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HAUNTED BY THE PAST?

Belgium's international responsibility for the atrocities of the Congo Free State and the question of State succession in matters of international responsibility

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Haunted by the past?

Belgium's international responsibility for the atrocities of the Congo Free State and the question of State succession in matters of international responsibility

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Abstract

The present paper addresses the question whether Belgium is responsible under international law for the atrocities committed in the era of the Congo Free State (1885-1908). In section 1, we first address how Leopold II was able to acquire enormous tracts of land in Central Africa and to secure international recognition for his 'Congo Free State'. Following a brief description of Leopold's reign of terror, we explain how the King was compelled to hand over his colony to Belgium. Subsequently, in section 2, we map various obstacles that would have to be overcome in order to hold Belgium internationally responsible for the atrocities of the Congo Free State, including the need to establish the existence of internationally wrongful conduct (notwithstanding the intertemporality principle). Section 3 moves to the main legal question addressed in this paper, and provides – for the first time – an in-depth treatment of the question of state succession with regard to the obligations resulting from internationally wrongful conduct of the Congo Free State. First, the general rules on State succession in matters of State responsibility will be examined, against the background of the recent reports of the ILC Special Rapporteur on this matter. Next, we examine the impact of the 1907 Treaty of Cession between Belgium and the Congo Free State, as well the extent to which Belgium could be said to have accepted and acknowledged responsibility for the conduct of the Congo Free State towards its population, or benefited from 'unjust enrichment'.

Keywords

Congo Free State – International Responsibility – State succession – Historical Injustice - Intertemporality

1 Introduction

The international community has long struggled with the question of reparation for historical injustices. States accused of such injustices have traditionally refrained from using language that would imply any recognition of legal responsibility. At the same time, recent years have witnessed increased attempts on the part of impacted peoples and States to obtain reparation for past wrongs, and, conversely, – at least in some corners – a greater openness to confront the dark side of one's past. Claims have, for instance, been made by the Caribbean Community and Common Market (CARICOM) against European States to compensate for slavery and (native) genocide.[3] Furthermore, an

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[3] Further, see: see A. Buser, 'Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to Compensate Slavery and (Native) Genocide', (2017) 77 *Z.a.ö.R.V.*, pp. 409-446.

agreement was recently concluded between Germany and Namibia providing for formal apologies and 'reparations'[4] in connection with the genocide against the Herero and Nama.[5] In the Netherlands and the United Kingdom, several domestic cases have been launched about the colonial past as well, eventually leading to damages.[6] The litigation before the Dutch courts also led the Dutch King to issue official apologies for the excessive violence of the Netherlands during the Indonesian War of Independence (1945-9).[7] The rise of the Black Lives Matter movement in reaction to the brutal murder of George Floyd has only augmented the attention for these historical injustices, including within Belgium. Voices were indeed raised to rename streets named after colonial figures, or to remove statues of the erstwhile King Leopold II from public space. This discussion intensified as several statues were defaced and some of them eventually removed.[8]

Overall, in recent years, there has been a growing interest within Belgium for a more conscious approach towards the colonial past. In 2018, for instance, the Africa Museum in Brussels reopened after a five-year renovation project was used to present a more contemporary and decolonised vision of Africa.[9] This museum was originally founded as the museum of the Congo by Leopold II to serve as a propaganda tool for his colonial project and was built with profits from his colony. Furthermore, the UN Working Group of Experts on People of African Descent issued a report in 2019, i.a. recommending Belgium to establish a truth commission to examine its colonial past and to offer official apologies.[10] In the summer of 2020, the Belgian parliament effectively decided to establish a parliamentary committee to examine the colonial rule in the Congo Free State (1885-1908), Belgian Congo (1908-1960) and Rwanda Burundi (1918-1962), and formulate recommendations for reconciliation.[11] In 2019, Prime Minister Charles Michel offered apologies specifically for the treatment of 'mixed-race' (*métis*) children during Belgium's colonial reign.[12] Furthermore, on the occasion of the 60th anniversary of the Democratic Republic of the Congo (DRC), Belgium's King

[4] Germany prefers to describe this as "healing of the wound" instead of reparations. J. Posaner and N. Nöstlinger, 'Namibia rejects German offer of compensation for colonial atrocities', *Politico* (12 August 2020), available at https://www.politico.eu/article/namibia-germany-compensation-colonial-atrocities/.

[5] Germany uses the term 'genocide' to describe these events but stresses that this does not have any legal consequences. X, 'Gräuel an Herero als Völkermord klassifiziert', *Zeit Online* (13 July 2016), available at https://www.zeit.de/politik/deutschland/2016-07/bundesregierung-herrero-massaker-voelkermord. Germany pledged to support Namibia and the victims' descendants with 1.1 billion Euros for reconstruction and development. H. Maas, 'Foreign Minister Maas on the conclusion of negotiations with Namibia', *Press release Federal Foreign Office* (28 May 2021), available at https://www.auswaertiges-amt.de/en/newsroom/news/-/2463598 .The Herero and Nama people have in the past also unsuccessfully sued the German government before US Courts. See infra, note 131 and accompanying text.

[6] See e.g. District Court The Hague (NL), 14 September 2011, 354119 / HA ZA 09-4171, ECLI:NL:RBSGR:2011:BS8793; District Court The Hague (NL), 11 March 2015, C-09-467005 HA ZA 14-0651, ECLI:NL:RBDHA:2015:2449; *Mutua & Ors v The Foreign And Commonwealth Office* (2012) EWHC 2678 (QB) (05 October 2012).

[7] X, 'Dutch king apologizes for 'excessive violence' in colonial Indonesia', *Reuters* (10 March 2020), available at https://www.reuters.com/article/us-indonesia-netherlands-idUSKBN20X15L.

[8] See A. Outters, 'Gent haalt controversieel standbeeld Leopold II weg: "Zijn criminele acties verdienen geen eerbetoon, integendeel"', *VRTNWS* (18 juni 2020), available at https://www.vrt.be/vrtnws/nl/2020/06/18/gent-haalt-controversieel-standbeeld-leopold-ii-weg/.

[9] On the Museum's history and renovation, see: https://www.africamuseum.be/en/discover/history_renovation.

[10] See Report of the Working Group of Experts on People of African Descent on its visit to Belgium, Human Rights Council on its 42th session (14 August 2019), UN Doc. A/HRC/42/59/Add.1.

[11] See Chambre des Représentants de Belgique, 'Commission spéciale chargée d'examiner l'état indépendant du Congo (1885-1908) et le passé colonial de la Belgique au Congo (1908-1960), au Rwanda et au Burundi (1919-1962), ses conséquences et les suites qu'il convient d'y réserver', *Parl. St. Kamer* 2019-2020, nr. 1462/001.

[12] See G. Paravicini, 'Belgium apologizes for colonial-era abduction of mixed-race children', *Reuters* (4 April 2019), available at https://www.reuters.com/article/us-belgium-congo-idUSKCN1RG2NF.

Philippe sent a letter to DRC President Tshisekedi expressing "his deepest regrets for the wounds of the colonial past".[13] This was the first time a reigning Belgian monarch expressed such regrets to the Congolese people.[14]

While there is growing acceptance within Belgium that the country bears a certain *moral* responsibility for its colonial past, the question whether it also bears *legal* responsibility remains highly sensitive. The present paper looks into this latter issue, and specifically addresses the question whether Belgium is responsible under international law for the atrocities committed in the era of the Congo Free State (1885-1908). We will not discuss the period when Congo was a Belgian colony (1908-1960), but focus exclusively on Leopold's reign over the Congo.

In chapter 2, we first clarify how Leopold II was able to acquire enormous tracts of land in Central Africa and to secure international recognition for his 'Congo Free State'. Following a brief description of Leopold's reign of terror, we explain how the King was compelled to hand over his colony to Belgium. Subsequently, in chapter 3, we map various obstacles that would have to be overcome in order to hold Belgium internationally responsible for the atrocities of the Congo Free State, including the need to establish the existence of internationally wrongful conduct (notwithstanding the intertemporality principle). Having tentatively mapped some of the most pressing challenges, chapter 4 moves to the main legal question addressed in this paper, and provides – for the first time[15] – an in-depth treatment of the question of state succession with regard to the obligations resulting from internationally wrongful conduct of the Congo Free State. First, the general rules on State succession in matters of State responsibility will be examined, against the background of the recent reports of the ILC Special Rapporteur on this matter. Next, we examine the impact of the 1907 Treaty of Cession between Belgium and the Congo Free State, as well as the extent to which Belgium could be said to have accepted and acknowledged responsibility for the conduct of the Congo Free State towards its population, or benefited from 'unjust enrichment'. Section 5 concludes.

2 Birth and demise of the Congo Free State

2.1 The emergence of the Congo Free State

"*Petit pays, petits gens*".[16] Next to its larger neighbours, Leopold II always deemed Belgium too small, and, inspired by the Dutch East Indies, became obsessed with the idea of enlarging its territory with a colony.[17] After previous attempts to acquire e.g. Fiji, or the Philippines, he realised that no territory was up for sale,[18] and that, if he wanted to acquire a colony, he would have to conquer one. As large parts of the world had already been claimed by the major powers, Leopold II focussed on Sub-Saharan Africa.

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[13] See X, De brief van koning Filip: 'Wonden uit het verleden worden weer pijnlijk voelbaar', *Knack* (30 June 2020), available at https://www.knack.be/nieuws/belgie/koning-filip-betuigt-diepste-spijt-voor-belgische-wandaden-in-congo/article-news-1615617.html.

[14] The apologies also stand in marked contrast to the infamous speech by Belgian King Baudouin on the occasion of the Congolese day of independence (30 June 1960), where he praised the 'genious' of King Leopold II, and heralded his ancestor as a 'bringer of civilization'. The original text of the speech is available at http://archiv.kongo-kinshasa.de/dokumente/lekture/disc_indep.pdf.

[15] It is observed that the main works on State succession in matters of international responsibility, such as the monograph by Patrick Dumberry (P. Dumberry, *State Succession to International Responsibility* (Brill: Dordrecht)(2007)), do not examine the case of the Congo Free State. Nor is this case addressed, it seems in the work of the International Law Commission or that of the International Law Association on the topic.

[16] Translation: small country, small people (Leopold II's own words to describe Belgium.); A. Hochschild, King Leopold's Ghost –A Story of Greed, Terror and Heroism in Colonial Africa (Picador Classic) (2019), at 36.

[17] Those aspirations were made crystal-clear by Leopold II when he gave a relic of the Acropolis to then Belgian minister of finance Frère-Orban, a fierce critic of colonialism, with the infamous description: "*Il faut à la Belgique une colonie*" (Belgium must have a colony). See *Ibid*., at 38.

[18] *Ibid*, at 38, 41-42.

Within Belgium, there was not much enthusiasm to support the King's imperialistic aspirations.[19] In addition, any open attempt to acquire a colony would have provoked a reaction from the major powers. Accordingly, Leopold II realised that if he wanted to succeed, he needed to thread carefully and sell his plans as a philanthropist project.[20] In 1876, the King hosted a three-day Geographical Conference in Brussels, to which he invited well-known scientists, explorers and philanthropists from all over Europe to discuss the exploration and 'civilisation' of Africa. The conference resulted in the establishment of the 'International African Association', an initiative that was enthusiastically received in Europe.[21] Although the suppression of slavery and slave trade in the Congo basin were among the main stated objectives of this Association, it would foremost serve as a smokescreen, enabling Leopold II to pursue his colonial ambitions.[22]

In 1878, Leopold II established a second organization, the Committee for Studies of the Upper Congo, a society funded by an international group of investors[23], and created with the sole purpose of financing HM Stanley's expeditions into Central Africa.[24] Stanley was charged with setting up commercial stations for Leopold during this expedition, under the guise of 'exploration'.[25] Pressured by the presence of France and Portugal in the region, King Leopold instructed Stanley in 1882 to conclude cessionary 'treaties' with African Chiefs conferring rights of sovereignty.[26] To this end, Leopold II established yet another association, the International Association of the Congo,[27] which would serve as "the diplomatic dress" in which he would found the Congo Free State.[28] Leopold thus ordered Stanley to conclude 'treaties' with the local African chiefs on behalf of the International Association of the Congo. He explicitly ordered that "[t]he treaties must be as brief as possible […] and in a couple of articles must grant us everything."[29] Stanley achieved this objective and by the time he was done, had concluded more than four hundred such 'treaties',[30] oftentimes granting a complete trading monopoly to Leopold and handing over the land for almost nothing.[31]

Leopold II conducted his activities in the Congo basin via these three private associations, without any status under public law. Apart from the fact that these associations seemed to lack legal personality under Belgian law[32], the acquisition of territory in the Congo Basin through the International African Association, raised questions, already at

