state.[190] As in the case of Vitorian jurisprudence, intervention was endorsed by a number of techniques, by the powerful invocation of disorder and lawlessness which necessitated the imposition of order which could take place only through conquest posited as unwillingly undertaken. The protectorate, then, demonstrated yet another variation on sovereignty as it developed in the colonial encounter. The use of the protectorate as a flexible instrument of control corresponded with a growing appreciation of the uses of 'informal Empire' and the realization that an important distinction could be made between economic and political control.[191] While it was desirable to exploit the raw materials of Asian and African countries and develop new markets there, this was achieved, where possible, without assuming political control over the territory and with it all the costs and problems of managing a colony. Seen from this perspective, the ideal situation was one in which economic control could be exercised over a non-European state which was nominally, at least, 'sovereign'. As a legal instrument, the protectorate arrangement was ideally suited for the implementation of such a policy.[192]

The Berlin Conference of 1884–1885

Introduction

Given the conceptual inadequacies of the positivist framework for dealing with the colonial encounter, the positivist validation of the use of force, and the intense competition among European states for colonies, it was hardly surprising that international law contributed very little towards the effective management of the colonial scramble. The tensions arising from the scramble were such that the European powers held the Berlin Conference of 1884–5 to try and resolve matters. Here, diplomacy and the traditional balance of power politics combined with

[190] Lindley asserts that the protectorate was intended to lead to 'an increasing control by that [protecting] Power over the internal affairs of the protected country. The sovereignty is to be acquired piecemeal, the external sovereignty first.' Lindley, *The Acquisition and Government*, p. 182.

[191] See John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) 6 *The Economic History Review* 1–15. For a discussion of the role of informal empire in the broad context of the imperial project see Michael W. Doyle, *Empires* (Ithaca, NY: Cornell University Press, 1986).

[192] In the final analysis, however, the British, for example, found it necessary to assume political control over most of the territories which they initially treated as protectorates; it was only in this way that they could create the political conditions and stability which enabled economic expansion.

international law, as the imperial powers of Europe attempted to create a legal and political framework, to ensure that colonial expansion in the Congo Basin took place in an orderly way which minimised tensions among the three most powerful European states at the time, England, France and Germany. This part of the chapter focuses on the legal attempts to define and domesticate the native and place him securely within the authoritative framework of positivist jurisprudence, together with the related theme of the complex ways in which law and politics intersected in the grand project of colonial management.

African peoples played no part at all in these deliberations. As U. O. Umozurike points out, 'The most irrelevant factor in deciding the fate of the continent was the Africans themselves who were neither consulted nor apprised of the conference',[193] a conference which determined in important ways the future of the continent and which continues to have a profound influence on the politics of contemporary Africa.[194] This exclusion was reiterated and intensified in a more complex way by the positivist argument that African tribes were too primitive to understand the concept of sovereignty to cede it by treaty: as a consequence, any claims to sovereignty based on such treaties were invalid.[195] This proposition may have been advanced not only for reasons of theoretical consistency, but in order to preclude the rampant abuse by European adventurers of the treaty mechanism by which they claimed to acquire sovereignty. Nevertheless, its effect was to transform Africa into a conceptual *terra nullius*; as such, only dealings between European states with respect to those territories could have decisive legal effect.[196] The Berlin Conference[197] was a unique event, furthermore, as it was the first occasion on which European states[198] sought as a body to address the

[193] U. O. Umozurike, *International Law and Colonialism in Africa* (Enugu, Nigeria: Nwamife Publishers, 1979), p. 26. See also Elias, *Africa*, pp. 18–34.

[194] See Makau wa Mutua, 'Why Redraw the Map of Africa?: A Moral and Legal Inquiry', (1995) 16 *Michigan Journal of International Law* 1113–1176.

[195] See Oppenheim, *International Law*, pp. 285–286 for the general proposition that cessions of territory by native tribes made to States fall outside the Law of Nations; for the application of the doctrine to Africa specifically, see Westlake, *Chapters on the Principles of International Law*, pp. 149–155.

[196] See Westlake, *Chapters on the Principles of International Law*, p. 154.

[197] See Crowe, *The Berlin West African Conference*, pp. 158–159; Mutua, 'Why Redraw the Map', pp. 1126–1134.

