

THE ORIGIN OF THE CONGO FREE STATE, CONSIDERED FROM THE STANDPOINT OF INTERNATIONAL LAW

The partition of Africa, which the present generation has seen accomplished, has yielded a generous by-product in international law. Protectorates, spheres of influence, hinterlands, the position of savage and semicivilized tribes, nominal and effective possession, territorial leases — these are but a few of the topics to which the political apportionment of the Dark Continent has drawn attention and exacted serious consideration. For more than twenty years the position of one of the largest holders of African territory, the Congo Free State, has aroused much discussion. With the serious accusations against Congolese administration press, pulpit, and platform have made the English-speaking peoples familiar. How far these have been proved it is not a part of the present paper to decide. It is enough for our purpose to say that charges of maladministration have been made in the official publications of more than one country, and that protests based upon them have been presented to those responsible for the direction of the State's affairs. No doubt the criticisms of the past few years have tended to hasten the annexation of the Congo, before which Belgium had previously faltered. Leaving aside the details of the annexation, important as they are from another point of view, the change means the substitution of a responsible government for the Congo in place of the former absolute control by a king-sovereign, who for some years had been able, thanks to the mutual jealousies of the powers, to govern as he chose, whatever might have been the limitations upon his activities which treaties had sought to impose. The coercive power of ultranational public opinion, upon which in the last analysis international law depends, has been plainly evident in the case of the Congo State. Public sentiment, transcending national boundaries, has demanded a responsible government for the Congo. It has accomplished prac-

tically all that the concerted action of the powers might have sought to do.

With the annexation of the Congo to Belgium will appear a new relationship — that of a neutralized state holding a colony within neutralized territory. Belgium will succeed, as the acknowledged owner of the Congo, to those conditions to which the Independent State of the Congo was subject. These appear in the various conventions and agreements to which the Congo Free State and its juristic predecessor, the International Association of the Congo, have been a party. The Congo Free State had treaty relations with the principal countries of the globe, the obligations of which Belgium must, of course, assume. Beyond this the Congo State had either signed or adhered to the General Acts of Berlin (February 26, 1885) and Brussels (July 2, 1890), as well as the Convention of Brussels of June 8, 1899.¹ In other words, the Congo Free State has been treated as sovereign and independent during nearly a quarter of a century. As it passes out of existence it is pertinent to review the peculiar conditions of its origin, viewed from the standpoint of international law. As the annexation to Belgium is now (November 15) an accomplished fact, this subject may be approached without propagandist bias.

No part of the larger Congo question has evoked more spirited discussion than this of the origin of the State. How and when did it come into existence? It was created by the powers in 1885, said some. It was a *de facto* state before the powers met in conference at Berlin, said others. It is easy to see why these two antagonistic theories have been advanced. Those who have wanted the powers to “do something” for the natives have insisted that the State was the creation of the powers. Those who sought to defend Leopold’s administration elected to regard the Congo State as having had a *de facto* existence prior to the Berlin Conference. This was done in order to support the view that the Congo State, in adhering to the Berlin General Act, did so as an existing sovereign state, yielding no more than did any other signatory — France or Germany, say —

¹ The texts of these treaties will be found in the Supplement to this number of the JOURNAL, at pages 7, 27, and 70.

which had territories affected by the terms of that act. Those who desired the Congo reformed through international action adopted the theory that a state may be called into being by the fiat or mandate of the existing powers. Those who have exalted the independence of the State have rested upon the familiar doctrine that recognition is but a statement of what at the time appears to be the fact.

The existence of the sovereign state is independent of its recognition by other states. This recognition is the statement of a *fait accompli*, and is also the approbation of it. It is the legitimation of a situation of fact, which is henceforth founded upon law. It is the attestation of the confidence which the states have of the stability of the new order of things.²

These words of the distinguished Belgian jurist correctly state the modern rule. Any other position logically leads to intervention on the part of the recognizing state. It is applicable when a state has been formed out of another state, or of parts of another state or states. But in the case of the Congo it is submitted that the rule does not apply. There was no *de facto* state in the Congo basin in 1884, and no one then claimed that there was. It was at that time the theory neither of the powers which 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.³

Those who maintain the State's antecedent *de facto* existence rest their case upon (1) the cessions made to the predecessor of the Free State, the International Association of the Congo, of political sovereignty by the native African chiefs; or (2) upon rights growing out

² Rivier, *Les Principes du Droit des Gens*, I, 57.

