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Le rêve d'un roi: Congo Free State and Its Unlikely Existence in 19th-Century International Law

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ABSTRACT

At the Berlin Conference of 1884-85, European Powers decided on the future of the African continent, leaving their marks for decades to come. By that time, the colonial race in Africa was in full gallop, so territorial disputes had to be settled. The Berlin Conference was an attempt to lay down firm rules and to remedy such disputes, more specifically with regard to the Congo basin. The 'Congo question' was a central feature of the Berlin Conference. Multiple European Powers made claims to the surroundings of the Congo basin because of its wealth of natural resources and strategic position. The stalemate between European States with respect to the territorial richness of that region led to the window of opportunity which the Belgian King Leopold II exploited to his benefit. Congo Free State is the unlikely realisation of one man's ambition to compete at the highest levels of European imperial politics.

At present, more than a century has past and one of the prime examples of European imperialism, *i.e.* Congo Free State, remains elusive in nature. This research tries to enlighten its legal position in international law from a legal-historical point of view. Through various logically-structured phases, an in-depth analysis of the status of Congo Free State under 19th-century international law will be made in order to assess whether Congo Free State can be qualified as a State or otherwise. By elaborating upon this subject, justice will be done to a legal-historical captivating topic.

METHODOLOGY

1 STATE OF THE ART

1.1 CONTEXT

The Scramble for Africa[1] was an integral part of the Age of New Imperialism (1870-1914).[2] Imperial rivalry drove European States to be the first, the greatest, and the mightiest on the African continent. They believed in the supremacy of Western culture over African native culture,[3] bringing light into a place previously ruled by darkness;[4] the latter by which is meant civilising Africa to European norms and standards.[5] The civilisation mission was a constitutive argument in rationalising the colonisation of Africa and can be described as *"the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, underdeveloped people of the non-European world by incorporating them into the universal civilization of Europe."*[6] Complementary to the civilisation argument, there was another element which played a paramount role in the colonisation of Africa and facilitated that exact argument: 19th-century international legal doctrine. Under the influence of positivist legal thought, 19th-century scholars argued that international law did not apply to African Societies.[7] Numerous non-European polities were considered to be uncivilised (or barbaric, savage, or inferior) and, thus, were excluded from the international society of sovereign States. The applicability of international law was made dependent on the condition of European civilisation,[8] a criterion only met by European States themselves and those recognised by them.[9] However, the practice of colonising Africa proved to be of a peculiar nature; more specifically, European States *did* conclude treaties with African

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[1] The 'Scramble for Africa' is the commonly understood notion to depict the partition and acquisition of Africa by European States.

[2] VAN DER LINDEN 2014, p. 5-6.

[3] See *e.g.* RYCKMANS 1955, p. 94.

[4] See the context and wording of Joseph Conrad's book *The Heart of Darkness*. Conrad's novella is one of the most influential books of the 20th century in English literature, but it is also one of the most controversial ones. As a response to Conrad's racist depiction of the African people and culture, Achebe wrote the book *Image of Africa: Racism in Conrad's Heart of Darkness*, describing it as deplorable, offensive and dehumanising. See also FISCH 1992, p. 33-34.

[5] ANGHIE 2004, p. 3.

[6] *Ibid.*

[7] VAN DER LINDEN 2014, p. 67-76.

[8] *Ibid.*, p. 68.

[9] For example: the Ottoman Empire, Japan, the States of North and South America, China, etc.

Chieftaincies in order to cede sovereignty over African territory.[10] Moreover, the conclusion of treaties formed the *main mode* for the acquisition of African territory, and not conquest.[11] In first instance, European States explored the African territories and, subsequently, concluded treaties with African Nations and Societies in order to make 'legitimate' claims towards their European counterparts. [12] Europeans States, then, decided among themselves who was entitled to which areas of African land based on those treaties.[13] Hence, the existence of a remarkable schism between theory and practice came about. 19th-century international legal doctrine created a world of bipolar character; one where international law regulates the interactions between sovereign European States and another in which international law had no place, while the practice of New Imperialism proved otherwise.[14] It is in the realm of that practice legal oddities and other by-products of international law occurred: spheres of influence, hinterlands, protectorates, etc. [15] *Realpolitik* led European States to make compromises, more often out of envy towards their rivals than out of clear vision. A thorough understanding of those power games guided Leopold II's opportunism for his own piece of African pride.[16] Ultimately, this resulted in the creation of the prime example of legal oddities: Congo Free State.

1.2 PROBLEM STATEMENT AND RESEARCH GAP

The specific problem at hand is that, due to various legal constructions made in practice, we have lost sight on the exact nature of the legal entities created in the Age of New Imperialism. Congo Free State is an important exemplification of this form of legal oblivion.

The legal nature of Congo Free State remains underexposed to the present day. The debate on its nature was, however, very lively around the turn of the century, but most of them were apologetic accounts in defence of Leopold II and his colonial adventure in the face of growing humanitarian critique.[17] In the course of the 20th century, a very selective number of authors have tried to assess the *origins* of Congo Free State, leading them to contend that it was an international anomaly, without resorting to an actual legal

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[10] See generally ALEXANDROWICZ 1973, p. 29-54.

[11] SHAW 1986, p. 46; VAN DER LINDEN 2014, p. 227. The conclusion of such treaties, however, was often accompanied by (military) coercion – see ANGHIE 2004, p. 72 for an elaboration.

[12] See ANDREWS 1978, p. 419.

[13] See ALEXANDROWICKZ 1976, p. 94-105 and 117-128; SHAW 1986, p. 31-46; VAN DER LINDEN 2014, p. 91-105.

[14] VAN DER LINDEN 2014, p. 77-78.

[15] REEVES 1909, p. 99.

[16] See THOMSON 1933, p. 313; VANTHEMSCHE 2007, p. 27-32.

[17] See *e.g.* DESCAMPS 1904, p. 233-259; NYS 1903, p. 333-379. That same year, DESCAMPS wrote a book, *L'Afrique nouvelle,* which was in essence an attempt to refute the attacks from other colonial powers.

classification[18] of Congo Free State or, when they do classify, without displaying thorough reasoning which is embedded into 19th-century international legal doctrine.[19]

So far, only one contemporary author has made an in-depth effort to establish the legal nature of Congo Free State and its legal predecessors.[20] The importance of this academic omission cannot be overlooked, as it was the Congo basin itself which constituted the core issue of the Berlin Conference of 1884-85, informally known as the *Congo Conference*. As this conference formed the very apogee of European colonisation, this gap cannot be left unfulfilled.

2 RESEARCH OBJECTIVES AND QUESTIONS

2.1 OBJECTIVES *PER SE*

The overall research objective is to classify a legal phenomenon, *i.e.* Congo Free State, into the then existing international legal system.[21] More specifically, the research (1) aims to assess the legal nature of Congo Free State according to dominant international law of the late 19th century through an exploratory journey of the various legal subjects of 19th-century international law, which is essential to understand *the context and the specifics* of the debate, and (2) tries to classify it into this or that category (see *infra*).

(1) There is, of course, no classification without *description*. The descriptive part will focus on three elements: (i) the legal subjects of 19th-century international law, (ii) the classification criteria, and (iii) Congo Free State itself and Leopold II's geographical organisations as legal predecessors. These three elements will constitute the first three parts of the research and, hence, align with the different sub-questions.

(2) Classification also necessitates *evaluation*. When the classification criteria are established, a subsequent evaluation will assess to which of the possible classes Congo Free State belongs. Every classificatory objective should be aware of the potentiality that the legal phenomenon under scrutiny cannot possibly be classified

[18] Indeed, some may purport that the denomination as 'international anomaly' qualifies as a classification. However, such a classification should be the last resort, when all other options are exhausted. Hitherto, this has not been the case. Most authors seem to assume that unique origins necessitate a unique classification, without any attempt to classify it as one of possible existing legal constructs.

[19] No actual classification: REEVES 1909. No reasoning embedded into 19th-century international legal doctrine: HENRIET 2015; THOMSON 1933. HENRIET designates Congo Free State to be 'a special example of political sovereignty', 'a colony without metropolis' and even 'a sovereign State'. Thomson perceives Congo Free State as an 'international colony'.

[20] See Salmon's pioneering article of 1988 'La nature juridique de l'État Independant du Congo et des entités qui l'on précedé*'.*

[21] See KESTEMONT 2018, p. 11.

as one of the existing classifications. Such an ascertainment leads to the formation of a new category.

2.2 RESEARCH QUESTIONS

Built upon fragile legal grounds, the main question revolving around Congo Free State is how one should perceive its legal nature. Was it a State or not? And, if not, then what was it: A common area in which international trade was conducted under the supervision of one ruler, a colony, a protectorate, a private possession, or any different kind? Therefore, the main research question (MRQ) reads as follows:

"What is the legal nature of Congo Free State in the international domain in the Age of New Imperialism (1870-1914)?" **(MRQ - classifying)**

As the MRQ is classifying, it is in need of several sub-questions rendering any meaningful classification possible. In line with the structure of the aforementioned objectives, the following sub-questions (SRQ) can be identified:

(i) *"Who were considered subjects of international law according to 19th-century international legal doctrine and practice?"* **(SRQ1 - descriptive)**

This first sub-question encompasses an inquiry into the dominant theories on the subjects of international law, followed by an analysis of how those theoretical propositions related to reality in the 19th century. Such an inquiry will enable us to assess the legal nature of Congo Free State in light of both a theoretical and practical framework and is therefore of vital importance to the development of the following chapters.

(ii) *"How and when did Congo Free State come into being?"* **(SRQ2 – descriptive and classifying)**

This question may seem a simple description but it is more complex than its façade might suggest. The emergence of Congo Free State demands a narrative on Leopold II's geographical organisations preceding the Congo Free State as its legal predecessors. Without them, there would not be a Congo Free State, or any other construct at all. It also involves an analysis of the dealings of these organisations with other States and their respective acts of recognition, which results in a classification of those acts on the basis of the framework identified under the first sub-question.

(iii) *"What was agreed upon in the Berlin Conference (1884-85) with regard to the Congo basin?"*[22] **(SRQ3 – descriptive and classifying)**

The third sub-question logically flows from the second one. Both are intrinsically interwoven. The second sub-question cannot be answered without due regard to the third

[22] 'Congo basin' is used since this is the terminology the Berlin Conference is most familiar with. It would be anachronistic to use 'Congo Free State' in the analysis of (the sources of) the Berlin Conference, considering that the single state denomination was only generally accepted by the end of that Conference. See HENRIET 2015, p. 210-213.

one (see *supra*, problem statement and research gap).[23] The approach of the second sub-question will therefore also be applied to the third sub-question. This third sub-question will have a filter function inasmuch the analysis of the various acts of recognition at the Berlin Conference as well as the Conference itself will condition the possible classifications of Congo Free State.

2.3 RELEVANCE AND ORIGINALITY

Academic relevance. The academic relevance is evidenced by the gap in the literature. To the present day, an in-dept assessment of the legal nature of Congo Free State and the classificatory approach in particular have been left out of the picture. This research attempts to remedy that omission. Moreover, the way the research is structured might reveal new knowledge on the subject and, hence, put a more than a century old subject into a new light.

Practical relevance. Considering the possibility of an exact classification (or not), this research has its relevance with regard to both cultural organisations, such as museums, and the educational field. This research will enable both to portray a clear legal-historical image of Congo Free State by possibly settling, or at least simplifying, discussions on this legal phenomenon. Hence, a clear and correct portrayal of history has the potentiality to revitalise the necessary debate upon our colonial past, both culturally and educationally.

Societal relevance. Since practice is not abstracted from society in this matter, the same holds true for the societal relevance. Nevertheless, it is indeed recognised that this requires, first and foremost, effective education (in the general sense) upon our colonial past, something which has been lacking so far. The need for an actual change in this regard is confirmed by today's climate.

Originality. The originality of this work lies both in the structure and its approach. The systematics of the structure allow for a thorough analysis of the legal phenomenon under scrutiny, from its very beginning until, at least, the Berlin Conference and its aftermath. The theoretical framework which emerges from Chapter 1 is completely original and has never been used before in relation to Congo Free State. The classificatory approach will enable us to understand Congo Free State within the then existing legal context. It elaborates upon the subjects of international law in the 19th century and role of the agency of recognition therein, subsequently applied to the case of Congo Free State – an extensive discussion of which has been lacking so far. Either way, the position of Congo Free State remains elusive until this very day, so research upon it bears significance in itself.

[23] See also THOMSON 1933, p. 310.

3 RESEARCH METHODOLOGY

3.1 FOCUS

Delineation. All sub-question are specifically designed to answer the MRQ with regard to the legal nature of Congo Free State. Thus, the delineation of the research follows the structure of this research proposal. Important to behold is the fact that not all can be seen and done in a preliminary fashion and that every research truly develops itself in practice. Emerging questions will possibly have to be answered along the way, in light of which adjustments will have to be made if that should prove necessary. Note that the research is, evidently, limited to a specific period in time, since Congo Free State existed only for a brief moment in history. The *terminus a quo* of this historical chapter is set on the (first) Geographical Conference of 1876, convened by Leopold II. It is this Geographical Conference which led to the creation of the first of several geographical organisations of Leopold II: *L'Association Internationale Africaine*.[24] The *terminus a quem* is set on the Berlin Conference of 1884-85 and its immediate aftermath, for reasons which will become evident throughout this thesis.

Feasibility. The scope and aim of this research is feasible for several reasons. First, the KU Leuven has a unique and comprehensive collection of legal-historical sources on this matter, allowing for thorough and profound research in a very accessible way. Second, the digitisation allows one to consult an extensive range of archival materials from around the world online, therefore optimising our legal-historical research (see *infra*). Third, the research has a clear aim: not too broad nor too narrow. It is transparent in the way it presents itself. Every step is needed to understand the whole narrative and it is exactly for that reason the research is designed in this way.

3.2 METHODOLOGY *PER SE*

General remarks. As is clear from the previous sections, the common thread throughout this research is legal history. The MRQ cannot be answered without engaging into history. This research is therefore inherently characterised by an interdisciplinary symbiosis of law and history and will act according to it.

There exists an indispensable link between the type of research objective and its methodological features. [25] As Adams and Griffiths point out, questions go before methods.[26] Only when such questions are in place, a methodology can be tailored to fit the

[24] THOMSON 1933, p. 35-60.

[25] KESTEMONT 2018, p. 4.

[26] ADAMS and GRIFFITHS 2012, p. 279.

bill.[27] Since such questions have been established in the previous pages, the time has come to determine our methodology.

SRG1 – first phase. This sub-question is descriptive in nature. A legal-historical method will be applied to determine the dominant theory (or theories) on the subjects of international law in the 19th century. Evidently, specific attention will be given to the question what was to be considered a State in that timeframe and the role of recognition in the formation thereof. All relevant doctrinal materials dealing with this topic will be analysed. As stated *supra*, the theoretical framework which emerges from this inquiry bears great significance for the development of the following chapters.

SRQ2 – second phase. This phase of research entails a descriptive and classificatory reconstruction of Leopold II's ambition to play chess with the European grandmasters. It focuses on the geographical organisations enabling Leopold II's search for fertile soil on the African continent up until the Berlin Conference. Both their legal existence, their capacity to obtain rights, and their dealings with other States are pivotal to understand the coming into being of Congo Free State. The reconstruction of this narrative has both a active and passive component. Active, thus empirical, inasmuch archival materials were consulted online (primary sources). Passive in the sense that it necessarily relies on the interpretation of legal-historical doctrine (secondary sources).

SRQ3 – third phase. A descriptive and classificatory analysis of the Berlin Conference will be necessary to fully complete the second phase, since the Conference was a fundamental stage in the coming into being of Congo Free State. A legal-historical and teleological interpretation will be used to interpret both the various acts of recognition, the Berlin Conference itself, and the Berlin Act. A teleological interpretation is justified by the simple observation that the recognition by the European Powers was necessary to transform the ambition of Leopold II into reality. Without their recognition, Congo Free State would never have seen the light of day. It is only by the grace of their approval that the Congo Free State could exist.[28] It is therefore essential to understand the nature of their consent, without an *a priori* determination by its denomination.

SRQ4 – fourth phase. The fourth and last phase will involve a legal-historical appraisal from an international law point of view. The legal nature of Congo Free State, as it manifested itself *during and after* the Berlin Conference, will be evaluated in light of the framework identified in the first phase. As is obvious from the methodological explanation of the third phase, the role of recognition in the formation of States will be central to this evaluation. By way of conclusion, the fourth phase will resort to a final classification of Congo Free State.

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[27] SAMUEL 2014, p. 25-26.

[28] See HENRIET 2015, p. 210-213.

CONGO FREE STATE

CHAPTER 1 SUBJECTS OF 19th-CENTURY INTERNATIONAL LAW

Due to the Western monopoly in documenting and steering the history and evolution of international relations and the international legal order in the particular timeframe to be discussed,[29] *19th-century international legal doctrine* will be equated with *Western legal doctrine* throughout this chapter. According to Oduntan, the incredible appropriation by Europeans of the authority to decide on the course of human progress and, in doing so, to arrogate the power to define and recognise, lies at the origin of that monopoly.[30] Therefore, *"Western intellectualism has had the near singular advantage of cultivating the international legal agenda"*,[31] as will become clear in this chapter.

1 THE 19th-CENTURY INTERNATIONAL LEGAL ORDER

In the pre-19th-century period, international law was thought to be truly universal. The universality of international law was based on natural law and applicable to all nations and societies.[32] However, the universalism of the naturalist tradition was overturned by the emergence of positivism in the 19th century. Where natural law was premised on a transcendental morality governing all human activity equally, including the behaviour of

[29] ODUNTAN 2015, p. 34.

[30] *Ibid.,* p. 35.

[31] *Ibid.,* p. 34.

[32] Note, however, that the image of universality in the pre-19th-century period did not come without its own horde of complexities: namely, it was primarily compromised by the threshold of Christianity. Throughout the Middle Ages and the Early Modern Age, it was the non-Christian, or 'infidel', who *"served as a unifying opponent for many thinkers in humanist as well as more strictly theological tradition [...]",* more commonly depicted as *respublica Christiana*. (PITTS 2018, p. 19) Even with regard to Vattel, someone who believed that difference in religion should have had no legal implications and a *"characteristic exponent of an eighteenth-century natural-law universalism"*, PITTS is compelled to conclude that *"we cannot assume that language of 'universal' and 'mankind' in legal treatises such as Vattel's were intended to apply globally."* (*Ibid.,* p. 21-27 and 71-74) This is due to a *"sort of equivocation"* in which 'universal' and 'European' were essentially synonymous. (*Ibid.,* p. 21-22) Nonetheless, the divide between the Christian and the infidel began to fade and created ample space for the occurrence of another divide between the civilised and the barbarous, which became really prominent in the 19th century and where the influence of Christianity was never far away. It is this latter divide which constitutes the essence of this chapter.

States, positivist jurisprudence took an opposite view, namely that of the sovereign State as the bedrock of the whole international legal system. Hence, for positivists, the sovereign State did not only oversee compliance with the law, but the law itself was also nothing more than a product of the sovereign will of those States.[33] To that end, sovereign States could only be bound to those laws to which it had consented, explicitly by way of treaty or implicitly by way of custom. Morality was therefore no longer the highest authority of international law but the State itself. Hence, for positivists, the rules of international law were *"to be discovered, not by the speculative inquiries into the nature of justice or teleology, but by a careful study of the actual behaviour of states and the institutions and laws that those states created."*[34] According to Anghie, this gradual evolution from naturalism to positivism had two catalysts. For one, international jurists sought to overcome the criticism voiced by the English legal theorist, John Austin, who challenged the idea that international law was effectively law. Furthermore, there was an urge to display international law as 'scientific', worthy of respect as an independent discipline.[35] The *Institut de Droit International*, founded in 1873 in Ghent, would become the pinnacle of this pursuit of credibility.

Authors like Lorimer,[36] Westlake,[37] and Wheaton[38] were among the most prominent advocates of this turnaround towards positivism. Wheaton, for example, denied the existence of a universal law of nations which was applicable to all mankind and proclaimed that international law had always been limited to the civilised and Christian people of Europe as well as to those of European origin, an argument which stands in a long and well-established tradition of Eurocentric reasoning.[39] Similarly, Westlake equated international society with European society, wherein norms of international law could emerge if there was a general consensus within the boundaries of European civilisation.[40] The latter is a common feature among proponents of a European international law, who generally identified civilisation with European civilisation.[41] Both Oppenheim[42] and Hall[43] agreed with the two previous authors by substantiating their arguments in the religious and cultural divergence between Europeans and non-Europeans, which ultimately rendered them so intellectually inferior as to be unable to understand international law, let alone

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[33] ANGHIE 1999, p. 10-13.

[34] *Ibid.,* p. 13.