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[19] See S. Press, *Rogue empires: contracts and conmen in Europe's scramble for Africa* (Harvard University Press) (2017), at 84.
[20] See Hochschild, *op. cit.,* supra n. 16, at 46.
[21] See M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: CUP) (2001), at 156.
[22] See Hochschild*, op. cit.*, supra n. 16, at 46; See J.S. Reeves, *The International Beginnings of the Congo Free State* (Johns Hopkins Press) (1894), at 17.
[23] It would not last long before Leopold was the only person in control of this Committee. When a key shareholder went bankrupt, Leopold used the opportunity to buy-out the other stockholders. Although the committee legally ceased to exist, Leopold II continued to refer to it as if it was still functioning, and as if it was not only him that was funding Stanley's operations. See Hochschild*, op. cit.,* supra n. 16, at 65; Press, *op. cit.,* supra n. 19, at 99.
[24] See J. Stengers, 'Leopold II and the Association Internationale du Congo' in S. Förster, W.J. Mommensen, and R. Robinson (eds.), *Bismarck, Europe, and Africa –The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press) (1988), at 229.
[25] See *Ibid.*
[26] *Ibid*, at 239.
[27] Leopold chose this name intentionally because of the possible confusion with the "philanthropic" International African Association. To add even more to the public's confusion, the three organisations that were established by Leopold II used the same flag: a gold star on a blue background, which would later also become the flag of the Congo Free State. See Hochschild, *op. citi.,* supra n. 16, at 65; Press, *op. cit.,* supra n. 19, at 105.
[28] See Koskenniemi, *op. cit.,* supra n. 21, at 156.
[29] See Hochschild, *op. cit.*, supra n. 16, at 71.
[30] See Reeves, *op. cit.,* supra n. 22, at 20.
[31] Many chiefs did not realise what they were actually signing as these treaties were drafted in a foreign language and few could read. See Hochschild, *op. cit.,* supra n. 16, at 72.
[32] Only in 1919 did the Belgian legislator introduce legal personality for philanthropic and scientific associations. October 25, 1919 –Loi tendant à accorder la personnification civile aux associations internationales à but scientifique (Moniteur Belge du 5 octobre 1919), *Pasinomie* 1919, p. 161-163. See also J.S. Reeves, 'The Origin of the Congo Free State, considered from the Standpoint of international Law', (1909) 3 *AJIL*, pp. 99-118, at 106.

the time, as to whether it was possible for non-state actors to acquire sovereign rights.[33] The general assumption in the nineteenth century was indeed that States were both the origin and finality of sovereignty and that private associations could not acquire rights of sovereignty.[34] Leopold II noted this resistance in scholarly debate and solicited the help of legal scholars such as Sir Travers Twiss.[35] Twiss advocated for the right of private actors to act as sovereigns when entering into treaties with natives and his work was used by Leopold to justify his 'treaty'-making practice.[36]

Ultimately, there was only one thing left to do for Leopold II, namely to receive recognition from other major states. On 22 April 1884, the United States of America became the first country to recognize "the flag of the International African Association as the flag of a friendly Government."[37] Soon after, Leopold was also able to make agreements with France and Germany. Leopold granted France a right of pre-emption with regard to the Congo Association's possessions in the Congo basin in the case that, due to unforeseen circumstances, the Association would be compelled to sell these territories. In exchange France undertook 'to respect the stations and free territories of the Associations and not to hinder the exercise of its rights',[38] thus acknowledging that the Association was more than a purely private enterprise and that it had legitimate rights under international law.[39] The German Empire also explicitly recognized the Congo Association's flag as that of a friendly State, therefore giving the Congo Association formal recognition as an independent state.[40] Leopold II's shrewd diplomatic strategy culminated in the Conference of Berlin. Although the legal status of the Congo Association was not a formal item on the agenda of the conference, Leopold II managed to secure formal recognition by all major states through bilateral negotiations in the margins of the Conference itself.[41] Belgium itself was among the last participants to adopt a declaration, in the final days of the Berlin Conference, in which it recognized the International Association of the Congo as a friendly state.[42] This paved the way for a personal union, whereby Leopold II became the Head of State of two independent states.[43]

By Royal Decree of 29 May 1885, Leopold II announced that the possessions of the International Association of the Congo would from now on form the 'Congo Free State', and on 1 August 1885 he ascended the throne as King-sovereign of the Congo.[44] The Congo Free State was thus officially born. By his ingenious diplomatic manoeuvring, Leopold II had been able to acquire a colony more than seventy times the size of Belgium.

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[33] See J. Blocher and M. Gulati, 'Transferable sovereignty: lessons from the history of the Congo Free State', (2020) 69 *Duke LJ*, pp. 1219-1273, at 1234.

[34] See A. Fitzmaurice, 'The Justification of King Leopold II's Congo Enterprise by Sir Travers Twiss' in S. Dorsett and I. Hunter (eds.), *Law and Politics in British Colonial Thought: Transpositions of Empire, Basingstoke, Palgrave Macmillan* (2010), at 119-121.

[35] See Koskenniemi, *op. cit.,* supra n. 21, at 143.

[36] See Reeves, *op. cit.,* supra n. 22, at 22.

[37] Recognition of the flag of the Congo Free State by the United States (22 April 1884), reprinted in (1909) 3 *AJIL Supp*., at 5.

[38] See R.S. Thomson, *Fondation de l'État Independent du Congo –Un chapitre de l'histoire du partage de l'Afrique* (Office de Publicité) (1933), at 165.

[39] *Ibid*, at 169.

[40] See Convention 1884 entre l'Empire d'Allemagne et l'Association Internationale du Congo, reprinted in E. Nys, 'L'Etat indépendant du Congo et le droit international', (1903) 5 *RDILC*, pp. 333-379, at 350-351.

[41] See e.g. treaty between Austria-Hungary and the International Association of the Congo, reprinted in *Ibid*., at 356

[42] See Déclarations entre l'Association Internationale du Congo et le gouvernement belge , reprinted in *Ibid*., at 365-366.

[43] In accordance with the Belgian Constitution, Leopold II also needed prior approval from the Belgian Parliament to become the monarch of another State. On this approval, see infra note 269.

[44] See G. Nzongola-Ntalaja, *The Congo From Leopold to Kabila – a people's history* (Zed Books) (2002), at 18.

2.2 Leopold's reign of terror

Leopold II ruled the Congo Free State with an iron fist. Through trade in ivory and especially, as of the 1890s, in rubber, he found a way to make the Congo Free State a profitable enterprise, albeit at an enormous human cost.[45] The stories of atrocities committed under Leopold's rule are endless. Contrary to most European colonial governments who imposed taxation in money to force natives to earn wages by labour on plantations or public works, the Congo Free State imposed a tax in labour itself.[46] Districts were taxed for quotas of food, porterage, ivory, rubber and other commodities.[47] Villagers were forced to spend days in the forest searching for rubber vines, to deliver food grains, or to work e.g. as woodcutters for the river steamers.[48] This system was set up by agents of Leopold II, who counted the population surrounding a station, and then determined how much should be contributed by way of produce or labour.[49] Quota were enforced by corporal punishments, collective fines in kind, imprisonment, or by punitive expeditions that destroyed or massacred whole villages.[50]

Leopold II never set foot on Congolese soil, but was able to control the Congo Free State through his notorious *Force Publique*. The *Force Publique* served as the official army of the Congo Free State, and consisted of white officers from Belgium and other European countries, as well as African mercenaries and local recruits.[51] Its officers as well as other agents of the Congo Free State operated in a situation of complete impunity and were financially incentivized to maximize the exploitation of the local population. Sometimes *Force Publique* soldiers held family members or the whole female population of a village hostage, in order to force the men to achieve their rubber quota.[52] Failure to deliver would be punished with lashes from the *chicotte* (a whip made of hippo hide), mutilation, or even death.[53] Uprisings were violently repressed and resulted in bloodbaths.[54] In order to prove that ammunition was not 'spilled' in hunting or saved for mutiny, officers of the *Force Publique* would oftentimes instruct their soldiers to cut off the right hand of the deceased and bring it back as evidence of the fact that their orders had been enforced.[55] In sum, by use of torture, murder and other inhumane methods Leopold's administration was able to compel the Congolese to produce or to do whatever was asked from them.[56]

Throughout the period of Leopold's reign, the overall population of the Congo Free State decreased dramatically. Hochschild distinguishes four major factors that contributed to this population decline: (1) murder, (2) starvation, exhaustion and exposure, (3) disease, and (4) a plummeting birth rate.[57] Even though outright murder was not the major cause of death in the Congo Free State, it is undeniable that it took place on large scale, as is clearly documented by visitors, missionaries and even *Force Publique* soldiers.[58] The reign of terror also resulted in widespread starvation, and plummeting birth rates, as thousands of villagers fled into the forests, villages were burned, locals were forced to give up food supplies to soldiers, families were torn apart as men were sent to the rainforest for weeks to collect

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[45] See G. Vantemsche, *Congo-De impact van de kolonie op België* (Lannoo) (2007), at 34.
[46] See N. Ascherson, The king incorporated (George Allen & Unwin Ltd.) (1963), at 202
[47] See M. Ewans, *European Atrocity, African Catastrophe – Leopold II, the Congo Free State and its Aftermath* (RoutledgeCurzon) (2002), at 161.
[48] See Ascherson, *loc. cit.,* supra n. 46, at 202
[49] See Ewans, *loc. cit.,* supra n. 47, at 162.
[50] See Ascherson *loc. cit.,* supra n. 46, at 202
[51] See Vantemsche, *loc. cit.,* supra n.45, at 34.
[52] See Hochschild, *op. cit.,* supra n. 16, at 161.
[53] See Nzongola-Ntalaja, *op. cit.,* supra n. 44, at 22; Blocher and Gulati, *loc.. cit.,* supra n. 33, at 1241.
[54] See Koskenniemi, *op. cit.,* supra n. 21, at 158.
[55] See Hochschild, *op. cit.,* supra n. 16, at 165.
[56] See Nzongola-Ntalaja, *op. cit.,* supra n. 44, at 20.
[57] See Hochschild, *op. cit.,* supra n. 16, at 226.
[58] *Ibid*, at 226-228.

rubber, etc.[59] Furthermore, many people died of diseases. New diseases brought by the Europeans and Afro-Arab slave traders, and old ones, spread quickly, with the most infamous killers being smallpox and sleeping sickness.[60] When confronted with evidence of mass population loss in the Congo Free State, Leopold often referred to these diseases to account for this phenomenon. Although it is true that sleeping sickness and other illnesses would, even without Leopold, have made a fair share of victims, epidemiologists nonetheless emphasize that epidemics take a much higher toll among the malnourished and traumatized, as was undoubtedly the case in Congo.[61]

For lack of census figures, the exact decline of the Congolese population remains difficult to establish. Hochschild notes that historians are more confident about the relative decline than of absolute numbers.[62] An official Belgian government commission estimated that the population had been reduced by half since the time Stanley began laying the foundations of Leopold's Congo.[63] In a similar vein, Vansina estimates that between 1880 and 1920 the population was cut by at least a half.[64] Based on an estimated population size of 10 million people in 1924, Hochschild therefore concludes that the population shrunk by approximately ten million people in the era of the Congo Free State.[65] Even if this approach is strongly criticised by others,[66] there is consensus that mass atrocities took place under Leopold's reign.

2.3 The end of the Congo Free State

During the first years of Leopold's reign, little was said in public about the bloodshed and exploitation occurring in the Congo Free State. With the exception of George Washington William, journalists who went to Congo usually upheld Leopold II's image of a great humanist.[67] At the end of the nineteenth century, this was about to change. Edmund D. Morel, an employee at the shipping company Elder Dempster noticed that ships that returned from the Congo Free State were fully loaded with ivory and rubber, but little value was sent out in return.[68] He deduced that it was impossible that the Congolese people were compensated with money or other valuable trading assets and concluded that there could only be one explanation: forced labour and mass exploitation.