³ This position is most strongly stated by Cattier (*Droit et Administration de l'État Independent du Congo*, Bruxelles, 1898), who denies that sovereignty was obtained either through recognition by the powers or through the treaties made at an earlier time with the native African chiefs (p. 43). Cf. Banning, *Le Partage Politique de l'Afrique* (Bruxelles, 1898). M. Rolin-Jacquemyns denied that the Congo State owed, or could owe, its existence to an assembly of diplomats, but elsewhere (*Rev. de Droit Int.*, 1889, 170) he seems to take the opposite view. Liberia is an apparent, rather than real, exception to the doctrine stated in the text.

of the occupation of territory *sans maître*; or (3) upon continuous and effective territorial possession *animo imperii*, following the cession of alleged sovereignty by the native tribes. As to the first of these, much of the discussion has shown a confusion of ideas as to territorial sovereignty and property, between *imperium* and *dominium*.⁴ No one within recent times would seriously maintain that *imperium* could be conveyed without any subsequent act or series of acts. As to the second, the occupation of territory *rei nullius*, the modern position is less clear. To deny that savage or semicivilized tribes have any place in international law shocks the modern conscience. It furnishes a basis for the doctrine that such peoples have no rights which civilized nations need respect.

Few would go as far as this, but would admit that while such tribes are not persons in international law (government being the test of civilization), yet they have moral rights as against such persons. There is always a danger of importing the idea of sovereignty into what are really matters of occupation and possession.⁵ It is to the third of the positions cited to which attention must be directed in order to decide the question as to whether the Congo State had an existence before the Berlin Conference, or, to be exact, prior to November 8, 1884, when its predecessor was recognized as a state by Germany. As this is a question of fact it is necessary to review the series of events which led up to the Berlin Conference. These group themselves into two classes: First, as to the origin and development of the idea of which the Congo Free State was the realization; and, second, as to the actions of the powers in 1884 looking to the partition of Africa, and in reference to the above idea. Finally, there is to be considered the theory as to the existence of the State held by its founder, Leopold.

I. The interest of Leopold II, King of the Belgians, in African affairs has been constant since September, 1876, when at his invitation forty or more prominent European scientists, statesmen, and publicists assembled at Brussels for the purpose "of discussing and

⁴ Cf. Westlake, Chapters on the Principles of International Law, IX.

⁵ Sir John MacDonnell, Occupation and Res Nullius, Jour. Comp. Leg. 1893, 277-286.

defining the ways to be followed and the methods to be used in order definitely to plant the standard of civilization upon the soil of central Africa." Leopold declared that he had no selfish or ulterior aim, and, although it has been charged that at this early date, when there was no exact geographical knowledge of central Africa, he had colonial aspirations for Belgium,⁶ there seems to be no conclusive evidence to prove the assertion. This conference resulted in the organization known as *L'Association Internationale pour l'Exploration et la Civilisation de l'Afrique Centrale*,⁷ or, shortly, *L'Association Internationale Africaine*. It had at the outset three objects: First, to explore scientifically the unknown parts of Africa; second, to facilitate the opening of roads by which civilization might be introduced into central Africa; and, third, to find means of suppressing the negro slave trade in Africa. The methods for the attainment of these objects were (1) an organization "upon one common international plan" for the exploration of Africa from ocean to ocean and from the Zambesi to the Soudan, and (2) the establishment of scientific and relief stations within this territory. Both of the objects were, therefore, scientific and humanitarian. The methods were to be international, *i. e.*, distinctly nonpolitical. An important and perhaps significant action was the adoption of a flag to cover the proposed expeditions and the stations to be established. At the time this flag was to have a status, if possible, like that of the Red Cross.⁷ An international commission was instituted which held a meeting in June, 1877, to formulate further plans. In addition to various national committees of the association there was to be an executive committee, resident at Brussels, under the immediate direction of Leopold, to which the several national committees were to send funds for the prosecution of the work. After the session of June, 1877, the International Commission seems to have done nothing. The various national committees had little or no vitality at any time. What activity Leopold's interest aroused outside of Belgium took the form of national or private expeditions. The Belgian committee, however, energized by Leopold, sent an expedition to Tan-

⁶ Keltie, *The Partition of Africa* (1st ed.), 119.

