

Colonial Law

by Luigi Nuzzo

This article reconstructs the development process of colonial law in Europe and discusses the relationship between colonial law and international law. The Berlin West Africa Conference (1884–1885) provided the basis for independent juridical thinking with regard to the colonial realm and for the emergence of a new juridical discipline. At this conference, the legal titles which justified the occupation of Africa were defined and the consensus emerged that the fundamentally different nature of the African continent and its inhabitants demanded extraordinary responses. Colonial law furnished these responses, which international law and consular law no longer seemed capable of providing. The special situation in Africa was of great importance for the establishment of the new law, while at the same time this special situation was used to legitimize the juridical monstrosities in the colonies, which existed simultaneously with the rational, modern legal system of the metropole.

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International Law, Consular Law, Colonial Law

Colonial law encompassed the totality of the legal norms and research which related to the governance and administration of overseas regions conquered by Western powers (→ Media Link #ab). Colonial law was not viewed as an autonomous discipline – with its own recognized title, academic courses and specific methodological characteristics in research and teaching at universities – until the beginning of the 20th century. Surprisingly, the first comprehensive theoretical works on colonial law were published in Italy, although Italy was the last state to become involved in colonialism.

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In 1918, an eminent European public law jurist, Santi Romano (1875–1947) (→ Media Link #ac), published in Rome his *Corso di diritto colonial*, which was based on a course he had taught in Florence. The text immediately attracted attention due to its originality.¹ While from the 1880s onward many experts in international, constitutional and administrative law had written about problems regarding the colonies in eminent journals or had devoted sections to the colonies in their handbooks, Santi Romano depicted the issue in a whole new light.

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For the first time, a famous public law jurist had devoted a special university course to colonial law and had published a handbook with the aim of offering a scholarly discussion of the material and of establishing the position which should be assigned to this law in the encyclopaedia of juridical knowledge. According to Santi Romano, jurists could no longer be satisfied by equating colonial law with norms which were in force in the colonies, or by applying order to the confused and contradictory norms which each European state had produced for its respective colonial possessions. Colonial law was a topic which called for theoretical legitimacy and academic autonomy. Its essence should be defined; the boundaries separating it from national law and international law should be described; the system of differences on which it was based should be outlined; and, finally, thought should be given to the changes which colonial expansionism had caused in the structures of the old liberal states.

However, attempts to attain these goals had other consequences, too. The foundation of "Colonial Law" as a subject at universities, with the corresponding journals, university chairs, and handbooks addressed to students, contributed to a process whereby the appropriation of the resources of indigenous peoples came to appear ideologically unobjectionable, as the topic was now being dealt with under academic auspices. The transfer of colonial law to the realm of academia removed – it seemed – all signs of force from the appropriation of the lands of other peoples by the West, depicting the process instead in the context of a civilizing mission, thereby helping the West to establish legitimizing legal titles as well as rules for relations with the natives. Civilization and progress were the guiding principles in this area. They legitimized overseas expansion, but they also dictated how this expansion unfolded. Following these guiding principles, it was the task of the executive power to set the daily rhythms of life in the colony. It also had to use the experience gained in doing this to establish economic, political, legislative and judicial structures.

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The construction of colonial law as an academic subject was therefore no easy task. It not only required the comprehensive consideration of Western colonialism from historical, economic and sociological perspectives, but also demanded a rigorous assessment of the juridical concepts regarding the colonies which had developed in Europe in the preceding 40 years. Since the African continent had become of interest to the European governments, legal experts had played a central role in the formation of the European colonial consciousness. This was the case – in the context of the definition of the object of investigation – both with regard to the definition of the "Self", of national identities, and with regard to the mobilization of the society in the metropole, so that the society would participate in the expansionist project of European liberalism. Even without engaging with the concept of "colonial law" in great depth, these jurists had suggested an initial juridical mode of interpretation of this new phenomenon. They had also elaborated justifications for the civilizing mission of the Occident. Additionally, they developed legal justifications which legitimized the appropriation of overseas territories, as well as rules of behaviour for governing interaction between powers with conflicting interests.

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The birth of colonial law proper occurred in tandem with the exploration of Sub-Saharan Africa, but, even before the start of the "scramble for Africa", the problem of establishing law governing relations with peoples of another religion or peoples considered to be on a lower level of civilization had assumed a central role in the international law debates of the West.

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International law in the 19th century was shaped by Christianity, and its norms were therefore essentially rooted in generally accepted moral values and a shared cultural tradition. For this reason, an objective basic consensus existed, which outweighed the self-interest of the nation-states and which gave international law a positive character. Consequently, it was by no means a universal law; it extended only to the borders of Europe and America. Outside the Occident, the absence of Christian faith and/or civilized culture among other peoples hampered the development of a corresponding law and the active participation of these peoples in the discourse of the international community. As they did not participate in the establishment of international law, international law could at best only be applied partially and vaguely in relations with them.² At the same time, they were not excluded from the international order. As the Western peoples regarded their values as universal and made those values the basis of international relations, relations with non-Christian peoples were also based on the morality and the universal principles of natural law, which were considered to be applicable to all.