Morel started to investigate the situation, left his job and became a full-time advocate for the reform of the Congo Free State. He succeeded in putting this issue on the agenda in the United Kingdom and eventually the Foreign Office ordered its consul in Congo, Rodger Casement to investigate the situation.[69] Casement's report, finally published in 1904 and heavily redacted, confirmed the abuses taking place in the Congo Free State and caused a public outrage that crystallized in the creation by Morel of the Congo Reform Association (CRA),[70] an international human rights movement *avant la lettre*. The CRA exerted a relentless pressure on the Belgian, British, and American governments

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[59] *Ibid*, at 229-232.
[60] *Ibid.*,at 230
[61] *Ibid*, at 231.
[62] *Ibid*, at 232.
[63] *Ibid*, at 233.
[64] See *Ibid.*
[65] *Ibid.*
[66] See e.g., J. Op de Beeck, *Leopold II – Het hele verhaal* (Horizon) (2020), at 718 (stressing that it is impossible to establish exact figures and that Hochschild's estimation does not withstand scientific scrutiny), See also Vantemsche, *loc. cit.,* supra n. 45, at 35.
[67] See Hochschild, *op. cit.,* supra n. 16, at 185
[68] *Ibid*, at 179-180.
[69] See A. von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality', forthcoming in (2021) *EJIL*, MPIL Research Paper No. 2020-49, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3742694, at 10.
[70] See Koskenniemi, *op. cit.,* supra n. 21, at 159. For an annotated edition of the report, see: D. Vangroenweghe and J.-L. Vellut (eds.), *Le rapport Casement: rapport de R. Casement, consul brittanique sur son voyage dans le Haut-Congo (1903)* (Louvain: UCL) (1985), 173 p.

to improve the situation of the Congolese.[71] Leopold II responded with a countercampaign to spread his *truth* about the Congo Free State. Several businessmen, politicians or newspapers were paid large sums to support Leopold's cause.

Leopold also established a commission of inquiry. This commission was supposed to be a mock commission, exonerating Leopold of all allegations. However, when the commissioners went to the Congo Free State, they were shocked when the true scale of abuse became apparent to them.[72] The commission confirmed all major accusations levelled against Leopold by Morel and Casement, and it became clear that a change in government was needed. When in 1906, a US newspaper exposed Leopold's attempt to influence Members of Congress with lobbying and bribes, his position in the Congo Free State became truly untenable.[73] This article increased the attention for the Congo Free State in the US and Félicien Cattier's work, a Belgian banker who criticized Leopold's rule largely on financial grounds, only added to this public outcry.[74]

Since an independent State in Africa was still unthinkable to western powers at the time, and since no major power wanted a 'competitor' to take control of the Congo Free State, even reformers like Morel pushed for "the Belgian solution".[75] This implied that the Belgian State would take over the Congo Free State and turn it into a Belgian colony, open to scrutiny and under the rule of law. Nevertheless, Leopold II did not give in immediately. He knew that he held all the cards as the Belgian government, embarrassed by Leopold's exploits and realising that Belgium's international reputation was at stake, felt pressured to take over Congo.[76] Eventually Leopold agreed to sell the Congo to the Belgian government. The Belgian government assumed 110 million francs' worth of debts of the Congo Free State, much of them in the form of bonds Leopold had dispensed.[77] Belgium also agreed to pay 45.5 million francs towards completing certain of the King's building projects. Finally, on top of all this, Leopold was promised another fifty million francs, *as a mark of gratitude for his great sacrifices made for the Congo*.[78] As Harms observes, this may have been Leopold's greatest trick of all.[79]

On 28 November 1907, the Treaty of Cession and Annexation was signed, transferring sovereignty over the territories composing the 'Independent Congo State' to the Kingdom of Belgium.[80] This treaty and the 1908 Additional Act to the Treaty of Cession[81] were approved by the Belgian parliament by the laws of 18 October 1908[82], officially transferring the Congo Free State to Belgium as of 15 November 1908. Congo would remain a Belgian colony until its independence

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[71] See Hochschild, *op. cit.,* supra n. 16, at 209.
[72] See Op De Beeck, *op. cit.,* supra n. 66, at 554
[73] See Blocher and Gulati, *loc.. cit.,* supra n. 33, at 1242; See Hochschild, *op. cit.,* supra n. 16, at 248.
[74] See J. Blocher, M. Gulati, K. Oosterlinck, 'King Leopold's Bonds and the Odious Debts Mystery' (2020) 60 *Virginia Journal of International Law*, pp. 487-530, at 502.
[75] See Hochschild, *op. cit.,* supra n. 16, at 257.
[76] *Ibid*, 257-258.
[77] Some of the debt the Belgian government took over was in effect to itself. The Belgian government had lent Leopold nearly 32 million francs that were never paid back. He managed to get rid of a debt-ridden colony while multiplying his fortune. See *Ibid*, at 259.
[78] See *Ibid.*
[79] See R. Harms, 'King Leopold's Bonds' in W. N. Goetzmann, K. G. Rouwenhorst (Eds.): *The Origin of Value The Financial Innovations that Created Modern Capital Markets* (Oxford: OUP) (2005), pp. 343–357, at 344.
[80] See *Traité de cession de l'état Indépendant du Congo à la Belgique, 4 Pasinomie, 776-786. For an En*glish translation: Treaty of cession and annexation (28 November 1907), reprinted in (1909) 3 *AJIL Supp.*, pp 73-75.
[81] Article 4 of The 1908 Additional Act to the Treaty of Cession governs Leopolds "terms of sale" to Belgium. See Acte additionnel au traité de cession de l'état Indépendant du Congo à la Belgique, (1908) 4 *Pasinomie*, 786-793.
[82] Loi (18 octobre 1908) réalisant le transfert à la Belgique de l'état Indépendant du Congo, (1908) 4 *Pasinomie*, 775. Loi approuvant l'acte additionnel au traité de cession de l'état Indépendant du Congo à la Belgique, (1908) 4 *Pasinomie*, 786.

on 30 June 1960.[83]

3 International responsibility for the atrocities committed in the period of the Congo Free state – General Observations

3.1 Do the horrors of the Congo Free State qualify as internationally wrongful acts?

There can be little doubt that, by contemporary standards, the reign of terror during the period of the Congo Free State entailed the commission of a panoply of internationally wrongful acts, including, most prominently, grave and systematic breaches of international human rights law. It would also involve, in all likelihood, widespread attacks against the civilian population meeting the definition of 'crimes against humanity' espoused in Article 7 of the ICC Rome Statute[84] and Article 2 of the ILC's Draft Articles on Crimes against Humanity[85] (conversely, it would arguably lack the special intent required for an act of genocide[86]).

The problem of course is that international law today is not the same as it was in the days of Leopold II, and that, as Judge Huber famously expressed in the *Island of Palmas* case, "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[87] This (first) 'principle of intertemporal law' (*tempus regit actum*) is commonly regarded as a general principle of international law and is reflected in Article 13 of the ILC's Articles on State Responsibility as well as Article 28 of the Vienna Convention on the Law of Treaties (VCLT).

It follows that the acts of the Leopold II regime cannot easily be qualified as human rights violations, as IHRL is essentially a post-WWII construct. In a similar vein – international law being the mostly European construct that it is, and having been developed with European interests in mind – colonialism itself (which was omnipresent at the time) was not regarded as contrary to international law.[88] In essence, colonies were considered as objects rather than subjects of international law, and their inhabitants denied the rights of western citizens.[89] Along the same lines, while forced labour was widespread at the time of the Congo Free State, a general prohibition only came into being with the adoption of the 1930 ILO Forced Labour Convention.[90] This Convention moreover excluded several types of work from its scope (including military service and work as part of 'normal civil obligations') (Article 2). It also allowed for reservations in connection with dependent territories (Article 26), a possibility which Belgium – which only ratified in 1944 – made extensive use of.[91]

What of 'crimes against humanity'? Interestingly, George Washington Williams, a US national that was one of the first to draw international attention to the abuses of the Congo Free State, accused Leopold II of being guilty of 'crimes against humanity'.[92] In a similar vein, debates in the British Parliament referred to the atrocities as a crime against

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[83] See Blocher and Gulati, *loc.. cit.,* supra n. 33, at 1247.
[84] UNTS Vol. 2187, 3.
[85] Reprinted in (2019) *Yb. ILC*, vol. II, Part Two.
[86] In this sense, see e.g. Hochschild, *op. cit.,* supra n. 16, at 225.
[87] See *Island of Palmas (Netherlands, USA)*, 4 April 1928, UNRIAA Vol. II, pp. 829-871, at 845.
[88] See J. A. Kämmerer, 'Colonialism', *MPEPIL,* January 2018.
[89] See *Ibid*., at para. 18.
[90] Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 UNTS 55, entered into force, May 1, 1932.
[91] See: K. Van der Speeten, 'Een juridisch perspectief op schadeherstel voor kolonialisme', (2020-3) *Tijdschrift voor Mensenrechten*, pp. 11-15, at 12. The most extensive reservation left room for "compulsory cultivation as a means of agricultural instruction, if such a measure is justified by the idleness or improvidence of the population" (sic).
[92] See Hochschild, *op. cit.,* supra n. 16, at 112.

humanity.[93] These may well be among the first recorded instances where the terminology of 'crimes against humanity' was used in public discourse. The reverse side of the medal is that it is difficult to sustain that it already existed as a legal concept and a trigger for international (State or criminal) responsibility. It is telling in this context that the International Criminal Tribunal for the former Yugoslavia found that 'crimes against humanity' were created as a 'new category of crime' by the Nuremberg Charter.[94] More generally, the question has been raised whether States were at all bound by any international obligations in the treatment of their citizens at the time. Cassese argues, for example, that the Armenian massacres in 1915-1916 did not breach any general rule of international law, because states were free to deal with their nationals as they pleased, as long as they were not bound by bilateral or multilateral treaties laying down specific rules on the treatment of their nationals or minorities.[95]

Admittedly, the principle of intertemporality is not without controversy in legal doctrine, and authors have occasionally sought to limit the reach of this apologetic dogma.[96] One qualification which is beyond contestation is that States may voluntarily agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State.[97] Cases involving the retrospective assumption of responsibility are not inexistent, but they remain undeniably rare. Such assumption of responsibility moreover cannot be readily presumed: acceptance of historical or moral responsibility, for instance, cannot simply be equated to an acceptance of *legal liability*. It is telling that, upon the adoption of the Durban Declaration at the 2001 World Conference against Racism, the Belgian representative stated, also on behalf of the European Union, that the reference in the Declaration to measures to halt and reverse the lasting consequences of the slave trade "should not be understood as the acceptance of any liability for these practices."[98] It is recalled in this context that on the occasion of the 60th anniversary of the DRC in 2020, the Belgian King issued a statement acknowledging that "[d]uring the time of the Congo Free State, acts of violence and atrocities were committed that still weigh on our collective memory", while expressing his "deepest regrets for those wounds from the past – wounds that are still painfully felt due to the acts of discrimination still all too present in our society" (our translation).[99] Welcome (and long overdue) as this apology by King Philippe was, no acceptance of legal responsibility can, however, be derived from its wording.

Some have presented an alternative way to circumvent the retroactivity problem by pointing to the continuing effects of the wrongful acts, such as the continuing adverse economic and social consequences for descendants of the victims of the slave trade.[100] Yet, this argument ignores the ILC's principled position that "[a]n act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which

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[93] See the text reproduced in W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: OUP)(2014), at 53.

[94] International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Tadic,* 7 May 1997, no. IT-94-1, at para. 618. Note: according to the ICTY the term 'crimes against humanity', "although not previously codified, had been used in a non-technical sense *as far back as 1915*" (*ibid*.) (our emphasis). According to Schabas, however, the notion of crimes against humanity was 'in wide circulation from at least the middle of the eighteenth century', and this label was later in the nineteenth century regularly attached to slavery and the slave trade. Further: W. Schabas, *op. cit*., supra n. 93, at 44.

[95] A. Cassese, 'Armenians (Massacres of)', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), pp. 248-250, at 249. In a similar vein, see: M. Roscini, 'Establishing State Responsibility for Historical Injustices: the Armenian Case', (2014) 14 *ICLRev*, pp. 291-316, at 305 (and note 57), 315 ("the treatment by a state of its subjects was at the time within its jurisdiction, unless a treaty provided otherwise").

[96] See, for instance, von Arnauld, *loc. cit*., supra n. 69.

[97] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, (2001) *Yb. ILC*, Vol. II, Part Two, at 58 (Commentary to Article 13, para. 6) (seeing this as an application of the *lex specialis* principle in Article 51 ARSIWA). Conventions may also expressly provide for their retroactive application.

[98] Text reproduced in (2001) 72 BYIL, 642-3. The statement further asserts that "nothing in the Declaration … can affect the general legal principle which precludes the retrospective application of international law in matters of state responsibility."

[99] See supra note 13.