[35] *Ibid.,* p. 10 and 13-17.

[36] See LORIMER 1883, p. 12-13 and 101-102.

[37] See WESTLAKE 1894, p. 129.

[38] See WHEATON 1866, p. 17-18.

[39] See footnote 32.

[40] ORAKHELASHVILI 2006, p. 318.

[41] *Ibid.,* p. 334.

[42] OPPENHEIM 1905, p. 147-149.

[43] HALL 1924, p. 150-151.

apply it. Therefore, as a natural consequence, they could not legitimately be regarded as subjects of international society.[44] As Koskenniemi aptly notices, all of them use a uniform logic of exclusion-inclusion in which cultural arguments are used at their discretion so as to guarantee the superiority of Europe.[45] In doing so, 19th-century international legal doctrine created a twofold world based on what Anghie calls a *"dynamic of difference"* of positive law.[46] Such reasoning gave positivists carte blanche to construct international law in a fashion which fitted them best, *i.e.* justifying the colonial encounter.[47] Accordingly, European international law came *"to cover, though not apply to, the African continent as a quiet companion of imperialistic diplomacy and colonialism",* [48] by virtue of which international law became the *"handmaiden of oppression."* [49] Already in 1973 Alexandrowicz elucidated this conclusion:

> *"The Europeans arriving in Africa, at first brought with them a law of nations based on a natural law ideology which started fading out in the 19th century, giving way to positivism. Positivism discarded some of the fundamental qualities of the classic law of nations, particularly the principle of universality of the Family of Nations irrespective of creed, race, colour and continent (non-discrimination). International law shrank into an Euro-centric system which imposed on extra-European countries its own ideas […] and thus ran on parallel lines with colonialism as a political trend."*[50]

The mere fact that *scholars* felt the need to justify the colonial encounter lies in the evident truth that many scholars at the time were also politicians, seeking legal justifications for their own behaviour.[51]

Now, one may wonder in light of which criteria the European standard of civilisation was to be measured in order to be regarded as a member of the family of civilised nations to which international law applied. In view thereof, contemporary literature agrees that the 19th-century positivist scholars constructed the family of nations around the threshold of sovereignty.[52] But as sovereignty, at the time, was essentially defined as control over territory, positivists were faced with a problem: namely, most African entities fulfilled this

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[44] ORAKHELASHVILI 2006, p. 321.

[45] KOSKENNIEMI 2002, p. 127.

[46] ANGHIE 1999, p. 25.

[47] VAN DER LINDEN 2014, p. 70-71.

[48] ONUMA 2000, p. 50. See also VAN DER LINDEN 2014, p. 77.

[49] ODUNTAN 2015, p. 12.

[50] ALEXANDROWICZ 1973, p. 6.

[51] See ANGHIE 2004, p. 69; VAN DER LINDEN 2014, p. 248 and 251.

[52] See *e.g.* KEENE 2002, p. 109-117; KOSKENNIEMI 2000, p. 129-152; ODUNTAN 2015, p. 33-36; UMOZURIKE 1979, p. 19-22; VAN DER LINDEN 2014, p. 74-75.

criterion.[53] Umozurike argues that Africans indeed did possess sovereignty, but that the significant factor, however, was that they did not possess sufficient military might as the Europeans by which they were thus able to ignore or deny sovereignty of Africans.[54] Oduntan, on his turn, calls the very idea that sovereignty would be limited to Europeans somewhat offensive to reason.[55] To mediate this problem, positivists came up with what van der Linden calls the *"society test".* This artifice test eventually resulted in the question whether or not one was *recognised* as sovereign. In other words, recognition became the main criterion for the applicability of international law, completely at the discretion of European States.[56] By the same token, Anghie, too, writes that the distinction between the civilised and uncivilised was to be made, not in the realm of sovereignty but of society, and that society enabled the jurist to link a legal status to a cultural distinction.[57] Thus, so Anghie argues, positivists asserted that sovereignty and society posed two different tests,[58] and the decisive issue was whether or not a particular entity - even a sovereign - was a full member of international society, *i.e.* was *recognised* as such by Europeans.[59] So even if Africans *de facto* did possess sovereignty, they were denied it *de jure* due to the fact that Europeans believed Africans to be culturally inferior and therefore could not be allowed into the family of civilised nations to which international law applied. In that, Koskenniemi establishes an historical truth when he concludes that sovereignty in the 19th century was nothing more than a gift of European civilisation.[60] Consequently, European States treated Africa as *"empty – subject to no-one's title."*[61] Emptiness, then, did not signify that Africa was devoid of humanity, since European States were evidently well-aware of the presence of Indigenous peoples, but simply meant that they were denied recognition because their Societies were not organised to European standards, which was equated with 'cultural inferiority'.[62] To have a wealthy, complex, and sophisticated societal organisation, such as the Kuba Kingdom, the Ashanti Empire, or the Kingdom of Benin, was clearly not enough; *"a certain type of civilisation was required in which acceptable social, political and religious features played an important defining role. Since these features were essentially those of European society, the concept of statehood and membership of the international community was not easily extended to non-European entities, unless they were modelled*

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[53] VAN DER LINDEN 2014, p. 74; See e.g. LAWRENCE 1909, p. 136.

[54] UMOZURIKE 1979, p. 21. See also ANGHIE 2004, p. 72.

[55] ODUNTAN 2015, p. 34.

[56] VAN DER LINDEN 2014, p. 75; See similarly ANDREWS 1978, p. 417: *"Membership of the family of nations was obtained by recognition – recognition by the existing members and they were dominantly European."*

[57] ANGHIE 1999, p. 28.

[58] Indeed, one can see the intellectual indebtedness of van der Linden in the oeuvre of Anghie.

[59] ANGHIE 1999, p. 28.

[60] See KOSKENNIEMI 2002, p. 98-178.

[61] GRANT 1999, p. 421.

[62] *Ibid.*

on European lines."[63] And so, Africa did not receive the blessing of European civilisation, granted at Europe's own volition, and was therefore open to the self-constructed and much desired European territorial hunt. International law, indeed, came to cover but not apply to the African continent.

2 CIVILISED SOCIETY AND THE LAW OF RECOGNITION

2.1 A THEORY BY EUROPE

As obvious from the previous section, polities not part of or recognised by the family of civilised nations were excluded from international law. This is all the more evidenced by the adage put forward by Westlake: *ubi societas ibi just est ("where there is a society there is law").*[64] He argued that society and law were interdependent: "*when we assert that there is such a thing as international law, we assert that there is a society of states: when we recognise that there is a society of states, we recognise there is international law."*[65] As there was only a *civilised* society, international law only existed within that society. Hence, solely members of that same civilised society were *subjects of international law;* everything and anyone else was in need of their recognition to be regarded as such. Moreover, as European States were both the source and judge of positivist international law and had for that reason belonged to the civilised society since *"time immemorial",* they were not themselves to be questioned or scrutinised.[66] Since Congo Free State was evidently not part of that original society of civilised nations, the real interest of this thesis is in the margins of their appreciation. Therefore, the most accurate follow-up question would be: were there any criteria an existing or newly-formed entity *not belonging to the original civilised society* had to satisfy in order to be given *recognition as a State*, by virtue of which it would become a subject of international law and be granted sovereignty *de jure*?

Well, the answer to that question is in line with the 19th-century positivist views on international law. Crawford encapsulates the effects of positivism on the acceptance of entities as States in the 19th century in a quinquepartite way, which is at once also a brief summary of the previous section:

> *"(1) International law was regarded as the law existing between civilized nations […]; (2) States as such were therefore not necessarily members of the Society of Nations, since recognition, express or implied, solely created their membership and bound them to obey international law […]; (3) Only States,*

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[63] Andrews deliberately uses 'type of civilisation' rather than 'level of civilisation' so as to avoid suggesting a cultural class consciousness, for it is only against one's own cultural experience and principles that the level of civilisation can be measured. ANDREWS 1979, p. 413.

[64] WESTLAKE 1894, p. 2

[65] *Ibid.,* p. 3.

[66] LAWRENCE 1909, p. 84.

> *then, or rather those entities recognized and accepted as States into international society, were bound by international law and were international persons […]; (4) The binding force of international law derived from this process of seeking to be recognized and acceptance […]; (5) Accordingly, how a State became a State was of no importance to traditional international law, which concentrated on recognition as the agency of admission into the 'civilized society' […].*"[67]

This dominant and interrelated view of positivism and recognition on the acceptance of States became later known as the 'constitutive theory' of statehood, as opposed to the 'declaratory theory' which holds that States exist and are subjects of international law as soon as certain conditions are fulfilled, without the necessity of being recognised as such. The latter was the leading theory of late 18th century and early 19th century and became once again the dominant theory of the 20th century.[68] The constitutive theory, however, is paradigmatic of the late 19th century, more specifically the Age of New Imperialism (1870-1914). It is a product of its environment inasmuch as it embodies the basic premise of positivism: international law as an expression of State voluntarism.[69] Therefore, one could not be expected to be bound by international law with regard to an entity if it had not recognised that entity as a State. It is only by virtue of its recognition, which is an exclusive attribute of existing States, that the sovereign State accepts the binding nature of international law *vis-à-vis* another entity.[70] Hence, recognition endows upon a recognised State rights and duties, thereby creating its international personality as a subject of international law.[71] As long as no such recognition was granted, the non-recognised entity was not bound by international law, nor was the family of civilised nations bound by it in their behaviour towards them, as evidenced by their attitude towards and actions on the African continent.[72] The consent of States was therefore needed in a double capacity: with regard to the law between them and with regard to the subjects thereof.

Note, however, that the constitutive theory does not deny the *existence* of an entity as a State prior to its recognition. *Quod non*. It only contends that the particular entity is no *subject of international law* prior to its recognition. Furthermore, constitutivists believe that the *formation* of States is factual and does not require any specification, while the *recognition* thereof is legal and therefore necessary.[73] Oppenheim, probably the best-

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[67] CRAWFORD 2006, p. 15-16.

[68] See VAN HULLE 2014, p. 292-295 and 309-316.

[69] See also CHEN 1951, p. 18: *"This wedlock between positivism and 'constitutivism' dates back to Hegel, who may be regarded as the spiritual father of both doctrines, and it is no surprise that they should go hand in hand with each other."*

[70] See RAIC 2002, p. 29-30

[71] *Ibid.*

[72] CRAWFORD 2006, p. 15.

[73] See also RAIC 2002, p. 30-31.

known and most influential advocate of the constitutive theory, epitomises the foregoing as follows:

> *"There is no doubt that statehood itself is independent of recognition. International Law does not say that a State is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes and International Person and a subject of International Law."*[74]

> *"The formation of a new State is […] a matter of fact and not of law. It is through recognition, which is a matter of law, that such a new State become subject to International Law. As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory is acquired before the recognition."*[75]

According to the dominant viewpoint of the 19th century, there were thus no rules determining when recognition as a State was to be granted; it was a matter entirely within the discretion of existing States.[76] That discretion even went so far as to enable them to recognise certain entities as States which were clearly no States in the ordinary understanding of it, by which is meant the common characteristics of European States.[77] Upon examination, the only constant to be found in the agency of recognition is that it was either granted to an entity mirroring European civilisation in terms of development or to individuals, originating from one of the members of civilised society, who are in the process of constructing a form of government or State in formerly uncivilised territory. This is indeed confirmed by Lawrence, who argued that admission into civilised society by way of recognition could take place in three instances, namely when: (i) entities accounted as barbarous reached or approximated European civilisation; (ii) States were formed by civilised men in uncivilised territory; and (iii) States were formed as a consequence of a successful revolt.[78] However, rather than theoretical propositions, these instances are nothing more than the codification of the extent by which European States had until then exercised their discretion. Turkey, Persia, Siam, China, and Japan had been accorded recognition due to their significant societal development; Dutch settlers had effectively organised themselves in a rudimentary form of civilised government and successfully established the South African Republic (also known as the Transvaal Republic), as of 1852

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[74] OPPENHEIM 1905, p. 110.

[75] *Ibid.,* p. 264.

[76] CRAWFORD 2006, p. 5.

[77] Those common characteristics were half a century later codified in the Montevideo Convention (1933), which once again adheres to the declaratory theory of statehood. The elements, as laid down in the Convention, are: 1) a defined territory; 2) a permanent population; 3) a government; and 4) the capacity to enter into relations with other States. These were also the generally accepted criteria of statehood within the family of civilised nations in the Age of New Imperialism. Outside that family, however, the agency recognition determined what was to be considered a State – as this section explains.

[78] LAWRENCE 1909, p. 84-87.

treated as an independent State by Britain; and, the United States of America and Belgium had victoriously revolted against their motherlands (Britain and the United Kingdom of the Netherlands respectively), both of which were considered to be fully-fledged members of the family of civilised nations.[79] Though, recognition by the members was not limited to these instances and their illustrations; it was no marginal but an absolute discretion. There was truly no restriction to the colonial imagination, which served their imperial interests properly. The unrestricted nature of the institute of recognition is perhaps best exemplified by Lorimer:

> *"[Recognition] is an agency, however, which must be called into action afresh on each separate occasion, and which demands such delicate adjustment of opinions which really and of interests which apparently conflict, that its regular action is impossible. […] Each State is to say, not only whether or not a given community fulfils the requirements of international existence, but is, moreover, left to determine what these requirements are. It can thus twist both facts and law to the gratification of its passions or its prejudices."*[80]

Recognition, then, meant that the body politic or (group of) individual(s) of European descent would henceforth be treated accordingly, *viz*. as a sovereign State. This signified that the entity as of that moment was independent from any earthly superior.[81] As a recognised State, it enjoyed all the rights and benefits accompanying membership of civilised society, but was also bound to abide by the international law of that society.

2.2 A PRACTICE IN AFRICA

According to Wheaton, the recognition of a State ultimately boiled down to the recognition of the *external sovereignty* of an entity. This point of view is probably the most nuanced version of the agency of recognition, especially in the Age of New Imperialism, and allows one to understand the complexity with which the colonial enterprise was realised. While arguing that African Societies were no subjects of international law and that they had therefore no obligations whatsoever in relation to those Societies, European States did conclude treaties with African Chieftaincies in order to cede sovereign rights over their territory. Moreover, as we have already seen, the conclusion of treaties formed the *main mode* of acquisition of African territory, and not conquest.[82] One cannot, of course, obtain sovereign rights from a body politic which supposedly would be devoid of any sovereignty. Wheaton opined that *internal sovereignty* was that which was inherent in the people of any State, independent of recognition by other States. Thus, the establishment of internal

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[79] *Ibid.*

[80] LORIMER 1883, p. 106-107.

[81] LAWRENCE 1909, p. 55-57.

[82] SHAW 1986, p. 46.

sovereignty *de jure* required no more than the mere existence of a State *de facto*.[83] He continued his reasoning:

> *"So long, indeed, as the new State confines its actions to its own citizens and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society."*[84]

If applied to the treaty-practice of European States on the African continent, it would imply that European States, at least to a minimal extent, acknowledged the internal sovereignty of African Societies with regard to the territory they occupied, for the conclusion of a cessionary treaty presupposes such an acknowledgement. The African Chief (or Council of Chiefs) was the supreme authority, both with regard to its people and to its territory.[85] It had *internal sovereignty* by reason of its mere existence as an organised Society. However, outside their own territory African Societies had no standing at all. They were expressly denied external sovereignty, *i.e.* their status and treatment *as a State* in the international law of the civilised society. Thus, African Societies existed as a matter of fact (internal sovereignty, *de facto* existence) but not as a matter of law (external sovereignty, *de jure* existence). Wheaton probably never imagined his theory being applied to African Societies, yet the application thereof unto those Societies is possibly the only sensical explanation which can be given to the treaty-practice in Africa while professing its emptiness.[86] Denying the external sovereignty of African societies was one thing, but negating their internal sovereignty would have constituted a denial of reality altogether. European States simply could not ignore the presence of African peoples and the authority they exercised over their lands. Occupation as a method of obtaining title to territory was therefore only an option with regard to uninhabited territory or those territories in which, despite the presence of individuals of African descent, no real Society had been developed.[87] Though, where *"the inhabitants exhibit collective political activity which, although of a crude or rudimentary form, possess the elements of permanence"*, the acquisition of the territory over which that political activity was exercised could only be realised by either cession, conquest, or prescription.[88] On October 16, 1975 the International Court of Justice reached the following

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[83] WHEATON 1880, p. 29.

[84] *Ibid*., p. 31.

[85] The role of the African Chief (or Council of Chiefs) was much more complex than commonly understood. See Tignor's article *Colonial Chiefs in Chiefless Societies* for an elaborate discussion thereof.

[86] This distinction between internal and external sovereignty was further elaborated upon by Rivier, Pradier-Fodéré, and Bonfils. See VAN HULLE 2014, p. 318-319.

[87] SHAW 1986, p. 37.

[88] LINDLEY cited in *ibid.,* p. 38.

conclusion in its *Western Sahara Advisory Opinion* regarding the same matter – a conclusion which can be extrapolated to the whole of Africa:

> *"Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius."*[89]

This is also in line with Andrews' analysis of 19th-century European treaty-practice in Africa, who partly draws his inspiration from the *Western Sahara Advisory Opinion*. While questioning the validity of such treaties, he holds that African Chiefs had either *"a sovereign title and sufficient personality"* to cede this in international law or the territory was occupied as *terra nullius*.[90] Moreover, state practice clearly demonstrated that annexation was the exception rather than the rule and, thus, that European Powers did not really think of Africa as *terra nullius*.[91] Hence, he reasons, the logical consequence of the above is that African Societies must have had some degree of personality in international law and that it might suggest that *"a two-tier level of international personality"* prevailed in the 19th century, which corresponds with Oppenheim's constatation that non-recognised States become *"through the treaty of cession in some respects a member of the Family of Nations"* – the latter essentially conceding to the principle of *nemo plus juris transferre potest quam ipse habet*.[92] In that way, it suited European States to engage in treaty relations with African Chiefs as it provided their territorial claims with the pretence of legitimacy over rival claims by other members of the civilised society.[93]

Realistically, however, we should not give too much weight to the acknowledgement of the internal sovereignty of African peoples by European States. In light of the treaty-practice, internal sovereignty meant, in all probability, nothing more than the recognition of the right of African Chiefs to confer upon European States title to their lands, since a wider understanding of internal sovereignty would no longer serve the interests of the civilised

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[89] October 16, 1975 – Western Sahara, Advisory Opinion, *I.C.J. Reports* 1975, para. 80.

[90] ANDREWS 1978, p. 419.

[91] *Ibid.*

[92] *Ibid.*; OPPENHEIM 1905, p. 269 and 272.

[93] ANDREWS 1978, p. 419.

society. This is indeed confirmed by Kasson, plenipotentiary of the United States of America to the Berlin Conference of 1884-85, who stated, in his observations to the *effective occupation*-doctrine (see *infra*) laid down in the General Act, that *"modern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territories."*[94] Even so, the explicit inclusion of such a right in the General Act would have been a bridge too far, for it would have defeated the very purpose of the Conference itself, namely to settle territorial disputes on the African continent and not to complicate matters further by granting rights which could potentially undermine their territorial claims. It is the centrality and significance of this Conference in relation to the actual existence of Congo Free State we turn to in the next chapter, after discussing the origins of the latter, itself a complex product of the labyrinthine practice described above.

2.3 THEORY-PRACTICE CONGRUENCE

Yet before moving on to the next chapter, an important point is left to be made – a point of great significance with regard to international status and dealings of Leopold's geographical societies in Africa *before, at, and after* the Berlin Conference. Oppenheim's theory on the modes of acquiring State territory is quintessential in this respect, which essentially is a codification of colonial practices and therefore a great tool to analyse the case of Congo Free State. He once again stresses the fact that recognised States are the sole subjects of international law and that, as far as the law of civilised society is concerned, only States can acquire State territory. However, he continues, this must not be confounded with *"first, the foundation of a new State, and, secondly, the acquisition of such territory and sovereignty over it by private individuals and corporations as lies outside the dominion of the Law of Nations."*[95] Since private individuals and corporations are obviously no States and therefore no subjects of international law, all acquisitions of native territory made on their behalf takes place outside the realm of international law. Though,

> *"if an individual or corporation which has made the acquisition requires protection by the Law of Nations, they must either declare a new State to be in existence and ask for its recognition by the Powers […] or they must ask a member of the Family of Nations to acknowledge the acquisition as made on its behalf."*[96]

This theory implies that if such an acknowledgement were granted before a new State was declared and recognised, those private individuals or corporations would assume what could be called an 'intermediate status' in international law – comparable to Andrews' *"two-tier level of international personality"* concerning African Societies. This intermediate status also corresponds to Lawrence's observation that individuals and corporations *as owners of property* may under

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[94] Kasson cited in WESTLAKE 1894, p. 138.

[95] OPPENHEIM 1905, p. 263-264.