[198] The instrument which emerged from the Conference was the General Act of the Conference of Berlin Concerning the Congo, Signed at Berlin, 26, 1885, Official Documents, *American Journal of International Law* 7. France and Germany first developed the idea of holding the Conference; invitations were issued in three stages,

'colonial problem'. Although concerned with the division of Africa, the conference's deliberations illuminated many aspects of the broader question of colonialism as a whole. The management of the division of Africa by systematizing the colonial scramble and the articulation of a new ideology of colonialism were two of the conference's major projects.

Partitioning and managing Africa

Trade was the central preoccupation of the conference, which focused on issues of free trade in the Congo basin,[199] and free navigation of the Congo and Niger Rivers.[200] In discussing these issues, the implicit failure of international law to devise a coherent framework for regulating the European–African encounter became evident. As the previous discussion on treaties suggests, the modes of acquiring trading rights and control over non-European territory were easily open to abuse, as European trading companies or even adventurers such as Henry Morton Stanley[201] could enter into 'treaties' which, they claimed, provided them with rights, if not actual sovereignty, over vast areas of land. The Berlin Conference, in addition to focusing on trade issues, thus sought to create a unified system by which claims could be asserted and recognised.

The underlying and crucial issue in this debate was the issue of the legal personality of African tribes. Despite the objections of jurists such as Westlake,[202] treaties with African tribes were the basis on which claims were made to African territory. This raised the familiar and by now apparently insurmountable problem of deciding the capacity of the African entity and the status of that entity within the overall political structure of the tribe.

first to Great Britain, Belgium, the Netherlands, Portugal, Spain and the United States; later, to Austria, Russia, Italy, Denmark, Sweden and Norway; and finally to Turkey. See Crowe, *The Berlin West African Conference*, pp. 220–221.

199 See *ibid*., pp. 105–118.

200 See Article 3 of the General Act.

201 Stanley, acting on behalf of the International Association of the Congo headed by King Leopold II, King of the Belgians, made hundreds of treaties with native 'sovereigns' in the region and thus gained control over large portions of the Congo basin which eventually formed the Congo Free State; Leopold was the personal sovereign over the state whose existence was recognized by the powers at the Berlin Conference. See Lindley, *The Acquisition and Government*, p. 112; Crowe, *The Berlin West African Conference*, pp. 158–160.

202 Westlake argued that African tribes were too simple to understand the concept of sovereignty and hence were incapable of transferring it by treaty. See Westlake, *Chapters on the Principles of International Law*, pp. 144–146.

An alternative proposal was made by the American representative to the Berlin Conference, Mr Kasson, who argued 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 title. In conformity with this principle my government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression.[203]

Kasson's proposal was greeted cautiously, and the conference 'hesitated to express an opinion' on such a delicate matter;[204] scholarly opinion was divided as to whether Kasson's proposal, even though not officially accepted, nevertheless reflected the practice of states.[205] On the one hand, Kasson's proposal would have severely and unacceptably curtailed colonial powers if indeed the principle had been implemented in such a way as to require scrupulous evidence of proper consent.[206] On the other hand, absent such an inquiry into the validity of the ostensible consent, the proposal simply offered a justification for entering into more treaties with African states, claiming that such treaties conformed with the scheme outlined by Kasson.

Several jurists such as Westlake pointed out that Kasson's scheme was impractical and dangerous. Its proper implementation raised questions to which there were no clear answers:

> Is any territorial cession permitted by the ideas of the tribe? What is the authority – chief, elders, body of fighting men – if there is one, which those ideas point out as empowered to make the cession? With what formalities do they require it to be made, if they allow it to be made at all?[207]

There is more than a suggestion in Westlake, furthermore, that the individuals characterized as 'African chiefs' in these treaties exploited all these confusions for their own purposes.[208]

Overall, therefore, no clear procedure for acquiring valid title was laid down by the conference. This same vagueness afflicted the conference's attempt to clarify the issue of 'effective occupation'. The conference