[100] See Roscini, *loc. cit*., supra n. 95, at 300.

continues."[101] Lastly, and most fundamentally, some authors have argued for a limitation of the intertemporality principle – whether in the form of a suggested 'teleological' interpretation of that principle and/or borrowing from natural law – on the grounds that concerns with legal stability and legal certainty cannot be allowed to produce outcomes that are fundamentally unjust.[102] An analogy with the (controversial) departures from the *nullum crimen sine lege* principle in the *Nuremberg*[103] and *Eichmann*[104] cases has sometimes been suggested.[105] At the same time, the differences between individual criminal responsibility and State responsibility cannot be ignored.[106] As far as State responsibility is concerned, the principle of intertemporal law has been consistently upheld in case-law and State practice, including, for instance, in cases concerning slavery.[107] The ILC Commentary to Article 13 ARSIWA[108] as well as article 71(2)(b) VCLT[109] confirm that the principle does not make distinctions on the basis of the status of the breached obligation and also applies to *jus cogens* norms. This is not to say of course that international rights and obligations – especially in the realm of international human rights law – cannot be interpreted in an *evolutive* manner. Yet, evolutive interpretation (which is permitted in certain cases) and retroactive application of norms (which is excluded) are conceptually different.[110] Put simply: evolutive interpretation presupposes that the norm was *already in existence* at the time of the contested conduct.

As with other cases of historical injustices,[111] the question remains whether any specific bilateral or multilateral treaties existed that were binding upon the Congo Free State and that granted some form of protection to the affected population – and which could accordingly serve to establish the existence of an internationally wrongful act. The lion's share of treaties concluded by the Congo Free State are bilateral agreements concluded between December 1884 and February 1885 (against the background of the ongoing Berlin Conference). Through these agreements, the

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[101] ILC, *loc. cit.*, supra n. 97, at 58 (Commentary to Article 13, para. 5). On the element of 'continuation' in connection with the question of State succession in matters of State responsibility see *infra* Section 4.3.2.

[102] For a discussion, see e.g., Buser, *loc. cit.*, supra n. 3, at 426-433. Some authors draw on the so-called *Radbruch* formula, according to which law which is horrendously arbitrary and unjust cannot be regarded as law at all. See: G. Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (1946), translated. by Litschewski Paulson and Paulson in (2006) 26 *Oxford Journal of Legal Studies* 1, at 7 (Radbruch developed this formula in connection with the atrocities committed by the nazi regime). Consider also: von Arnauld, *loc. cit.*, supra n. 69. Von Arnauld relies in part on the well-known Martens clause enshrined in the preamble of the 1899 Hague Convention (II) to argue in favour of an obligation to give satisfaction, coupled with a state obligation to negotiate with the victims of historical injustice or their descendants. On the other hand, the Martens clause's reference to 'the laws of humanity and the requirements of the public conscience' was tied to the occurrence of an armed conflict, and, more specifically, an *international* armed conflict at that. Also relying on the Martens clause (but in the context of the armed conflict between Germany and the Ovaherero and Nama people in modern-day Namibia): M. Goldmann, 'Anachronismen als Risiko und Chance: Der Fall rukoro et al. gegen Deutschland', (2019-1) 52 *Kritische Justiz*, pp. 92-117, at 116, paras. 64-6.

[103] *Trial of German Major War Criminals*, 1 October 1946, International Military Tribunal (Nuremberg), (1947) 41 *AJIL*, at 217.

[104] District Court of Jerusalem, *Attorney-General of Israel v Eichmann*, 12 December 1961, no. 40-61, (1968) 36 *ILR,* 42, at para. 27.

[105] See e.g., ICJ, *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Separate Opinion of Judge Al-Khasawneh, (2002) *I.C.J. Reports* 492, at para. 16.

[106] See Roscini, *loc. cit.*, supra n. 95, at 298 et seq. (Roscini notes, among other things, "how, in practical terms, in criminal prosecutions the problem of how far back in time one can go when applying law retroactively is necessarily a limited problem, as the accused must be alive. By contrast, states usually 'live' longer than human beings … and therefore, should we accept retroactivity in at least certain instances, we would face the difficult task of establishing a time limit in the past beyond which not to go in order to avoid, for instance, that Italy is called to account on grounds of genocide for the destruction of Carthage in 146 BC.").

[107] ILC, *loc. cit.*, supra n. 97, at 58. For a recent illustration, see ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, (2019) *ICJ Rep.*, 95, para. 148 (where the Court insists on the need to "ascertain when the right to self-determination crystallized as a customary rule binding on all States").

[108] ILC, *loc. cit.*, supra n. 97, at 58 (para. 5).

[109] Article 71(2)(b) VCLT makes clear that the emergence of a new peremptory norm, while terminating any existing treaty in conflict with that norm (pursuant to Article 64 VCLT), "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination…"

[110] ILC, *loc. cit.*, supra n. 97, at 59 (Commentary to Article 13, para. 9).

[111] See e.g., Goldmann, *loc. cit.*, supra n. 102, at para. 63 (in relation to German atrocities against the Herero); Roscini, *loc. cit.*, supra n. 95 (relying on treaty law in connection with the mass killings of the Armenians in the Ottoman Empire).

International Association of the Congo (which would later abandon that name and come to present itself as the 'Congo Free State') secured recognition from numerous States. In return, it committed itself vis-à-vis these States e.g. not to impose charges on goods imported to or transited through the Congo, to grant their nationals right of access to Congolese territory, or to ensure 'most favoured nation' treatment'.[112] By contrast, these treaties did not provide for any obligations on the part of the Congo Free State vis-à-vis its own nationals.

This situation is different, when looking at the General Act of the Berlin Conference of 26 February 1885.[113] The Berlin Act was signed by all of the major powers of the day. What is more, the International Association of the Congo was the first to accede to it in accordance with Article 37 of the Act – an accession that was welcomed by the other delegations.[114] The Berlin Act consists of several components, including, for instance, a chapter on the liberty of commerce in the Congo basin, or a chapter on the area's neutrality. Additionally, in accordance with Article 6, "[a]ll Powers exercising rights of sovereignty or an influence in the Said territories [engaged] themselves to watch over the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence". The States concerned moreover committed "to strive for the suppression of slavery and especially of the negro slave trade" (ibid.). Article 9 further confirms the interdiction of slave trade in accordance with "the principles of the law of nations", and asserts that all States Parties will employ all the means in their power to put an end to it. The Congo Free State was also among the States to sign the 1890 Brussels Act,[115] the first comprehensive multilateral treaty laying down detailed rules related to the suppression of the African slave trade.

Interestingly, while Leopold II presented himself as an anti-slavery advocate to rally support for his International African Association and his International Association for the Congo, and acted as host for the Anti-Slavery Conference in Brussels in 1889-90,[116] the reality on the ground was rather different. Indeed, it has been argued that, to refer to Leopold's rubber quota system as 'forced labour', is an understatement, as the quota system, coupled with e.g. the practice of hostage-taking or the widespread use of the *chicotte*, was more akin to slavery.[117] As Blocher and Gulati explain, from a legal perspective, the fundamental fact of slavery is that it entails one person's ownership of another. Through brutal submission, Leopold II and his cronies *de facto* achieved exactly that.[118] One might object that such *de facto* ownership would be insufficient to fit the legal definition of slavery, or that the instruments above did not yet introduce a ban on slavery in all of its forms.[119] Even if one were to adopt this logic, a strong case can at least be made that the Congo Free State disregarded its obligation under the Berlin Act to "watch over the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence". Indeed, as Anderson explains, the *travaux* of the Berlin Conference and related documents confirm that Article 6 of the Berlin Act reflected the intent of the signatories to protect indigenous African peoples, and that the Act was intended to

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[112] See the instruments reproduced in Nys, *loc. cit.,* supra n. 41, at 349 et seq. See also the treaties available in the *Oxford Historical Treaties* database at https://opil.ouplaw.com/home/OHT.

[113] General Act of the Conference of Berlin concerning the Congo, reprinted in (1909) 3 *AJIL Supp.*, pp. 7-25.

[114] See: Nys, *loc. cit.*, supra n. 112, at 368; Reeves *loc. cit.*, supra n. 32, at 113.

[115] General Act for the repression of the African slave trade and the restriction of the importation into, and sale in, a certain defined zone of the African continent, of firearms, ammunition and spirituous liquors, Brussels, 2 July 1890, reprinted in (1909) 3 *AJIL Supp.*, pp. 29-61.

[116] Hochschild, *op. cit.,* supra n. 16, at 92-93.

[117] See Blocher and Gulati, *loc.. cit.,* supra n. 33 at 1240-1 (with further references). In a similar vein: Nzongola-Ntalaja, *op. cit.,* supra n. 44, at 20.

[118] In this sense: Blocher and Gulati, *op. cit.,* supra n. 44, at 1240; S. Drescher and P. Finkelman, 'Slavery', in B. Fassbender and A. Peters, *The Oxford Handbook of the History of International Law* (Oxford: OUP)(2012), pp. 890-916, at 910.

[119] The first comprehensive Anti-Slavery Convention was only adopted in 1926 (Geneva, 25 September 1926, LNTS Vol. 60, 253). What is more, rather than confirming a pre-existing (customary) ban on slavery, Article 2(b) of the Convention proclaims the commitment of States Parties to "bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms". It is suggested that both institutions of slavery and slave trade "were outlawed somewhere between 1885 and 1926 by customary international law". Buser, *loc. cit.*, supra n. 3, at 424.

establish binding international law.[120] Further, ample evidence suggests that the conditions of existence of the Congolese did not improve under Leopold II's reign, but worsened dramatically. The steep decline of the Congolese population similarly illustrates that the fundamental disregard for "the conservation of the indigenous populations". It is true that some Belgian lawyers, such as Nys[121] and Descamps,[122] denied allegations that the Congo Free State breached its commitments under international law, and that the international law community mostly stayed silent/indifferent during the peak years of the Congo controversy.[123] It is doubtful, however, if the partisan position of Nys and Descamps can be regarded as the prevailing view at the time.[124] Thus, in a note to the Belgian Foreign Minister of 7 April 1908,[125] the United States called for far-reaching reforms to promote the well-being of the local population in the Congo following the annexation. In so doing, it strongly critiqued the fact that the administration of the Congo Free State had left 'much… to be desired… from the standpoint of the acts of Brussels and Berlin', and observed how 'in the opinion of competent investigators, [the regime had been] enslaving, degrading and decimating the native population'. Writing in 1909, Reeves observes how "[t]he impression has been general that the provisions of the [Berlin Act] have been violated".[126] One year later, Despagnet suggested the situation in the Congo Free State had been "contrary to humanity and morality", and "perhaps illegal".[127]

In the end, a *plausible* argument can at least be made that, having regard to the commitments under the Berlin Act, the treatment by the Congo Free State of the Congolese population gave rise to internationally wrongful conduct.[128]

3.2 Establishing the international responsibility of Belgium – an uphill battle?

Leaving aside the difficulty of ascertaining internationally wrongful conduct in light of the principle of intertemporality, additional hurdles arise, including of a more procedural nature, that complicate any attempt to hold Belgium internationally responsible for the past atrocities of the Congo Free State. Without in any way claiming exhaustivity, a few obstacles can be identified.

First, any attempt to bring proceedings against Belgium *before a foreign domestic court* (in the DRC or elsewhere) would in all likelihood falter on account of Belgium's immunity from jurisdiction under international law. As is well-known, the law of State immunity indeed prevents domestic judges from considering claims brought against third States and relating to their *acta jure imperii*.[129] The International Court of Justice has famously asserted in its 2012 judgment in *Germany v Italy* that this immunity also applies in respect of 'grave' breaches of international law,

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[120] R. Anderson, 'Redressing Colonial Genocide under International Law: the Hereros' Cause of Action against Germany', (2005) 93 *Cal. L. Rev.*, pp. 1155-1189, at 1173-6. Consider also: Kämmerer, *loc. cit.*; supra n. 88, para. 23 (arguing that the Berlin act reflected the customary international law of its time).

[121] See e.g., E. Nys, 'L'Etat Indépendant du Congo et les Dispositions de l'Acte Général de Berlin', (1903) 5 *RDILC*, pp. 315-332 (While the article is mostly concerned with accusations that the Congo Free State breached its commitments in the domain of commerce and trade, Nys also dismisses out of hand the "*haineuses allégations*" of maltreatment of the Congolese population in violation of the Berlin Act. *Ibid.*, at 316-317); Nys, *loc. cit.*, supra n. 112, at 371-9 (claiming that the Congo Free State loyally complied with all of its obligations under the Berlin Act).

[122] E.E.F. Descamps, *l'Afrique nouvelle* (Brussels : Janssens) (1903), 626 p.

[123] Koskenniemi, *op. cit.,* supra n. 21, at 163.

[124] von Arnauld, *loc. cit.*, supra n. 69, at 3, Note 16. Further: Koskenniemi, *op. cit.,* supra n. 21, at 164-6.