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International law in the 19th century therefore assumed the existence of two separate categories with a common Christian origin. The first category contained law which was formalized to a high degree, the main protagonists of which were the states, international lawyers and Western populations, who were also the only recognized representatives of positive law. The second category – based on foundations which were universal from the Christian point of view – extended much further, to the extent that the minimum qualification was that one had to be human. Consequently, from a theoretical standpoint, two very different ways of defining international law became apparent. In the first case, international law appeared as a positive law, but one which was not universally applicable because it was limited to the Christian nations or to countries whose civilizations were sufficiently respected by the West. In the second case, international

law was universal law, but it was not positive law. From a practical standpoint, the problem was considerably more complex than this. The borders of the international community were also the borders of the Christian West. The existence of a world beyond these borders (which was the object of renewed economic and political interest) directed academic interest to two issues: on the one hand, there were the diplomatic relations which the Western countries had maintained for a long time with the Mediterranean countries of Africa, the countries of the Middle East and – from the 1840s – with China, Siam, Persia, Japan and Korea; on the other hand, there was the recent occupation and division of Sub-Saharan Africa.

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In the first case, the aim was to promote and protect commercial interests in the countries of the Levant and to protect those engaged in trade from the dangers of local justice, which was considered to be arbitrary and vicious. In the second case, in contrast, the aim was to establish whether the peoples of central and southern Africa were entitled to legal personality and sovereignty, and what were the legal justifications which legitimized the occupation of their territories.

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International law which was positive in character seemed unsuitable for achieving these aims. The otherness of the judicial and political situation in the Middle East, the Far East and the states of the Maghreb, and, in particular, the reality on the ground in Sub-Saharan Africa made it necessary to rapidly adapt the law to the requirements of the executive power. This made it necessary to revise old categories as well as to introduce new and more flexible categories. Consular law and colonial law seemed to the international lawyers of the 19th century to be the best instruments with which to meet these requirements and with which to establish legal relationships with the "half-civilized" states of the Orient and North Africa and with the "wild" peoples of equatorial Africa which were outside international law but within an internationally recognized and uniform concept. Past experiences with these categories of peoples were reflected in the nature of the relationships and provided justification for a series of juridical decisions: the tendency of removing control over colonial law from the competencies of parliaments; the dilution of the principle of the sovereignty of peoples; the return to the personality principle;³ and – beyond the borders of the Occident – the rediscovery of the executive power, which was incompatible with the separation-of-powers principle prevailing in the rule of law.⁴

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The special connection between consular law and colonial law was clearly expressed in the German *Schutzgebietsgesetz* (Protectorate Law) of 16 March 1886. This law bestowed on the Kaiser both legislative and executive powers in the African possessions and also subordinated all private law, criminal law and procedural law to the *Konsulargesetz* (Consular Law) of 10 July 1879.⁵ However, consular law and colonial law remained two separate areas of law. Above all, this led to demands to establish the academic autonomy of the new discipline and to emancipate it from consular law. While it was possible to identify common denominators shared by these areas of law (flexibility, speciality and exceptionality), they had different juridical prerequisites and related to different political and geographical realities.⁶ For example, German legal experts highlighted the fact that the Consular Law was a personal law which was applied abroad, while the Protectorate Law was a territorial law. The protectorates themselves – it was further pointed out – were territories over which the Kaiser exercised full protective powers even though they were not considered part of the German Empire (*Reichsgebiete*).⁷ On the one hand, there were the so-called "half-civilized" states, the legal personality of which was nonetheless recognized. Their perceived cultural and juridical backwardness provided justification for the restriction of their sovereignty and – based on the extraterritoriality principle – the expansion of the competencies of consular law.⁸ On the other hand, there were the completely "wild" peoples, who were assigned to the lowest level of the scale of races (→ Media Link #ae), and who did not satisfy European standards for recognition as a state and were therefore not recognized as subjects of international law at all.⁹ They had to be granted a separate juridical status.

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Developments up to the Berlin West Africa Conference

In the late 1870s, the discoveries of David Livingstone (1813–1873) (→ Media Link #af), Pierre Savorgnan de Brazza (1852–1905) (→ Media Link #ag), Verney Lovett Cameron (1844–1894) (→ Media Link #ah) and Henry Morton Stanley (1841–1904) (→ Media Link #ai) unveiled to the international public the equatorial Africa and opened the eyes of Europeans to a new world inhabited by "wild" people, where slavery, heathenism and cannibalism still reigned. An incredibly

large territory had been discovered and Europeans viewed it as their moral duty to bring this territory onto the path of civilization through missionary activity (→ Media Link #aj) and free trade. In other words, the task was to colonize a space which was seen as having no previous norms. The "scramble for Africa" had begun and everyone, religious orders (→ Media Link #ak), adventurers, private companies as well as new and old European powers were ready to participate in it. Law scholars were also called to take part. In particular, the interest of Leopold II (1835–1909) (→ Media Link #al) of Belgium in the Congo Basin made the involvement of international lawyers important. The construction and representation of the African territory, the definition of relations with the native peoples, and the position of the latter within the international order also posed legal problems.¹⁰

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The plans of the Belgian king took more concrete form in 1876. After the conclusion of the Brussels Geographic Conference which he chaired, an international organization (→ Media Link #am) with philanthropic, scientific and commercial goals, the *Association Internationale Africaine*, was founded. In a very large territory which extended from the Atlantic to the Indian Ocean and from Sudan to the Zambezi Basin, the association was given the task of coordinating the activities of the national committees of the participating countries and of promoting the founding of staging posts or bases, in order to promote geographical discovery, the abolition of the slave trade (→ Media Link #an) and, in particular, the development of commercial activities. In the second half of the 19th century, the civilizing mission supported by Europe was not restricted to fighting slavery and converting the native peoples to Christianity. On the contrary, civilizing these populations meant opening up these immense territories to trade and commercial exploitation.