[203] Cited in Westlake, *Chapters on the Principles of International Law*, p. 138. On Kasson's contribution to the Conference see Crowe, *The Berlin West African Conference*, pp. 97–98.
[204] See Westlake, *Chapters on the Principles of International Law*, p. 138.
[205] See Crawford, *The Creation of States*, p. 179.
[206] See Westlake, *Chapters on the Principles of International Law*, p. 139.
[207] *Ibid*., pp. 139–140.
[208] See Westlake, *Chapters on the Principles of International Law*, pp. 139–140.

basically stipulated that any party taking possession of a tract of land in Africa was required to notify all other members of this possession[209] and, further, was required to exercise its authority in its possessions in such a way as to protect existing rights within the territory.[210] This was intended to prevent countries from making claims to territory based only on the most tenuous connections with that territory, and to ensure that control was accompanied by international responsibility. The conference was only partially successful in achieving these ambitions, as Britain, which had the largest interests in Africa, opposed all efforts to impose greater responsibility on the colonizing powers.[211] These attempts to formulate rules for effective occupation acknowledged the lack of any precise, accepted and workable principles regulating the colonial encounter. The best that could be achieved was to proceduralise the matter by requiring states acquiring territorial interests to notify other signatories of their claims, to enable these states to lodge any objections.[212] No clarity existed as to how such claims were to be resolved, or in what forum.

This unsatisfactory resolution represented a fundamental irony for positivist jurisprudence. Positivists had sought at numerous levels of their jurisprudence to erase the problematic native from their scheme; the native was expelled from the realm of the family of nations and excised from history by positivist disregard for the four preceding centuries of diplomatic relations, and excluded from the process of treaty making. Native resistance and opposition were silenced by the positivist practice of reading a treaty with no regard to the violence and coercion which led to its formation. Despite all such attempts to exclude the African from the conference, however, the identity of the African native became the central preoccupation of its deliberations over the question of systematizing territory. And despite positivist attempts to assume complete control over the identity of the native, the native remained unknowable in a way which threatened the stability and unity of Europe. Conventional histories of the conference make the powerful point that Africans were excluded from its deliberations. The story of

[209] See Chapter VI, Article 34 of the General Act. For discussion as to the problem of effective occupation see Crowe, *The Berlin West African Conference*, pp. 176–191.

[210] Article 35 of the General Act.

[211] See Crowe, *The Berlin West African Conference*, pp. 176–191. In particular, Britain sought to restrict the application of these principles to the coastal states in Africa; and, further, prevented these principles from applying to protectorates.

[212] The term used in the Act is 'reclamations' rather than protest. Article 34 of the General Act.

the conference may also be written, however, from another perspective which focuses on the complex way in which the identity of the African was an enduring and irresolvable problem that haunted the conference's proceedings.

The existence of unassimilability, and the problems of native identity and their effect in bringing to crisis the colonial will to power, may well be worth identifying and celebrating; but such a celebration must be tempered with the knowledge that whatever the disruptions inflicted on the logic of colonial narratives, these did little to ameliorate the real and violent consequences which followed for African societies.

Although Kasson's approach was attacked and criticized, subsequent practice suggests that to that extent that *any* remotely legal explanation could be given to the partition of Africa, it was based on his proposal.[213] Seen in this perspective, which accepted the possibility of treaties between Africans and Europeans, consent, as ostensibly granted by Africans, became a complete reversal of what it was supposed to mean. Consent, rather than an expression of the will of the relevant party, was instead created in accordance with the exigencies of the situation. What resulted, in effect, was a system of treaty making in which ideas of 'consent' acquired a peculiar and completely distorted form. Consent, of course, was the basis of positivist jurisprudence, and the science of jurisprudence, authorities such as Oppenheim argued, consisted precisely in determining whether such consent had led to the formation of certain rules, which would then be binding on the state which had so consented. A rich and complex set of ideas – which are still an integral aspect of contemporary international legal jurisprudence – developed out of this set of considerations. However, with regard to native consent, a very different set of issues arose. Here, consent was created by the jurist; agency was created by the writer, as African chiefs, Indian princes and Chinese Emperors, were ascribed powers to consent to various measures which benefited the European powers. They were excluded from personality; when granted personality, this was in order to enable the formulation of a consistent jurisprudential system or else to transfer the entitlement which the Europeans sought. Having articulated a legal framework for acquiring sovereignty over African territory which was radically disconnected from the actual practice[214] on which they purported to base their system, positivists,

[213] See Crawford, *The Creation of States*, pp. 178–179 and sources cited therein, which include Lugard.

