule 1908-1960* (Oxford UP, 1966) 1-10.

128 Ferry, Note 22 August 1884, no 376, in Gavin & Betley (1973) 328-30.

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free trade and, on the other, a recognition that some agency had to put in place the conditions for it to operate. For freedom of commerce to become the 'rule' in Central Africa, it was dependent, above all else, upon the creation of the requisite infrastructure—ports, warehouses, roads, railways and telegraph systems. And this was especially true in respect of the Congo in which it was recognised that effectively to open the interior to trade depended upon the construction of a railway around the cataracts (between Vivi and Stanley Pool).[129] In order for those facilities to be created, however, it was clear that investment would have to be sought from European markets,[130] and such investment would only be obtainable with security—both as to the physical integrity of the investment and as to the possibility of recuperating the costs through charges and levies on transported merchandise. That security, furthermore, could not be guaranteed through the mere exercise of consular jurisdiction but would require the full armature of sovereignty[131]—a system of police, a government, an administration, a system of civil and criminal justice—and the development of an auxiliary knowledge of the physical and human geography of the region. If, in other words, commercial expansion was to take place, it could only do so through the establishment of colonial rule backed by a right to levy the tariffs and taxes necessary to cover the administrative expenses.[132]

At this point, it becomes apparent that the establishment of Leopold's Congo Free State as the predominant power in Central Africa, was not so much an expression of the failure of the internationalised regime, but rather its most logical extension. To begin with it was clear that, without it, commerce would have had to rely upon the old systems of African middle-men and be confined largely to activity on the coastline.[133] Some agency, at the very least, had to take responsibility for the transport infrastructure around the cataracts.[134]

129 See Sandford proposal, Protocol 3, 27 November 1884, in Gavin & Betley (1973) 147; Bontinck (1966) 248-49. The project was opposed by both France and Portugal. Thomson (1933) 342; Bontinck (1966) 250.

130 See Lambermont, Protocol 3, 27 November 1884, in Gavin & Betley (1973) 146.

131 As Robinson notes, both Ferry and Bismarck seemed clear, prior to the Conference, that 'the free trade principle required a partition of the interior'. Robinson (1988) 7. See Minute by Lister, 14 October 1884, FO 403/46, No 26, in Gavin & Betley (1973) 46 ('It seems almost necessary that the whole course of the Congo should be annexed by European Powers before the principle of freedom of commerce could be established').

132 It is notable, in that sense, that Sandford's proposal for the Vivi-Stanley Pool railway included a provision allowing the Company or Concessionaire to be free from all restrictions in terms of tariffs imposed except only that they should be non-discriminatory.

133 See Geiss (1988) 270.

134 In 1889, the Congo Railroad Company had been constituted in order to construct a railway from Matadi to Leopoldville. For an account of the construction, see Hochschild (1998) 170-72.

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That it was the AIC/Congo Free State, furthermore, that was tasked with the duty of opening up the continent to international commerce was also plausibly related to its anomalous character (being, in the words of one member of the British Foreign Office, 'neither fish, flesh, nor red herring').[135] It was not a colony as such, as there was no metropolitan power to which it was responsible; nor indeed was it a state formed, like Liberia or Sierra Leone, as a consequence of settlement.[136] It still assumed, all things told, the aura of a private 'philanthropic' initiative (in part humanitarian and scientific) assuming for itself the duty of advancing the conjoint interests of the peoples of Africa and Europe.[137]

That Leopold's Congo Free State came into being under conditions that were plausibly designed to render colonial rule unappealing, was, however, to have certain inevitable consequences. In the first instance, the resulting parlous financial condition in which the new Congo Free State found itself[138] was to encourage Leopold, at the earliest opportunity, to seek re-negotiation of the provisions relating to the restrictions on tariffs.[139] This he did in 1889 by organising a conference in Brussels overtly concerned with the task of putting in place a more effective means of implementing the prohibition of slavery found in the Berlin General Act, but to which end he also sought, and obtained, a modification of the tariff regime, allowing the imposition of an import tariff of 10 per cent.

Tariff reform, however, seems not to have been sufficient on its own,[140] and Leopold was therefore prompted to embark upon a range of other initiatives that were later to lead to the formation of the Congo Reform Association, the publication of the famous Casement Report[141] and the establishment of a Commission of Inquiry in 1904-05.[142] In September 1891, a '*régime domanial*' was put in place taking into state ownership all 'vacant land', and asserting, in the process, state ownership over all ivory and rubber. Traders who bought such

135 Anstey (1962) 78. See also Bontinck (1966) 117; Stengers (1988) 262-64.

136 Cf. Grovogui (1996) 85 who speaks of the 'double nature' of the Congo Free State as being that of a 'state and an international colony'.

137 For an expression of this idea see Report of the Courcel Commission, Protocols, Annex 2 to Protocol No 4, in Gavin & Betley (1973) 168, 170-71.

138 Stengers (1988) 272; Hochschild (1998) 91-92. The Free State survived prior to 1900 largely as a consequence of two loans from Belgium (25 million francs in 1890 and a further seven million francs in 1895) and yields from a lottery established for the benefit of the Congo.

139 G de Courcel, 'The Berlin Act', in Förster et al. (eds) (1988) 247, 259.

140 Ibid 259.

141 See *Correspondence and Report from his Majesty's Consul at Boma respecting the Administration of the Independent State of the Congo* (1904), cd 1933.