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The arrival of Henry Morton Stanley in Boma (Congo) in August of 1877 simplified everything. Europeans could finally gain access to the interior of Africa along the Congo River. Leopold II was immediately aware of this, but an international organization with primarily philanthropic aims did not appear to be a suitable way of making capital out of this discovery. Thus, the *Comité d'Etudes du Haut-Congo* was founded. It was a private company with Leopold II as its head, which – in spite of its name – had the primary aim of engaging in commercial and industrial activities in the region. The committee entrusted Stanley with the task of leading an expedition along the course of the Congo. On 13 August 1880, one of his representatives in Vivi procured part of the lands of the tribal leaders of the region in exchange for a uniform jacket, a hat, a coral necklace, a knife and a piece of cloth. The contract of purchase included the ceding of all communications routes as well as the right to trade freely with the native peoples and to cultivate unoccupied lands, and especially contained the transfer of the rights of sovereignty of the native leaders to the committee. Only two years later, Leopold was able to convert the *Comité d'Etudes du Haut-Congo* into the *Association internationale du Congo* by connecting colonial projects with humanitarian ideals in a skilful way.¹¹ In doing so, he created a new political entity which in its nature belonged to the realm of private law, but which had public dimensions, and which – after the acquisition of rights of sovereignty by means of hundreds of contracts concluded with the Congolese tribes – not only exercised governmental power over an extremely large territory which was not precisely defined, but also laid claim to state status for the ceded territories which were now under its control and protection. On 22 April 1884, the United States of America recognized the flag of the *Association internationale du Congo* and of its free states (→ Media Link #ao) as the flag of a friendly government, thereby making the entry of the new state into the international community possible.¹² By the conclusion of the Berlin West Africa Conference early the following year (26 February 1885), all European powers had recognized the Congo Free State as a new sovereign state and Leopold was able to sign the concluding documents of this conference as the head of this African state.¹³

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The epilogue to the story is hardly surprising: Firstly, the negotiations on recognition placed the state of Congo in a situation partially comparable to that of the states of the Orient. In the Congo, there was a civilian government which exercised sovereign power over a territory which remained largely unexplored and the population of which was completely "wild". It therefore seemed necessary to protect the Europeans and to entrust their civil and criminal disputes to consular justice, even though the state administration had already been established in the proper way.¹⁴ Secondly, the humanitarian campaign to abolish slavery which was one of the stated goals of the association and, in particular, the conversion of the Congo Basin into a neutral zone in which full freedom of trade was guaranteed, presented the Western powers with good reasons for recognizing the new political entity.

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Of course, there were also exceptions. While it proved easy to reach an agreement with France (in spite of French in-

terests in the region and even though the French rejected the principle that a subject of private law could acquire and exercise rights of sovereignty), Portugal only recognized the new entity after the European states applied considerable pressure with France playing a mediator role.¹⁵

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At the beginning of the 1880s, the companies founded by Leopold II in the Congo Basin intensified their entrepreneurial endeavours and the French government signed a treaty with King Makoko who ceded the territories and rights of sovereignty over the right bank of the river to Pierre Savorgnan de Brazza. This led Portugal to claiming rights of sovereignty over a long strip of the east African coast including the mouth of the Congo.¹⁶ Portugal had by this time become a peripheral figure on the international stage and its demands should have been doomed to failure, but paradoxically it was the official arrival of France in the region which was conducive to Portugal's demands. The presence of France, which constituted a far greater threat to the interests of Britain than the presence of Portugal, prompted Britain to accept Portugal's claims. Consequently, the Anglo-Portuguese treaty recognized the sovereignty of Portugal over the African east coast between 5° 12' and 8° latitude, i.e. between Ambriz and Pointe-Noire and extending as far inland as Noki. In addition, the treaty guaranteed the freedom of trade and navigation in the territory and along the Congo and Zambezi rivers, and protection for missionaries and the admission of all religions. It extended the customs tariffs applied in Mozambique (but not to the British), excluded the imposition of all taxes and customs duties that were not expressly mentioned in the treaty or agreed to by the parties, and it entrusted to a mixed commission the duty of drafting and monitoring the implementation of Congolese regulations with regard to navigation, the police and controls, and the setting of toll duties.¹⁷

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Nevertheless the treaty was not ratified. The anxieties of the chambers of commerce of London, Liverpool and, in particular, Manchester with regard to Portuguese protectionism, and the concerns of the anti-slavery associations and the Baptists due to Portugal's history of trading in slaves and due to its Catholic integralism led to a strong anti-Portuguese campaign in Britain. In continental Europe, the staunch opposition of France and Germany made the ratification impossible. As it was accurately described at the time, 1884 marked the end of British "informal empire". Otto von Bismarck (1815–1898) (→ Media Link #ap), who had recently been converted to the cause of imperialism, wrote to the French ambassador in September of the same year, that the British would have to be liberated from the illusion that every territory in Africa which had not yet been occupied belonged to their sphere of influence and that new territorial acquisitions which involved the exercise of rights of sovereignty therefore represented an infringement upon the legitimate rights of the British.¹⁸ France had already done this by occupying the right bank of the Congo; but Germany too had sent out unmistakable signals only a few months previously. The protection which the German Chancellor granted to a base established by the Bremen businessman Franz Adolf Eduard Lüderitz (1834–1886) (→ Media Link #aq) in Angra Pequena (which was not far from the border of the British Cape Colony) led to the the birth of German Southwest Africa and to the German protectorate over Togo and Cameroon.