[125] Memorandum presented by American Minister at Brussels to the Belgian Minister for Foreign Affairs, 7 April 1908, reprinted in (1909) 3 *AJIL Supp.*, pp. 94-96.

[126] Reeves *loc. cit.*, supra n. 32, at 117.

[127] F. Despagnet, *Cours de droit international public* (Paris : Sirey) (1910 ; 4th ed.), at 101.

[128] Consider also von Arnauld, *loc. cit.*, supra n. 69, at 8 (referring to the Berlin Act as a 'point of entry' to establish a breach). See also Goldmann, *loc. cit.*, supra n.102, at 115-6 using the same provisions of the Berlin Act in connection with the German atrocities against the Herrero.

[129] Further: H. Fox and P. Webb, *The Law of State Immunity* (Oxford: OUP) (2013; 3rd ed.), 704 p.

including breaches of peremptory norms.[130] By way of illustration, reference can be made to the recent attempt by descendants of the Herero people in Namibia to bring proceedings before the US courts on the basis of the Alien Tort Statute, and seeking damages from Germany for the 'enslavement and genocide' of the Herero, and concomitant acts of expropriation, in the early 20th century.[131] In particular, while the claimants attempted to circumvent Germany's immunity from suit by relying on the 'expropriation exception' in the US Foreign Sovereign Immunities Act (FSIA), the US Court of Appeals dismissed the arguments and held the case inadmissible.[132]

Of course, State immunity operates only at the domestic level, and not in inter-State proceedings at the international level. Be that as it may, State consent remains a *sine qua non* for proceedings of the latter type. And while both Belgium and the DRC have lodged declarations accepting the compulsory jurisdiction of the International Court of Justice (ICJ),[133] the Belgian declaration extends only to "legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement".[134] It follows that the DRC would either have to conclude a special agreement with the Belgian authorities, or find an alternative jurisdictional basis, to raise the atrocities of the Congo Free State before the ICJ or before an arbitral tribunal.

Even if such jurisdictional basis can be established, further challenges may arise, e.g. in terms of the *locus standi* needed to invoke international responsibility.[135] For instance, would the DRC be entitled to claim reparation for internationally wrongful acts which were committed at a time it did not even exist as a State? One interesting precedent in this context concerns the human rights abuses committed by South Africa during its illegal occupation of (then) South West Africa, where the UN General Assembly affirmed that the newly-independent State of Namibia was indeed entitled to claim reparation.[136] Further, while no limitation period exists in the law of State responsibility, the possibility to claim reparation can be lost through waiver or acquiescence, which may include situations of unreasonable delay.[137] At the same time, the ICJ has made clear that an assessment of whether the passage of time renders an application inadmissible must be conducted in light of the circumstances of each case.[138] When it comes to claims for historical injustices by newly independent States, it has been rightly stressed that such circumstances must necessarily include the strong political pressure faced by such States as well as the time required to prepare such complex claims.[139]

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[130] See ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, (2012) *I.C.J. Reports* 99.
[131] US Court of Appeals, *Rukoro v Federal Republic of Germany*, No. 19-609 (2d Cir. Sept. 24, 2020), at 2.
[132] *Ibid.* Note: in a judgment rendered shortly hereafter, the US Supreme Court moreover asserted that 'domestic takings', involving the taking of property by a country from its own nationals, is not covered by the FSIA's expropriation exception, thus limiting the scope of that exception. US Supreme Court, *Federal Republic of Germany et al. v. Philipp et al.*, 3 February 2021, 592 U.S.
[133] See the overview at https://www.icj-cij.org/en/declarations.
[134] Belgium, Declaration of Minister of Foreign Affairs V. Larock, 17 June 1958, available at https://www.icj-cij.org/en/declarations/be.
[135] Further: Buser, *loc. cit.*, supra n. 3, at 437-443. As Buser observes, most legal scholars' accounts of reparations for historical injustices seem to have neglected these challenges (*ibid.*, at 437).
[136] E.g., GA Res. 36/121 of 10 December 1981, at para. 25. Further: Dumberry, *op. cit.*, supra n. 15, at 331. Dumberry concludes more generally that "the principles of succession or non-succession to the right to reparation are simply (almost) never invoked by States in their actual practice and never dealt with by judicial bodies. It should therefore be concluded that the fact that an internationally wrongful act was committed before the date of succession is not treated in State practice and international case law as an obstacle preventing the new successor State from receiving reparation." *Ibid.*, at 336, 409. On a related note, as far as the requirement of 'continuous nationality' for the exercise of diplomatic protection is concerned, Dumberry notes that this rule should not be applied in the context of State succession, and that "[t]he right for the successor State to claim reparation on behalf of its new nationals for pre-succession damage is supported in doctrine." *Ibid.*, at 356.
[137] See ILC, *loc. cit.*, supra n. 97, at 122 (Commentary to Article 45 ARSIWA).
[138] ICJ, *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, (1992) *ICJ Reports*, 253 et seq.
[139] In this sense, see e.g.: Buser, *loc. cit.*, supra n. 3, at 443.

In the end, even assuming that the atrocities committed during King Leopold II's reign over the Congo Free State gave rise to internationally wrongful conduct, any attempt to bring legal proceedings against Belgium – whether at the national or international level – to claim compensation for these atrocities more than a century after their occurrence would meet several, potentially insurmountable, obstacles. The next section zooms in specifically on one of those challenges, viz. the question whether present-day Belgium can be said to have 'inherited' the international responsibility of the Congo Free State when the country was 'ceded' to it by Leopold II in 1907. Answering this question requires a closer look into the law of State succession, particularly as it applies in matters of State responsibility.[140]

4 State succession in relation to the Internationally wrongful acts of the Congo Free State

4.1 First impressions from the work of the ILC and the ILA: a general rule of succession where the predecessor State ceases to exist

Until recently, the issue of State succession in matters of State responsibility remained somewhat overlooked in legal doctrine[141] and in the work of the UN International Law Commission (ILC). As is well-known, the ILC undertook extensive efforts to codify and develop various aspects of the law of succession (with mixed success), culminating in the adoption of the 1978 Vienna Convention on Succession of States in respect of Treaties (VCSST),[142] the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts,[143] and the 1999 Draft articles on nationality of natural persons in relation to the succession of States.[144] The question of State succession in respect of international responsibility was, however, deliberately excluded from the scope of the ILC's work, as is reflected in the 'without prejudice' clauses in the 1978 and 1983 Conventions.[145] Thus, the Commentary to the 1981 Draft Articles on Succession of States in respect of State Property, Archives and Debts, states – somewhat bluntly – that "[d]elictual debts, arising from unlawful acts committed by the predecessor State, raise special problems with regard to succession of States, the solution of which is governed primarily by the principles relating to international responsibility of States."[146] A more nuanced approach would be to accept that where delictual responsibility has been acknowledged by the State or adjudicated by an international court or arbitration at the date of succession, the rules on State succession in respect of State debts are to be applied.[147] By contrast, for our purposes, the relevant rules are those governing State succession in respect of international responsibility.

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[140] Note: the analysis focus on the question as to whether Belgium succeeded in the obligations resulting from possible internationally wrongful acts of the Congo Free State. On the question of State succession in respect of the right to claim reparation, see *supra* note 136.

[141] See further on this point: Dumberry, *op. cit.*, supra n. 15, at 11-13. Dumberry's excellent monograph remains the most recent in-depth analysis of the topic concerned until today. For earlier works, see e.g.: W. Czaplisnki, 'State Succession and State Responsibility', (1990) 28 *Can. YbIL*, pp. 339-360 (providing a useful overview of relevant case-law (international and domestic), treaties, diplomatic practice and legal doctrine on the topic pre-1990); J.-P. Monier, 'La succession d'États en matière de responsabilité internationale', (1962) 8 *AFDI*, pp. 65-90; C. Hurst, 'State Succession in matters of torts', (1924) 5 *BYbIL*, pp. 163-187.

[142] UNTS, vol. 1946, 3.

[143] UN Doc. A/CONF.117/14, 8 April 1983 (not yet in force)

[144] Annexed to UNGA Res. 55/153, UN Doc. A/RES/55/153, 30 January 2001.

[145] See Article 39 of the VCSST and Article 5 of the 1983 Convention.

[146] ILC, Draft Articles on Succession of States in respect of State Property, Archives and Debts with Commentaries, (1981) *Yb ILC*, vol. II, Part Two, at 78, para. 36.

[147] See in this sense: ILC, Special Rapporteur Pavel Sturma, 'First report on succession of States in respect of State responsibility', 31 May 2017, UN Doc. A/CN.4/708, at paras. 79-80: "A debt means 'an interest in assets of a fixed or determinable value' existing on the date of the succession of States. Such a debt may arise from a contract, a municipal tort or even from an internationally wrongful act of a State. In particular, it will be a debt for purposes of rules on succession in respect of State debts, if such an interest in assets of a fixed or determinable value was acknowledged by the State or adjudicated by an international court or arbitration at the date of succession. In

The relative neglect of the topic concerned has only recently subsided, inspired by developments in State practice and case-law. Credit is due in no small part to the *Institut de Droit international* (IDI), which established a thematic commission to look into the issue under the rapporteurship of Prof. Marcelo Kohen.[148] At its Tallinn session in 2015, the *Institut* effectively adopted a 16-article resolution (the 'Tallinn resolution'), which also stressed the need for further codification and progressive development in this area.[149] Shortly hereafter, the ILC decide to place the topic on its agenda and appointed Mr. Pavel Sturma as Special Rapporteur. At the time of writing, the ILC Special Rapporteur had produced four reports as well as several provisional draft articles.[150]

Both the 2015 resolution and the provisional draft articles put forth by the ILC Special Rapporteur distinguish between different types of State succession,[151] separating cases where the predecessor State continues to exist from those where it disappears entirely, and singling out specific modalities of State succession. Two scenarios are of particular relevance in the present context.

The first scenario involves the establishment of a 'newly independent State',[152] as happened when Congo finally became independent on 30 June 1960 (and one colonial regime came to supplant another). In such scenario, both the Tallinn resolution and the ILC Special Rapporteur confirm, in line with State practice and domestic case-law, that the obligations arising from the internationally wrongful act of the predecessor State do not in principle pass to the successor State,[153] save with the latter's consent.[154] Put differently: former colonies are not haunted by the internationally wrongful acts of the former metropolitan State but start with a 'clean slate' in this respect. Conversely, both the IDI and the ILC Special Rapporteur affirm, based on available (if limited) State practice, that a newly independent State is entitled to claim compensation for internationally wrongful conduct preceding its independence *where the wrongful act has a direct link with the territory or the population of the newly independent State*.[155]

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this hypothesis, the rules on succession of States in respect of State debts are to be applied. If, however, an internationally wrongful act occurs before the date of the succession but the legal consequences arising therefrom have not yet been specified (e.g. a specific amount of compensation was not awarded by an arbitral tribunal), then any possible transfer of obligations or rights should be governed by rules on succession of States in respect of State responsibility". See also the distinction between 'an interest in assets of a fixed or determinable value' and 'a right of action for unliquidated damages of a penal or compensatory character' set forth by O'Connell. D.P. O'Connell, *The Law of State Succession* (Cambridge: CUP) (1956), at 201. See also: Monier, *loc. cit.*, supra n. 141, at 67 (suggesting that when the predecessor State unilaterally recognized its international responsibility, we are confronted with a question of succession in respect of debts). See also *infra* note 190 and accompanying text.

[148] Institut de droit international (IDI), Tallinn Session, 'State succession in matters of State Responsibility (Rapporteur: Marcelo Kohen)', (2015) 76 *Yb Institute of International Law*, pp. 509 et seq.

[149] Institut de droit international (IDI), Tallinn Session, 'Succession of States in Matters of International Responsibility', Resolution of 28 August 2015, available at https://www.idi-iil.org/app/uploads/2017/06/2015_Tallinn_14_en-1.pdf.

[150] The Fourth Report dates from 27 March 2020, but its discussion was postponed to the ILC meeting in the period April-August 2021 due to the corona pandemic. ILC, Special Rapporteur Pavel Sturma, 'Fourth report on succession of States in respect of State responsibility', 27 March 2020, UN Doc. A/CN.4/743, at paras. 79-80.

[151] Both adopt the definition of State succession of Article 2(b) VCSST as referring to 'the replacement of one State by another in the responsibility for the international relations of territory'.

[152] Defined as 'a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible' (Article 2(f) VCSST).