142 *The Congo: A Report of the Commission of Enquiry appointed by the Congo Free State Government* (GP Putnam's Sons, 1906).

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products from the natives 'would be liable to charges of being in the possession of stolen goods'.[143] In the same vein, the administration was to institute a system of labour service in place of direct taxation in which the natives had to offer to the administration a certain number of hours of 'public labour' every week in the form of porterage, paddling or the production of rubber, the enforcement of which was notoriously brutal.[144] Finally, Leopold resorted to seeking a substantial loan from the Belgian government in return for which he promised to bequeath, on his death, his possessions in the Congo to the Belgian State.[145] In short, the very financial restrictions that were designed to ensure freedom of commerce did little other than place a premium upon the ever more imaginative and violent extraction of wealth from the colony. It also resulted in the effective monopolisation of commerce in the hands of Leopold and the various concessionaires to whom 'vacant land' had been leased. In that sense, the demand for commercial freedom seemed to exhaust itself in the conditions for its own establishment in precisely the same way as the demand for the internationalisation of the Congo was subverted through the logic of its own ends. The old conundrum that long engaged historians of the era—whether trade followed the flag or vice versa[146]—missed the essential point that in many cases there really was no either/or; only perhaps, as Conrad put it, a 'rapacious and pitiless folly'.[147]

CONCLUSION

If, in substance, this essay has been concerned with bringing together two rival accounts of the Berlin West Africa Conference, and bridging the apparent gap that subsists in much of the literature that is structured around the oppositional poles of its (colonial or anti-colonial) purpose and (productive or insignificant) effect, the reason for doing so is a more general one. In the first place, the concern has been to prompt reflection upon the role of international law in the process of 19th-century colonial expansion in a way that does not simply associate it with providing an ideology ('legitimating cover' or a 'justificatory discourse') for a political or economic process that existed

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143 de Courcel (1988) 259; Stengers (1988) 264-66; Ewans (2002) 157-65.

144 R Slade, *King Leopold's Congo: Aspects of the Development of Race Relations in the Congo Independent State* (Oxford UP, 1962) 175-92; Stengers (1988) 268-71.

145 Hochschild (1998) 94-95. Belgium later paid substantial sums to Leopold on assuming responsibility for the Congo in 1908. Ibid 258-59.

146 See Robinson et al. (1981) ch. 13.

147 J Conrad, *The Heart of Darkness* (1899) 81.

entirely independently of the language of law. Certainly, one may say that international law at the time had this function—constructing, as Anghie points out, a conception of native sovereignty that privileged its subordination in the name of civilisation—but I want to suggest it did more than this and that the structures of free trade set out in the General Act themselves created the conditions for the establishment and operation of Leopold's regime in the Congo.

If, in that sense, I want to suggest that the General Act had an important effect upon the future of Africa, it was not an effect to be conceptualised in conventional terms. It did not involve a straightforward translation of aspiration into reality or result in a perceived congruence of rules and outcomes. On both of these scores, as Crowe and others pointed out, the General Act appears to have been ineffective. But 'efficacy' and 'effect' are not necessarily covalent. Indeed, what I want to suggest is that the effect of the General Act may be perceived in the operationalisation of what might be called a 'structural logic' that worked on the relationship between the explicit aspiration, on the one hand, and its material conditions of possibility, on the other. As a logic, it operated like a chain of reasoning—provoking, inciting and encouraging a series of interventions, the initiation of which cannot be attributed solely to the greed or avaricious character of Leopold himself (as some might have it). As a logic that occupied the 'gap' between reality and aspiration, furthermore, it was equally susceptible to the destruction of its own ultimate rationale, as it was its fulfilment. What I am alluding to, of course, is the way in which the regime of free trade subverted itself through the (attempted) realisation of its own conditions of possibility: to make free trade possible entailed the creation of conditions on the ground the actualisation of which was, perversely, to diminish the possibility of free trade being realised.

Two further features of this structural logic may be brought out. In the first place, it may suggest that a conceptualisation of international law that is organised around the antimonial categories of the utopian and the apologetic—as being in this case, either ineffective (as per Crowe) or ideological (as per Anghie)—may obscure the way in which these may operate as entirely compatible forms of analysis. Even if the abstract teleology of the idea of free trade was formally 'opposed' to an apologetic retrocession to the 'old' system of colonial rule, attending to the conditions of formation of the former is to reveal its ultimate dependence upon the latter. The 'old colonial system', in turn, arguably only survived so far as it was invested with new utopian purpose—to cultivate the non-European world into a space equipped for commerce.

In the second place, it may also be suggested that the inexplicit premise of certain institutional regimes might, on occasion at least, be that they embody

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or unleash perverse logics. If, one may say, the logic of Berlin was ultimately to confound the expectations of its authors, one may also wonder whether the same might apply, for example, to institutions such as the International Criminal Court or the regime of the Deep Sea Bed, to name but two? Might these not surreptitiously encourage, respectively, the promotion of impunity or the appropriation for private benefit of the resources declared to be owned by all? Might not the productive conditions for each demand the establishment of impunity before the trial, or rights of ownership of the resource before its distribution? To answer such questions, what is needed is a reading of the regimes in question that is attentive to their conditions of possibility and to the social processes that they unleash.

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