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Colonial politics obviously needed new rules, and a large European conference seemed to Bismarck the most suitable way to find a common solution for the commercial, juridical and territorial problems which Europe was faced with due to the division of Africa. Apart from the commitment of all the invited states to fighting slavery and guaranteeing freedom of conscience and freedom of religion for natives and Europeans, two main goals were pursued. On the one hand, there was the guarantee of freedom of trade and unrestricted navigation of the Congo and Niger rivers. On the other hand, there was the definition of the legal status of the regions of Africa which had not yet been occupied by European powers, as well as the definition of modalities by which occupation was to occur.

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On 15 November 1884, Bismarck opened the conference by discussing its aims and stressing the duty of all participating states to help to bring civilization to Africa. He made the Dean of the Diplomatic Corps, Italy's plenipotentiary Edoardo de Launay (1820–1892) (→ Media Link #ar), chairman.

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Juridical Monstrosities

The debate about legal justifications which legitimize the acquisition of territories of peoples of other religions and territories of peoples considered to be inferior in culture had been a prominent feature of juridical thought from the late 15th century. Francisco de Vitoria (1460–1546) (→ Media Link #as) and Alberico Gentili (1552–1608) (→ Media Link #at) transferred the property acquisition title of *occupatio* from private law to international law and helped it to gain currency there by forming from it a legal title which legitimized the acquisition of land and property without *dominus* on the basis of natural law. Hugo Grotius (1583–1645) (→ Media Link #au), John Locke (1632–1704) (→ Media Link #av) and Emer de Vattel (1714–1767) (→ Media Link #aw) asserted the right to occupy all territories which were not being used commercially and which were not in private ownership in the Western sense, and they introduced the differentiation between public and private occupation. The international lawyers of the 19th century only had the task of completing the circle: occupation became a means of acquiring sovereignty over a territory over which no-one had previously exercised sovereignty, and the right to utilize the territory commercially followed from this. To avoid the acquisition of a territory being open to challenge from a third party, this law required an effective process for taking possession of the territory. The prerequisite for acquiring a territory was therefore no longer the emptiness of the territory or the fact that it was not inhabited or utilized. The prerequisite was now the absence of sovereignty.

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The discovery of Africa highlighted the paradox inherent in this construction. By Western standards, the African tribes could not be considered either as nations or as states, while at the same time every territory which did not belong to a state was considered open to occupation. The right to occupy was only excluded by the existence of another state. In all other cases – Western international law experts agreed – the fact that the respective territories were inhabited did not negate the right to occupy those territories. The presence of a population could have prevented or limited acquisition under private law, but not occupation in relation to possible state sovereignty rights.¹⁹ For the European international lawyers, occupation had become a principle of civilization. By transferring the principle of *res nullius* (nobody's property) to public law, Guido Fusinato (1860–1914) (→ Media Link #ax) was able to define as *territorium nullius* any territory which was not the sovereign territory of a state or a protectorate of a state, regardless of whether it was inhabited or not.²⁰

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However, it was not enough to connect the right to occupy a territory to the absence of state sovereignty. The division of African territory had to be viewed in relation to the higher principles of civilization and progress. At the same time, the necessary prerequisites for occupation had to be defined and the validity of these against third-party claims had to be guaranteed in order to avoid conflicts between the colonial powers.

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The concluding document of the Berlin Conference (1884–1885) regarding the Congo Free State²¹ enshrined the most important guidelines of the politics of Western expansion on the African continent. By defining the modalities for the appropriation and "peaceful division" of the continent while respecting the principle of the sovereignty of each individual state, the signatories of the concluding document expressed their wish to establish in a concerted effort favourable conditions for the development of trade and civilization in particular regions of Africa. In article 6, "all powers which exercise sovereignty rights or influence in the ... regions" ceremonially committed themselves to defending the native peoples, to improving the moral and material conditions of the native peoples, to working together to end slavery, in particular the slave trade, and finally confirmed their commitment to the protection and assistance of all religious, scientific and charitable organizations whose aims were "to teach the natives and to make the advantages of civilization comprehensible and appealing to them".²² On the one hand, the European states pointed to the modern civilized state and to progress as justification for freedom of trade and their role as protectors of the natives. On the other hand, by laying claim to precisely these ideas, they liberated the acquisitive ambitions of their foreign policy from all constitutional restrictions.

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Africa was a territory *sans maître* and could therefore be occupied legitimately. Article 35 defined the prerequisites for occupation by introducing the principle of the effectiveness of ownership and by compelling the signatory powers to ensure the presence within the African territories of an authority which was capable of ensuring that the acquired rights were respected, as was free trade and freedom of passage. However, the terms of article 35 were loosened considerably due to British resistance, with the result that the interior was excluded from the remit of the article, which ultimately only applied to the coastal regions. Article 34 further restricted the applicability of the regulations contained in the concluding document, so that these applied only to future acquisitions. Additionally, this article stipulated a duty to inform

the other signatory states in the event of the occupation of a territory or the establishment of a protectorate in order to give the other states the opportunity to lodge a complaint.