[96] *Ibid.,* p. 265.

certain circumstances come under the rules of international law.[97] They are at that point in time evidently no State nor are they recognised as such but nonetheless do have certain rights of property or possession under the law of civilised society in their relation to the acknowledging State.

This is once again law accommodating the political reality of colonial practices, resulting in legal hybrids. Moreover, such an acknowledgment could have political consequences for other members of the civilised society as it implicates the sovereign judgment of the acknowledging State, which can, in turn, have political and legal consequences when other Powers decide to either follow suit or steer towards diplomatic collision. Withal, the absolute discretion in the agency of recognition enjoyed by sovereign States can also lead to another unfortunate consequence: *"that an entity might simultaneously be a State to some and a non-State to others."*[98]

All this begs the question: *who, in light of so much fragmented discretion, bestowed upon an entity the legitimate claim to a definitive status? And, if there was one, what was its status relative to the other States?*

Van Hulle has written an important work on Britain's influence on the development of the doctrine of recognition in international law and how it came to be increasingly embedded into a positivist and constitutivist approach.[99] Britain introduced three practical modes of recognition in the early 19th century (in a specific context relating to the Spanish American Republics):[100] 1) *de facto* recognition; 2) diplomatic recognition; and 3) *de jure* recognition.[101] *De facto* recognition was to be understood as a commercial recognition, resulting in the establishment of commercial relations (possibly after the adaptation of domestic legislation), the sending of commercial agents to protect or promote its mercantile interests in the particular region, or even the sending of such agents with consular powers.[102] *De facto* recognition ended where diplomatic recognition began: with the official exchange of plenipotentiaries and the conclusion of treaties / conventions. *De jure* recognition was a prerogative of the motherland (from which the colony broke loose).[103]

The first two modes were originally styled as being merely political and without legal consequences whereas the last mode was the only one which fell within the law of

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[97] LAWRENCE 1909, p. 79 and 88.

[98] VAN HULLE 2014, p. 285.

[99] *Ibid.,* p. 284.

[100] See VAN HULLE 2014 for an extensive discussion of this context.

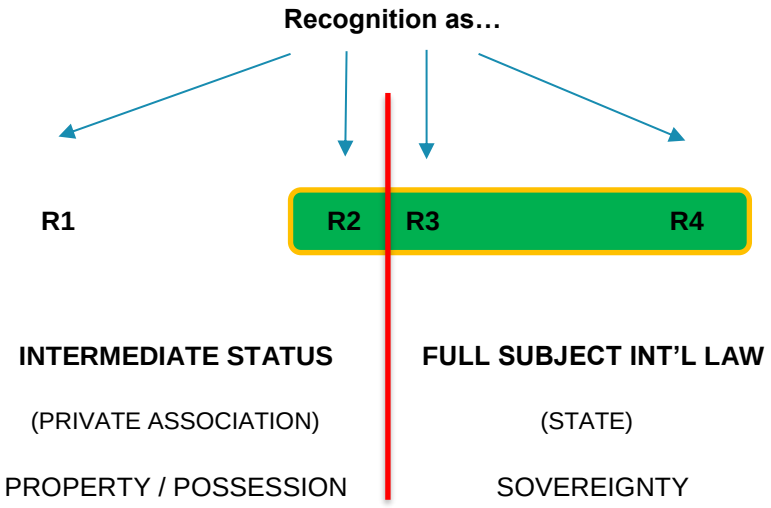
[101] Britain's doctrine of recognition was developed in 1822 by Foreign Secretary Castlereagh and further elaborated upon by his successor Canning.

[102] VAN HULLE 2014, p. 294-295.

[103] *Ibid.,* p. 295.

nations.[104] However, over time, the doctrine of recognition became progressively appropriated into positivist and constitutivist views on international law, reaching its zenith in the last quarter of the 19th century – the Age of New Imperialism. Recognition went from merely a matter of policy to really constituting new States relative to those granting their recognition – as we have already seen.[105] Though, the different modes did stand the test of time and remained as apparent as ever in colonial practices – of which the case of Congo Free State will prove to be the very evidence to sustain such a claim. This holds true for *de jure* recognition as well, which retained its relevance even outside the context for which it was introduced.

When one combines the constitutivist context with Oppenheim's theory and the three modes of recognition, one gets (schematically) the following symbiosis:



There are thus historically four modes of recognition which emerge from a careful combination of complementary theories and which can be properly applied to the practice in Africa in the particular timeframe at hand:

- Stage 1 – **R1**: acknowledgement of certain rights;
- Stage 2 – **R2**: *de facto* recognition (as an advanced form of acknowledgement);
- Stage 3 – **R3**: diplomatic recognition;
- Stage 4 – **R4**: *de jure* recognition.

The intermediate status (embodied as a private association) is a result of the acknowledgement (R1) or *de facto* recognition (R2) of rights of property or possession. A full subject of international law (embodied as a State) is the result of diplomatic or *de jure* recognition, both of which go hand-in-hand with the validation of (rights of) sovereignty.

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[104] *Ibid*.

[105] See VAN HULLE 2014 for an illuminating discussion of this evolution.

R1 is distinct from R2, R3, and R4 in that there is no formal act of recognition (distinction symbolised by the green field). The formal act can take the form of a declaration, the performance of an element constituting a specific mode of recognition, or (ideally) a combination of both.

R1, R2, and R3 are modes of recognition which third States can adopt – R4 is reserved to the motherland.

R3 and R4 are on par in legal consequences. R4 is merely called *'de jure'* recognition since there will in all probability be a legal obstacle on the side of the motherland (which is not present in its relation to third States) preventing the wanting entity from becoming a full subject of international law in relation to the motherland (and potentially even in relation to third States). In recognising the wanting entity the motherland removes that legal obstacle (insofar as it is not to be interpreted as R1 or R2). That obstacle might either be the sovereignty of the motherland itself (as with the United States of America, the Spanish American Republics, and Belgium) or a constitutional norm applicable to one of its subjects who simultaneously constitutes the wanting entity (as with the Congo Free State (see *infra*)) – it is interesting to juxtapose these obstacles with Lawrence's three instances of acceptance into the family of nations as discussed above. There will always be a potential *de jure* recognition unless the people constituting the wanting entity originate from outside the society of civilised nations.

Then, to answer the question 'who bestowed upon an entity the legitimate claim to a definitive status?' the response must be: there is no one State in possession of such a power given the absolute discretion in the agency of recognition – paradigmatic of the nature of international law itself, without central authority. Yet, it is equally true that the motherland, by removing the legal barrier (R4), has unlike any other State the capacity to 'legitimise' its status.[106] Still, in every relation the status is defined by the mode of recognition applied by the States at hand.

This scheme provides a lens through which the particular history of the Congo Free State can be perceived as well as the more general history of (legal) colonialism. It is the result of a systematic analysis of the agency of recognition in all its relevant components and is presented in an orderly and coherent manner. It is essentially a tool to create order in the discretionary chaos and to make sense of it all.

[106] See VAN HULLE 2014.

CHAPTER 2 CONGO FREE STATE AND ITS GENESIS

This chapter will evolve in two stages. In the first stage, the existence and operations of Leopold's geographical societies will be narrated. In the second stage, the complexities surrounding their legal standing and actions in 19th-century international law will be developed.

1 THE WHITE MAN'S BURDEN[107]

It were the intricacies of the practice described in Chapter 1 of which King Leopold II became both apprentice and master. While recognising that his colonial ambitions have prior origins,[108] Leopold's road to absolute mastery of imperial politics only really took off in 1876 when he convened his first Geographical Conference. On September 12, the most well-known geographers, scientists, and wealthy philanthropists from Germany, Austria, Belgium, France, Britain, Italy, and Russia gathered in Brussels for a three-day conference to discuss new discoveries in and civilisation of Africa. Leopold warmly welcomed the foreign delegations and made sure in his opening statement he was not to be suspected of any self-interest or greed:

> *"To open to civilization the only part of our globe which it has not yet penetrated, to pierce the darkness which hangs over entire peoples, is, I dare say, a crusade worthy of this century of progress. […] It seemed to me that Belgium, a centrally located and neutral country, would be a suitable place for such a meeting. […] Need I say that in bringing you to Brussels I was guided by no egotism? No, gentlemen, Belgium may be a small country, but she is happy and satisfied with her fate; I have no other ambition than to serve her well."*[109]

After three days of deliberations and discussions, the following resolution was adopted concerning the system of organisation:

> *"1. There shall be established an international commission of exploration and civilisation of Central Africa, and national committees which shall keep themselves in communication with the commission with the view of centralising, as far as possible, the efforts made by their fellow-countrymen,*

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[107] *The White Man's Burden* is a poem by Rudyard Kipling in which he professes that the 'white race' is burdened with the moral duty of civilising the non-white world through colonisation. It is a typical example of Victorian imperial poetry.

[108] See HOCHSCHILD 1999, p. 35-40. Before his eyes befell on Central Africa, Leopold considered parts of Argentina and Brazil, Formosa, Borneo, etc.

[109] King Leopold II cited in HOCHSCHILD 1999 , p. 44-45.

and to facilitate, by their co-operation, the execution of the resolutions of the commission.

[…]

6. The central committee, after having drawn up its regulations, shall make it its duty to direct by means of an executive committee the enterprises and operations aiming at the fulfilment of the object of the association and to administer the funds supplied by government, by national committees and by individuals."[110]

In accordance with this resolution, a private association was founded, presided by the King himself as its first chairman, to achieve the goals set forth by the Conference – the *Association Internationale Africaine / International African Association*. The primary 'object of the association' was the establishment "*as bases for these operations [i.e. exploration and civilisation] a number of scientific and relief stations, both on the coasts of Africa, and in the interior of the continent."*[111] At the end of the Conference as well as in the years to come, Leopold was hailed as a great philanthropist and statesman – someone who was willing to invest his personal fortune for the advancement of Africa and was therefore revered throughout Europe. History, however, would turn out otherwise. As will become clear, deception lies at the very root of Leopold's modus operandi.[112] He succeeded in creating an ingenious smokescreen of philanthropy around his actual ambitions as he realised that only with such a motive the Belgian people and the European Powers would grant him the liberty to be active on African soil. Those ambitions were revealed years earlier when he gifted then Belgian minister of finance Frère-Orban, a fierce critic of colonial practices, a relic of the Acropolis with the legendary inscription: *"Il faut à la Belgique une colonie."*[113]

One year later, the Association re-elected Leopold as chairman in its first and last meeting and adopted a dark blue flag with a golden star in the middle, distinct from any other nation's flag to emphasise its unique and international character (see *Annex I*); it represents the light (golden star signifying Europe's civilisation) which the Association will bring into the Dark Continent (dark blue background signifying Africa's backwardness),[114] plagued by the Arab slave trade and inferior development. This flag would later also become the official flag of Congo Free State. Expeditions into Africa with a view of establishing stations began at the end of that same year under the direction of the Association.[115] Those expeditions were, however, not as successful as Leopold had hoped. Having read carefully the successes of Stanley's explorations in Africa, Leopold was convinced that he was the right

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[110] Resolution cited in BANNING 1877, p. 156-157.

[111] BANNING 1877, p. 155.

[112] See Hochschild's *King Leopold's Ghost* for a selective biographical narrative on King Leopold II in relation to his colonial ambitions.

[113] HOCHSCHILD 1999, p. 38.

[114] *Ibid.,* p. 65.

[115] SALMON 1988, p. 149.

man to carry out his mission. Upon Stanley's return to Europe, Leopold wrote to the Belgian minister in London:

> *"1. I would like to see Stanley as soon as he has been fêted in London. 2. If Stanley appeals to me, I shall provide him with money necessary for him to explore fully the Congo and its tributaries, and to establish stations there. 3. According to circumstances, I will endeavour to transform these stations into Belgian settlements, either afloat or on land, which would belong to us. I believe that if I commission Stanley to take possession in my name of any given place in Africa, the English would stop me… I am therefore thinking in terms of entrusting him a purely exploratory mission which will offend no-one and will provide us with stations, staffed and equipped, which we will put to good use once they have got used, both in Europe and Africa, to our being in on the Congo."*[116]

Stanley accepted Leopold's invitation after having failed to convince the British government of annexing the Congo. Two years after the Geographical Conference, on 25 November 1878, Leopold established the *Comité d'Études du Haut-Congo / Committee for Studies of the Upper Congo* to circumvent any suspicion of his real ambitions. This society, funded by an international group of bankers, was created with the sole purpose of financing Stanley's expeditions into Central Africa, whose task it was to set up commercial stations under the guise of 'exploration'.[117] The *Comité d'Études* was officially dissolved one year later. Nonetheless, Leopold kept financing Stanley's expeditions in the name of the *Comité d'Études* as the exclusive administrator of that society.[118]

The letter above summarises Leopold's whole *"African design"* and is eventually also the means which will lead to the creation of Congo Free State.[119] Truth be told, Leopold did not, *in first instance*, envisage establishing Congo Free State in Central Africa in the way it did. It is only by circumstance that such was the eventual outcome. When he imagined his glorious 'colony', it was primarily construed as a trade monopoly in a vast area of land, ideally with an enormous wealth of natural resources.[120] However, due to the rapid advancement of the French and the Portuguese in Central Africa, Leopold had to switch to another strategy in order to safeguard his ambitions, *i.e.* that of ceding sovereignty so as to exclude any other rival claim to the same territory. Namely, the French ratified the Brazza-Makoko Treaty in 1882 covering territory near the area on which Leopold had set his eyes and this sparked a watershed in Leopold's tactics as he realised that his enterprise, of a commercial nature but hidden behind the pretence of philanthropy, would not be able to defend itself against political claims of territorial sovereignty.[121] Stengers,

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[116] King Leopold II cited in EMERSON 1979, p. 85.

[117] STENGERS 1988, p. 229.

[118] SALMON 1988, p. 151.

[119] EMERSON 1979, p. 85.

[120] STENGERS 1988, 238-239.

[121] EMERSON 1979, p. 98; STENGERS 1988, p. 239.

reading into the mind of Leopold, essentialises his manoeuvre in one phrase: *"The only way of stopping the expansion of French sovereignty was to oppose it through the prior rights of another sovereign organization."*[122] He therefore ordered Stanley *"to place successively under the suzerainty of the Comité […] all the chiefs from the mouth of the Congo to the Stanley Falls"* and insisted that the treaties *"must be as brief as possible and must grant us everything."*[123] Hence, as of 1882, he instructed Stanley to conclude[124] cessionary treaties with African Chiefs conferring rights of sovereignty rather than mere rights of commercial monopoly – a transition from commercial to political treaties (in which rights of sovereignty and commercial monopoly were often combined).[125]

Yet Leopold had made it abundantly clear in the past that he had no political motives so he evidently had to legitimise the conclusion of political treaties. He therefore pledged to provide free trade in the Congo basin (as opposed to his trade monopolies previously sought in all secrecy) and *"to make it possible to open up the Congo basin and to guarantee unimpeded commerce to all countries, the king had to control the territory in question."*[126] To that end, Leopold created the *Association Internationale du Congo / International Association of the Congo*, financed and directed by the King himself.[127] The creation of the Congo Association, externally the successor of the *Comité d'Études* but internally essentially a continuation thereof,[128] provided Leopold two particular advantages: *"D'une part, elle précise mieux le cadre géographique des intérêts de l'Association: le Congo, ce qui peut rassurer les puissances, d'autre part, elle réintroduit le simulacre commode d'internationalité pour ne pas inquiéter les Belges [who viewed their neutrality as inviolable]."*[129] However, according to Hochschild, it had also another benefit: the International Association of the Congo *"was calculated to sound confusingly similar to the moribund 'philanthropic' International African Association"* so as to be associated with the latter's cause though distinct enough to serve as a political entity.[130] Stanley, thus, had to secure rights of sovereignty in the Congo basin in favour of the Congo Association – all the while he was still under contract with the officially dissolved but still operating *Comité d'Études,* which certainly kept instructing him until January 1884.[131] Consequently, Leopold

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[122] STENGERS 1988*,* p. 239.

[123] King Leopold II to Stanley cited in HOCHSCHILD 1999, p. 70-71.

[124] Magalhaes already wrote in 1884 that Leopold's agents did whatever it took to conclude those treaties, even the threat of violence when faced with unwilling Africans. See MAGALHAES 1884, p. 19.

[125] STENGERS 1988, p. 239.

[126] EMERSON 1979, p. 98.

[127] *Ibid.*

[128] See THOMSON 1933, p. 89-90.

[129] SALMON 1988, p. 152.

[130] HOCHSCHILD 1999, p. 65.

[131] SALMON 1988, p. 151.

had Stanley working in a double capacity: essentially funded by the *Comité d'Études* but tirelessly labouring for the political gain of the Congo Association.

To obfuscate things even further, all three organisations used the same flag and, by the time Stanley and his companions were done in 1885, it appears that around 400 treaties were concluded in the name of the all three of them – the International African Association, the *Comité d'Études*, and the International Congo Association. Nonetheless, it is the latter which eventually will acquire recognition via numerous treaties concluded with the European Powers.[132] Be that as it may, Leopold first had to figure out what exactly he was claiming by concluding such treaties and, hence, acquiring rights of sovereignty. Since his change in approach from commercial to political treaties, Leopold's vision on the Congo basin quickly evolved:

> *"Within the space of little more than a year he rather rapidly enhanced his claims. In November 1882 he demanded recognition of his 'free towns' (his commercial stations created in the Congo), and by February 1883 he was requesting 'free stations and territories'. In November 1883 he was talking about the 'free states of the Congo', only to wind up by finally claiming 'the Free State of the Congo' in January 1884."*[133]

Of course, Leopold did not make such claims publicly. He only revealed his real intentions to his confidants and monitored their political correspondence closely. Leopold always acted with great secrecy to avoid offending one of the European Powers.

What, then, to make of this of these geographical societies in legal terms? Salmon writes of the *International African Association*: *"Il s'agit d'une institution purement privée. Elle n'a aucun statut de droit public. C'est une association de fait, sans statut juridique précis, en Belgique ou ailleurs."* This, indeed, seems to be the correct analysis since the Belgian legislator did not introduce legal personality for philanthropic and scientific associations until 1919.[134] That constatation holds true for the *Comité d'Études* and the *Congo Association* as well; they lacked the same legal standing in Belgian law. Salmon therefore argues that *"les associations 'internationales' du XIXe siècle étaient donc des associations de fait, fondées sur l'article 20 de la Constitution [i.e. freedom of association], de pur droit privé et sans personnalité juridique."*[135] Likewise, Reeves holds that the Congo Association remained 'international', by which he means without legal status in Belgium, to circumvent the restrictions of the Belgian Constitution.[136] Moreover, the Congo Association was never 'founded' in the way the previous two were; it was merely mentioned in Leopold's private correspondence and then got a life of its own through the conclusion of treaties by Stanley in its name. The statutes of the Congo Association have never even been found, making

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[132] *Ibid.,* p. 153 and 156.

[133] STENGERS 1988, p. 239.

[134] 25 October 1919 – *Loi tendant à accorder la personification civile aux associations internationals à but scientifique (Moniteur Belge du 5 octobre 1919)*, Pasinomie 1919, p. 161-163.

[135] SALMON 1988, p. 152.

[136] REEVES 1909, p. 105-106.

most historians doubt whether it ever had written statutes.[137] Stengers concurs insofar as he notes that the Congo Association was *"a purely fictitious organization. It was merely a label behind which there was no one but Leopold II."*[138] The existence of all three societies, especially the Congo Association, is perhaps best captured by the following statement by Vermeersch: *"Au fond, le nom ne faisait rien. Il designait toujours le même pensée, le même volontée creatrice."*[139]

Moreover, it is important to bear in mind that acquisitions of territory and sovereignty over it by private individuals or corporations, such as Leopold's geographical societies, took place outside the realm of international law as long as no member of the civilised society had acknowledged or recognised the transfer of those rights. Thus, in the absence of such an acknowledgement or recognition, those private individuals and corporations operated in a legal vacuum as far as the law of civilised society was concerned (see *supra*). So all the cessionary treaties concluded by Stanley on Leopold's behalf *before* any acknowledgment or recognition only existed as matter of fact but not of law. Besides, even if a European State decided to acknowledge or recognise certain claims, it could still *"twist both law and facts to the gratification of its passions and its prejudices"* – to cite Lorimer again.[140] This implies that it essentially did not matter what Leopold would claim on the basis of his treaties with African Chiefs; his claims would only be what he claimed they be if they were acknowledged or recognised as such.

2 ALL THE KING'S MEN

2.1 TRAVERS TWISS AND *THE INSTITUT DE DROIT INTERNATIONAL*

The trouble with these societies did not end with their legal personality and, hence, their legitimate existence. One of the major issues was whether such private associations *could* acquire sovereign rights over African territory. As we have seen, (external) sovereignty was an exclusive attribute of the recognised State. Though, it is indeed also undeniably true that, at the time, *chartered* companies enjoyed sovereign privileges (such as the right to exploit, administer, and provide justice in designated territories) – often unjustly assimilated with sovereignty itself – comparable to those of a State. Yet, those companies were no private associations; they operated by virtue of royal assent and to the benefit of the State.