⁷ E. Banning, *Africa and the Brussels Conference*, London, 1877, 155.

ganyika, which had few results, geographical or otherwise. It served, however, to give continuity to the organization and to perpetuate the name of the association. Even that would probably have remained a doubtful asset had not Henry M. Stanley returned from Africa in January, 1878, with exuberant accounts of the commercial value of the Congo basin. When Stanley landed at Marseilles two agents of Leopold sounded him upon undertaking an expedition to the regions which he had just quitted. In the year following a new organization was formed at Brussels by certain of the members of the former executive committee, to whom were added several financiers. This new group, under the name of the Comité d'Études du Haut Congo, while apparently distinct from the earlier one, was really identical with it in management. It entered into an agreement with Stanley, the exact terms of which have never been made clear. Stanley left Europe for the Congo upon an expedition financed by the new association, which soon changed its name to "L'Association Internationale du Congo."⁸ Under all these names the directing authority was King Leopold. Although somewhat disguised, the purpose of the supporters of the Stanley expedition was commercial. With the commercial idea was the embryo, very soon

⁸ It is true that the Comité d'Études was organized as a "société en participation" November 28, 1878, with a capital of one million francs. This sum was soon exhausted in the prosecution of the Stanley expedition, and thereafter the necessary funds were supplied by Leopold. The first appearance of the International Association of the Congo is variously stated. Wauters (*L'État Indépendant du Congo*, 23) says that the comité changed its name at the end of 1883; Chapeaux (*Le Congo*, 322), that the comité "took the title" of International Association of the Congo in 1882, as does Vermeersch (*La Question Congolaise*, 12). Boulger (*The Congo State*, 26) gives no date, but states that the comité "soon" changed its name. Cattier (*op. cit.*, 19), on the other hand, definitely states that the comité ceased to exist during Stanley's expedition. Leopold's motives for assuming a new name for his work Cattier conjectures to have been based upon the apparent utility "of introducing the word *international*" and of renewing the appearance of internationality with which the earlier African association had been invested. As late as 1884 treaties with the chiefs were still being made in the name of the old International African Association. "Au fond, le nom ne faisait rien. Il designait toujours le même pensée, le même volonté creatrice (Vermeersch, *op. cit.*, 12.)" But when the will became political, the adjective "international" was reassumed. The Belgian Constitution then barred the way to accession of territory.

developed, of political power. The president of the International Association of the Congo (under which title Leopold's undertaking was known until the close of the Berlin Conference) thus directed Stanley at the outset of his work:

It would be wise to extend the influence of the stations [to be established in the Congo basin] to the chiefs and tribes dwelling near them, of whom a republican confederation of free negroes might be formed, such confederation to be independent, except that the King, to whom its conception was due, reserves the right to appoint the president, who should reside in Europe.

To this it was added that Leopold's purpose was to create, "not a Belgian colony, but a powerful negro state." Stanley replied that he understood that there was no intention of founding a Belgian colony, but that the alternative would be far more difficult. "It would be madness for me to attempt it except in so far as one course might follow another in the natural sequence of things."⁹ Between 1879 and 1883 Stanley established several stations on the Congo and had negotiated more than three hundred treaties with the native chiefs.

How far these treaties conferred sovereign rights upon Stanley's principals must be decided by the peculiar, if not unique, circumstances of the case. Had Stanley been acting, for instance, on behalf of an African company chartered under British law, no one would have contended that the British flag did not cover the territories thus sought to be obtained.¹⁰ But Stanley and his associates were not then acting for any company, the creation of Belgian or other municipal law. Had the International Association of the Congo been created by Belgian law, it is probable that Belgium, as against other states, might have acquired *imperium* over the territories which the association, as such Belgian subject, might have obtained. She could not have done so as a matter of domestic law, for the Belgian Constitution at that time forbade the cession, exchange, or addition of territory save by special law.¹¹ It may well be that the association

⁹ The Congo and the Founding of its Free State,

¹⁰ Cf. the treaty between the British South African Company and Umtassa, September 14, 1890, quoted by Westlake, *op. cit.*, 151.

¹¹ Article 68 of the Constitution, as revised in 1893, reads: "The colonies,

remained "international," *i. e.*, having no legal status in Belgium, for the purpose of avoiding the restrictions of the Constitution. As it was a private association merely, certain jurists have sought to prove that individuals can acquire sovereign rights by cession from the heads of quasi-states who possess these rights.¹² The precedents cited for this position, *viz.*, the Puritans in New England, the Quakers in Pennsylvania, the British chartered companies in Africa and Borneo, are not in point. In these cases the individuals or companies acquired *dominium*; the *imperium* belonged to the state to which the individuals or companies owed political allegiance, provided, of course, such state ratified, or acquiesced in, the acts of its nationals. Had the African tribes really been members of international society, and hence subjects of international law, the case might have been different. It is idle to hold that sovereignty may be transferred by those who have no conception of it. Stanley's treaties were evidence that the natives had certain moral, if not internationally legal, rights; and the International Association of the Congo recognized that they had.