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Articles 34 and 35 are worthy of particular attention. They allow us to gather important insights into the beginnings of colonial law and the paradox which was inherent in colonial law from the start. Although the native communities were not recognized as state entities, they were nonetheless seen as capable of concluding protectorate treaties. In its colonial version, the concept of protectorate did not imply that the signatories were two sovereign and independent states, one of which— the protected one – agreed to the diminution of its sovereignty on the international level, but retained its legal personality and complete control over its territory. In other words, the colonial powers granted African tribes the capacity to restrict a right which they possessed, that is the right to sovereignty, which according to the prevailing opinions in Europe, however, the tribes should not be allowed to have any knowledge of. In this way, the colonial powers got around article 35 of the document of the Berlin Conference, which stipulated that a valid protectorate treaty was an essential element of a legitimate occupation. From a theoretical standpoint, the contradictions are obvious. The European powers had two possible ways of gaining control of a region and its African peoples. These two options involved different degrees of control and had fundamentally different prerequisites. On the one hand, the absence of state sovereignty made the African territories a *territorium nullius*, which justified their occupation. On the other hand, the fact that the African territories were inhabited by peoples with which one had to establish some kind of diplomatic relations made the concluding of protectorate treaties possible.²³ But that is not all. It was neither clear what legal value the treaties concluded with these peoples had, nor was it easy to differentiate between the effects which actually occurred as the result of an occupation and the effects implied by the protectorate status. It seemed equally difficult to discern the point at which the limitation of "native sovereignty" due to protectorate status became a complete annexation of the territory.

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As the comprehensive and vigorous debate among European scholars of international law and public law shows, it was not easy to find satisfactory answers.²⁴ Some jurists recognized the treaties with the native tribes as being fully effective,²⁵ while others rejected them and insisted, on the contrary, that the rights of the occupiers derived from the subsequent occupation.²⁶ There were others who preferred a compromise and spoke of a qualified occupation. On the one hand, they acknowledged the decisive role of the protectorate treaty; on the other hand, they viewed the occupation as making the protectorate status complete, thereby transforming a derivative acquisition into an independent acquisition.²⁷ While in theory it was not possible to interpret colonial protectorate status as an actual occupation as it only provided the right to prohibit colonization activity by other Western states in the same region, in practice the ambiguous formulation of article 34 allowed the European powers to acquire territories and rights of sovereignty over them by simply informing the other powers.²⁸

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In Africa, it was not so important that the prerequisites for occupation and those for protectorate status clearly contradicted each other and that the definition of Africa as *territorium nullius*, which was recognized in international law, was called into question by hundreds of treaties which all the European powers had concluded with the native peoples. In Africa, it was sufficient to give these treaties an official form in order to ensure their effectiveness – in spite of doubts and the subtle differentiations of international lawyers. Colonial protectorate status seemed the suitable instrument with which to achieve this goal. It allowed the most varied of cases and experiences to be subsumed in one single category and it permitted the theoretical legitimization of control over an African territory. This was the case, in particular, if occupation was not an option for acquiring sovereignty because occupation lacked (international legal) effectiveness, or if it proved difficult to describe the territory as *nullius* because the native leaders exercised guiding and directing powers.

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An Extraordinary Law

At the end of the 19th century, Sub-Saharan Africa was not only perceived as different from urban Europe. Its political, social and economic circumstances and the large differences between Africans and Europeans made it exceptional and therefore demanded exceptional responses. International law, consular law and public law towards which most of the contemporary European jurists who were familiar with colonial law were oriented did not seem suited to providing satis-

factory solutions. The "settlements" and the leased concessions (usage rights to land) in the Orient, the introduction of the terms "hinterland" and "sphere of influence", the way the institution of the protectorate had been compromised by its transfer to the African territory, and the reversion to the principle of mandate after the First World War constituted a serious and obvious *vulnus* (wound) with respect to general law. But at the same time these were signs of a great force, which could compel general law to change to suit the needs of the social reality. Beyond the borders of the Occident, there was an overlap between *iura* and *facta*, between rules and exceptions, and between rights and privileges, to the extent that it was ultimately no longer possible to differentiate between the two, and they legitimized power structures that had nothing to do with the law-based state, as well as a new, independent and formally "anti-juridical law". The unique feature of this law was that, on the one hand, it contained a constitutive principle, and, on the other hand, it provided the instrument with which the rational legal system of the metropole could be made theoretically compatible with the "anomalies" and "juridical monstrosities" which were common in the colonies.²⁹

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Colonial law was therefore decidedly different from the law of the metropole. It was a heterogeneous law due to the diversity of its material components. It contained many special norms, primarily customary law, and it was prepared to accommodate some Islamic (→ Media Link #ay) and native legal traditions. As applied in the colonial context, the juridical and political discourse in Europe lost the abstract, general, scientific and apolitical character which it laid claim to in Europe, and – paradoxically – emphasized the centrality of the law and the authority of the rule of law by returning to a pluralism of norms and a pre-modern, authoritarian paternalism.

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It seemed as though the colonies were living in a different time period than the metropole, in a period which the Italian jurist Romano compared with that of European antiquity. Through this temporal disconnection, it was possible to maintain a unified concept of the legal order. It permitted the co-existence of the exceptionality of colonial law, on the one hand, and the rule of law in the metropole, on the other hand, and it thereby created a unique cross-temporal unity between the pre-modern past of Christian Europe and the colonial present. The emergence of many new legal entities, the pluralism of norms and the enormous power of the executive and the military apparatus were able to co-exist with the forms of rule of law in the metropole because the colony existed in a different period than the metropole.