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[137] SALMON 1988, p. 152. Not even the *Recueil Usuel de la Législation de l'État Indépendent du Congo* can provide one with necessary information. Its contribution regarding the statutes of both the *Comité d'Études* and the Congo Association is limited to: *"Statuts non publiés."* See RECUEIL USUEL 1903, p 4.

[138] STENGERS 1988, p. 230.

[139] VERMEERSCH 1906, p. 12.

[140] LORIMER 1883, p. 106-107.

It was the State itself which was both the origin and finality of sovereignty and chartered companies merely acted as agents of the State.[141] That is how Britain, France, Germany, and The Netherlands accrued considerable portions of their colonial empires.[142] Leopold's geographical societies, however, were nothing of the kind and can therefore not be equated nor compared to chartered companies, especially not to those of the 17th and 18th century. When Leopold engaged and invested in his African endeavours, he did not act as King of the Belgians but in a private capacity.[143] That was also the official standpoint of the Belgian government; *"Le caractère privé du Comité fut souligné par le Gouvernement belge lorsque le Gouvernement portugais se plaignit auprès de lui des activités du [Comité d'Études] dans la région de Vivi."*[144] Stengers, too, is of the opinion that Leopold acted in a private manner, though capitalised on his position as sovereign. The following passage by Stengers clarifies the government's take on Leopold's course of action and how he manoeuvred his constitutional limbo:

> *"There was also a sort of paradoxical situation which is worth emphasizing: Leopold II was able to derive considerable advantage from his position as sovereign, but he did not suffer any of the handicaps which could have resulted from the way the Belgian constitution defined the king's powers. While it was the king of the Belgians who appeared to the public as the creator of the Congo, legally speaking he did not act as king, but as a private individual. As far as the Belgian government was concerned, what Leopold II did in Africa he only did as a private entrepreneur; thus the government did not need to get mixed up in it. In fact, with a few exceptions, the king did not regularly inform his ministers about the development of his undertaking. […] As king of the Belgians Leopold II was bound by constitutional rules which he scrupulously adhered to. […] In Belgium itself he could not even appoint the director of a music school without the agreement of the minister in charge. But*

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[141] Lindley:

- With regard to the chartered companies of the 17th and 18th century: *"In all cases the ultimate sovereignty rested with the Crown, and the Crown or Parliament possessed the power to withdraw the charter and assume directly the government of the Companies' territory. […] So far as the Companies of the first period were concerned, we may say, then, that the enterprise always had its national aspect. Any territory acquired by the Company was considered to accrue to its State. There does not appear to have been any case in which a Company claimed to be an independent sovereign body, and when it was exercising or acquiring sovereign rights it was acting as the delegate or agent of its State."* LINDLEY 1926, p. 99.

- With regard to the chartered companies of the 19th century: *"With regard to these later Companies, we therefore come to the same conclusion that we reached in respect of the Companies of the earlier period, namely, that they were not independent sovereigns, and that, when they acquired or exercised rights of sovereignty, at all events rights of external sovereignty, they were acting as agents for the State under whose charter they existed."* LINDLEY 1926, p. 108.

[142] SALMON 1988, p. 157-158.

[143] See e.g. FITZMAURICE 2014, p. 277; SALMON 1988, p. 149; STENGERS 1988, p. 232.

[144] SALMON 1988, p. 151.

at the same time he was able to create an empire without even speaking to his ministers."[145]

So in no way did Leopold's activities represent the Belgian State. Nonetheless, due to his position as sovereign, the King did receive his fair share of support from influential figures within the government – the most prominent of which were Banning and Lambermont, director-general of the Ministry of Foreign Affairs *resp.* secretary-general at the same Ministry and Minister of State, who assisted him from the Geographical Conference onwards to the Berlin Conference and beyond in defending his 'private' interests in Africa.[146] In addition to diplomatic support, Leopold also sought legal validation for the legitimacy of his enterprise – recognising the fact that private associations would have a difficult time claiming rights of sovereignty according to dominant international law all the while being utterly aware of the importance of juridical arguments.[147] He therefore hired Sir Travers Twiss to bend the margins of international law to the benefit of his Congo Association.[148] Twiss, a former Queen's Advocate and Professor of International Law, was eager to redeem himself after a personal scandal had led him to resign all of his paid positions and live abroad. Leopold offered the opportunity Twiss needed to restore his public image and Twiss was the legal complement Leopold wanted to support his enterprise.[149]

The overall consensus within international legal doctrine at the time was one of rejection: private associations could not acquire rights of sovereignty. Private entities could perhaps act as an instrument or even as an agent of the State, but it was only the State itself that was both the origin and finality of sovereignty – typical for that positivist era.[150] Twiss, however, brought the discussion to the *Institut de Droit International* – in that period certainly the most prestigious institute of international law in Europe.[151] He knew that, being a member, prevailing within this institute could seriously tilt the scales in the King's favour. Renowned members of the *Institut*, such as De Laveleye and Moynier, had already made strong arguments in favour of the neutrality of the Congo (river), a solution which was rapidly gaining support. Such a neutrality, however, would jeopardise Leopold's whole plan in the region. Twiss' arguments therefore revolved around two principal points: the rejection

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[145] STENGERS 1988, p. 232.

[146] *Ibid.*

[147] Indeed, this 'passion for legality' is typical for the particular era. See Sylvest's article 'Our Passion for Legality: International Law and Imperialism in Late Nineteenth-Century Britain'.

[148] KOSKENNIEMI 2002, p. 143.

[149] See Fitzmaurice's article 'The Justification of King Leopold II's Congo Enterprise by Sir Travers Twiss' for more information on the vital role played by Twiss. FITZMAURICE 2010, p. 112.

[150] See Fitzmaurice's and Koskenniemi's discussion of primary authors such as Jèze, Salomon, Heimburger, Rolin, Bluntschli, Lawrence, Despagnet, and Oppenheim. FITZMAURICE 2010, p.119-121; KOSKENNIEMI 2002, p. 144-146.

[151] The *Institut* was already in the loop of the issues revolving around legal status of the Congo since 1878 when Moynier, President of the International Committee of the Red Cross, put it on its agenda. Though, at the time, there was not much impetus to discuss the matter thoroughly. See *Annuaire de l'Institut de Droit International – Septième Année (Tome 7)*, 1883-1885, p. 237-242.

of the neutrality of the Congo and the assertion that private associations could take on sovereign rights.[152] Twiss responded to his fellow members with four essays published in 1883 and 1884 and, after refuting the neutrality-argument, phrased the essential question as follows: *"[…] whether the agent of an association which had not the political character of a State, could, by cession of the actual Sovereign of the country, acquire and exercise the sovereignty of a territory situated outside of Europe."*[153] Twiss drew primarily from historical examples to substantiate his positive answer to that question. As Sylvest describes it somewhat damningly: *"Twiss admitted that the answer to this question had to be found in the 'unwritten law of nations' and in order to throw light on the legal status of the Dark Continent he ventured into the history of the equally dark Middle Ages."*[154] The historical examples he found were the Teutonic Order and the Order of St. John of Jerusalem (informally known as the Knights of Malta).[155] According to Twiss, both were chivalrous associations which had *"obtained territorial sovereignty."* He provides the reader with a follow-up series of examples in support of his point that international law did recognise the capacity of private associations to acquire sovereign rights: four of the current United States of America owed their origins to private associations and English and Dutch companies had *"acquired sovereign rights"* from American and Asian Chiefs and had exercised those rights accordingly (see *supra* with regard to chartered companies). When concerned with the question whether African Chiefs could cede their sovereignty, Twiss argumentatively posed a suggestive counter-question encapsulating his primary argument: *"Why should it be forbidden to a native chief to cede his territory to an international European company, which, according to the law of nations, is perfectly capable of accepting and exercising such a sovereignty?"*[156]

By the end of 1883, Égide Arntz, another eminent jurist hired by Leopold, wrote to reinforce Twiss' argument that private associations could indeed conclude treaties and subsequently found a State thereupon.[157] Although there were some critics, among them not least the

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[152] FITZMAURICE 2010, p. 112-113. The essays Twiss published in support of Leopold's cause were a reversal of all of his convictions previously held. In *The Oregon Territory*, which Twiss wrote forty years earlier, he fiercely stated that if an individual were to claim the exclusive right to a country, it would be nothing short of legal absurdity. See *ibid*., p. 114.

[153] Twiss' second essay 'La libre navigation du Congo. Deuxième Article' translated and reprinted in WACK 1905, p. 504.

[154] SYLVEST 2008, p. 412.

[155] The Order of St. John of Jerusalem is still in existence and is officially known as the Sovereign Military Hospitaller Order of St. John of Jerusalem, of Rhodes and of Malta. Today, it has its headquarters in Rome where it enjoys property under extraterritorial status, maintains diplomatic relations all over the world, and issues its own passports. The Order's own Constitutional Charter, promulgated in 1961, indicates that it is *a "subject of international law and exercises sovereign functions."* Nonetheless, the Order's status under international law is a captivating matter entirely deserving its own research.

[156] Twiss' second essay 'La libre navigation du Congo. Deuxième Article' translated and reprinted in WACK 1905, p. 505-509. See also SYLVEST 2008, p. 413.

[157] Arntz' article 'Argument of Professor Égide Arntz' reprinted in WACK 1905, p. 516-527. See also FITZMAURICE 2010, p. 114.

British Foreign Office and the Portuguese government,[158] Twiss' essays were overall received with great success: De Laveleye and Moynier withdrew their support for the neutrality of the Congo and De Laveleye eventually offered his assistance to the King's *"marvellous oeuvre".*[159] Nonetheless, a main point of critique was Twiss' medieval perception of relations with the non-civilised world. At one known instance, he was even accused of masquerading Leopold's real ambitions, which was to build a colonial empire for Belgium.[160] He therefore wrote a third essay in an attempt to silence his critics and furnished a more recent example which could further ground his assertions: the American Colonization Society,[161] which later declared itself the Commonwealth of Liberia and subsequently the Republic of Liberia in 1847.[162] Twiss, again, stressed this recent example and added the case of Maryland in the preface to the second edition of his treatise *The Law of Nations Considered as Independent Political Communities*.[163] He even went as far as to say that the *"juridical difficulty"* which would supposedly prevent private associations from acquiring and exercising sovereign rights is *"without foundation".*[164]

2.2 HENRY SANFORD AND THE AMERICAN RECOGNITION

Nevertheless, it was not as if Twiss' argumentation was met with nothing than praise; it remained a controversial issue even when he prevailed within the *Institut*.[165] It was more

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[158] The Portuguese Government pointed out abuses committed by Leopold's agent in the Congo. See FITZMAURICE 2010, p. 115.

[159] FITZMAURICE 2010, p. 114; De Laveleye cited in STENGERS 1988, p. 242.

[160] See *Sir Travers Twiss et le Congo. Response à la Revue de droit international et de legislation comparé et au Law Magazine and Review, par un Membre de la Societé Royale de Geopgraphie d'Anvers*. This was an anonymous tract written in strong opposition to Leopold's real, colonial ambitions and Twiss' role in justifying it. It contains a detailed refutation of all of Twiss' legal assertions. On the basis thereof, Fitzmaurice argues that it cannot be held that no-one, prior to the Berlin Conference, suspected anything of what was to come. More information on the tract can be found in FITZMAURICE 2010, p. 115-116. Also important is the contribution by Magalhaes, member of the Geogrphical Society of Lisbonne, who already wrote in 1884: *"On comprend donc aisément que le roi Léopold ait tenu à protéger et à subsidier largement une entreprise destinée à apporter à son pays de si largement compensations futures." – "Il y a longtemps que les intentions commerciales du Comité d'études de l'association internationale ne sont plus un secret pour personne au Zaïre. C'est en vain qu'il essayerait d'y faire valoir sa prétendue mission scientifique ; personne ne le croirait. D'ailleurs tout le monde sait qu'il possède des esclaves, qu'il les fait travailler sur ses stations et qu'il les a acquis par l'emploi d'un des moyens usités au Zaïre à cet effet – l'achat."* The author called upon the Congo Association to cease their abusive practices immediately. MAGALHAES 1884, p. 17, 20 and 32.

[161] In full: the American Society for Colonizing the Free People of Color of the United States.

[162] Reference to Twiss' third article 'La libre navigation du Congo. Troisième Article' can be found in FITZMAURICE 2010, p. 116..

[163] TWISS 1884, preface xi-xiii.

[164] *Ibid*., preface xiii. See also FITZMAURICE 2010, p. 116.

[165] See SYLVEST 2008, p. 413.

than helpful towards Leopold's cause but it did not, at least not in first instance, provide his Congo Association with the necessary recognition to act on a political level. To that end, Leopold took General Henry Shelton Sanford on board – a former American minister to Belgium who had been appointed by Abraham Lincoln.[166] Sanford had already helped Leopold to recruit Stanley. Now, his job was not entirely different: convincing President Chester A. Arthur of a *"full American diplomatic recognition of [Leopold's] claim to the Congo."*[167] Sanford was born a wealthy man as he inherited his family fortune. But Sanford himself was, unfortunately, not the entrepreneur at heart to really make something of his riches – although it was not for his lack of trying. His commercial shortfalls were somewhat compensated by his firmly established diplomatic relations and, over time, he developed a good relationship with Leopold;[168] *"As Sanford saw his inherited fortune draining away, his connections at the Belgian court loomed larger for him. […] Like many Americans, Sanford had a fondness for royalty and Leopold valued him, he felt, in a way that his own country did not."*[169] So, happy to work in the King's service, Sanford started campaigning continuously for Leopold's Congo venture. He worked both the President and Congress as well as newspapers and businessmen by stressing the humanitarian aims and the free trade opportunities for Americans in the Congo. He managed to get the New York Chamber of Commerce to endorse American recognition of Leopold's Association by passing a resolution, which gave serious weight to Sanford's campaign.[170] In the meanwhile, Arntz' argumentation, in which he heavily relies on the authority of Twiss, was passed on to the US Senate Committee on Foreign Relations. He provided them with a list of examples where private individuals had created States, so as to normalise Leopold's efforts.[171] Eventually, all the strategic manoeuvring bore fruit on April 22, 1884 when the United States of America, as the very first country, made the following declaration:

> *"Frederick T. Frelinghuysen, Secretary of State, duly empowered therefor by the President of the United States of America, and pursuant to the advice and consent of the Senate heretofore given, acknowledges the receipt of the foregoing notification from the International Association of the Congo, and declares that, in harmony with the traditional policy of the United States, which enjoins a proper regard for the commercial interests of their citizens while at the same time avoiding interference with controversies between other powers as well as alliances with foreign nations, the Government of the United States announces its sympathy with and approval of the humane and benevolent purposes of the International Association of the Congo, administering, as it does, the interests of the Free States there established, and will order the*

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[166] HOCHSCHILD 1999, p. 58.

[167] *Ibid.,* p. 77.

[168] *Ibid.,* p. 58-59.

[169] *Ibid.,* p. 59.

[170] *Ibid*., p. 78-80.

[171] KOSKIENNIEMI 2002, p. 143. See also Arntz' article 'Argument of Professor Égide Arntz' reprinted in WACK 1905, p. 516-527.

officers of the United States, both on land and sea, to recognize the flag of the International African Association as the flag of a friendly Government."[172]

Hochschild writes that *"Sanford's multi-layered campaign was probably the most sophisticated piece of Washington lobbying on behalf of a foreign ruler in the nineteenth century […]."*[173] In prior and subsequent correspondence between Sanford and Secretary of State Frelinghuysen and between Leopold and President Arthur, it becomes clear that the recognition of the International African Association's flag as that of a friendly government should really be understood as the recognition of the latter's flag *as adopted by the International Association of the Congo* – which aligns itself with the fact that all three geographical societies adopted the same flag, of which the Congo Association was the last.[174] Again, Leopold was not too eager to clarify that distinction; three months before the official recognition, Leopold wrote to Strauch – one of Leopold's confidants who at the time served as President of the Congo Association:[175] *"Care must be taken not to let it be obvious that the Association of the Congo and the African Association are two different things. The public doesn't grasp that."* [176] This was, as already mentioned, to create a continuum of philanthropy around the succession of his organisations.[177] So it should indeed come as no surprise that the Secretary of State managed to include the names of both associations in his declaration of recognition.[178]

Now, one could ask, what exactly did the Unites States recognise? Well, Frelinghuysen thought, as the declaration suggests, that the Congo Association would act as a temporary agent of the Free States (plural) established in the Congo basin. Sanford had made it abundantly clear that the territories in the Congo basin were ceded to the Congo Association for the use and benefit of the Free States there established or in the process of establishing themselves – a political model of which they knew the Americans would be supportive of as it was modelled on their own.[179] However, those so-called 'Free States' were in reality nothing more than the stations founded by Stanley in his transit through the

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[172] April 22, 1884 – *Recognition by the United States* in *British and Foreign State Papers*, vol. LXXV, p. 376.

[173] HOCHSCHILD 1999, p. 80.

[174] See correspondence in BONTINCK 1966, p. 200-206; See also THOMSON 1933, p. 147-162 and REEVES 1909, p. 110.

[175] Colonel Strauch also played a vital role in the African Association and the *Comité d'Études*. More information on Strauch can be found in *Biographie Coloniale Belge*, T. III, 1952, col. 831-833.

[176] King Leopold II cited in HOCHSCHILD 1999, p. 65 with reference to *Unpublished Letters* of Stanley.

[177] Thomson: *"L'adoption du nom d'Association Internationale du Congo, vers la fin de 1882, servit à aggraver le malentendu général. Il est probable que Léopold, en choisissant ce titre pour son entreprise, fut guidé autant par la considération qu'une activité politique serait bien mieux couverte par la conviction que les jalousies nationales seraient apaisées par le titre d' 'internationale'."* THOMSON 1933, p. 161-162.

[178] HOCHSCHILD 1999, p. 81.

[179] BONTINCK 1966, p. 200-201; See also THOMSON 1933, p. 157.

region and around which whole towns were built for both political and commercial reasons. Leopold pretended that those Free States were constituted by and for the Indigenous peoples but nothing could be further from the truth. All the powers lay with those stations themselves and only they were the real essence of those Free States. It was merely a pretence to please the other States and to keep the appearances of philanthropy high. This was all the more evidenced by Strauch's letter to Stanley: *"There is no question of granting the slightest political power to negroes. That would be absurd. The white man, heads of the stations, retain all the powers."*[180] Yet, towards their equal counterparts, they would nonetheless claim disinterested administration: *"[…] the Association only lives for the States and does no commerce, gives no dividends. She is part of their life until she dissolves in them, the future Free States of the Congo."*[181] So, based on Sanford's explanations, President Arthur and Secretary of State Frelinghuysen understood the Congo Association as a sort of provisional government which would disappear when those Free States were capable of governing themselves. That misguided understanding was ushered by President Arthur's conviction that the Congo Association was led by nothing than philanthropy and, thus, "*does not seek permanent political power, but only the neutrality of the Congo basin."*[182] Important to remember is the fact that Leopold, on several occasions, promised free trade within the territory administered by the Congo Association – a promise which was a crucial consideration for the United States in granting recognition. On the day of recognition itself, Sanford once again reassured Frelinghuysen of the Association's commitment to freedom of trade:

> *"That the [International Association of the Congo] and the [Free] States have resolved to levy no custom-house duties upon goods or articles of merchandise imported to their territories […]. That they guarantee to foreigners settling in their territories the right to purchase, sell, or lease lands and building situated therein; to establish commercial houses and to carry on trade upon the sole condition that they shall obey the laws. They pledge themselves moreover, never to grant to the citizens of one nation any advantage without immediately extending the same to the citizens of all other nations […]."*[183]

Therefore, by the very act of recognising, that promise turned into an international legal obligation *vis-à-vis* the United States (see *infra*).[184] Remarkable, however, is the apparent change in objective pursued by the Congo Association one month later. While before the recognition, the Congo Association was presented as an agent of the Free States in the Congo basin, Leopold now saw an opportunity to present a version of his actual ambition without deviating too much from what was said and done. Leopold wrote to President Arthur on May 15, 1884:

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[180] Strauch to Stanley cited in HOCHSCHILD 1999, p. 67.

[181] Sanford (instructed by Devaux – head of King Leopold II's cabinet) to Frelinghuysen in BONTINCK 1966, p. 181-182.

[182] President Arthur cited in THOMSON 1933, p. 151.

[183] Sanford to Frelinghuysen cited in BONTINCK 1966, p. 200.

[184] THOMSON 1933, p. 158-159.