Did the International Association constitute a state *de facto*, in the sense that a recognition of its *de facto* existence would, or should, follow in the ordinary course of diplomatic action? A state must have territory, a numerous population, and be politically organized. It must have independence and permanence.

For all purposes of international law, a state may be defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs, into one body politic, exercising through the medium of an organized government independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other countries of the globe.¹³

Judged by this standard of Phillimore, it can not be seriously contended that the International Association was a state *de facto*.

foreign possessions, or protectorates, such as may be acquired by Belgium, are to be ruled by special laws. Belgian troops for the defense of these can only be recruited by voluntary enlistment." Bull. de la Soc. de Leg. Comp., 1893, 611.

¹² Notably, Twiss and Arntz in Rev. de Droit Int., 1883-4.

¹³ Phillimore, International Law, 3d ed., I, 81.

In 1884 its territorial claims were large; it comprised the territory south of the Congo and drained by that river and its affluents. But up to the time of the Berlin Conference there had been no delimitation of its territories. Its population was numerous, it is true, having been estimated at from eleven to thirty millions. But these were the blacks, subject to their own primitive rule of life, dwelling in more or less settled fashion in tribal organizations, just as they had for centuries. Of the whites there were at this time about two hundred and fifty, nearly all of whom were in the service of the association. How many of the blacks were conscious of the existence of the alleged sovereign authority of the association, there is no evidence. Later events lead one to think that they were few. Some of these were tribes which resisted, more or less successfully, all exercise of that authority. Outside the small spheres of the various stations, no actual control over the natives was at first attempted. The association was not even able at all times to maintain uninterrupted communication among its stations. What organization there was for the purpose of enforcing the sovereign will, or of political administration, was the company of two hundred and fifty whites, one white person for each one hundred thousand or so of blacks. Nor was the association in any wise "self-contained." It was directed from Brussels and sustained out of Leopold's private purse. Even as to the whites there is nothing to show that they were bound by any tie of political allegiance to the association. Each servant or officer was recruited for a certain number of years' service. It has never been contended that any of the Belgians in its service foreswore allegiance to Belgium, substituting therefor an allegiance to the International Association of the Congo.¹⁴

If the International Association of the Congo was not a sovereign state *de facto* in 1884, what, then, was its status? The most striking characteristic of the organization was its artificiality. Leopold was called the founder (*fondateur*) of the association. Consciously or not, there is imported the idea of an artificial juristic person, the "foundation" of the civil law. The foundation may have scientific

¹⁴ Naturalization in the Congo Free State was established in 1892 by a decree of Leopold of December 27 of that year. *Lycops, Les Codes Congolais*, 161.

or charitable purposes, as well as religious.¹⁵ Note that only the idea was imported, for the association denied that it was the creation of Belgian or other municipal law.¹⁶

The International African Association was, potentially at least, such an "ideal juristic person" when it proposed to found scientific and relief stations in Africa. Later, when the International Association of the Congo took its place, there appears the idea of a corporation, having at first commercial and finally political aims. Its character as an inchoate, or as a potential, corporation is of prime importance in connection with the question of recognition. Had it been a corporation organized under the municipal law of any state, its territories might have "belonged" to that state. Recognition gave it a *locus standi*, absolutely necessary owing to the unique and anomalous circumstances of its origin. The association by no test of international law was a state *de facto*. 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 to 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. It does not greatly stretch the meaning of the term to call it an international legal fiction. Therefore, when the representatives of the powers welcomed at Berlin the appearance of the new State, there was what M. Rolin-Jacquemyns called, by no mere figure of speech, "an international investiture."¹⁷

II. Whether led by the belief that Leopold was doing his work for the benefit of England,¹⁸ or in order to check the growing colonial power of France, Lord Granville found himself the center of attack when he signed the Anglo-Portuguese treaty of February 26, 1884.

¹⁵ Savigny, *Traité du Droit Romain*, II, 237. Cf. Cuq, *Les Institutions juridiques des Romains*, II, 794.

¹⁶ Note the apparent exception of the Comité d'Études described above.

¹⁷ *Rev. de Droit Int.*, 1889, p. 170.

¹⁸ Keltie, *The Partition of Africa*, 1st ed., 143, who quotes an unnamed source for the statement.