[153] See Draft Article 8 in ILC, Special Rapporteur Pavel Sturma, 'Second report on succession of States in respect of State responsibility', 6 April 2018, UN Doc. A/CN.4/719, at 53/56; Article 16 of the IDI Tallinn resolution (*loc. cit.*, supra n. 149). Note: both provisions acknowledge, however, that the conduct of a national liberation or other movement which succeeds in establishing a newly independent State shall be considered an act of the new State under international law. On succession in respect of debts with regard to newly independent States, see Article 38 of the 1983 Vienna Convention (*loc. cit.*, supra n. 143).

[154] ILC, *loc. cit.*, supra n. 153, at 53/56 (Draft Article 8(2); Art. 3 of the IDI Tallinn resolution (*loc. cit.*, supra n. 149).

[155] This is the wording used in Article 16(2) of the IDI Tallinn resolution (*loc. cit.*, supra n. 149). Draft Article 12(2) of the ILC Special Rapporteur uses the following wording: "[T]he successor State may request from the responsible State reparation in special circumstances where the injury relates to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State." ILC, Third report on succession of States in respect of State responsibility by Pavel Sturma, Special

The second scenario, which is the most relevant here, concerns the incorporation of a State into another existing State. This is precisely what happened when the Congo Free State was ceded to of Belgium and ceased to exist as an independent State. As the ILC Special Rapporteur observes, a general rule of non-succession in such a situation would mean that no State incurs obligations arising from internationally wrongful acts.[156] Such a solution, the Rapporteur continues, would be 'hardly compatible with the objectives of international law, which include equitable and reasonable settlement of disputes'.[157] According to the Rapporteur, however, there are several precedents that instead indicate that international responsibility, or rather[158] the obligation to pay compensation for the wrongful act of the predecessor State, is passed on to the successor State. Reference is made in this context to the German unification (whereby the German Democratic Republic (GDR) was integrated into the Federal Republic of Germany) or the incorporation of Singapore into the Federation of Malaya.[159] While only few relevant precedents are found to exist, the Special Rapporteur observes that 'there is little doubt in doctrine' that the successor State succeeds in the obligations arising from the internationally wrongful acts of the predecessor State(s) – an approach reflected in the proposed Draft article 10(2).[160] The same approach is adopted in Article 14 of the IDI's Tallinn resolution. According to the latter provision, both the rights and obligations arising from an internationally wrongful act of which the predecessor State has been the author or the injured State pass to the successor State.

4.2 First impressions dispelled?

4.2.1 Is the presumption also applicable to wrongful acts committed by the predecessor State against its own nationals?

A first glance at the IDI's Tallinn resolution and the draft articles proposed by the ILC Special Rapporteur suggests that there can be little discussion that liability for the internationally wrongful acts of the Congo Free State was effectively passed on to the Kingdom of Belgium in 1908. There is, however, more than meets the eye. Two reservations merit further consideration.

A first reservation pertains to the substantive scope of the ILC and IDI projects. In particular, it remains uncertain to what extent the findings and draft articles put forth by the ILC Special Rapporteur are also applicable in respect of wrongful acts committed by the predecessor State *against its own nationals*. On the one hand, the reports of the Special Rapporteur do not explicitly exclude such situations from the scope of the ILC's work.[161] In fact, some of the

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Rapporteur, 2 May 2019, UN Doc. A/CN.4/731, at 41/42. A marked difference nonetheless exists between the two approaches. In particular, the IDI resolution explicitly asserts that the rights arising from internationally wrongful conduct committed before the date of State succession by the predecessor State (or any other State) against a people entitled to self-determination shall pass after that date to the newly independent State created by that people (Article 16(4)). By contrast, the ILC Special Rapporteur's draft article 12(3) provides for an important carve-out according to which the abovementioned rule is supposedly 'without prejudice to any question of compensation between the predecessor State and the successor State'.

[156] ILC, *loc. cit.*, supra n. 153, at 39/56, para. 148.

[157] *Ibid.*

[158] See *infra* note 197 and accompanying text.

[159] ILC, *loc. cit.*, supra n. 153, at 43-44/56.

[160] *Ibid.*, at 44/56. Note: Draft article 13(1) further takes the view that, 'when two or more States unite and so form one successor State', the successor State can request reparation from the responsible State for past internationally wrongful acts committed against the predecessor State. ILC, *loc. cit.*, supra n. 155, at 23/42. For actual support in legal doctrine, see e.g., Czaplinski, *loc. cit.*, supra n. 141, at 357-8 (arguing that, at least in the case of a 'merger of states', responsibility is transferred to the successor State, since this State takes over all rights of the predecessors 'and thus obtains measurable advantages from the delict'. Czaplinski suggests that in these cases, 'delictual obligations should be treated as contractual debts'); Dumberry, *op. cit.*, supra n. 15, at 202-203, 220-2, 421 (observing a clear tendency towards succession).

[161] This can be contrasted to the leading contemporary monograph on the topic by Dumberry, which explicitly asserts that it does not deal with internationally wrongful acts committed by the predecessor State against its own nationals or corporations. Dumberry, *op. cit.*, supra n. 15, at 29.

material relied upon by the ILC Special Rapporteur in support of the proposed draft articles stems from the jurisprudence of international and regional human rights bodies. Thus, with regard to situations of secession, the Special Rapporteur draws attention[162] to the Human Rights Committee's confirmation that the fundamental rights protected by international treaties 'belong to the people living in the territory of the State party' and continue to belong to them notwithstanding State succession.[163] Reference is also made to the *Bijelic* judgment,[164] where the European Court of Human Rights (ECtHR) held, in light of the circumstances of the case, that Montenegro could be held responsible for human rights violations that had been committed by the public authorities of Montenegro at the time when Montenegro still formed part of the State Union of Serbia and Montenegro. The implication appears to be that the draft rule set forth in respect of situations of secession[165] also applies to wrongful acts committed by the predecessor State against its own nationals. In a similar vein, when discussing the possibility for a newly independent State to claim international responsibility for past wrongful acts, the ILC Special Rapporteur stresses that his examination encompasses 'internationally wrongful acts that were committed before independence and caused *injury to these territories or their population*'.[166] On the other hand, however, the reports nowhere explicitly treat the question of responsibility for internationally wrongful acts by the predecessor State against its own nationals where the predecessor State ceases to exist. The Third Report contains a detailed examination of the impact of State succession in respect of the exercise of diplomatic protection, yet dealing solely with internationally wrongful acts committed against the nationals of the predecessor State by a *third* State.[167] What is more, the Third Report (2019) asserts that the scope of the project is limited to 'international wrongful acts committed by or against the predecessor State for which the injured State did not receive full compensation'[168] and proposes explicit language to circumscribe the scope of the two substantive parts of the draft articles accordingly.[169] On closer scrutiny then, the ILC project appears to be aimed exclusively at the question of international responsibility at the inter-State level, with the issue of responsibility for internationally wrongful act committed by the predecessor State against its own nationals (esp. human rights violations) falling between the cracks.

This lacunae, or at least ambiguity, in the ILC's (ongoing) work on the matter is both unsurprising and surprising. On the one hand, it can be regarded as a continuation of the approach adopted in the ILC's earlier work on the impact of State succession on treaties, State property and debts, where questions of human rights were essentially overlooked.[170] On the other hand, it appears to ignore the important advance of human rights law and the trend of 'humanization' of international law since the ILC's earlier work (as acknowledged by the ILC in its more recent work on nationality in relation to State succession[171]), as well as the unique features of human rights law, as creating

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[162] ILC, *loc. cit.*, supra n. 153, at paras. 120-1.

[163] Human Rights Committee, General Comment No. 26, Continuity of Obligations, 8 December 1997, UN Doc. CCPR/C/21/REV.1/ADD.8/Rev.1.

[164] ECtHR, Case of *Bijelic v. Montenegro and Serbia*, App. No. 11890/05, Judgment of 28 April 2009. See in particular para. 69, where it is stressed that the 'fundamental rights protected by international human rights treaties should… belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession…'.

[165] ILC, *loc. cit.*, supra n. 153, at 33/56 (Draft article 7(2)-(3)).

[166] ILC, *loc. cit.*, supra n. 160, at 17/42, at para. 57.

[167] *Ibid.*, at 23/42.

[168] *Ibid.*, at 39/42

[169] *Ibid.*, at 41/42. With respect to Part II, the Special Rapporteur proposes the following language: "The provision of this Part apply to reparation for injury resulting from internationally wrongful acts committed by the predecessor State for which the injured State did not receive full reparation before the date of succession of States." *Mutatis mutandis*, similar language is suggested for Part III (yet referring to "internationally wrongful acts committed against the predecessor State for which this State did not receive full reparation…").

[170] Note: the 1978 VCSST contains only a passing reference to human rights in its preamble. The Commentaries to the ILC'S 1981 Draft articles on succession of States in respect of State property, archives and debts (*loc. cit.*, supra n. 146) do not mention human rights at all.

[171] ILC, Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries, (1999) *Yb ILC*, vol. II, Part Two, at 24, para. 5: "As a result of this evolution in the field of human rights, the traditional approach based on the preponderance

inalienable rights for individuals that surpass the reciprocal obligations between States. In the wake of the UN Commission of Human Rights' resolutions on the topic,[172] there has indeed been considerable attention for the question whether human rights treaties must be regarded as a separate category in the context of State succession.[173] It has been observed that State practice 'does not support there being a totally clean slate' in respect of such treaties,[174] and that international practice rather 'indicates a tendency that the obligations under human rights treaties continue under the law of state succession'.[175] On the other hand, some have emphasized that 'international practice is not homogeneous', so that no specific rule can be said to have emerged concerning succession in respect of human rights treaties.[176] Even if one were to accept automatic succession for such treaties (including their accountability provisions), that does not necessarily imply that a successor State would also succeed in the international responsibility of the predecessor State for past violations of these treaties. The continued application of the treaty and the succession in the obligations resulting from past breaches are indeed separate issues, as was also pointed out by the Venice Commission.[177] For the same reason, the contrary hypothesis, namely that there would be no automatic succession for human rights treaties, would not necessarily entail that a successor State could not be held liable for the human rights violations of the predecessor State.

The lacunae in the ILC's work is also remarkable when considering that the question was discussed in the context of the IDI's Tallinn resolution, which formed (and forms) an important source of inspiration for the ILC Special Rapporteur. In particular, the initial report and draft resolution prepared by Kohen at the level of the *Institut* contained no references to circumstances in which the obligation breached before the date of State succession related to human rights (save with the exception of the right of self-determination).[178] Upon recommendation of other IDI members, however, it was decided to include in the resolution 'situations in which the victim is an individual or even another subject, and not another State'.[179] The resolution was accordingly amended to consistently refer to internationally wrongful acts 'against another State or another subject of international law'.[180] The resolution's 'main

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of the interests of States over the interests of individuals has subsided. Accordingly, the Commission finds it appropriate to affirm … that, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account."

[172] E.g., UN Commission on Human Rights, Resolution 1993/23, 'Succession of States in respect of international human rights treaties', (5 March 1993).

[173] See e.g., M.T. Kamminga, 'State succession in respect of human rights treaties', (1996) 7 *EJIL*, pp. 469-484 (Kamminga explains the distinct treatment of human rights obligations in part by reference to the doctrine of 'acquired rights' – ibid., at 472-3).

[174] European Commission for Democracy through Law (Venice Commission), Amicus Curiae Brief in the case of Bijelic against Montenegro and Serbia (Application N° 11890/05), Opinion no. 495/2008, 20 October 2008, CDL-AD(2008)021, at 8 (further: "if there is a rule that a certain type of treaty continues in force by reason of its nature – and … strong evidence exists that this applies for a treaty for the protection of the human rights of the inhabitants of the territory – and/or if the newly independent state expressly or by implication accepts succeeding to the treaty, than the state continues to be bound").

[175] N. el-Khoury, 'Human Rights Treaties and the Law of State Succession in the Event of Secession', (2021) 23 *Max Planck Yb UN Law Online*, pp. 340-354, at 340.

[176] International Law Association, Resolution No. 3/2008, Aspects of the law on State succession', August 2008, available at https://www.ila-hq.org/index.php/committees, at para. 11. In a similar vein, see A. Zimmerman and J. Devaney, 'State Succession in Treaties', *MPEPIL*, July 2019, para. 18 ("It still remains somewhat doubtful whether, at this stage, a new rule of customary international law has already been created…").

[177] Venice Commission, *loc. cit.*, supra n. 174, at 8 (after discussing the question of succession in respect of human rights treaties, the Venice Commission stresses that the crucial issue in the matter before it is a distinct one, namely pertaining to 'the devolving of State responsibility. In this respect, no real guidance can be drawn from the 1978 treaty, because issues of state responsibility were deliberately left outside the scope of the treaty'). Contrast to: Kamminga, *loc. cit.*, supra n. 173, at 483. According to Kamminga, the 'principle of continuity applies also to the accountability provisions incorporated in human rights treaties. Successor States may therefore be held accountable for violations committed by the predecessor State, in accordance with any reporting and complaints procedures accepted by the predecessor State.' Kamminga fails to explain, however, on what grounds the continuity of the treaty would automatically entail continuity in terms of international responsibility for past violations.