> *"I am anxious to express my gratitude towards you, Mr. President, for the sympathy you have so kindly evinced in the great work of liberty and civilization which is at present being carried out on the Congo by the International Association with the objective of creating an Independent State whose constitution and international engagements both equally pledged it to grant absolute liberty of commerce to all nations. I am deeply gratified to find that the United States have acknowledged the blue Banner with a golden star as the flag of a friendly Power."*[185]

Both the 'Independent State' and 'friendly Power' denomination are distinct from Frelinghuysen's declaration in which he refers to 'Free States' and 'friendly government'. Nonetheless, President Arthur made no objection whatsoever and accepted the subtle adaption in his response:

> *"The American Government and People cannot but watch with the keenest interest, and extend the most evident sympathy toward the growth of an Independent State in that vast region, on bases which make it a secure trust for the benefit of the world. […] I trust that the time is not far distant when the constitutional organization of the new States will be a manifest guarantee of their international pledge to which your letter refers 'to grant absolute liberty of commerce to all nations'."*[186]

Note the interchangeable use of 'Free States', 'Independent State', and 'new States', strengthening the impression that the United States had all but a clear understanding of the political construction being set up in the Congo basin. One could argue that, in view of these developments, it did not really matter what political structure the Congo Association would assume as long as the promise of commercial freedom stands. The rationale behind it is that the United States, as well as all other European Powers, were to reap the enormous economic benefits of a colony without the heavy financial burden of administering it and that, in light thereof, they would grant Leopold's Congo Association a certain margin of appreciation to do what is necessary to achieve the commercial liberalisation of Central Africa.[187] Support for that assertion can be found in the fact that Frelinghuysen knew that the political structure of which the Congo Association claimed to be the guardian was still under construction but nevertheless granted recognition (albeit conditionally).[188] This does, however, not mean that no consideration went into the exact nature of their recognition. There was extensive communication between Frelinghuysen and Morgan – member of the U.S. Senate Committee on Foreign Relations. The following extract of Frelinghuysen's letter to Morgan preceding the actual recognition is incredibly illuminating:

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[185] King Leopold II to President Arthur cited in BONTINCK, p. 204-205.

[186] President Arthur to King Leopold II cited in *ibid*., p. 206.

[187] See also HENRIET 2015, p. 213 and KOSKENNIEMI 2002, p. 111. It is indeed this decidedly simple guarantee of free trade to which all other European Powers will succumb at the Berlin Conference.

[188] See THOMSON 1933, p. 156.

"The question of recognition of the rights and flag of the International Association would appear, therefore, to resolve itself into a question of its territorial rights. The Department [of State] has cognizance of seventy-nine treaties conveying to it concessions of territory with other sovereign rights by indigenous chiefs, and cannot but admit that any rights heretofore pertaining to those native princes, whether of sovereignty or possession, appear to have been duly ceded to the International Association. If such chiefs are capable of making a treaty with foreign nations – and we have numerous instances where Great Britain and other powers have recognized and made treaties with uncivilized tribes – it fails to be apparent why such tribes may not equally make treaties with a philanthropic association, nor why the United States may not recognize such sovereign powers, and thereby secure protection for the legitimate enterprises of our citizens.

To resume: The stations and territory of the International Association appear to have local government. Their chiefs are chiefs of districts. They have made an agreement with native kings to form a union on certain conditions which have been carried out. What we might properly ask for, therefore, has been done. What is asked for by the International Association is not so much recognition of the governments of the stations and territories at this time, as that, in consequence in an exchange of declarations, its flag to be treated as a friendly flag. What exists on the Congo under the flag of the International Association, the settlements, the forces, the administrations, the agreements with native chiefs, appear sufficient to justify and authorize such a recognition. The action, which has its center in Brussels (the headquarters of the International Association), does not appear necessarily an impediment; its action is provisional; it shares in the government of the territories only in their interest and behalf. Publicists [reference to Twiss and Arntz] generally agree that the International Association (a private association) has, as has been shown before [reference to the example of Liberia], a full right to found free states. If the International Association has that right, it must also have the right of supporting its creation during a certain time.

Various provisional governments have been recognized by us at different times without any care as to the detail which they had to make to achieve their constitution, or as to the place of their residence. The International Association exists only for its stations. It has no commerce; it gives no dividends. It is part of their lives until it dissolves into them, the future Free States of the Congo [literally copy-paste from Sanford's letter to Frelinghuysen]."[189]

After the recognition Frelinghuysen only appointed a commercial agent, W.P. Tisdel, to the *"States of the Congo Association […] charged with introducing and extending the*

[189] Frelinghuysen to Morgan in *Compilation of Reports on Committee of Foreign Relations, United States Senate, 1789-1901 – First Congress, First Session to Fifty-Sixth Congress, Second Session (vol. VI)*, p. 232.

commerce of the United States in the Congo Valley."[190] He wrote a letter of instruction on September 8, 1884 in which he gave Tisdel specific tasks:

> *"While this country has not committed itself as to the conflicting political claims over the Lower Congo [at that point in time contentiously claimed by Portugal], it has recognized the flag of the International Society by an agreement dated the 22d of April, 1884, of which I inclose a copy, which is so full in its statement of our position that it seems unnecessary to now add anything in explanation of this point.*
>
> *You will therefore report upon the political situation of both the Upper and Lower Congo Valley, explaining the Portuguese claims, those of France and the International Association, and anything else in this direction which you may deem of interest, especially as to any commercial or political agreements, should such exist, with native tribes or between the nations, or any of them, and the International Association. You will also report as to the system of laws in force upon different portions of the river, and where no code of laws exist what system is in force for the protection of the rights of the individual. The system of executive and judicial administration, the system of customs and dues, the charges on shipping, and other forms and methods of financial administration and taxes on trade should also receive your attention.*
>
> *Everything that relates to the political or commercial condition of the International Society, and their relations to the natives, their tenure of power, and relations with foreign nations will be read with interest.*
>
> *This Government, in its anxiety to obtain its proper share of the commerce of the Congo, has deemed it proper to intrust the preliminary work to your keeping."*[191]

When Tisdel had reported back, Frelinghuysen felt the necessity to set the record straight and make the following clarification on December 12, 1884:

> *"When you were designated as agent to the States of the Congo Association it was not intended, either by this Department or by Congress, to actually accredit you to the Government of the States of the Congo Association, as it was well known here that those States, as a political entity, did not exist.*
>
> *You were charged with introducing and extending the commerce of the United States in the Congo Valley, and in order to definitely fix the scope of your mission, you were designated as agent to the States of the Congo*

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[190] July 7, 1884 – *Act making appropriations for the consular and diplomatic service of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-five and for other purposes*, Forty-Eighth Congress – Session I, Chapter 333. Enacted by the Senate and House of Representatives of the United States. Tisdel is mentioned under the heading 'commercial agents'.

[191] Frelinghuysen to Tisdel in *Papers Relating to the Foreign Relations of the United States, Transmitted to Congress, With the Annual Message of the President, December 8, 1885, Doc. No. 224,* Office of the Historian, https://history.state.gov/historicaldocuments/frus1885/d224.

Association, because it was believed here that the residents of the region adjoining and including the Congo Valley seemed on the verge of establishing constitutional States by progressive movement in that direction.

Your designation was geographical rather than political."[192]

In light of these prior and posterior developments, a series of observations emerge. Frelinghuysen's letter to Morgan strengthens the impression that the United States genuinely believed that the Congo Association would disappear at a certain point in the future when those Free States were capable of governing themselves. Yet they did expect either an Independent State or a Federation of Free States to emanate from the Congo Association's efforts in due time which would further ensure free commerce (*"[…] toward the growth of an Independent State in that vast region […]. I trust that the time is not far distant when the constitutional organization of the new States will be a manifest guarantee of their international pledge to which your letter refers 'to grant absolute liberty of commerce to all nations'"*). Equally apparent is the impression that the United States was not entirely sure of the exact nature of the rights obtained by the Congo Association (*"whether sovereignty or possession"*). It was for that exact reason that Frelinghuysen instructed Tisdel to report on the nature of the agreements concluded by the Congo Association. Though, if it would effectively had acquired sovereign rights, they saw no obstacle as to why they could not recognise those rights (*"[…] it fails to be apparent why such tribes may not equally make treaties with a philanthropic association, nor why the United States may not recognize such sovereign powers […]"*) – a result of Twiss' and Arntz' legal writings (who are explicitly referenced in their reports). Also crucially important is the fact that no official diplomatic relations were established between the United States and the Congo Association. The United States only designated a commercial agent to the Congo basin (*"Your designation was geographical rather than political"*). Hence, when it recognised the Congo Association's flag as that of a friendly government, it presumably only intended to recognise all that resorts under what is conventionally understood as comprising the Congo Association ("*What exists on the Congo under the flag of the International Association, the settlements, the forces, the administrations, the agreements with native chiefs, appear sufficient to justify and authorize such a recognition")* rather than the Congo Association itself *as government* and thus as a political entity (*"[…] it was not intended […] to actually accredit you to the Government of the States of the Congo Association, as it was well known here that those States, as a political entity, did not exist"*). Be that as it may, the United States did recognise the physical presence of the Congo Association in the form of its stations and territories and its right to administer those until they were self-sustaining (*"Publicists generally agree that the International Association (a private association) has, as has been shown before, a full right to found free states. If the International Association has that right, it must also have the right of supporting its creation during a certain time"*). It is unclear, however, how they perceived the nature of that right. Even so, one cannot but conclude that the United States must have believed that the Congo Association *at least*

[192] Frelinghuysen to Tisdel in *Papers Relating to the Foreign Relations of the United States, Transmitted to Congress, With the Annual Message of the President, December 8, 1885, Doc. No. 226*, Office of the Historian, https://history.state.gov/historicaldocuments/frus1885/d226.

had certain rights of property or possession, for otherwise the recognition of the Congo Association's presence would have no ground.[193]

The combination of a formal declaration with the sending of a commercial agent and the acknowledgement of certain rights justifies the conclusion of a *de facto* recognition (R2), which is clearly not the full diplomatic recognition Sanford aimed for (but still a significant political victory on behalf of Leopold's cause). The *de facto* recognition did bring the Congo Association within the ambit of international law in its relation to the United States and bestowed upon it an intermediate status (see *supra*): it was neither internationally inexistent nor a full subject of international law. The Congo Association had, as of the moment of recognition, the right to have its stations and territories respected until they were fully autonomous and the United States had towards the Congo Association a right of freedom of commerce in all its *non-contested* stations and territories (as the United States explicitly refrained from taking any position in contentious political matters). The declaration by the United States should therefore be understood as a support for its cause and a willingness to enter into commercial relations rather than as a formal opinion on its legal status or as a position on contentious political claims. Reeves wrote that the recognition by the United States was *"so unique in form and substance"* that it could not be anything else than a *"sort of collateral incident."*[194]

Confusingly, when President Cleveland wrote to Leopold on September 11, 1885 in congratulating him having effectively established the Independent State of the Congo, he reminded the King of the fact that the United States was *"the first among the powers to recognize the flag of the International Association of the Congo as that of a friendly State."*[195] It certainly gives greater weight to Van Hulle's constatation that recognition of governments and recognition of States were used interchangeably throughout 19th-century state practice to denote the recognition of States.[196] Yet, given the above-mentioned considerations and passages and taking into account the fact that President Cleveland is a different administration as President Arthur's, one cannot reasonably argue that the declaration of the April 22, 1884 should at that point in time be interpreted as diplomatic recognition (R3).[197] This is also in line with the then official standpoint of the British

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[193] Stengers' imprudent claim that the United States recognised the *sovereignty* of the Congo Association would therefore seem to be mere conjecture, hardly contemplated by legal considerations (see STENGERS 1988, p. 242). Stern tentatively described the recognition by the United States as a recognition of the *"virtual sovereignty"* of the Congo Association. How Stern understood that notion is unclear (see STERN 1987, p. 404-405). Thomson interpreted the recognition as a *"protective recognition"*: merely granted to a *temporary agent* for the sake of commercial gain (see THOMSON 1933, p. 157-162).

[194] REEVES 1909, p. 111.

[195] President Cleveland to King Leopold II in *Papers Relating to the Foreign Relations of the United States, Transmitted to Congress, With the Annual Message of the President, December 8, 1885, Doc. No. 38 (Inclosure 1 in No. 5),* Office of the Historian, https://history.state.gov/historicaldocuments/frus1885/d38.

[196] VAN HULLE 2014, p. 288.

[197] The Office of the Historian of the U.S. Department of State also clearly indicates in its *Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776* that official recognition of the Congo Free State was only granted on September 11, 1885.

government, who believed that the declaration by the United States was certainly no recognition as a State: *"It would seem to import little more than the recognition of the Association as the representative of certain native States which have placed in its hands the administration of their affairs."*[198]

2.3 ARTHUR STEVENS AND THE FRENCH RIGHT OF PRE-EMPTION

Around the same time and after intense lobbying by Arthur Stevens, a well-connected and regular guest at the Quai d'Orsay,[199] Leopold managed to pull off another tactically important move when he granted France a right of pre-emption with regard to the Congo Association's possessions (*i.e.* territories and stations) in the Congo basin in the case that, due to unforeseen circumstances, the Association is compelled to sell it off. France had insisted on a guarantee by the Association to not sell its possessions off to any other European Power. Strauch, as instructed by Leopold, sent a letter to Jules Ferry, French Prime Minister as well as Minister of Foreign Affairs, on April 23 in which he provided that guarantee and added the right of pre-emption to it. France accepted without hesitation the possible opportunity to acquire its possessions.[200] Ferry replied to Strauch one day later:

> *"[…] Je prends acte avec grande satisfaction de ces déclarations et, en retour, j'ai l'honneur de vous faire savoir que le gouvernement français prend l'engagement de respecter les stations et territoires libres de l'Associations et de ne pas mettre obstacle à l'exercise de ses droits."*[201]

Innocent at first sight, the gesture had some major consequences not readily anticipated by France and the other Powers – though meticulously calculated by Leopold. First, in accepting the right, France implicitly recognised what it had until then expressly denied (partly due to the Congo Association's competition with de Brazza):[202] that the Association is more than a purely private enterprise and that it does have legitimate rights under international law, for otherwise the right of pre-emption would have no value.[203] However, a scrupulous analysis by Bontinck of the correspondence and context leading up to this exchange of declarations evidences that *"l'engagement pris par la France n'équivalait nullement à une reconnaissance des droits souverains de l'[Association International du*

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[198] Note of Malet, British Minister to Belgium, cited in THOMSON 1933, p. 158.

[199] See BONTINCK 1971 for an extensive elaboration on the important role played by Arthur Stevens.

[200] THOMSON 1933, p. 163-169.

[201] Ferry to Strauch cited in *ibid.*, p. 165.

[202] Ferry had previously made the following statement: *"Le Comité [d'Études du Haut-Congo] n'est et ne sera jamais qu'une association privée, il n'est ni la Belgique, ni la roi des Belges, il ne peut avoir ni pavillon reconnu, ni forces régulières, ni droit souverain d'aucune sorte."* Ferry cited in BONTINCK 1971, p. 37-38.

[203] THOMSON 1933, p. 169.

Congo] sur ses stations et territoires libres."[204] Stevens had tried to convince Ferry of such a recognition but failed in his effort; Ferry refused to go that far.[205] If the response by France indeed were such a recognition, it would have conferred upon the Congo Association the status of a full subject of international law in its relation to France. However, since this is obviously not the case, the acceptance can at best be described as an *acknowledgement* (R1)[206] of the Association's rights of property (as opposed to sovereignty)[207] by virtue of which it created an intermediate status in international (see *supra*) for the Association in its dealings with France: again, it was neither internationally inexistent (private association) nor a full subject of international law (State). Thus, France had henceforth engaged itself to respect the Congo Association's rights of property according to the law of civilised society.[208] This is an illustrious example of Lorimer's absolute discretion in the agency of recognition; although Leopold claimed to have obtained sovereign rights from African Chiefs, France was only prepared to acknowledge it as rights of property.[209] The following passage by Bontinck embodies that discretion:

> *"La France ne voulait pas courir le risque que l'Association s'étende à ses dépens (l'occupation 'foudrayante' du Niadi-Quillou était dans tous les esprits) ; en outre, selon l'Association les droits qu'elle s'était fait céder par les chef locaux étaitent des droits souverains. La France se borne donc à déclare qu'elle ne mettrait pas d'obstacle à l'exercise des droits de l'AIC, comprenant ces droits comme de simples droits de propriété."*[210]

Second, as Leopold explained in a note to Lambermont, the gesture was in essence *"directed at the Portuguese to force them to come to terms with the [Association's presence in the Congo]."*[211] The right was therefore intended to be a leverage on the Portuguese whereby Leopold could threaten to withdraw out of the region as a consequence of which

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[204] BONTINCK 1971, p. 30.

[205] Bontinck: *"Ferry ne fit aucune réponse à cette ouverture ; cette 'première proposition' de Stevens était assez ambiguë ; en effet, 'les stations et territoires libres du Congo' s'arrogeaient implicitement des droits de souverainété : droits de douane, privilèges résevés à leurs citoyens. Entrer en arrangement avec ses 'stations en territoires libres' aurait impliqué l'attribution à l'[Association Internationale du Congo] d'un statut de souverainété. Ferry s'y réfusait catégoriquement."* BONTINCK 1971, p. 58.

[206] No *de facto* recognition (R2) since there is no formal act of recognition.

[207] Bontinck concurs insofar he writes that those who argue that the French acknowledgement did amount to a recognition of the Association's sovereign rights, confuse sovereignty (*imperium*) with property (*dominium*). See BONTINCK 1971, p. 30.

[208] France and Belgium would go on to conclude an interpretative treaty in 1895 in which France's right of pre-emption was confirmed but only in relation to the other European States. France did not have a pre-emptive right over Belgium. See REEVES 1909, p. 109-110.

[209] Remember what has been said in the previous the first section of this chapter: it essentially did not matter what Leopold would claim on the basis of his treaties with African Chiefs; his claims would only be what he claimed they be if they were acknowledged or recognised as such.

[210] BONTINCK 1971, p. 78.

[211] King Leopold II to Lambermont cited in STENGERS 1988, p. 242.

the Portuguese (who had made claims to the same region via the contentious Anglo-Portuguese Treaty of February 1884) would have to deal with the much more stronger French, as the potential heir to the Association's possessions.[212] Third and last (but certainly not least), if Britain and Germany did not help Leopold's Congo Association succeed, its possessions would go to France – an undesirable prospect to both.[213]

2.4 GERSON VON BLEICHRÖDER AND THE GERMAN RECOGNITION

In Germany, Leopold had yet another pawn labouring for his benefit: Gerson von Bleichröder. As influential figure in German aristocracy and chief banker of Bismarck, Bleichröder was ideally placed to take on the task of promoting Leopold's Congo venture.[214] After the exchange of declarations between the Congo Association and the United States on April 22, Bismarck became more interested in the potential of the Congo Association and its promise of free trade. Bismarck inquired a report on the nature of the organisation and received one from Brandenburg, German Minister to Belgium, on April 27. The report stated that the Congo Association had acquired sovereign rights from African Chiefs over their territories. Bismarck grew suspicious of the apparent contradictions emanating from those treaties: the promise of commercial freedom towards the United States was not in line with the clauses of commercial monopoly enclosed in the treaties the Congo Association had concluded.[215] He therefore wanted firm guarantees from the Congo Association as to its (financial) capacity to provide free trade. Moreover, after being confronted with the reality of the French right of pre-emption, Bismarck wanted the same assurance for German citizens as the United States had obtained for its theirs.[216]

Leopold was now proclaiming, via proxies,[217] that the ultimate goal of the Congo Association the foundation of a new and independent State was, as a guardian of the commercial freedom in the Congo basin.[218] On May 15, 1884 Leopold wrote to Bleichröder regarding the next steps to be undertaken by the Congo Association, which was to introduce the *"Independent State of Central Africa, created under its auspices […] into the family of states."* Leopold continued:

> *"We are now actively engaged in devising a political constitution and in drafting fundamental laws for the new state. We wish that that Constitution*

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[212] *Ibid.*

[213] THOMSON 1933, p. 168.

[214] On the role of Bleichröder as go-between, see STERN 1987, p. 394-435.

[215] THOMSON 1933, p. 171.

[216] *Ibid.,* p. 175.

[217] For example in German press, see *ibid.,* p. 175.