The date may be taken as the *terminus a quo* of the really political significance of the Congo project. This treaty recognized the hitherto shadowy title of Portugal to that part of the African west coast through which the Congo River debouches, between 5° 12' and 8° south latitude. This *volte-face* on the part of Great Britain, which had previously denied Portugal's claims, was denounced by the British press and in Parliament. Leopold appealed to Granville to wait before acting, in order to inquire into the validity of the treaties between Stanley and the native chiefs.¹⁹ More important still were the protests of the continental powers. France declared that she would not be bound by the treaty (March 13). Germany served a like notice (April 18).²⁰ The Anglo-Portuguese treaty, therefore, allowed France and Germany to make common cause against the power which would have deprived Leopold of an outlet from his territories. While Great Britain and Portugal had agreed upon a joint commission for the Congo River, Germany and France came forward with a proposition for an international commission for the river, such as had been considered some time before by the Institute of International Law. These two Powers were drawn into an *entente* by which Leopold would surely be the gainer. On the 23d of April France had a further and tangible interest in favoring the International Association of the Congo. By an interchange of notes between Strauch, the president of the association, and Ferry, the French Minister for Foreign Affairs, the association engaged (1) never to cede its possessions to any power, and (2) to give France the right of preference (*droit de préférence*) in case the association were ever forced to alienate them (*réaliser ses possessions*). As a *quid pro quo*, France agreed "to respect the stations and free territories [*sic*] of the association, and to put no obstacle upon the exercise of its rights (*de ne pas mettre obstacle à l'exercice de ses droits*)."²¹

¹⁹ Boulger, *The Congo State*, 42.

²⁰ Cattier, *op. cit.*, 25, makes the unsupported assertion that Holland and the United States also protested.

²¹ Van Ortruy, *Conventions internationales concernant l'Afrique*, 98. See also **Supplement to this JOURNAL**. This right of preference in favor of France gave rise to many complications. France announced her right by a circular to the powers (April 23-24, 1884), and, so far as known, none protested. The Congo Associa-

It was by no mere coincidence that just at this juncture the United States recognized the flag of the International African Association, carried by the Congo Association, as "that of a friendly government." Leopold, acting through Mr. Henry S. Sanford, a former minister of the United States to Belgium and member of the old Comité d'Études, managed to obtain from Secretary Frelinghuysen that which Ferry was unwilling to concede, for the French note stopped short of recognition. It was then an open secret in Europe that Leopold had unsuccessfully requested more than one government to recognize the association. The action of the United States came as a distinct surprise, especially in England. The importance of the action of the United States has, however, been overestimated. The movement of forces had already started, the result of which was to give Leopold's work an international status. It was valuable to Leopold in making a precedent, but it does not appear that it materially changed the position of the association. Frelinghuysen signed and the Senate ratified quickly and perhaps without knowledge of the motives which lay back of the request for recognition. The phraseology of this correspondence between Sanford and Frelinghuysen is noteworthy. The association declared that by treaties "with the legitimate sovereigns" there had been ceded to it "territory for the use and benefit of free states, established and being established, * * * to which cession the said free states [*sic*] of right succeed." Free entry of goods into these territories was guaranteed, as well as the right of foreigners to carry on trade there. The United States, sympathizing with and approving "the humane and benevolent purposes of the International Association of the Congo, administering as it does the interests of the Free States there established," recognized the flag as that of a friendly government.

tion ratified the right after its full recognition by France (February 5, 1885). As no exception was made it was feared that France would oppose its right as against Belgium in case the latter State desired to annex the Congo. The question was left open by an interchange of notes between France and the Congo in 1887. By the Franco-Belgian treaty of 1895 the right was confirmed. Although annexation did not then take place, the treaty served to interpret the right: that it would not take priority over Belgium, but that as to other powers both the Congo and Belgium admitted its force.

A few days before the exchange of these notes Bismarck suggested to Ferry that France join Germany in calling a conference of the powers in order to solve the difficulties to which the rival claims to the center of the continent had given rise. To this Ferry consented. In June Bismarck stated in the Reichstag that the enterprise of Leopold had for its object the establishment of an independent state, and, further, that the German Government was favorable to that project. Three days later Granville announced that the Portuguese treaty had been abandoned.²² The plan of Bismarck, as tentatively put forth, took definite form in September, when France and Germany decided to recognize the association as independent. After outlining the program of the proposed conference, to which Great Britain had by this time agreed, Bismarck stated that Germany would take a friendly attitude with respect to the "Belgian enterprise" on the Congo, as a consequence of the desire of his Government to assure to its nationals freedom of commerce over the whole extent of the "future state of the Congo."