[178] IDI, *loc. cit.*, supra n. 148, at 523.

[179] *Ibid.*

[180] *Ibid.*, 633.

policy' was that 'no internationally wrongful conduct must remain unpunished as a result of the emergence of a case of State succession, the individuals or groups of victims of human rights obligations will always find a State that will be obliged to repair that breach'.[181] It remains to be seen whether the ILC will similarly shift gear as it moves towards the conclusion of its work on the topic.

4.2.2 Does the presumption reflect a customary rule applicable to the case of the Congo Free State?

Apart from the question whether proposed rules on State succession in matters of State responsibility also encompass wrongful conduct by the predecessor State against its own nationals, a second reservation is in order. The question arises indeed whether the presumption of succession when the predecessor State ceases to exist (as suggested in the work of the IDI and the ILC) reflects binding customary law applicable to the case of the Congo Free State.

It must be recalled indeed that, in the past, 'the doctrine of State succession generally denied the possibility of the transfer of responsibility to a successor State'.[182] This theory of non-succession was based on a variety of theoretical arguments, including the analogy with the non-transferability of delictual responsibility in domestic law, or the fact that a State is generally only responsible for its own international wrongful acts.[183] As the ILC Special Rapporteur acknowledges, for most of the twentieth century,[184] this theory was not questioned, but was rather 'taken for granted'.[185] It was moreover echoed in several early cases, such as the case of *Brown v. Great Britain*[186] (1923) and *Redward v. the United States*[187] (1925).[188] In the former case, an American national seeking to exploit a goldmine in the Transvaal was found to have been subject to a denial of justice by the Boer Republics. The arbitral tribunal made clear, however, that inasmuch as the case concerned liability for 'unliquidated damages'[189] (rather than debts), such liability 'never passed to or was assumed by the British government' upon its annexation of the Boer Republics.[190] The latter case involved a British subject that had been wrongfully imprisoned by the Government of the Hawaiian Republic before it became part of the United States. Again, the tribunal found that there was no general rule of succession to liability for delict.[191] The mode of State succession was moreover deemed irrelevant: "*Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.*"[192]

Admittedly, the olden doctrine of non-succession as applied in *Brown* and *Redward* has become the subject of

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[181] *Ibid.*, 524.
[182] ILC, *loc. cit.*, supra n. 147, at 9/35.
[183] *Ibid.*, at 10/35. For an in-depth treatment of scholarly support for the doctrine of non-succession and the arguments invoked in support, see: Dumberry, *op. cit.*, supra n. 15, at 35-52. See also: P. Dumberry, 'The Use of the Concept of Unjust Enrichment to Resolve issues of State Succession to International Responsibility', (2006) *RBDI*, pp. 507-528, at 510-512; Monier, *loc. cit.*, supra n. 141, at 87-90.
[184] ILC, *loc. cit.*, supra n. 147, at, 10/35.
[185] O'Connell, *op. cit.*, supra n. 147, vol. I, at 482. In a similar vein : Monier, *loc. cit.*, supra n. 141, at 86 (speaking of a quasi-unanimous position in legal doctrine).
[186] *Robert E. Brown (United States) v. Great Britain*, 23 November 1923, UNRIAA Vol. VI, pp. 120-131.
[187] *F.H. Redward and others (Great Britain) v. United States*, 10 November 1925, UNRIAA, Vol. VI, 157-158.
[188] For other examples illustrating the application of the principle of non-succession in older examples of annexation, see: Dumberry, *op. cit.*, supra n. 15, at 63 et seq.
[189] *Brown, loc. cit.*, supra n. 186, at 128. See further: Hurst, *loc. cit.*, supra n. 141, at 178 (defending the outcome of the case, i.a. because to have a rule of succession in matters of international responsibility would 'set a premium on misgovernment').
[190] *Brown, loc. cit.*, supra n. 186, at 129. But questioning the precedential value of the award: Dumberry, *op. cit.*, supra n. 15, at 77.
[191] *Redward, loc. cit.*, supra n. 187, at 158 (the tribunal drew an analogy to succession in private law)
[192] *Ibid.*

increasing critique, and it has been argued that the 'authority of those cases a century later is doubtful'.[193] In more recent decades, legal doctrine has become increasingly critical of the theory of non-succession to State responsibility, and has instead found growing support for continuity in State practice and case-law.[194] This trend is illustrated by the shifting position within the ILC in the context of its earlier work on State responsibility. In particular, whereas in 1998, then ILC Special Rapporteur James Crawford asserted that there was a widely held view that a new State does not, in general, succeed to any State responsibility of the predecessor State,[195] only three years later the ILC Commentary to the 2001 Articles on State Responsibility at least partly embraced the possibility of continuity.[196] Conceptually, there has also been a shift in thinking: in contrast to the earlier emphasis on the *intuitu personae* character of responsibility for internationally wrongful act (as laying the basis for a general doctrine of non-succession), it has been pointed out that it is more accurate to speak of *succession to the rights and obligations arising from* internationally wrongful acts committed or suffered by the predecessor State.[197] Such succession can take place even where succession with respect to *responsibility per se* is excluded because of its *intuitu personae* dimension.

At the same time, notwithstanding the ILC Rapporteur's confident assertion that 'there is little doubt in [contemporary] doctrine' that the successor State succeeds in the obligations arising from the internationally wrongful acts of the predecessor State where the latter ceases to exist,[198] the picture remains nuanced. In particular, the observed trend away from a general doctrine of non-succession – important as it is – cannot alter the fact that it is a relatively recent phenomenon only, the impact of which remains somewhat uncertain. Thus, the reports of the ILC Special Rapporteur are replete of references to the 'limited' State practice available – a point also underscored in the comments from States,[199] and acknowledge that the aim of the ILC's work is not a simple codification of existing custom, but that his work must at least partly be seen as an exercise in the 'progressive development' of international law.[200] Furthermore, it has also rightly been stressed that the question of State succession in matters of international responsibility is highly context-specific and cannot easily be translated in a binary option between succession and non-succession depending on the type of succession concerned, given the extreme diversity of situations that could potentially arise.[201] In the end, whether existing custom prescribes a binding rule of succession in situations where

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[193] American Law Institute, *Restatement of the Law (Third): the Foreign Relations Law of the United States* (1987), at § 209, reporters' note 7. See also: Dumberry, *op. cit.*, supra n. 15, at 53 (identifying the 1956 *Lighthouse* arbitration as a milestone in this respect).

[194] See ILC, *loc. cit.*, supra n. 147, at 10/35 et seq. Further: Dumberry, *op. cit.*, supra n. 15, at 52-58.

[195] ILC, Special Rapporteur James Crawford, 'First report on State responsibility', 1998, UN Doc. A/CN.4/490 and Add.1-7, at para. 279.

[196] ILC, *loc. cit.*, supra n. 97, at 52 (Commentary to Article 11, para. 3): "In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it." Consider also the analysis in J. Crawford, *State Responsibility: the General Part* (Oxford: OUP)(2013), pp. 435-455. Crawford concludes that it is "difficult to reach any conclusions of general application", but finds a 'fact-sensitive approach' 'preferable to the [olden] negative succession rule".

[197] This observation was eloquently made by Prof. Marcelo Kohen in the context of the work within the IDI on the Tallinn resolution. See IDI, *loc. cit.*, supra n. 148, at 526, para. 31. It is also echoed in the Second Report of the ILC Special Rapporteur: ILC, *loc. cit.*, supra n. 153, at para. 50. Also: Dumberry, *op. cit.*, supra n. 15, at 6; Crawford, *op. cit.*, supra n. 196, at 440-1.

[198] ILC, *loc. cit.*, supra n. 153, at 44/56, para. 164.

[199] *Ibid.*, at 3/56, 40/56 (para. 152), 44/56 (para. 164); ILC, *loc. cit.*, supra n. 160, at 18/42 (para. 64).

[200] ILC, *loc. cit.*, supra n. 153, at 4/56; ILC, *loc. cit.*, supra n. 147, at 8/35, para. 27. See also the second preambular paragraph of the IDI's Tallinn resolution (IDI, *loc. cit.*, supra n. 149), calling for 'codification and progressive development' of the topic under consideration.

[201] E.g., ILC, *loc. cit.*, supra n. 153, at 4/56, para. 9. The need for a context-specific approach also finds confirmation in the work of the Venice Commission – see *infra* note 258. See also *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)*, 24/27 July 1956, UNRIAA Vol. XII, pp. 155-269, at 197-8: « *[L]a question de la transmission de responsabilité en cas de changement territorial présente toutes les difficultés d'une matière qui n'a pas encore suffisamment mûri pour permettre des solutions certaines et également applicables à tous les cas possibles. Il n'est pas moins injustifié d'admettre le principe de la transmission comme une règle générale que de le dénier. C'est plutôt et essentiellement une question d'espèce dont la solution dépend de multiples facteurs concrets. … Il est impossible de formuler une solution générale et identique pour toutes les hypothèses imaginables de succession territoriale et toute tentative de formuler une telle solution identique doit nécessairement échouer sur l'extrême diversité de cas d'espèce. »* In a similar vein : Dumberry, *loc. cit.*, supra n. 183, at 513; Dumberry, *op. cit.*, supra n. 15, at 7-8, 206 ff. Note: Dumberry identifies several relevant

the predecessor State ceases to exist, as suggested by both the IDI and the ILC Special Rapporteur, ultimately remains to be confirmed in further practice and case-law.

The above considerations also force us to take a second look at the principle of intertemporality, already alluded to above. As explained, this principle essentially dictates that a 'juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'.[202] In his analysis on the potential liability of European States for 'slavery and (native) genocide' in the Caribbean in past centuries, Buser notes how it 'appears only logical that the telos (legal certainty) of the intertemporal principle also requires attribution, circumstances precluding wrongfulness and the legal consequences of an illegal act to be appreciated in the light of the law contemporary with the facts. Otherwise States would face unforeseeable consequences or would be liable for acts not attributable or justified at the time of their conduct'.[203] Buser thus extends the principle of intertemporality to 'secondary' rules, a position supported by others as well.[204] Somewhat surprisingly perhaps, Buser does not appear to follow this approach through to its logical end. Indeed, the author elsewhere emphasizes that 'state practice supports some basic rules on the succession to obligations to repair' and that '[t]he principle of succession to international responsibility is for example applicable in cases of unification and integration of States'.[205] No mention is made of the fact that this presumption is of recent vintage only. If the principle of intertemporal law is applicable in this context, the more logical conclusion would seem to be that, certainly for those cases of State succession that long predate the Charter era – including, for instance, the cession of the Congo Free State to the Kingdom of Belgium in 1908 – the olden doctrine of non-succession applies.

Against this, one might object that the principle of intertemporal law does not extend to *all* secondary rules. In particular, in *Jurisdictional Immunities of the State,* the ICJ stressed that 'application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility'.[206] This was so because the rules on State immunity were 'procedural in character', as distinct from 'the substantive law which determines whether that conduct is lawful or unlawful'.[207] This dichotomy raises the question whether the rules on State succession (and specifically those in matters of international responsibility) fall within the realm of 'procedural' rules, or should instead be qualified as 'substantive' rules. Talmon defines the latter category as those rules that 'determine – either directly or indirectly – whether a particular conduct or situation is lawful or unlawful. These rights prescribe rights, obligations and standards of conduct; determine legal status, title, and conditions; provide legal definitions; and establish international criminal and state responsibility. They include rules on attribution of conduct…'[208] By contrast, 'rules of a procedural nature' encompass 'rules governing the judicial and non-judicial interpretation, implementation, and enforcement of substantive rules',[209] including 'rules on capacity to act, nationality of claims, the exhaustion of local remedies… as well as time limits, litispendence, and res judicata'.[210] Talmon does not address

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factors, but stresses that "[t]here is … no support in State practice and international case law" to suggest that the peremptory character of the norms violated has any impact. Rather, from the perspective of State succession, "violations of jus cogens norms should not be treated differently from other 'ordinary' norms of international law". *Ibid*., at 289.

[202] *Island of Palmas, loc. cit*., supra n. 87, at 845.

[203] Buser, *loc. cit*., supra n. 3, at 434.

[204] Roscini, *loc. cit*., supra n. 95, at 292, 312 (Roscini specifically applies the principle of intertemporal law to the question of attribution of conduct for the purpose of establishing State responsibility).