[218] *Ibid.,* p. 175-176.

should please Germany, whose commercial interests the new state will greatly serve."[219]

As with the United States, Leopold once again made the staunch promise of free trade to Bismarck within the frontiers of what he already called his *"new state"*. It was therefore important to demarcate the borders of that new State via an agreement with Germany.[220] Four months later, in September, Bismarck received a draft map of the borders of the to-be State from Leopold, which was accompanied by a still unanswered urge for recognition. Yet Bleichröder proved himself to be an invaluable agent when he had the fortune of notifying Leopold that Bismarck had made up his mind and a recognition of the Congo Association was forthcoming. There was only one hurdle: Bismarck wanted undeniable certainty regarding freedom of commerce for German citizens, even in the case that the Congo Association would sell its possessions off to France. Leopold eventually provided that certainty on August 8, 1884:

"L'Association Internationale du Congo est prête à garantir à l'Allemagne dans l'État indépendant et neutre qu'elle fonde dans l'Afrique centrale ce que désire Votre Altesse. […] L'Association s'engage à ce que les territoires compris dans les limites énoncées au projet et sur lesquels l'Allemagne aura reconnu sa souveraineté ne puissent jamais être cédés volontairement soit par elle, soit par l'Etat qu'elle est en train de constituer, sans l'acquéreur accepte les conditions stipulées avec l'Allemagne. […] L'Association serait heureuse de voir l'Allemagne reconnaître son oeuvre et autoriser l'émission de ses valeurs dans l'Empire germanique."[221]

Bismarck was reassured by that formal pledge and was now ready to proceed towards an actual convention, in which the mutual concessions would be solidified. He also urged the other European States to follow suit for rather obvious reasons: *"sans une entente entre les puissances sur l'attitude à tenir envers l'Association, sa reconnaissance par des États isolés ne remédierait pas à sa précarité."*[222] It is for that reason that Münster, German Minister to Britain, wrote to one of his British colleagues on November 4, 1884 with a specific suggestion:

"The status and actions of the Association seem to fall outside the scope of deliberation of the [Berlin] Conference. The Imperial [German] Government, however, holds that it is desirable in the interest of commerce and civilisation that the association should be recognised as an international legal entity [Rechtssubjekt]."[223]

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[219] King Leopold II to Bleichröder cited in STERN 1987, p. 405.

[220] *Ibid.*

[221] King Leopold II to Chancellor Bismarck cited in THOMSON 1933, p. 183-184.

[222] THOMSON 1933, p. 172.

[223] Münster to Granville cited in MOMMSEN 1988, p. 165 and THOMSON 1933, 238.

Bismarck was indeed entirely open to grant the Congo Association *"an independent legal status in international law, or formal recognition as an independent state"* as long as German citizens would profit from it.[224] Yet it would take another month or so before the first of many other European States would follow the example set by Germany. That example saw the light of day on November 8, 1884 when *"Sa Majesté l'Empereur d'Allemagne, Roi de Prusse, au nom de l'Empire d'Allemagne, et Sa Majesté le Roi des Belges, agissant comme fondateur de l'Association Internationale du Congo, et au nom de cette Association"* concluded a convention with the following crucial articles (see *Annex II* for the whole convention):

> *"(Article V) – L'Empire d'Allemagne reconnaît le pavillon de l'Association – drapeau bleu avec étoile d'or au centre – comme celui d'un Etat ami.*
>
> *(Article VI) – L'Empire d'Allemagne est prêt à reconnaître de son côté les frontières du territoire de l'Association et du nouvel Etat à créer telles qu'elles sont indiquées sur la carte ci-jointe."*[225]

It is evident that the recognition by Germany amounted to a diplomatic recognition (R3). The following reasons justify that conclusion: (i) the convention included an explicit recognition of the Congo Association's flag as that of a *friendly State*; (ii) Germany recognised a vast area of land as being under the *sovereignty*[226] of the Congo Association;[227] and (iii) the Congo Association's representative (*in casu* Strauch) was formally treated as a plenipotentiary (see again *Annex II*); and (vi) the very act of concluding a convention is an attribute reserved to States. Henceforth, as consequence of the diplomatic recognition, the Congo Association became a full subject of international law in its relation to the German Empire and would be treated accordingly – that is, as a State: the Congo Association had the right to have its sovereignty respected by Germany and Germany had obtained fundamental freedoms for its citizens within the Congo Association's recognised borders.

Quite remarkable and unprecedented is the fact that Germany granted recognition *as a friendly State* to a State *yet to be formally established* (*"du nouvel Etat à créer"*) – an *unicum* in international law. This, too, fell within the absolute discretion of the agency of recognition enjoyed by sovereign States. Indeed, that discretion even went as far as according to the Congo Association the status of a State in its relation to Germany, which is a *fait accompli*

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[224] MOMMSEN 1988, p. 165.

[225] November 8, 1884 – *(No. 1616) Convention entre l'Empire d'Allemagne et l'Association Internationale du Congo*, *Reichsgesetzblatt* 1885, No. 23. The convention itself would only be published in the summer of 1885 because Leopold wanted to keep the fact that he personally concluded the

[226] The legend of the map annexed to the convention explicitly reads: *"Croquis des Stations fondées ou en cours de fondation dans les bassins du Congo et KN et formant les chefs lieux des territoires acquis en toute souveraineté par L'Association Internationale du Congo."* Map recovered from the *Reichsarchiv* and presented in THOMSON 1933, p. 298.

[227] Even vaster than Leopold himself could sustain on the basis of his treaties. Bismarck did so because he knew that France would not object to such a recognition as they themselves are the potential heirs to it. See STENGERS 1988, p. 243.

from the moment of recognition itself, before the actual constitution of the State itself.[228] The premature nature of the recognition was for Bismarck also a way of forestalling a dangerous competition for territorial possession in Central Africa as well as reducing English influence over Portuguese Africa.[229]

[228] The effective establishment was not even phrased as a pre-condition but as a future certainty.

[229] REEVES 1909, p. 112.

CHAPTER 3 THE BERLIN CONFERENCE OF 1884-85

1 LEOPOLD'S SLICE

Ever since Leopold wanted *"a slice of [that] magnificent African cake"*,[230] he exploited with diplomatic stealth every window of opportunity that may have manifested itself. Though, the greatest window of opportunity was yet to come: the Berlin Conference, where all major European States (plus the United States) would gather to discuss (i) the principles of free trade to be applied to the Congo basin (the 'Congo question'), (ii) a mechanism to settle territorial disputes on the coasts of Africa (since the Conference itself had no mandate to adjudicate any particular territorial matter), and (iii) the freedom of navigation on the Congo and the Niger based on the system of administration adopted for the Danube. Convenient for Leopold was the fact that Sanford and Stanley were appointed as the delegates for the United States, Lambermont as one of two official delegates for Belgium (also representing the Congo Association together with Banning as an unofficial delegate[231]), and Twiss as legal advisor to the British delegation. They could therefore continue to press Leopold's cause from beginning until the very end. The Conference was convened on November 15, 1884 and lasted until February 26, 1885 when the Berlin Act was formally signed. Between those two dates, Leopold managed to get recognition from almost all major European States, with the exception of the Ottoman Empire (which only granted recognition on June 25, 1885). Yet neither the status nor the actions of the Congo Association itself were a formal item on the agenda of the Conference. That was the reason why its recognition remained a matter of bilateral negotiations in the margins of the Conference itself. The forthcoming sections involve a concise discussion of the nature of the recognition granted by Britain, France, and Portugal and subsequently an analysis of the Berlin Act regarding the Congo question.

1.1 THE BRITISH CONCEDE

Bit by bit Britain came to realise that they fundamentally had no other choice but to support the Congo Association.[232] Though, as with Germany, a serious point of agitation was the right of pre-emption accorded to France. There was a genuine distrust towards the Congo

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[230] King Leopold II to Solvyns, Belgian Minister to Britain, on November 17, 1877 cited in HOCHSCHILD 1999, p. 58.

[231] It was for that reason that Britain and Portugal initially raised objections against Belgian participation at the Berlin Conference as they feared such a construction would be set up (DE COURCEL 1988, p. 251). See also *The Times* of November 8, 1884 with regard to the Berlin Conference: *"The Liberal journals demand that an interpellation should immediately be addressed to the Ministry, with a view to the disengagement of Belgium – a neutral State – from all responsibility for the action of the International African Association."*

[232] ANTLEY 1962, p. 182.

Association due to that right of pre-emption as well as the monopolistic clauses included in their original treaties with African Chiefs. Yet they also wanted to remain on good terms with the United States, France, and Germany, who all had taken in some way or another a positive stance towards the Congo Association. Any refusal of recognition would therefore have offended the sovereign judgment of all three of them. Britain further knew that to act against the Congo Association would only benefit France, who remained an imperial rival.[233]

Still, Britain's hesitation persisted. On the opening day of the Conference, the British government wrote to Malet, its plenipotentiary there, a remarkable legal brief:

> *"The question of the status of the African International Association is one which will probably be incidentally discussed at the Conference, and I desire, therefore, briefly to place before your Excellency the views of Her Majesty's Government on that subject.*
>
> *In the opinion of Her Majesty's Government the Association under existing circumstances does not present the conditions which constitute a state. But it no doubt possesses elements out of which a state may be created.*
>
> *Its constitution is at present unknown and has probably no existence except on paper; but there is no reason why it should not become a reality. The Association is still in its infancy; but having regard to the noble aims of its founder and to the liberal and enlightened principles which it is understood to advocate, Her Majesty's Government will watch with great interest and sympathy its efforts to develop itself into a new state.*
>
> *If these efforts should result in the establishment of a political organization possessing a regular Government, and those constitutive elements which, according to the recognized principles of public law, are indispensable to the existence of a State, then her Majesty's Government will gladly unite with other Governments in recognizing its right to claim a place in the family of nations.*
>
> *But such result must necessarily be the work of time. No community can struggle at once into political existence and a considerable period must elapse before the promotors of this great enterprise could be expected to afford adequate protection to foreigners or to provide sufficiently for the exercise of Civil and Criminal jurisdiction over them.*
>
> *Therefore, until these conditions can be satisfied, Her Majesty's Government are of the opinion the regime of Consular Jurisdiction should be allowed to continue in the territories of the Association, without prejudice to its rights of dominion therein.*
>
> *In the meanwhile Her Majesty's Government are quite prepared to respect the rights of property which the Association has acquired, and to cooperate in its*

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[233] *Ibid.,* 182-183.

> *endeavours to promote the work of civilization in those regions on the great principles of religious liberty and the freedom of commerce and navigation."*[234]

Those well-balanced considerations were indeed a matter of policy in stark contrast with the absolute discretion with which Germany had shaped its course of action. Though, when Bismarck learned of the British hesitance, he stressed that the Congo Association's possessions falling into the hands of France was both a grave peril and undesirable outcome. He also indicated that a failure to recognise would result in less cooperation and goodwill on the part of Germany. [235] The insistence by Bismarck was sufficient to cause a change of attitude and the British government gave Malet a mandate to negotiate a convention with the Congo Association.[236] Malet subsequently sent a note to Bismarck: *"His Majesty's Government will recognise the [Association's] flag as the flag of the Free States and as that of the Government of the States it administers."*[237] The convention was signed on December 16, 1884 and included an explicit recognition of the Congo Association:

> *"The Government of Her Britannic Majesty declare their sympathy with, and approval of, the humane and benevolent purposes of the Association, and hereby recognize the flag of the Association, and of the Free States under its administration, as the flag of a friendly Government."*[238]

They clearly wanted a recognition modelled on that of the United States, though adjusted to their own desires.[239] The convention itself focused on the mutual relationship and the rights of British citizens in the territories of the Congo Association. Again, freedom of commerce, the most favoured nation-principle, and other fundamental rights and freedoms were solidified in first three articles of the convention. Britain reserved to itself consular jurisdiction over its own citizens in case of infractions of the applicable laws *"until sufficient provision shall have been made by the Association for the administration of justice among*

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[234] Granville to Malet cited in THOMSON 1933, p. 326-327.

[235] ANTLEY 1962, p. 183.

[236] MOMMSEN writes: *"It has already been pointed out that Bismarck welcomed the [Congo Association] as a suitable proxy regime which would make it unnecessary for the major powers to step in themselves in order to provide the necessary protection for international trade. The British were far more sceptical on this point. They disliked the idea of granting the [Congo Association] international status, and the fact that France had been conceded the right of pre-emption made it all the more unattractive in British eyes. Given the diplomatic constellation, however, they had to put aside whatever reservations they harboured about the suitability of Leopold's enterprise."* MOMMSEN 1988, p. 168.

[237] Malet cited in THOMSON 1933, p. 240.

[238] *Declaration of Her Britannic Majesty's Government* annexed to the *Convention between Her Britannic Majesty and His Majesty the King of the Belgians, acting as Founder of, and in the name of, the International Association of the Congo, relative to Commerce, Navigation, and Jurisdiction* in *British and Foreign State Papers*, vol. LXXV, p. 29.

[239] *Ibid.,* p. 239.

foreigners."[240] Also important is the fact that the Congo Association undertook not the cede its possession otherwise than as subject to all the engagements contracted by the Association under the convention.[241]

The convention clearly amounted to a diplomatic recognition (R3) on the part of Britain – roughly justified by the same considerations as in Germany's case. Britain accepted the Congo Association as a force to be reckoned with and welcomed the creation of a new State under its auspices (see *supra*, legal brief). The convention acknowledged the Congo Association's exclusive administration of the Free States; it allowed for the appointment of consuls and consular officers, in respect of whom the Congo Association had an obligation to protect;[242] it expressly conferred upon British citizens the obligation to comply with the laws of the Free States as governed by the Congo Association; it made the Congo Association competent to arrest and punish those who committed any wrongs against the person or property of a British subject; and Britain entrusted the Congo Association to provide equitable and impartial justice within its own borders (save with regard to their own citizens). Put simply, Britain recognised the Congo Association as a full subject of international law capable of entering into relations with other States and attributing to it all the competences which normally would be equated with sovereignty. The fact that Britain reserved consular jurisdiction to itself did not make the Congo Association any less of a subject of international law in relation to Britain. Moreover, Britain already recognised the Association's sovereign rights in their internal correspondence (*"without prejudice to its rights of dominion"*). It was the essential nature of its recognition which was of importance and it was that exact nature that made Britain's recognition differ from the American one in that the former was far more extensive. It involved the actual conclusion of a convention by plenipotentiaries whereby mutual rights and obligations were agreed upon.

1.2 THE FRENCH AND PORTUGUESE DEMARCATE

France had remained strongly opposed to any recognition of the Congo Association as a sovereign State up until the Berlin Conference itself. Ferry had made the following statements in the lead-up to the Conference and during the Conference itself:

- In May 1884: *"Ce n'est pas un compagnie par actions. Ce n'est pas une compagnie d'État, elle ne peut faire de lois parce qu'il lui manque une base juridique."*
- In October 1884: *"Cela [recognition] était essentiellement impossible cependant, premièrement parce que le bassin du Congo, dans le sens le plus large, couvrait un quart de l'Afrique, puis parce que le population ne possédait pas les éléments d'un État : elle n'avait pas les droits d'une personne juridique, et en particulier n'avait pas de cour de justice devant laquelle elle pouvait porter ses litiges."*

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[240] *Ibid.*

[241] Article X of the Convention in *ibid.*

[242] Casement was assigned to set up the first British consulate in 1900. Later he would play a key role in exposing Leopold's abuses in Congo Free State (known as the 'Casement Report').

- In December 1884: *"Si le drapeau belge flottait sur les stations de l'Association, je devrais reconnaître la validité de ses prises de possession ; mais le drapeau bleu n'est que l'emblème d'une sociéte commerciale."*[243]

Ferry clearly contradicted his own course of action to some extent as he had accepted the right of pre-emption over the Congo Association's stations and territories, which implied the acknowledgment of valid possession. Yet, due to the proceedings at the Berlin Conference, the French and Portuguese were compelled to come to terms with the Congo Association as a matter of political reality. The Congo Association had in the meanwhile obtained recognition from the United States, Germany, Britain, Italy, Austria-Hungary, and The Netherlands (see *infra*). Still, France, Portugal, and the Congo Association were each other's greatest rivals in the Congo basin. All three had at some point in time made claims to certain territories which was contested by at least one other. So, if any convention would be concluded between them, it would necessarily have to demarcate their borders to steer clear from future disputes and settle those issues once and for all. That was exactly what France and Portugal did in bilateral conventions with the Congo Association on February 5 *resp.* February 14, 1885.

The convention with France repeated the beneficial clauses which all other European States had obtained for their citizens in their bilateral negotiations. It also established in a very detailed manner the borders between the possessions of France and the Congo Association. France in turn recognised the Congo Association:

> *"Le Gouvernement de la République française reconnaît le drapeau de l'Association Internationale du Congo – drapeau bleu avec étoile d'or au centre – comme le drapeau d'un Gouvernement ami."*[244]

Yet the French reluctance towards the Congo Association was still apparent. The Congo Association agreed in an additional convention to cede those territories which, according to the demarcation of borders in the main convention, would fall naturally into French possession and France consented to an indemnification. The reluctance lay in the stipulation of that additional convention: *"L'Association International du Congo cède à la France les stations et propriétés qu'elle possède à titre privé dans les territoires […]."*[245]

À titre privé. France just accorded all the attributes to the Congo Association normally accorded in the recognition of *a State* though was still reluctant to admit its own concession. It had conferred upon the Congo Association international legal rights and obligations; it had recognised the Congo Association's territorial claims and had agreed upon the demarcation of borders like States do; and, in addition, it had also recognised the neutrality

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[243] Ferry cited in THOMSON 1933, p. 259-260.

[244] February 5, 1885 – *Convention conclue à Paris le 5 février 1885 entre le Gouvernement de la République française et l'Association Internationale du Congo pour la délimitation de leurs possessions respectives* in *British and Foreign State Papers*, vol. LXXVI, pp. 578 and 580.

[245] February 5, 1885 – *Convention additionnelle* annexed to *Convention conclue à Paris le 5 février 1885 entre le Gouvernement de la République française et l'Association Internationale du Congo pour la délimitation de leurs possessions respectives* in *British and Foreign State Papers*, vol. LXXVI, pp. 578 and 580.

of the Congo Association's territories (dependent upon further agreement at the Berlin Conference). France's road to recognition as well as the recognition itself was clearly paved with contradictory actions. Still, one cannot but admit that all elements presented here point towards a diplomatic recognition (R3).

The same conclusion holds true for the Portuguese recognition, based on the same considerations. Portugal as well recognised the Congo Association's flag *"comme le drapeau d'un Gouvernement ami."*[246] The convention between Portugal and the Congo Association was an exact copy of the convention between France and the Congo Association, except for the demarcation of borders of course. This was in part due to France's role as mediator between the two parties and in part because all other European States built upon the preceding conventions.

1.3 THE OTHERS CONCUR

All the States represented at the Berlin Conference recognised the Congo Association in the course of its proceedings or right after (with the exception of the Ottoman Empire who did recognise the Congo Association until June):

- Italy on December 19, 1884: as a friendly government;[247]
- Austria-Hungary on December 24, 1884: as a friendly State;[248]
- The Netherlands on December 27, 1884: as a friendly government;[249]
- Spain on January 7, 1885: as a friendly government;[250]
- Russia on February 5, 1885: as a friendly State;[251]
- United Kingdom of Sweden and Norway on February 10, 1885: as a friendly State;[252]

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[246] February 14, 1885 – *Convention entre le Portugal et l'Association Internationale du Congo* in *British and Foreign State Papers*, vol. LXXVI, p. 583.

[247] December 19, 1884 – *Convention entre l'Italie et l'Association Internationale du Congo* in *British and Foreign State Papers*, vol. LXXV, p. 633.

[248] December 24, 1884 – *Convention entre l'Autriche-Hongrie et l'Association Internationale du Congo* in *British and Foreign State Papers,* vol. LXXV, p. 991.

[249] December 27, 1884 – *Convention entre les Pays-Bas et l'Association Internationale du Congo* in *British and Foreign State Papers,* vol. LXXV, p. 322.

[250] January 7, 1885 – *Convention entre l'Espagne et l'Association Internationale du Congo* in *British and Foreign State Papers,* vol. LXXVI, p. 575.

[251] February 5, 1885 – *Convention entre la Russie et l'Association Internationale du Congo* in *British and Foreign State Papers,* vol. LXXVI, p. 1010.

[252] February 10, 1885 – *Convention entre les Royaumes-Unis de Suède et de Norvège et l'Association Internationale du Congo* in *British and Foreign State Papers,* vol. LXXVI, p. 580.

- Belgium on February 23, 1885: as a friendly State;[253]
- Denmark on February 28, 1885: as a friendly State;[254]
- Ottoman Empire on June 25, 1885: as a friendly State.[255]

All the conventions (without exception) contained the exact same stipulations regarding free trade, fundamental freedoms, the most favoured nation-principle, and consular jurisdiction. They also all included a survival clause in the case that the Congo Association would cede its stations and territories. Yet Belgium did not conclude a convention but only took official notice of the declaration made by the Congo Association and subsequently recognised it as friendly State.