At the time, therefore, when the program of the Berlin African conference had been formulated, it appears that (1) France, Germany, and Great Britain acted upon the assumption that the International Association of the Congo was not a state *in esse*, but a possible state *in futuro*; and (2) that within a few days of the conference at Berlin no power had recognized the association, except the United States, whose recognition, so unique in form and substance, was a sort of collateral incident.

The purpose of Bismarck in calling the conference was to have the powers come to an understanding concerning the Congo basin, in order that this core of the African continent should not be fought over by the rival claimants to territory. France, Great Britain, Germany, and Portugal looked, as colonial powers, toward the center of the continent. With the basin of the Congo unappropriated except by the group of private individuals supported by Leopold, acting privately, a scramble, unseemly if not belligerent, might have engaged those states whose colonial aspirations were leading them thither. To recognize the International Association of the Congo

²² Wauters, *L'État Indépendant du Congo*, 30.

as a legal person, having sovereign power over this region, was Bismarck's method of eliminating a dangerous contest for possession.²³ To subject the area to a régime of commercial freedom was to effect what afterwards came to be known as the "open door." To safeguard this freedom, he further proposed that the territories be neutralized. The invitations said nothing about the International Association. The powers were asked into a conference to come to an agreement upon the questions (1) of freedom of commerce in the basin and at the mouth of the Congo, (2) of applying to the Congo and Niger rivers the principles governing the Danube and other international rivers, and (3) of defining the formalities to be observed in order that new occupations on the coast of Africa might be considered effective. These invitations were sent to the various governments of Europe, whether colonial powers in Africa or not. The United States was also asked to send representatives. Many reasons have been given for this inclusion. The conference was said to be commercial and not political in scope; the United States had already recognized the association and had therefore a friendly interest in the matter. No sufficient reason is to be seen why the United States accepted the invitation, as it had nothing to gain by taking part in the conference. Its representatives, however, rendered Leopold valuable services, for assisting the principal delegate, Mr. Kasson, then minister to Germany, were Henry M. Stanley ("nominally as a geographical expert, but in reality there to look after the interests of his patron, the King of the Belgians")²⁴, and Mr. Henry S. Sanford, who had already been conspicuous in behalf of Leopold's enterprise.

The representatives of the powers met at Berlin November 15, 1884. On the 8th Germany and the Congo Association signed a convention of friendship and limits. The terms of this document are significant as compared with those used by the United States in the preceding April. Although the flag was recognized as that

²³ And to check English influence over Portuguese Africa.

²⁴ Keltie, *The Partition of Africa*, 1st ed., 207. The General Act of Berlin, signed by the American delegates, was not submitted to the Senate for ratification by President Cleveland.

of a friendly state ("d'un État ami," "eines befreundeten Staates"), yet this follows immediately:

The German Empire is, on its part, ready to recognize the frontiers of the territory of the association and of the new state to be created (du nouvel État à créer, des zu errichtenden Staates) as they are indicated upon the annexed map.

While the conference collectively deliberated, each of the powers (with the exception of Turkey), acting by itself through its representatives at Berlin, recognized the Congo Association, Great Britain being the first after Germany (December 16), followed by Italy (December 19), Austria (December 24), the Netherlands (December 27), and Spain (January 7, 1885). France signed a treaty of limits after a long correspondence (February 5), as did Portugal (February 14). The other powers then followed in recognition in the following order: Russia (February 5), Norway and Sweden (February 14), Denmark (February 23), and finally Belgium (February 23) on the last day of the conference, when the Final Act was signed. It is to be noted that as an expression of the opinions then held by the recognizing governments as to the existing régime upon the Congo each reserved consular jurisdiction.

Following this several recognition, the International Association of the Congo was introduced to the conference as adhering to the terms of the General Act. This introduction came by way of a letter from President Strauch in which he called attention to the accession of a power ("l'avènement d'un pouvoir") which had for its single mission the introduction of civilization and commerce into central Africa. Addresses of congratulation by the various representatives followed. In them may be further seen the theory held as to the origin of the State. Baron de Courcel, for France, referred to it as a state "territorially constituted to-day with exact limits." Sir Edward Malet expressed the satisfaction with which his Government witnessed the founding of this new State. "We salute the new-born State." Count van der Straten Ponthoz spoke for Belgium: "Thanks to the conference the existence of the new State is henceforth assured." In the same vein was Bismarck's greeting. "I believe," said he, "that I express the views of this conference when

I acknowledge with satisfaction the steps taken by the International Association of the Congo in acknowledging its adhesion to our decisions. The new Congo State is called upon to become one of the chief protectors of the work which we have in view. * * *

The inchoate corporation was now a juridical entity and a political person. The new State was henceforth a member of the family of nations. To quote Rivier: "Le nasciturus etait né."