[214] See Crawford, *The Creation of States*.

in a now familiar reversal, discarded several important elements of their jurisprudence; whereas previously they insisted that treaties could not be the basis for acquiring sovereignty over African territory, they now applied their science to the interpretation and application of treaties.

Justifying colonialism: trade, humanitarianism and the civilizing mission[215]

The Berlin Conference was perhaps the first occasion on which Europe as a body went some way towards articulating a philosophy of colonialism which was appropriate for the late nineteenth century, a time in which the colonial project entered a new phase because of the direct involvement of states in the furtherance of colonialism, and because of the systematic economic exploitation of the colonies which led not only to intense inter-state rivalries but the increasing importance of the colonies for the metropolitan economy. The idea of the civilizing mission, of extending Empire for the higher purpose of educating and rescuing the barbarian, had a very ancient lineage.[216] Versions of the civilizing mission were used by all the actors who participated in imperial expansion. New challenges were posed to the way in which imperial states conceived of themselves and their colonies once, for example, the United Kingdom dissolved the East India Company and assumed direct responsibility towards its Indian subjects.[217]

The humanitarian treatment of inferior and subject peoples was thus one of the issues addressed by the conference. Over the previous century or so, the slave trade had been gradually abolished by international law. The conference, however, while reiterating the necessity to stamp out

[215] 'The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look at it too much. What redeems it is the idea only. An idea at the back of it.' Joseph Conrad, *Heart of Darkness* (Edinburgh: W. Blackwood & Sons, 1902).

[216] See Pagden's study of how the modern European Empires modelled themselves on the Roman Empire, and the Roman idea of what may be termed the 'civilizing mission'. Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c.1800* (New Haven: Yale University Press, 1995). See especially his discussion of Cicero's version of the 'civilizing mission', *ibid*., pp. 22–23.

[217] This led Queen Victoria to declare that the Crown was as responsible towards its native Indian subjects as it was to all its other subjects. See Quincy Wright, *Mandates Under the League of Nations* (Chicago: University of Chicago Press, 1930), p. 11, n. 18.

the trade, went further. In his opening speech at the conference, Prince Bismarck noted that 'all the Governments invited share the wish to bring the natives of Africa within the pale of civilization by opening up the interior of the continent to commerce'.[218] The British representative made similar remarks, warning of the dangers of completely unregulated trade and arguing for that type of trade which would 'confer the advantages of civilization on the natives'.[219] The conference concluded that it had properly embodied these concerns in Article 6, which read in part:

> All the Powers exercising sovereign rights or influence in the aforesaid territories [the conventional Basin of the Congo] bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery and especially the Slave Trade.[220]

These vaguely expressed concerns were only sporadically implemented;[221] indeed, the most notable achievement of the conference was the creation of the Congo Free State, which was subsequently recognised as belonging to the personal sovereignty of King Leopold II of the Belgians and which was the scene of mass atrocities.[222] Nevertheless, the humanitarian rhetoric of the conference was extremely important because it refined the justification for the colonial project. Trade was not what it had been earlier, a means of simply maximizing profit and increasing national power. Rather, trade was an indispensable part of the civilizing mission itself; the expansion of commerce was the means by which the backward natives could be civilized. 'Moral and material' well being were the twin pillars of the programme. This gave the whole rhetoric of trade a new and important impetus. Implicit within it was a new world view: it was not simply the case that independent communities would trade with each other. Now, because trade was the mechanism for advancement and progress, it was essential that trade be extended as far as possible into the interior of all these societies.

[218] Quoted in Lindley, *The Acquisition and Government*, p. 332.
[219] *Ibid*. [220] Article 6 of the General Act.
[221] Crowe, for example, asserts quite forcefully that humanitarian issues played only a very small role in the Conference. See Crowe, *The Berlin West African Conference*, pp. 3, 103–04.
[222] See Lindley, *The Acquisition and Government*, pp. 112–113. Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Boston: Houghton, Mifflin, 1999).