The correct conclusion for all these instances would indeed be diplomatic recognition (R3) – in line with Germany, Britain, France, and Portugal. The case of Belgium, however, deviates from that general conclusion (see *infra*).

2 GOVERNMENT AND STATE

An apparent schism emanating from the recognitions granted at the Berlin Conference is one between the recognition as a government and the recognition as a State. What to make of that schism? As already mentioned, Van Hulle maintains that both were used interchangeably throughout the 19th century to denote the recognition of *States*. Yet we also saw that for the United States such a conclusion would have been a historical misinterpretation. So clearly Van Hulle's constatation has no universal application in the 19th century. Its validity has to be verified against the background of each case since both forms of recognition are not always (meant to be) the same. Still, that does not mean that her conclusion would not be correct in the majority of cases of those who recognised the Congo Association as a *friendly government*. Chen also observes that the recognition of a *new State* is often accomplished by the recognition of its government.[256] The confusion between both, he reasons, may be found in the fact that both are inseparable from one another insofar as their existence is concerned. This is all the more so in the case of *new States*: *"to recognise the one must necessarily involve the recognition of the other."*[257]

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[253] February 23, 1885 – *Déclaration par l'Association Internationale du Congo et reconnaissance par la Belgique* in *British and Foreign State Papers,* vol. LXXVI, p. 585.

[254] February 28, 1885 – *Convention entre le Danemark et l'Association Internationale du Congo* in *British and Foreign State Papers,* vol. LXXVI, p. 586.

[255] June 25, 1885 – *Convention entre l'Empire ottoman et l'Association Internationale du Congo* in *British and Foreign State Papers,* vol. CL, p. 631.

[256] CHEN 1951, p. 101.

[257] *Ibid.,* p. 102-103.

One can see the application of that theory befit the case of Congo Free State. Of all those who granted diplomatic recognition, six did so as a *friendly government*: Britain, Italy, The Netherlands, Spain, France, and Portugal. Even so, in all those cases, the recognition as a *friendly government* coincided with the development of a State of which they knew the Congo Association itself was in the process of creating – hence why the others recognised the Congo Association as a friendly State. What those six might have been unaware of was the exact nature that State would assume since four of them (Britain, Italy, The Netherlands, and Spain) still mentioned 'Free States'[258] in their respective conventions – though always in combination with the Congo Association itself as administrator. Yet Britain's, Italy's, and France's representatives, who recognised the Congo Association as a *friendly government*, were recorded as making the following congratulatory pronouncements:

- Malet (Britain): *"La part que la Gouvernement de la Reine a prise dans la reconnaissance du drapeau de l'Association comme de celui d'un Gouvernement ami m'autorise à exprimer la satisfaction avec laquelle nous envisageons la consitution de ce nouvel État, due à l'initiative de S. M. le Roi des Belges […]. […] nous saluons l'État nouveau-né avec la plus grande cordialité et nous exprimons le sincère désir de le voir fleurir et croître sous Son [King Leopold II] égide."*
- Launay (Italy): *"Les Puissances representées à la Conférence ont déjà presque unaniment reconnu le nouvel État qui va se fonder sous l'auguste patronage d'un Souverain qui, depuis huit années, […] n'a epargne ni soins, ni sacrifices personnels pour la réussite d'une genereuse et philanthropique entreprise."*
- De Courcel (France): *"J'émets au nom de mon gouvernement, le voeu que l'État du Congo, territorialement constitué aujourd'hui dans des limites précises, arrive bientôt à pourvoir d'une organisation gouvernementale régulière le vaste domaine qu'il est appelé à faire fructifier."*[259]

Those declarations indeed confirm Van Hulle's constatation of interchangeable use and Chen's theory that the recognition of a *new State* is often accomplished by the recognition of its government. Those who recognised the Congo Association as a *friendly government* clearly also intended to recognise the soon-to-be erected State it was to *govern* – as this is logically the distinctive function of any government. Reeves wrote that Germany, Britain, and France acted upon the assumption that he Congo Association *"was not a State in esse, but a possible State in futuro."*[260] There was therefore no essential difference between those who recognised the Congo Association as a friendly government and those who recognised it as a friendly State: both forms envisaged the establishment of a new

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[258] Remember: those so-called 'Free States' were nothing more than the stations established by Stanley on behalf of Leopold's geographical societies and which had developed themselves into political and commercial strongholds. In the course of their growth they came to be described as 'Free States' under false pretences of disinterested administration for the benefit of the Indigenous peoples. In reality, however, the Congo Association was both possessor and administrator of its own stations – a concurrence not all too clear to many.

[259] All three cited in RECUEIL USUEL 1903, p. 19; See also SALMON 1988, p. 165.

[260] REEVES 1909, p. 111.

State through the Congo Association.[261] It had only yet to be officially materialised (see *infra*, Belgian Approval).

3 THE BERLIN ACT AND ITS AFTERMATH

3.1 ADHERENCE

On February 23, 1885 Strauch wrote to Bismarck that the Congo Association had obtained recognition from almost all European States represented at the Berlin Conference and expressed his wish for the Congo Association to adhere to the Berlin Act *("[…] je l'ose espérer, considérer l'avènement d'un Pouvoir […]"*).[262] Namely, Article 37 of the Berlin Act specified that *"the Powers who shall not have signed the present general Act may adhere to its dispositions by a separate Act. The adhesion of each Power is notified, in a diplomatic way, to the Government of the German Empire, and by the latter to all the signatory or adhering States."* The Congo Association effectively adhered to the Berlin Act three days later on February 26 – the day the Berlin Act itself was signed. Bismarck notified all the other States in accordance with Article 37 and transmitted to them the Act of Adherence by the International Association of the Congo and the Letter of Notification to the Government of the German Empire.[263] It is fair to say that henceforth the Congo Association was not only bilaterally but also *collectively* considered to be a State on par with the other signatory States by virtue of Article 37. Blanchard constated:

> *"A partir du 26 février, son admission à la signature de l'Acte général lui conféra aux yeux de tous la qualité d'État, car ceux qui lui permettaient ainsi de prendre rang parmi les puissances étaient les interprètes autorisés de la communauté internationale entière."*[264]

Rivier concluded in a similar manner that *"la Conférence de Berlin reconnut expressément le nouvel État comme membre de la Société des Nations. Le nasciturus était né."*[265] The Berlin Act made the Congo Association, in agreement with Reeves, *"not half sovereign or dependent, but fully sovereign."*[266] The Congo Association became formally bound by the Berlin Act like any other signatory State. All the bilateral conventions were annexed to the Berlin Act as protocols and formed therefore an integral part of the interpretation of the

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[261] Blanchard also wrote that the Congo Association became *"pour chacune d'elles un État, au jour où un traité reconnaissait son drapeau […]."* BLANCHARD 1899, p. 78.

[262] Strauch cited in RECUEIL USUEL 1903, p. 18.

[263] *Ibid*., p. 20-21.

[264] BLANCHARD 1899, p. 79.

[265] RIVIER 1896, p. 56.

[266] REEVES 1909, p. 115.

Berlin Act itself. The latter only evidenced the importance of the bilateral conventions to the overall solutions designed at the Berlin Conference.

3.2 ECONOMIC REGIME

All the States represented at the Berlin Conference came to an agreement regarding the Congo question. That agreement constituted the very first chapter of the Berlin Act: the *Declaration Relative to the Liberty of Commerce in the Basin of the Congo*. It stipulated that the commerce of all nations enjoyed complete liberty in all the territories constituting the basin of the Congo and its affluents and that no distinction was to be made whatsoever on the ground of nationality (Article 1 and 2); that no duties were to be discharged on any of the imported goods of whatever origin (except as an equitable compensation for expenses incurred useful to commerce) as well as no entrance and transit dues (Article 3 and 4); and that no monopolies or privileges of any kind in commercial matters were to be granted (Article 5). Those articles represent the essence of the free trade-clauses which all the Powers had negotiated for themselves in their bilateral conventions with the Congo Association. It was a crucial pre-condition for all the States who concluded such conventions, for without it no recognition would have been granted by any of them. So obviously their recognition was *conditional upon* the establishment of a regime of commercial freedom – what later came to be known as an 'open door regime', predominantly applied in the colonisation of Asia.[267] Then, does such a condition alter the nature of their recognition? Or could it be revoked if the Congo Association failed to abide by the regime as imposed by both the bilateral conventions and the Berlin Act? The answer is 'no' according to Oppenheim – to both questions. Oppenheim was decisively clear: *"The meaning of such conditional recognition is not that recognition can be withdrawn in case the condition is not complied with. The nature of the thing makes recognition, if once given, incapable of withdrawal. But conditional recognition, if accepted by the new State, imposes the internationally legal duty upon such State to comply with the condition, failing which a right of intervention is given to the other party for the purpose of making the recognised State comply with the imposed condition."*[268] Chen similarly wrote half a century later – with explicit reference to the case of Congo Free State – that failure to abide by the imposed obligations *"does not affect the recognition, which is an act accomplished beyond redemption. […] The consequence of non-fulfilment of 'conditions' is rather like the non-fulfilment of other obligations accepted after recognition, the enforcement of which, whether taking the form of a diplomatic rupture or some forcible measure, does not affect, as it cannot affect, the legal personality of the entity recognised."*[269]

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[267] GREWE 2000, p. 477-479; REEVES 1909, p. 112.

[268] OPPENHEIM 1905, p. 111-112.

[269] CHEN 1951, p. 265-266 with explicit reference to the free trade-regime imposed on Congo Free State.

3.3 BELGIAN APPROVAL

The Berlin Act was ratified by the House of Representatives on March 21 and by the Senate on March 25. Another legal obstacle remained, however. Article 62 of the then Belgian Constitution stipulated that the King could not become the chief of another State without the consent thereto by the two Chambers. The House of Representatives discussed and voted on the matter on April 28. The report *"au nom de la section centrale"* presented to the House of Representatives was clear about the sequence of events which led to the Congo Association as a recognised State:

> *"Aussi longtemps que l'Association Internationale du Congo a été une entreprise privées, les chambres législatives y sont restées étrangères. Aujourd'hui la situation n'est plus la même. […] reconnu celle-ci comme un être juridique, capable d'acquérir et de posséder des territoires avec tous les attribus de la souveraineté. […] La conférence de Berlin consacra cette solution devenue européenne ; l'Association fut admise à adhérer à l'acte général à la suite des puissances contractantes : le nouvel État du Congo entrait désormais dans le droit international."*[270]

The report also wanted to remove any doubt that may have existed as to the relationship between Belgium and *"le nouvel État du Congo"* and, in doing so, put forward a qualification of that State which did not align itself with reality:

> *"Ces expression pourraient faire croire qu'il y aura un lien colonial quelconque entre les deux pays ; telle n'est pas la pensée du gouvernement. Il n'y a ici ni métropole, ni colonie ; il n'y a que deux États absolument séparés, et l'Exposé l'indique lui-même en se servant de la qualification de colonie internationale."*[271]

It is true that the Congo Association in its capacity of a State owed its existence to international approval and it is also true that the approval was conditional upon a regime of commercial liberty, but that did not make it an 'international colony'. The Congo Association became a sovereign State in itself on an equal footing with the other States – with all the benefits of sovereignty attached thereto.

The discussion in the plenary session was rather one-sided. Only one representative, M. Neujean, raised serious objections against authorising Leopold to become the Head of another State. He argued that such an authorisation would go against the spirit of the Belgian Constitution since the Provisional Government of 1830-31 included Article 62 *only* to form a personal union with France.[272] Neujean also questioned the legitimacy of the new State and the constitutionality of Leopold's actions:

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[270] April 28, 1885 – *Rapport fait, au nom de la section centrale, par M. A. Nothomb*, Pasinomie 1885, p. 135.

[271] April 28, 1885 – *Rapport fait, au nom de la section centrale, par M. A. Nothomb*, Pasinomie 1885, p. 136.

[272] April 28, 1885 – *Discussion à la Chambre des Représentantes*, Pasinomie 1885, p. 137.

> *"Le gouvernement a-t-il pris connaissance de ces traités qui fournissent la matière du nouvel État qui constituent ses titres et doivent contribuer à lui assurer la tranquillité ? Je concilie difficilement l'existence de ces traités avec les vides qui remplissent les 9/10 de la carte du nouvel État. La Belgique, dont le droit est la force, est-elle donc indifférente à la légitimité de cette souveraineté du nouvel État ? Le gouvernement ne cherche nullement à nous édifier, même sommairement, sur la vitabilité du nouvel État ! Il ne nous fait pas seulement entrevoir quelles en seront les bases, quel en sera le régime, quels seront ses moyens d'action, comment il espère faire pénétrer un sentiment quelconque de son autorité dans les pays que l'Europe lui reconnaît et lui confie ! Nous ignorons jusqu'au titre que prendra le futur souverain du Congo et ce qu'il joindra au titre de roi des Belges ? En un mot, l'Éxposé des motifs ne contient pas une phrase qui atteste l'examen sérieux de tous ces points, dont il commençait par proclamer lui-même la nécessité. Il accuse tout au contraire la préoccupation de dégager la responsabilité du ministère et de la couvrir des déclarations du roi. C'est le renversement du principe constitutionnel : ce ne sont pas les ministres qui couvrent le roi, c'est le roi qui couvre les ministres !"*[273]

Yet, despite such well-founded questions and remarks, the House of Representatives and the Senate went on the authorise Leopold's request on April 28 *resp.* April 30 and insisted that the union was of a purely personal nature:

> *"La Chambres des Representants, vu l'article 62 de la Constitution, décide : Sa Majesté Leopold II, roi des Belges, est authorisé à être le chef de l'État fondé en Afrique par l'Association Internationale du Congo. L'union entre la Belgique et le nouvel État du Congo sera exclusivement personelle."*[274]

The declaration of February 23 in combination with the authorisation of April 28 *resp.* April 30 amounted to *de jure* recognition (R4) since Belgium removed the legal barrier which prevented Leopold from becoming the sovereign of the new State and in doing so 'legitimised' its status. As Thomson wrote: *"Le consentement du parlement belge à l'union personelle mit fin à la position ambiguë que Leopold avait occupée jusqu'ici comme chef de facto et non de jure de l'Association Internationale. Il pouvait maintenant, aux yeux des puissances, apparaître légalement comme le souverain de l'État qu'elles avaient reconnu."*[275]

Leopold had already commissioned Ahn, Twiss, and Strauch to draft a constitution for the new State in anticipation of his authorisation.[276] Fitzmaurice uncovered documents which

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[273] *Ibid.,* p. 138.

[274] April 28, 1885 – *Assentiment des deux chambres à ce que le roi soit le chef de l'Association Internationale du Congo*, Pasinomie 1885, p. 133-134.

[275] THOMSON 1933, p. 296.

[276] *The Times* wrote:

revealed the true nature of that constitution. It contained elements on the legislative, judicial, and administrative functioning. Though, the most remarkable aspect was that it granted Leopold absolute powers; *"according to the constitution, Leopold could suspend laws and officers of the state 'à sa discretion'."*[277] The constitution itself has never been found.[278]

On August 1, 1885 Leopold informed all those who had recognised the Congo Association as well as a dozen other States and the Holy See that *"les possessions de l'Association Internationale du Congo forment désormais l'État Indépendent du Congo ; que Sa Majesté a pris, d'accord avec l'Association, le titre de Souverain de l'État Indépendent du Congo […]."*[279] All Leopold's efforts materialised on this date into the creation of his new State: Congo Free State was officially born.[280] Leopold declared Congo Free State at once to be perpetually neutral in accordance with Article 10 of the Berlin Act, which imposed on the signatory parties the obligation to respect that neutrality *"so long as the Powers who exercise or shall exercise rights of sovereignty or protectorate over these territories [placed under the regime of commercial liberty], making use of the option to proclaim themselves neutrals, shall fulfil the duties which belong to neutrality."*[281]. The Article mainly targeted the Congo Association as it had a near territorial monopoly over the Congo basin (see *Annex III* for a map of Congo Free State).[282] It therefore left no possibility whatsoever to sustain any doubt as to the nature of the Congo Association's rights or its status.

- On November 8, 1884: *"The [Indépendence Belge] alleges that the draft Constitution for the future Congo State is the joint work the King of the Belgians and Sir Travers Twiss."* See also SYLVEST 2008, p. 414.

- On January 9, 1885: *"The proposed constitution of the new Congo State was, in great measure, drawn up by professor Ahn before his death, and since the meeting of the Conference the work has been continued mainly by Sir Travers Twiss and Colonel Strauch. The constitution has been framed very much in accordance with the principles of an English colonial administration."* See also SYLVEST 2008, p. 414.

[277] FITZMAURICE 2010, p. 118.

[278] See SYLVEST 2008, p. 414-415.

[279] SUCCESSION DE LEOPOLD II, Doc. No. 8. See also SALMON 1988, p. 168.

[280] Literal translation of 'État Indépendent du Congo': Independent State of the Congo / Conventional translation of 'État Independent du Congo': Congo Free State.

[281] Article 10 of the Berlin Act.

[282] Report of the Commission of the Berlin Conference cited in SALMON 1988, p. 164: *"Il a été explicitement entendu que cette disposition (celle relative à la Délaration de neutralité) visait surtout l'État que l'Association Internationale du Congo est en voie de fonder et qu'elle paraît avoir l'intention de placer sous le régime de la neutralité permanente."*

CHAPTER 4 VIRTUAL REALITY

1 PRIVATE ASSOCIATIONS AND SOVEREIGN RIGHTS

Prior to the Berlin Conference of 1884-85, European States concluded treaties with Indigenous peoples on the African continent to obtain sovereign rights over African territory. The Congo Association, as a private enterprise, was also very active in this regard and reportedly concluded hundreds of treaties. The rationale behind that practice by European States (including the Congo Association) – and therefore the implied recognition of the internal sovereignty of African Societies (see *supra*, Chapter 1) – lay not in the equal standing of African Societies towards European States – as this was obviously not the case – but in the relationship between the cessionary European State and its truly equal European counterparts, so they could make 'legitimate' claims *in relation to one another*. That was the *raison d'être* of that very practice. European States did not see themselves bound by international law in relation to the African Societies; *"in effect, Europe [was] the subject of sovereignty and non-Europe the object of sovereignty."*[283] The binding nature of international law only manifested itself among the colonising States and the only obligations were those towards other colonising States (as evidenced by the entire Berlin Act and its effective occupation-doctrine). African Societies were therefore nothing more than paper sovereigns in light of that practice. The question, then, is not whether private associations could (objectively) acquire sovereign rights over African territory but whether private associations could (subjectively) acquire such rights in relation to other European States. Or, considering the constitutivist mantra of recognition dominant in the imperial epoch, one should rephrase the question: were private associations *recognised* as capable of acquiring sovereign rights?

The answer to that question is at once affirmative and obsolete in view of the diplomatic proceedings of the Berlin Conference. The Congo Association was given extensive recognition in bilateral conventions and subsequently adhered to the General Act. Thus, by the time Leopold declared that the possessions of the Congo Association constitute henceforth Congo Free State, those possessions were effectively considered to be the possessions of *a friendly State*. That very fact affirmed the ability of private associations to obtain sovereign rights over African territory since the recognition of the Congo Association as a State located in the Congo basin logically implied the recognition of its claims over that territory as the basis for its recognition as a State. Hence, the States represented at the Berlin Conference decided to *retroactively* validate the Congo Association's ability to acquire and exercise such rights. However, it would be wrong to purport that such an ability existed *before* the Berlin Conference itself.

Westlake theorised the above in a manner with which one has become familiar by now:

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[283] ANGHIE 2004, p. 102.

> *"The form which has been given to the question, namely 'what facts are necessary and sufficient in order that an uncivilised region may be internationally appropriated in sovereignty to a particular state?' implies that it is only the recognition of such sovereignty by the members of the international society which concerns us, that of uncivilised natives international law takes no account."*[284]

Westlake's proposition evidences that mere recognition by other States was sufficient for the Congo Association to acquire sovereign rights over African territory – the common thread throughout this thesis. Constitutivism indeed allowed for the creation of a reality tailored on the colonial imagination.

2 DOCTRINAL RECEPTION

Koskenniemi already undertook a review of the position of international lawyers regarding the status of Congo Free State in international law in the period between 1885 and 1908 and came to the conclusion that most textbooks only took notice of the peculiar history of Congo Free State and its personal union with Belgium, though abstained from any systemic analysis.[285] Some prominent Belgian lawyers, such as Nys and Descamps, were mainly occupied with rendering apologetic accounts of Leopold's administration. They took the position that the governance of Congo Free State was not a matter of international law but reserved to the constitutional law of the State itself. Any critique voiced against Leopold's atrocities in Congo Free State was countered with *tu quoque* arguments.[286]

Nys, however, did engage in an extensive legal analysis of Congo Free State. He came to the faulty conclusion that the recognitions granted did *not* have a constitutive character. Nys, a staunch proponent of the declaratory theory, was convinced that those recognitions merely amounted to *"la constatation du fait accompli."*[287] Congo Free State "*existait prealablement à la reconnaissance […]."*[288] The recognitions did not therefore constitute Congo Free State nor did the Berlin Act condition in any way its existence, Nys wrote.[289] It was all very clear to him: *"La situation juridique de l'État Indépendent du Congo nous paraît établie avec toute la clarté desirée : l'État Independent est un État souverain ; son existence est antérieure à l'Acte Général de Berlin ; cet acte ne pouvait lui imposé de 'conditions' dont la non-accomplissement exposerait l'État à quelque grave mesure ; l'État*

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[284] WESTLAKE 1894, p. 136.