Like Homunculus:

Er ist. . . .

Gar wundersam nur halb zur Welt gekommen.

Ihm fehlt es nicht an geistigen Eigenschaften,

Doch gar zu sehr am greiflich Tüchtighaften.²⁵

It is impossible within the limits of the present paper to enter into detail as to the results of the Berlin Conference as embodied in its General Act. The scope of the meeting was broader than Bismarck had originally suggested. Certain parts of the General Act refer particularly to the régime for the Congo, though nowhere is the Congo Association mentioned. The terms of the General Act are general and affect all territories with the so-called "conventional free-trade zone" as defined by the act. That the conference applied its stipulations to a territory larger than the mere geographical basin of the Congo was due to the initiative of the American representatives. Mr. Kasson suggested that the "commercial basin" of the Congo should be considered, rather than the geographical one. Stanley urged this plan, but was surprised to notice "a curious reluctance to speak, as if there was some grand scheme of state involved."²⁶ A matter of policy was indeed involved, for by adopting the so-called "conventional zone" of the Congo, all powers having territory within it were affected. The provisions of the General Act were thereby made to apply not only to Belgian and French Congo, but practically to all territory between the Atlantic and Indian oceans, from the Zambesi to 5° north latitude on the east, and from 2° 30' north latitude to 80° south latitude on the west. Within this territory there was to be absolute freedom of commerce. No power which exercised rights of sovereignty within the zone was to grant

²⁵ Faust, II, Act II.

²⁶ Stanley, The Congo, II, 394.

monopolies or privileges of any kind in commercial matters. The act provided for the protection of the natives:

All powers exercising rights of sovereignty or an influence in the said territories engage themselves to watch over the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence and to strive for the suppression of slavery and especially of the negro slave trade. * * * The right to erect religious edifices and to organize missions belonging to all forms of worship shall not be subjected to any restrictions or hindrance.

Furthermore, a basis for the neutralization of this conventional basin was adopted by the conference. The neutralization was, however, not compulsory or imposed upon the territories within the zone, but it was voluntary as to each colonial power, or, in other words, it was a system of facultative neutralization. The powers did not thereby assume to guarantee such neutrality, but only to respect it after any power had adopted the régime of neutralization. The adoption of the conventional zone, within which the terms of the General Act were to apply to all powers alike, was of decided advantage to Leopold, for it put the new State upon a footing of equality with other states. No more or greater obligation rested upon it than upon any other power having territorial interests within the zone. The recognition of the association was complete and unconditional. It was not half sovereign or dependent, but fully sovereign.

III. There remains to be considered Leopold's theory as to the existence of the Congo State. In the volume entitled "Codes Congolais et Lois usuelles en vigueur au Congo," prepared in 1900 by M. Lycops, clerk to the Superior Council of the Congo Free State, the text of the Berlin General Act and that of the adhesion thereto by the Congo Association appear as the "preliminaries to the constitution of the State." Following these are what M. Lycops calls the "constitution" of the State. This "constitution" consists of a letter from Leopold to the Belgian Council of Ministers and the resolutions of the Belgian Chambers in reference thereto. In the communication Leopold's own theory of the status of his undertaking is seen. This was that the State had not yet been politically organized; *i. e.*, that the State *de facto* did not even then exist.

The work created in Africa by the International Association of the Congo has had a great development. A new State has been founded, its

limits have been determined, and its flag recognized by almost all the powers. There remains to be organized on the banks of the Congo its government and administration.

Leopold then asked that the Belgian Chambers give their consent, necessary under article 62 of the Belgian Constitution,²⁷ for him to assume the headship of the new State, preliminary to the organization of its government and administration.

King of the Belgians, I shall be at the same time sovereign of another State. This State will be independent, like Belgium; and, like her, it will enjoy the benefits of neutrality.