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Juridical modernity resurrected pre-modernity and, citing the temporal difference between the centre and the periphery, defined the colony as different. The latter appeared as a remnant of the past or a remote realm which could be penetrated by the advantageous effects of the modern era and could become an object of its myths, but the history of the colony had yet to begin or had begun in precisely the same moment as European colonization had started there. The territory of the colony was neither part of the territory of the metropole nor part of a foreign state, but floated somewhere between the two. It was a different space which legitimized different evaluations and legal systems, depending on the nature of the individual colonies. According to the German doctrine, the African possessions were simultaneously inside and outside the empire. While they were subject to the territorial sovereignty of the empire, they did not belong to the territory of the empire. To Paul Laband (1838–1918) (→ Media Link #az), they were *Pertinenzen* ("cohesions"); to Georg Meyer (1841–1900) (→ Media Link #b0) and Otto Köbner (1869–1934) (→ Media Link #b1), they were *Nebenlande* ("ancillary lands"); to Georg Jellinek (1851–1911) (→ Media Link #b2), they were *Staatsfragmente* ("state fragments"). They were the object of Romano's unique *diritto reale pubblicistico*, semantically legitimized by the general use of the terms "possessions" or "dominion" for the colonies, and historically legitimized by the close relationship between colonial law and antique law.³⁰

▲ 32

The different levels of civilization not only prevented any form of consistency between the legal system of the metropole and that of the colony, they also negated any possibility of comparing the two systems. Therefore an understanding of the reality overseas was only possible from the perspective of the pre-constitutional state, i.e. the perspective of the "stato che vigeva prima dello Stato costituzionale" ("the state that existed before the constitutional state"),³¹ not from the perspective of the constitutional state, in which a separation of powers prevailed. According to Romano, Colonial law could not be constituted on the same basis and according to the same criteria as the law of the metropole, because the subjects of colonial law, i.e. the natives, prevented this. "Esso si riferisce" – Romano asserted – "a popolazioni di civiltà meno sviluppata di quella europea, per le quali è compatibile un governo simile a quello vigente presso di noi in epoca più antica, e viceversa non sarebbe possibile adottare i principi del moderno costituzionalismo".³²

The occupiers argued that, in all European colonies, the cultural difference and the backwardness of the African peoples left no alternative and led to two different complexes of norms: one for members of Western peoples, and one for the natives and others of equal status. This was a subjective reality which was defined by two different political-judicial perspectives: by the legislative power with its laws and codes, and by the executive with customs, regulations and administrative guidelines. This was how the creation of a special form of law came about, because, due to the differences between subjects and places, the relationships on which that law was based "di regola richiedevano un trattamento giuridico a sé" ("usually made juridical special treatment necessary").³³ It was a special form of law which was of course not suitable for the interpretation of the law in the metropole, but could nonetheless be recognized and integrated by the latter.

▲ 34

It was a special form of law which was always drifting towards the paradigm of an exception. While this special law was viewed by Romano as a complex of norms which could supersede general law due to "cause e considerazioni straordinarie" ("exceptional causes and considerations") and not due to its inherent qualities, the unique feature of colonial law was that it offered the possibility to transform colonies into extraordinary places – places where the state legal system had to be transferred to a different level of civilization and where the aboriginal inhabitants were subjected to a legal system which can hardly be described as new because it was the legal system of pre-modern Europe.³⁴

▲ 35

It was as though the natives occupied some kind of anteroom to law, they could only admire the radiant light that – filtered through the gates of Western civilization – penetrated through to them and hope that they one day would gain entry there by means of naturalization. The pre-modern existence to which they had been assigned condemned them to an unending childhood entangled in the sordid machinations of a familiar regime which protected them. This situation may have contributed to intellectual and moral growth, but it also made the principle of the separation of powers inapplicable, due to the uniqueness of the power which emerged from the idea of the family. This power permeated all subjects without distinction and explains why the legislative competencies were transferred to the executive.

▲ 36

The natives and their territory lay outside the Occident, but nonetheless belonged to it. Inhabiting an indefinable zone, they were excluded from the metropolitan rule of law, but incorporated into the absolutist state. Far removed from modernity, they found themselves in pre-modernity, subjected to the authority of the governor and his regulatory, judicial, bureaucratic and military apparatus and to the application of those customs which had been "transferred" to the latter and through which the new "civilized" values were filtered.

▲ 37

A New Era

The end of the Second World War and the return of democracy in Europe did not solve the colonial problem. The Charter of the United Nations designated territories and peoples which were under the guardianship of Western states. Additionally, it was viewed as the "sacred mission" of the Western states to assist the progress of these territories and peoples who, it was thought, would at some point gain entry into the international community.³⁵ On the other hand, the time was not yet ripe for a decolonization of historiography and of the juridical debate. For example, Rodolfo Quadri, an important Italian international lawyer, was able to republish his *Manuale di diritto coloniale* of 1950 in the mid-1960s without any qualms in a country which had lost its empire and had only succeeded – with considerable difficulty – in retaining trusteeship over Somalia. However, Quadri had to admit that the choice of title had caused him difficulties. He decided it was best to await the decision of the relevant authorities before deciding between the titles "Law of the Overseas Territories" and "Law of the Non-self-governing Territories".³⁶

▲ 38

However, while the Italian international lawyer waited for this decision, something had changed outside the borders of Europe and outside jurisprudence. Independence movements had demanded – in addition to independence and the end

of colonialism – the retrieval and reinvigoration of their own long-suppressed, cultural memories which, they hoped, would help them to reclaim their self, their history, their identity. This was a particularly difficult path of remembering, which involved overcoming the military-political violence of western colonization, as well as unmasking the latter's ideological and cultural structure and the individual juridical, religious and artistic elements on which it was based. This path began in 1960 with the Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960) and continued six years later with the International Covenant on Civil and Political Rights (12 December 1966). It can probably now be viewed as being completed with the adoption by the United States of America of the Declaration on the Rights of Indigenous Peoples (15 December 2010), which had already been adopted by the UN General Assembly in 2007.