[285] KOSKENNIEMI 2002, p. 159.

[286] *Ibid.*, p. 160-161.

[287] NYS 1903, p. 19.

[288] *Ibid.,* p. 63 and 66.

[289] *Ibid.,* p. 60-67; KOSKENNIEMI 2002, p. 161.

Independent s'est acquitté de toutes ses obligations internationales et toujours il a agi conformément au droit." [290] Of course, in light of the conclusions drawn in the preceding chapters and the well-documented atrocities occurring at the time of his writing, such a position was (and still is) completely untenable and morally indefensible.

Rolin-Jaequemyns interpreted Congo Free State as *"une colonie internationale, sui generis, fondée par l'Association Internationale du Congo, dont le généreux promoteur a été investi, par la reconnaissance et la confiance de tous les États civilisés, du pouvoir et de la mission de gouverner, dans l'intérêt de la civilisation et du commerce général, des territoires africains compris dans certaines limites conventionnellement déterminées."*[291] Such a qualification cannot be maintained. In no way did those who recognised the Congo Association have a right of intervention (in military sense) in Congo Free State. It was as sovereign as any other State signatory State to the Berlin Act. Leopold's declaration of neutrality moreover imposed on all those States the obligation to respect its neutrality – excluding any legal possibility of intervention so long as Congo Free State itself respected the duties of that neutrality. Besides, none of the recognising States themselves viewed Congo Free State as an 'international colony', so it would historically be incorrect to attribute a different reality to their intentions.

Moynier, incorporating the report of March 20 by Nothomb to the Belgian Parliament, wrote:

> *"Mais, par suite de conventions analogues, conclues successivement avec des pays divers, le caractère d'État alla en grandissant et celui de société en s'affaiblissant, jusqu'au jour où la conférence de Berlin, faisaint pour son propre compte ce que les États répresentés dans son sein, avaient déjà fait individuellement, reconnut à l'Association, en l'admettant à adhérer à l'Acte général, les caractères et les droits d'un être juridique de droit publique. Dès lors on peut dire cette Association entrée dans le droit international universel. C'etait, comme on l'a dit, l'inscription officielle sur les registres internationaux, de l'état civil d'un nouveau-né."*[292]

Oppenheim noted similarly: *"It must be mentioned that a State of quite a unique character, the Congo Free State, is, since the Berlin Conference of 1884, a member of the Family of Nations."*[293] He put Congo Free State forward as an example of a corporation which had acquired sovereign rights over territory and subsequently had obtained recognition as a State, resulting in protection by the law of nations (see *supra*, Chapter 1 – Theory-Practice Congruence).[294] Apart from that, Oppenheim only made some remarks on its personal union with Belgium and its neutrality.[295] Westlake, too, limited himself to some remarks on

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[290] NYS 1903, p. 74.

[291] ROLIN-JAEQUEMYN 1889, p. 168.

[292] MOYNIER 1887, p. 486; See also SALMON 1988, p. 166.

[293] OPPENHEIM 1905, p. 34.

[294] *Ibid.,* p. 265.

[295] *Ibid.,* p. 126 and 146-147

its birth history and neutrality – although he was a frequent commentator on African affairs.[296] Congo Free State, according to Lawrence, was an example of civilised men creating a State in uncivilised territory. It was one of three instances by which States could be accepted into the family of civilised nations (see *supra*, Chapter 1 – A Theory by Europe).[297]

Reeves conducted the first in-depth and dispassionate analysis of Congo Free State from an international law point of view in 1909. His conclusions were strikingly accurate:

> *"There was no de facto state in the Congo basin in 1884, and no one then claimed that there was. It was at the time the theory neither of the powers who recognized the State, nor of Leopold who founded it. This claim of an antecedent de facto existence does not appear until after the Berlin Conference, and then as a matter not wholly free from doubt."*[298]
>
> *"The association by no test of international law was a state de facto [i.e. according to European standards]. It was an association without legal standing. To have had a charter under Belgian law would have defeated the very ends of the association. The powers gave the inchoate organization what otherwise it could not have had. In lieu of de facto existence, it was called into being de jure by the powers, which recognized it in 1884-85. They made it, or, more correctly, they agreed to consider it, a legal entity – a person, not in municipal law (for such it was not), but in international law."*[299]
>
> *"The inchoate corporation was now a juridical entity and a political person. The new State was henceforth [i.e. from its adherence to the Berlin Act on] a member of the family of nations."*[300]

They agreed to consider it. That sentence is the epitome of the constitutive theory; the other States *decided* to recognise the Congo Association as something it was inherently not (in light of the accepted norms of statehood in Europe)[301] and thereby *constituted* legally speaking exactly that: the status of a *sovereign State*. As Blanchard wrote*: "on lui a attribué à l'avance la qualité de puissance souveraine, en se fiant, par anticipation, aux institutions qu'elle établirait pour l'accomplissement de ses devoirs internationaux."*[302] It

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[296] See KOSKENNIEMI 2002, p. 163-164.

[297] LAWRENCE 1909, p.

[298] REEVES 1909, p. 101. The claim of antecedent existence was made by Cattier before he wrote a tract in 1906 on colonial practices in Congo Free State which would gravely stir public sentiment in the negative towards Leopold.

[299] *Ibid.,* p. 108.

[300] *Ibid.,* p. 114.

[301] SALMON 1988, p. 171: *"Même plus tardivement, vers février 1885, il n'y avait ni organisation politique ni gouvernement régulier – simplement une organisation administrative rudimentaire."*

[302] BLANCHARD 1899, p. 80-81; See also SALMON 1988, p. 172.

was only *after* they had already recognised it as such that the Congo Association and subsequently Congo Free State really started to develop elements which resembled European standards of colonial governance[303] – indeed, plagued with all the excesses which were to form some of the darkest pages of human history. Yet those who argued, like Cattier and Nys, that the Congo Association had a sovereign existence *as a State* prior to the Berlin Conference were clearly mistaken in their observations.[304] Reeves ended his article with the constatation that *"the Congo Free State now passes out of existence and becomes in fact what it should have been long ago, a Belgian colony."*[305]

Thomson observed that the recognitions granted *during the Berlin Conference* differed from that of the United States in that the former had a constitutive character – which is in line with our own analysis.[306] The Congo Association was the tool they needed to further their commercial interests; *"le besoin d'un État-tampon [i.e. a buffer State] en Afrique centrale justifiait assez, croyaient-elles, la reconnaissance de l'Association comme État, à ce moment où elles ne croyaient pas qu'elle fût vraiment un État. Tout ce qui fut dit à Berlin tend à montrer que les puissances s'attendaient à voir s'organiser un État dans l'avenir."* Thomson wrote that the Congo Association became a sovereign entity because the other States wanted to recognise it as such for their own individual benefit. One cannot underestimate, following Stengers, the importance of Leopold's promise of commercial freedom. Stengers called Leopold *"the father of colonization without duties"* (because no-one had the idea before him for financially obvious reasons) and *"since the establishment of freedom of commerce was the major reason for calling the [Berlin] Conference, it can be claimed without exaggeration that Leopold II was also the spiritual father of the Conference itself."*[307]

When pondering on the exact nature of Congo Free State, Thomson reasoned correctly that it could not be contemplated without due account of the Berlin Conference. He came to the following conclusion – and justifiably so: *"La souveraineté complète de l'État Indépendent du Congo ne peut être contestée sans qu'on conteste en même temps la souveraineté de toutes les puissances ayant signé l'Acte général ou y ayant adhéré."* Thomson also believed that the qualification of 'international colony' was the most satisfying out there but nonetheless nuanced that qualification insofar as it could create the wrong impression that Congo Free State would be less sovereign as the other States. *Quod non*. *"Mais si nous limitons l'emploi de l'expression 'colonie internationale' à*

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[303] Even on April 16, 1885 Leopold had yet to admit to the Belgian Council of Ministers that *"il reste à organiser sur les bords du Congo le gouvernement et l'administration."* SUCCESSION DE LEOPOLD II, Doc. No. 6.

[304] See CATTIER 1898, p. 54.

[305] *Ibid.,* p. 118.

[306] Salmon's conclusion that the recognition by the Unites States had the same consequences as the others, is obviously incorrect. See SALMON 1988, p. 161.

[307] STENGERS 1988, p. 241.

l'explication des origines de l'État Indépendent du Congo, nous avons l'indice le plus sûr de la situation qui lui fut dévolue lors du partage de l'Afrique."[308]

Salmon averred, in a more recent study, that Congo Free State indeed did not satisfy the criteria of statehood applicable among European States themselves yet admitted that it was effectively a State due to the fact that the States represented at the Berlin Conference wanted it to be exactly that:

> *"On peut donc conclure de tout ceci pour ce qui concerne l'[Association Internationale du Congo] que si l'adhésion à l'acte général de Berlin peut être considérée comme une reconnaissance de l'[Association Internationale du Congo] comme État, cette reconnaissance était incontestablement prématurée. Pour ce qui concerne l'existence des conditions de l'État, elle était donc constitutive."*[309]

> *"Pour le point de savoir si l'[État Indépendent du Congo] était ou n'était pas un État, nous estimons qu'il en était un pour la seule et bonne raison qu'il fut tenu pour tel par les États de la Communauté internationale."*[310]

Last but not least, Henriet took an interesting view on how Leopold was able to carve out a State for himself in Central Africa. She reasoned that, in addition to the fact that it was commercially lucrative to all other States, Leopold's regal title legitimised the whole enterprise. The 19th century saw a wide variety of *"special jurisdictions, corporations, and privileges which drew their legitimacy from Kings"*[311] – Henriet citing Bayly who wrote *The Birth of the Modern World, 1780-1914.* Congo Free State *"could then be seen as one of those special jurisdictions",* Henriet deduced.[312]

This thesis, however, is convinced of the accuracy of the qualification of Congo Free State as a *sovereign State* for all the reasons developed in the previous chapters (including this one). To argue otherwise would be a doctrinal deflection of reality. Moreover, Congo Free State would go on to conclude numerous other bilateral and international treaties between 1885 and 1908 – treaties which by their very nature could only be concluded by States (*e.g.* with regard to extradition, protection of wildlife, spheres of influence, trade, etc.).

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[308] THOMSON 1933, p. 311-312.

[309] SALMON 1988, p. 172-173.

[310] *Ibid.,* p. 175.

[311] Bayly cited in HENRIET 2015, p. 212.

[312] *Ibid.*

CONCLUSION

In this thesis, we have attempted to reconstruct Congo Free State's peculiar birth history with a view of resorting to a final classification of the legal status of Congo Free State in 19th-century international law. We initiated our research in Chapter 1 with an exploration of the context of 19th-century international law and applied it to European practices in Africa. Theory and practice were then analysed and presented in an orderly manner to operate as framework for the ensuing chapters. None of the previous works written on this topic have used this scheme or any other rigorous framework to analyse the various acts of recognition.

Chapter 2 revolved around the effective reconstruction of Congo Free State's genesis. Multiple private associations were deployed by King Leopold II in his search for African soil. These associations had no legal status in Belgium nor anywhere else. These were merely associations of fact but not of law. The theoretical framework allowed us to conclude that the Congo Association enjoyed different statuses in its bilateral relations up until the Berlin Conference (*cf.* United States, France, and Germany).

Chapter 3 focused on the Berlin Conference and its consequences. The Congo Association obtained extensive recognition via bilateral conventions during the course of this Conference and subsequently adhered to the Berlin Act itself. We concluded that from the moment of adherence on the Congo Association was not only bilaterally but also collectively considered to be a sovereign State.

Chapter 4 established the fact that private associations were indeed able to acquire sovereign rights, though only retrospectively. Doctrine adopted various interpretations of Congo Free State and this thesis concurred in the interpretation of Congo Free State as a sovereign State on par with all the other signatory States of the Berlin Act.

Congo Free State was the creation of very specific circumstances in a very specific time. The Congo Association (personified by King Leopold II) needed the European States to realise its colonial ambitions as much as the European States needed the Congo Association to secure their commercial interests. It was a mutually beneficial relationship and Congo Free State was the product of that reciprocity. Politics clearly trumped legal considerations. The paradox of it all is that positivism at its apogee led international law to extreme relativity. It reduced international law (through the agency of recognition) to the passions and prejudices of the members of the family of civilised nations, essentially subjective rather than supremely objective (which was the ultimate goal of positivism).

We have witnessed an extraordinary chapter in legal history and have become familiar with the ins and outs of it. Yet that does not imply that the topic itself would be exhausted. There are still questions open to answer. One such an important question is the constitutionality of King Leopold II's actions and his use of the civil list to finance his colonial ambitions. Future research on this question would not only have historic but also contemporary relevance as to how far a King may go in his private aspirations and whether it is constitutionally desirable to let a King have such aspirations in the first place.

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ANNEX I

Source:
https://en.wikipedia.org/wiki/Congo_Free_State#/media/File:Flag_of_Congo_Free_State.svg

ANNEX II

(No. 1616.) Convention entre l'Empire d'Allemagne et l'Association Internationale du Congo. Du 8 Novembre 1884.

Sa Majesté l'Empereur d'Allemagne, Roi de Prusse, au nom de l'Empire d'Allemagne, et Sa Majesté le Roi des Belges, agissant comme fondateur de l'Association Internationale du Congo, et au nom de cette Association, animés du désir de régler par une convention les rapports de l'Empire d'Allemagne avec l'Association Internationale du Congo, ont, dans ce but, muni des pleins-pouvoirs:

Sa Majesté l'Empereur d'Allemagne, Roi de Prusse:

Frédéric Guillaume Alexandre Charles Gustave Comte de Brandenbourg, Envoyé Extraordinaire et Ministre Plénipotentiaire à la Cour Royale de Belgique,

Sa Majesté le Roi des Belges:

Maximilien Charles Ferdinand Strauch, Intendant militaire de 1ère classe dans l'armée belge,

lesquels, après avoir échangé leurs pleins-pouvoirs, trouvés en bonne et due forme, sont convenus des articles suivants:

Article I

L'Association Internationale du Congo s'engage à ne prélever aucun droit sur les articles ou marchandises importés directement ou en transit dans ses possessions présentes et futures des bassins du Congo et du Niadi-Kwilu, ou dans ses possessions situées au bord de l'Océan Atlantique. Cette franchise de droit s'étend particulièrement aux marchandises et articles de commerce qui sont transportés par les routes établies autour des cataractes du Congo.

Article II

Les sujets de l'Empire Allemand auront le droit de séjourner et de s'établir sur les territoires de l'Association.

Ils seront traités sur le même pied que les sujets de la nation la plus favorisée, y compris les habitants du pays, en ce qui concerne la protection de leurs personnes, et de leurs biens, le libre exercice de leurs cultes, la revendication et la défense de leurs droits, ainsi que par rapport à la navigation au commerce et à l'industrie.

Spécialement ils auront le droit d'acheter, de vendre et de louer des terres et des édifices situés sur les territoires de l'Association, d'y fonder des

maisons de commerce et d'y faire le commerce ou le cabotage sous pavillon allemand.

Article III

L'Association s'engage à ne jamais accorder d'avantages, n'importe lesquels, aux sujets d'une autre nation, sans que ces avantages soient immédiatement étendus aux sujets allemands.

Article IV

En cas de cession du territoire actuel ou futur de l'Association, ou d'une partie de ce territoire, les obligations contractées par l'Association envers l'Empire d'Allemagne seront imposées à l'acquéreur. Ces obligations et les droits accordés par l'Association à l'Empire d'Allemagne et à ses sujets resteront en vigueur après toute cession vis-à-vis de chaque nouvel acquéreur.

Article V

L'Empire d'Allemagne reconnaît le pavillon de l'Association – drapeau bleu avec étoile d'or au centre – comme celui d'un Etat ami.

Article VI

L'Empire d'Allemagne est prêt à reconnaître de son côté les frontières du territoire de l'Association et du nouvel Etat à créer telles qu'elles sont indiquées sur la carte ci-jointe.

Article VII

Cette Convention sera ratifiée et les ratifications seront échangées dans le plus bref délai possible à Bruxelles. Cette Convention entrera en vigueur immédiatement après rechange des ratifications.

En foi de quoi les deux Plénipotentiaires respectifs l'ont signée et y ont apposé leurs sceaux.

Ainsi fait à Bruxelles, le 8 Novembre 1884.

Source: November 8, 1884 - *(No. 1616) Convention entre l'Empire d'Allemagne et l'Association Internationale du Congo*, *Reichsgesetzblatt* 1885, No. 23.

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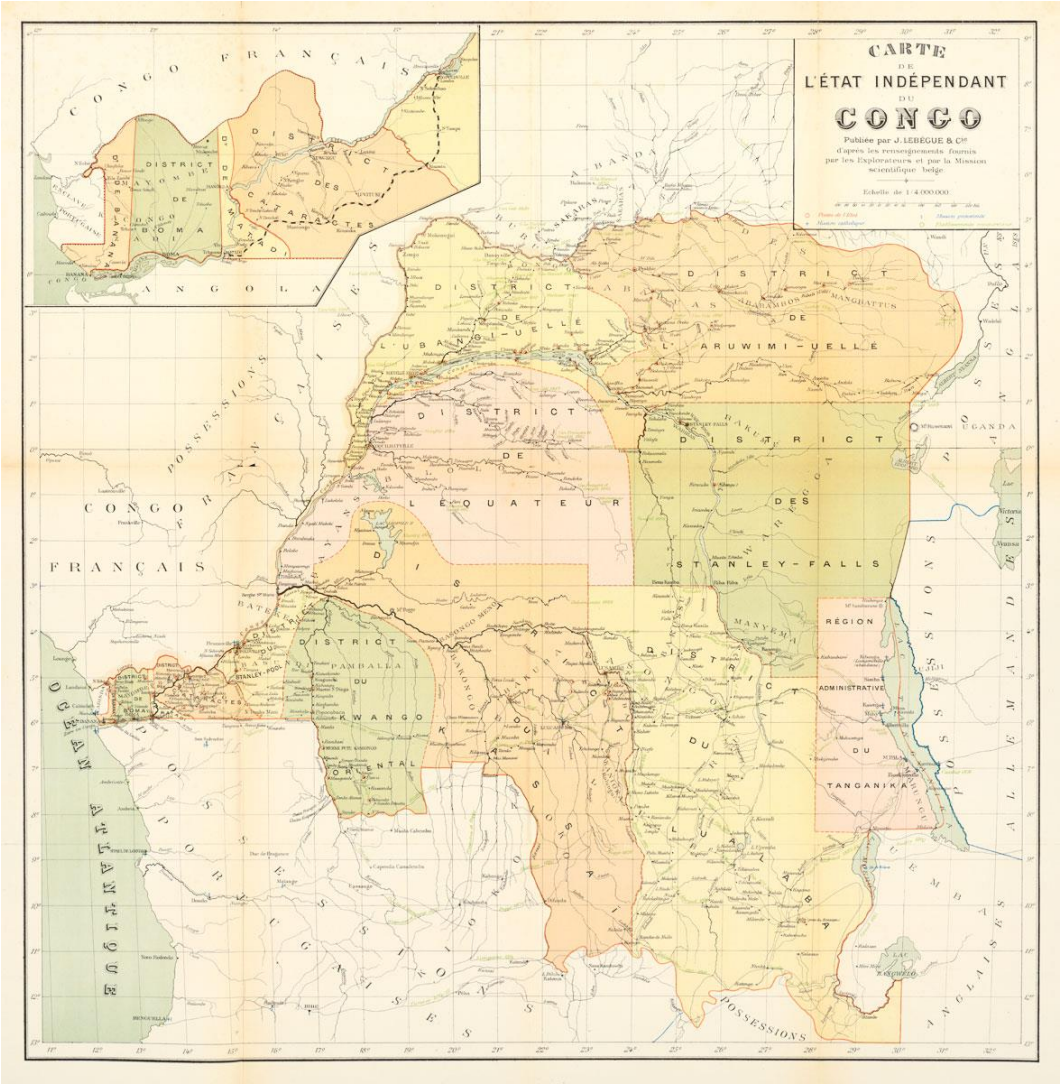
ANNEX III



Source: http://expocongo.be/content.php?m=5&r=1&doc=2&l=nl#anchor

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