The required assent of the Chambers quickly followed, with the proviso that "the union between Belgium and the new State shall be exclusively personal," that is, that the Congo was to be not an appanage of the King of the Belgians *ex officio*, but of Leopold personally. Of course this was not a constitution in the ordinary acceptance of that term. It was merely the basis upon which the governmental machinery might be organized or constituted. Leopold was not a "constitutional" sovereign, in the sense that his powers were limited by any fundamental law of the State. Unless limited by the terms of the Berlin Act, he became August 1, 1885, the absolute sovereign, or autocrat, of the Congo, controlling absolutely, in theory at least, the inhabitants within the limits marked by the various treaties of delimitation. "The possessions of the International Association of the Congo form henceforth the Independent State of the Congo," Leopold informed the powers in the summer of 1885. At the same time the new State, which by a reversal of the usual order had organized a government after it had been recognized as a state, declared itself perpetually neutral, according to the terms of the Berlin Act. This, as has been suggested, was in no sense a limitation of the State's sovereignty. Nor was any provision of the General Act such a limitation upon sovereignty. The Congo Free State (properly the Independent Congo State, the change of name signifying the change in status), in adhering to the terms of the General Act and in declaring itself neutral, bound itself in no respect

²⁷ ART. 62. The King can not be at the same time chief of another state without the consent of the two Chambers. Neither Chamber can deliberate upon this question unless two-thirds of its members are present, and the resolution shall not be adopted except by a two-thirds vote of each House.

differently than did any state signing the act. It agreed to lay no import duties, to look after the welfare of the natives, to encourage missions, to create no commercial monopolies. So did every other state signing the act. There was no method under the act by which violations of its terms might be enforced. No offending state could be coerced. All of the signatories were sovereign. In such a case, rupture of diplomatic relations, if another state felt itself aggrieved, a new conference, if there was substantial agreement among the signatory powers as to the serious infraction of the act, practically exhaust the remedies.

Freedom from import duties in the conventional zone, while making for commercial freedom, seriously handicapped the Congo Free State in its internal administration by cutting off a large and necessary source of income. In 1890 the representatives of the powers again assembled, this time at Brussels. The ostensible purpose of this meeting was to take further steps for the suppression of the slave trade. Before the Brussels Conference had progressed far, it developed that an attempt would be made to modify the onerous restrictions of the former act in reference to import duties. A provision for limited import duties was after long debate duly incorporated in the Brussels General Act, for the purpose of better enabling the Free State to wipe out the slave trade. In other respects the Berlin Act stands to-day. The impression has been general that the provisions of that act have been violated; that within late years, at least, the natives have been treated with no due regard for their "moral and material amelioration," such as the act prescribed. When charges of violation of the spirit of the Berlin Act were brought against the Congo Free State answer was made either by way of general denial or by a "*tu quoque*" argument, or else that if there had been some necessary disregard of the means of moral or of material regeneration, the State was within its right, as it was sovereign and independent; that as such sovereign and independent state it was the sole judge of the truth or falsity of the charges. Of course there were other answers, but these three groups comprise most of them. The force of public opinion, however, resulted in the appointment of a commission for the investigation of the charges of maladministration. This commission reported upon certain grave

abuses in the form of labor taxes and of unrestricted forced services demanded both by the State and by the State's concessionary companies. Slowly — too slowly for many active reformers — public sentiment became a force which the absolute sovereign of the Congo did not withstand. A new conference which might review the whole question of the condition of the natives in the conventional zone, both within and without the Congo Free State, was declined by certain of the continental powers when Great Britain proposed it in 1903. The only remaining sanction was that of ultranational public opinion. This, voiced in protests by more than one government, was reflected in Belgium. Leopold had as early as 1889 devised the Congo to Belgium. Later he agreed to permit Belgium to annex it if she so desired, after a term of years. After long negotiations between Belgium and Leopold, the Congo Free State now passes out of existence and becomes in fact what it should have been long ago, a Belgian colony. As a colony it will be subject to government by discussion. In that country where party strife is active, where liberal ideas find such ready expression, responsible parliamentary government must surely be a guaranty that the provisions of the Berlin Act will be observed in spirit as well as in letter.

The Congo Free State has been a political if not a financial failure. Why? The answer, it seems, must be plain. States to be worthy of the name are not artificial productions, even when conceived by the master minds of the great chancelleries. When the powers recognized the International Association of the Congo they agreed to consider something as a state which was in truth not a state. However benevolent the intentions of its sponsors might have been, the effects of creating such an institution to be regarded as sovereign and independent were not foreseen. It was the anomalous character in international law of the State which has made the Congo question so difficult of treatment. The Congo State, not being the result of ordinary conditions, could not be judged by ordinary standards. An unnamed diplomat was well within the truth when he described the Congo Free State, soon after it came into being, as "an anomaly and a monstrosity, from an international point of view; and from that of the future, it was an unknown danger."

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