▲ 39

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Appendix

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Notes

1. ^ Romano, Corso 1918.
2. ^ Henry Wheaton refers to a "relaxed relation" of Western international law with regard to the Muslim population: Wheaton, *Elements of International Law* 1836, pp. 44–46.
3. ^ The personality principle states that the law to be applied is dependent on the subject's membership of a particular ethnic group.
4. ^ Romano, Corso 1918, pp. 114–123; cf. also the whole of chapter VI.
5. ^ The application of the consular law of 1879 in the colonies was subject to a decree of the Kaiser. Georg Meyer wrote: "Damit soll nicht die Einführung selbst, sondern nur die Zeit der Einführung in das Ermessen des Kaisers gestellt sein" ("Not the introduction itself, but only the time of the introduction is placed in the discretion of the Kaiser.", transl. by N.W.) (Meyer, *Staatsrechtliche Stellung* 1888, p. 174); but cf. also *ibidem*, pp. 121–128; pp. 195ff. On the application of German colonial law in the African possessions, see: Bornhak, *Die Anfänge* 1887, pp. 17ff. A few years later, the special requirements of the overseas territories and the need to separate colonial from consular law resulted in the German Colonial Law of 25 July 1900, which contained no more complete references to consular law with regard to civil law, criminal law, or procedural law, but merely stipulated the applicability of a limited number of the prescriptions of consular law. In the case of both consular law and colonial law, there were instances in which the Kaiser was empowered to intervene by decree.
6. ^ Köbner, Art. "Deutsches Kolonialrecht" 1904, pp. 1087–1089; Sieglin, *Die koloniale Rechtspflege* 1908, pp. 1–7; Meyer, *Lehrbuch* 2005, pp. 719–722.
7. ^ *idem*, *Staatsrechtliche Stellung* 1888, pp. 88–104; Bornhak, *Die Anfänge* 1887, pp. 9ff.; Laband, *Das Staatsrecht* 1911, pp. 285; Stengel, *Die Rechtsverhältnisse* 1901, pp. 38ff.; Hoffmann, *Deutsches Kolonialrecht* 1907, pp. 21–25; Sassen, *Das Gesetzgebungs und Verordnungsrecht* 1909, pp. 13–25.
8. ^ Kayaoğlu, *Legal Imperialism* 2010.
9. ^ James Lorimer divided humanity into the categories of civilized, half-civilized and wild (Lorimer, *La doctrine* 1884, pp. 333–359). Though the members of wild ethnic groups could not be recognized as members of the international community, they were nonetheless subject to international law. This guaranteed them the right to emigrate and to commensurate compensation for the occupied territory (cf.: Bluntschli, *Das moderne Völkerrecht* 1868, pp. 55–56; 165–167, which states that the occupation must be limited to the part of the territory which could actually be civilized), the right to independence (Heilborn, *Das völkerrechtliche Protektorat* 1891, pp. 23–28), the observance of human rights and the right to property (Levi Catellani, *Le colonie* 1885, p. 580; Fiore, *Il diritto* 1900, pp. 37–38; 113), the commitment of the civil states to their intellectual development (Hornung, *Civilisés et barbares* 1885, pp. 5–18; 447–470; 539–560) and even a right to sovereignty (with different nuances: Jèze, *Étude théorique* 1896, p. 115; Salomon, *L'occupation* 1889, p. 206; Bonfils, *Manuel de droit* 1894, p. 300; Despagnet, *Cours de droit international public* 1894, p. 425).
10. ^ Koskenniemi, *The Gentle Civilizer* 2001, pp. 136–142.
11. ^ Stengers, *Leopold II* 1988, pp. 229–244.
12. ^ Hopf, *Nouveau recueil* 1885–1886, pp. 366–367.
13. ^ However, the first European power to recognize the association was Germany. The treaty was ratified on 9 November 1884, cf.: *ibidem* pp. 367–368.
14. ^ On consular jurisdiction in the Congo, see: Hall, *A Treatise on the Foreign Powers* 1979, pp. 156–157.
15. ^ The treaty between France and the Association internationale du Congo was signed on 5 February 1885; the treaty with Portugal was signed on 14 February 1885, cf.: Hopf, *Nouveau recueil* 1885–1886, pp. 377–378; 381–382.
16. ^ Loi du 30.11.1882 qui approuve les Traités et Actes signés les 10 septembre et 3 octobre 1880 par M. De Brazza et le Roi de Makoko, in: Hopf, *Nouveau recueil* 1884, pp. 215–216.
17. ^ The treaty was signed on 26 February 1884 in London. Sanderson, *British Informal Empire* 1988.
18. ^ *ibidem*, p. 199.
19. ^ Although the native peoples were in practice not recognized as constituting states, there were many legal experts who asserted the view that native sovereignty existed. See note 9.
20. ^ Immediately after the documents of the conference in Berlin were published, the Institute for International Law decided in a meeting in Brussels (1885) to convene a research commission consisting of Tobias Asser (1838–1913), Eduard Engelhardt (1828–1916), Friedrich Heinrich Geffken (1830–1896), Émile Louis Victor de Laveleye (1822–1892), Fëdor Fëdorovič Martens (1845–1909), Ferdinand von Martiz (1839–1921) and Travers Twiss (1809–1897). Engelhardt had written a text on the rules to be observed during the occupation of territories (Engelhardt, *Projet* 1887). The elaboration of this project was discussed in the Heidelberg meeting of 1887 (*Annuaire de l'Institut* 1928, pp. 428–442) as well as in the meeting in the following year in Lausanne, where

Fusinato delivered an especially noteworthy address, in which he argued in favour of including a preliminary definition of *territorium nullius* in the first article (ibidem, p. 714).

21. ^ The concluding documents are available in digital form under: http://commons.wikimedia.org/wiki/File:Deutsches_Reichsgesetzblatt_1885_023_215.jpg?uselang=de [02/04/2012].
22. ^ Grewe, *Fontes Historiae* 1988, p. 297, transl. by N.W.
23. ^ Fisch, *Africa as res nullius* 1988, pp. 358–359.
24. ^ idem, *Die europäische Expansion* 1984, pp. 332–337, subsequently: Koskenniemi, *The Gentle Civilizer* 2001, pp. 136–142.
25. ^ The doctrine that ascribed a right of sovereignty to the native peoples in their own territories consequently allowed them to conclude treaties that were valid in international law (see note 9). See also: Lindley, *The Acquisition* 1926, pp. 45–47; pp. 175–177; the position is more complex in: Westlake, *The Collected Papers* 1914, pp. 136–157, who, in spite of leaving it to the "conscience" of the occupying state to decide whether to grant rights to the native peoples, nonetheless states: "a right of property may be derived from treaties with natives and this even before any European sovereignty has begun to exist over the spot" (p. 147).
26. ^ Cf.: Bornhak, *Die Anfänge* 1887, p. 7, for whom a "subjugation treaty" concluded with the native peoples was no legal impediment to other powers occupying the territory. The prohibition "kann höchstens als eine unter den civilisirten Staaten übliche Kourtoisie angesehen werden" ("can at best be viewed as a customary courtesy among the civilized states", transl. by N.W.); Adam, *Völkerrechtliche Okkupation* 1891, pp. 247–261.
27. ^ Laband, *Das Staatsrecht* 1911, p. 285; Salomon, *L'Occupation* 1889, pp. 232–237; Heimburger, *Der Erwerb der Gebietshoheit* 1888, pp. 112–114; Meyer, *Staatsrechtliche Stellung* 1888, pp. 29–32; in the same vein Despagnet, *Cours de droit international public* 1894, pp. 425–429; Rivier, *Principes* 1896, p. 188; particularly useful is: Ghirardini, *Delle cosidette "occupazioni qualificate"* 1912, pp. 32–53; 193–223.
28. ^ Despagnet, *Essai sur les protectorats* 1896, pp. 226–229; Westlake, *The Collected Papers* 1914, p. 185, and Hall, *A Treatise on International Law* 1895, p. 131, viewed it as a necessary condition of protectorate status that – as was specified in the Berlin documents with regard to occupation – the protector should be in a position to exercise effective authority over the protected territory. Particularly critical were: Levi Catellani, *Le Colonie* 1885, p. 591, and Fiore, *Du protectorat colonial* 1907, who saw in the colonial protectorate a more or less hidden form of occupation. According to the German doctrine as well, which granted the protector state full territorial sovereignty, the two institutions were essentially the same. Cf. also: Pradier Fodere, *Traité de droit international* 1885, p. 342; Bonfils, *Manuel de droit* 1894, p. 548; Despagnet, *Cours de droit international public* 1894, p. 429; Rivier, *Principes* 1896, p. 188; Westlake, *The Collected Papers* 1914, pp. 187–188.
29. ^ Mondaini, *Il carattere* 1907, p. 25. The exceptional character of colonial law is stressed by: Costa, *Il fardello* 2004–2005, pp. 169–257, and in many of the essays contained in the two volumes of the journal that are devoted to international law. The essays collected in the volume by Martone are also seminal in relation to the Italian experience (Martone, *Diritto d'Oltremare* 2008). Useful information is also contained in the volume edited by Wolfgang J. Mommsen and Jaap de Moor: *European Expansion* 1992.
30. ^ Köbner, Art. "Deutsches Kolonialrecht" 1904, p. 1090; Meyer, *Staatsrechtliche Stellung* 1888, p. 173; Laband, *Das Staatsrecht* 1944, p. 286; Jellinek, *Staatsfragmente* 1896, pp. 17–21; Romano, *Corso* 1918, pp. 114–123. Cf.: Schack, *Das deutsche Kolonialrecht* 1923, pp. 41–61. However, the Italian and the French doctrines agree with one another in that they recognize the existence of a territorial identity between colony and metropole (see the summary of the various positions in: Arcoleo, *Il problema* 1914, pp. 35ff.).
31. ^ Romano, *Corso* 1918, p. 104.
32. ^ ibidem, p. 167 ("It refers to peoples with a civilization that is less developed than the European civilization, for whom a government similar to what we had in olden times is appropriate, which is why it would not be possible to apply the principles of modern constitutionalism", transl. by N.W.).
33. ^ Romano, *Corso* 1918, p. 22.
34. ^ ibidem, p. 22.
35. ^ See chapters XI and XII of the Charter of the United Nations with regard to the non-self-governing territories and the institution of trusteeship. All explanations referred to here can be viewed on the United Nations website: <http://www.un.org/en/documents/charter/chapter11.shtml> [04/04/2012].
36. ^ Quadri, *Corso* 1964.

Indices

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
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Link #an




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
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
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