[205] Buser, *loc. cit*., supra n. 3, at 438.

[206] ICJ, *loc. cit*., supra n. 130, at paras. 58, 93.

[207] *Ibid*., at para. 58.

[208] Stefan Talmon, 'Jus Cogens after Germany v Italy: Substantive and Procedural Rules Distinguished', (2012) 25 *Leiden JIL*, pp. 979-1002, at 981.

[209] *Ibid*., at 982

[210] *Ibid*., at 991.

the question where the rules on State succession in respect of international responsibility fit in. On the one hand, if these rules are seen as forming part of the broader regime of international responsibility, it would seem logical to qualify them as substantive rules (similar to the rules on imputability). On the other hand, it is recalled that the rules are not so much about succession in the international responsibility of the wrongful act of the predecessor State, but rather about the succession to the *rights and obligations arising from* internationally wrongful acts committed (or suffered) by the predecessor State (see *supra*). To the authors' knowledge, whether the principle of intertemporal law applies in this context was not addressed in the work of the *Institut* (in connection with the Tallinn resolution), nor was it tackled (as of yet) by the ILC Special Rapporteur.[211] It would seem desirable, however, for the ILC to shed light on the matter before concluding its work on the topic.

In light of the foregoing, it remains uncertain whether, *under general international law*, the Kingdom of Belgium has succeeded in the obligations resulting from the internationally wrongful conduct committed by the Congo Free State against its nationals. Upon further scrutiny, however, other compelling factors suggest that the olden doctrine of non-succession must be cast aside after all. We turn to these factors in the next section.

4.3 Other elements supporting succession in connection with the international responsibility of the Congo Free State

4.3.1 The 1907 Treaty of Cession – legal relevance and interpretation

Whereas the above analysis was informed by the quest for the *general* rules on State succession in matters of State responsibility, it must be stressed that these rules are of a subsidiary nature,[212] and apply only 'in the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the State or other subject of international law injured by the internationally wrongful act.'[213] In practice, the predecessor and successor States will oftentimes conclude devolution or other agreements that also pronounce on questions of State succession including in matters of State responsibility – and the reports of the ILC Special Rapporteur cite several such examples.[214] Agreements of this sort are of course subject to the rules relating to the consent of the parties and the validity of treaties, as reflected in the Vienna Convention on the Law of Treaties (VLCT). Chiefly, they are subject to the *pacta tertiis* rule reflected in Articles 35-36 VCLT. The implication is that such treaties cannot create obligations or a loss of right vis-à-vis a third party absent the latter's consent. By contrast, where such treaty instead creates a right for a third party, the latter's assent may be presumed.

In the present case then, the 1907 Treaty concluded between the Kingdom of Belgium and the Congo Free State is of pivotal importance. As was explained above, through this treaty King Leopold II, as Head of State of the Congo Free State and following mounting international pressure, agreed to cede to Belgium the sovereignty over the territories constituting the Congo Free State.[215] Importantly, pursuant to Article 1 of the Treaty, King Leopold II further declared to cede, together with these territories, 'all the rights and obligations attached to them'.[216] In turn, the Belgian State declared 'to accept this cession, and to accept as its own the obligations of the [Congo Free State], as detailed in Annex A, and [to commit] to respecting the existing foundations in Congo, as well as the recognized rights lawfully

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[211] Nor does the question appear to be tackled in Dumberry's leading monograph on the topic (Dumberry, *op. cit.*, supra n. 15).
[212] E.g., ILC, *loc. cit.*, supra n. 147, at 23/35, para. 86.
[213] Art. 3 of the IDI Tallinn resolution (*loc. cit.*, supra n. 149*).*
[214] *Trait*é de cession de l'état Indépendant du Congo à la Belgique, 4 *Pasinomie*, 776-786. For an English translation : Treaty of cession and annexation (28 November 1907), reprinted in (1909) 3 *AJIL Supp.*, pp 73-75.
[215] Art. 1 of the Treaty of cession and annexation (28 November 1907), *loc. cit.,* supra n. 80 ("*Sa Majesté le Roi-Souverain déclare céder à la Belgique la souveraineté des territoires composant l'État Indépendant du Congo avec tous les droits et obligations qui y sont attachés.*").
[216] *Ibid.*

acquired by third persons, indigenous and non-indigenous.'[217] Article 3 further added that the cession encompassed all debts and financial engagements of the Congo Free State, as detailed in Annex C.[218]

On its face, Article 1 of the 1907 Treaty strikes as an unequivocal assertion that Belgium effectively succeeded in the rights and obligations of the Congo Free State. While such treaty-based succession in the *rights* of the Congo Fee State might clash with the *pacta tertiis* principle, the acceptance by the successor State (Belgium) of the *obligations* of the predecessor State (the Congo Free State) raises no such difficulties for the reasons mentioned above.

Still, de Visscher objects that the 1907 Treaty could not give rise to any international commitment on the part of Belgium since such commitment can only exist between two persons with international legal personality capable of demanding from one another respect for the agreed provisions.[219] According to de Visscher, this could not be the case here since the Congo Free State ceased to exist upon ratification of the Treaty, as a result of which the 'Treaty' was more akin to a legislative act of a federal State.[220] The above reasoning appears to reflect an overly narrow understanding of the concept of a treaty as a source of binding international law. The better approach, also reflected in the work of the ILC Special Rapporteur,[221] is that agreements of this type, such as the *Einigungsvertrag* between the GDR and Federal Republic of Germany, are indeed capable of creating binding international obligations. De Visscher's argument also falls flat when considering that *unilateral* declarations of States can, under certain conditions,[222] create legally binding obligations. Contrary to what the *Institut* appears to suggest in its Tallinn resolution,[223] there is indeed no reason whatsoever why a successor State cannot unilaterally accept – in a legally binding manner – the obligations resulting from the internationally wrongful acts of the predecessor through such a declaration. This position finds confirmation in the *Lighthouses* arbitration.[224] In a similar vein, the ILC Special Rapporteur rightly acknowledges that the ILC's Guiding Principles on the binding character of unilateral acts of States apply *mutatis mutandis* in such context.[225] Accordingly, if the successor State accepts the obligations stemming from the predecessor State's wrongful conduct in 'clear and specific terms', it will be so bound.[226] In the present case, Belgium did accept the Congo Free State's obligations in such terms, and publicly manifested its will to be bound through the 1907 Treaty.[227] The Treaty was widely communicated to third States, who responded by recognizing Belgium's sovereignty over the Congo in the period 1908-1913.[228] It would be patently absurd to hold that the commitment undertaken by Belgium in 1907 would have been legally binding when expressed in a unilateral declaration, but would somehow be deprived of legally binding consequences on account of its inclusion in a treaty

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[217] *Ibid*.: "*L'État belge déclare accepter cette cession, reprendre et faire siennes les obligations de l'État Indépendant du Congo, telles qu'elles sont détaillées en l'Annexe A, et s'engage à respecter les fondations existantes au Congo, ainsi que les droits acquis légalement reconnus à des tiers, indigènes et non-indigènes.*"

[218] *Ibid.* : « *[L]a cession comprend tout le passif et tous les engagements financiers de l'État Indépendant, tels qu'ils sont détaillés dans l'annexe C.* »

[219] P. De Visscher, 'Le problème de la succession d'État envisagé dans l'histoire diplomatique du Congo', (1960-2) 11 *Comunicazioni e studi*, pp. 51-85, at 68.

[220] *Ibid*.

[221] ILC, *loc. cit*., supra n. 147, at paras. 87 et seq.

[222] ILC, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, (2006) *Yb ILC*, Vol. II, Part Two.

[223] IDI, *loc. cit.,* supra n. 149. Article 6(3) of the Institut's Tallinn resolution asserts that there is no succession of the successor State in the international responsibility of the predecessor State 'only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it'. The language is borrowed from Article 9(1) VCSST, and seems to be based on a misplaced analogy with the rules on State succession in respect of treaties.

[224] *Concession des phares, loc. cit*., supra n. 201, at 198.

[225] ILC, *loc. cit*., supra n. 147, at 33/35, para. 124.

[226] If the predecessor State continues to exist, the effect of such declaration will not necessarily be that the predecessor is absolved of liability vis-à-vis the injured party. It simply ensures that the injured party can at least hold the successor State responsible.

[227] As per para. 1 of the ILC Guiding Principles (*loc. cit*., supra n. 222).

[228] de Visscher, *loc. cit*., supra n. 219, at 64.

with a predecessor State that ceased to exist upon the treaty's ratification.

Having discarded the above argument, a further complication stems from the so-called 'Colonial Charter'. In particular, on 18 October 1908, the Belgian legislator adopted two separate laws, one approving the 1907 Treaty of Cession (in accordance with Belgian constitutional law) and another, dubbed the 'Colonial Charter', relating to the governmental organization of '*le Congo belge*'.[229] Importantly, the opening article of the latter instrument stipulated that Belgian Congo retained a personality distinct from that of the metropolitan State; that it would be governed by specific laws, and; that the debt and credit of Belgium and its colony remained separate.[230] The apparent inconsistency between the former provision and the text of the Treaty of Cession has given rise to considerable scholarly debate, as well as a fair amount of (rather divergent) domestic case-law (mostly post-dating Congolese independence).[231] Thus, the Colonial Charter has been regarded by some as evidence that Belgium never committed to take over the debt (and obligations?) of the Congo Free State.[232] Some case-law could be seen as going in the same direction. Thus, in 1927, the Brussels Tribunal of First Instance relied on the above provision to hold inadmissible an action against the Belgian State in connection with bonds issued by the Congo Free State in 1906.[233] A few years later, the Brussels Court of Appeals rendered a similar judgment.[234] And in the *Montefiore* case, a holder of bonds emitted by the Congo Free State in 1901 brought proceedings before the French courts against the colony of Belgium Congo. In a judgment of 31 October 1956, the Paris Court of Appeals held that, contrary to the Treaty of Cession, the 'Colonial Charter', was a purely internal act within the Belgian order.[235] This meant that the action was in reality brought against the Kingdom of Belgium, which, according to the Court of Appeals, benefited from State immunity.[236] The French Court of Cassation, however, slammed the Court of Appeals for having violated a legislative instrument consecrating a clear distinction between the debts of the metropolitan State and those of its colony, and identifying Belgian Congo as the sole debtor of the Congolese debts.[237]

From an international law perspective, the idea that the Colonial Charter could (retroactively) restrict the binding commitments assumed by Belgium under the Treaty of Cession cannot be upheld. Such idea would indeed appear to go against one of the fundamental tenets of international law, namely that States cannot invoke provisions of internal law as a justification for their failure to perform binding obligations under international law.[238] The legal impact of Article 1 of the Colonial Charter at the level of the Belgian domestic order is also open to debate. As Waelbrouck argues, the Treaty was meant to grant rights to private individuals.[239] Given the monist character of the Belgium legal system, it should accordingly have been given precedence over Article 1 of the Colonial Charter e.g. in those cases relating to bonds emitted by the Congo Free State.[240] All this is not to say that the Colonial Charter, or rather the resulting separation between the accounts of the colony of Belgian Congo and the metropolitan State, was without

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[229] Loi (18 octobre 1908) sur le gouvernement du Congo Belge, (1908) 4 *Pasinomie*, 829-836. For an English translation : Bill Providing for the Government of the Belgian Congo, reprinted in (1909) 3 *AJIL Supp.*, pp. 76-87.

[230] « *Le Congo belge a une personnalité distincte de celle de la métropole. Il est régi par des lois particulières. L'actif et le passif de la Belgique et de la Colonie demeurent séparés.* »

[231] See e.g. de Visscher, *loc. cit.*, supra n. 219 ; M. Waelbrouck, 'A propos des emprunts congolais', (1962) 15 *Chronique de politique étrangère*, pp. 57-74 ; J.-V. Louis, 'L'accession du Congo à l'indépendance – Problèmes de succession d'États dans la jurisprudence belge', (1966) 12 *AFDI*, pp. 731-756.

[232] See e.g. de Visscher, *loc. cit.*, supra n. 219, at 68 et seq.

[233] Civ. Brux. 13 July 1927, (1929) *Revue de doctrine et de jurisprudence coloniales*, 1929, at 19.

[234] Cour d'appel de Bruxelles, 2 October 1930, (1930) *Pasicrisie Vol. II,* at 170.

[235] Cour d'Appel de Paris, 31 October 1956, (1956) *Revue juridique et politique de l'Union Française*, 370-372 (with commentary by S. Bastid).

[236] *Ibid.* For a critique of the Court's approach, see S. Bastid, 'Note', 1956) *Revue juridique et politique de l'Union Française*, at 372-5.

[237] France, *Cour de Cassation*, 21 November 1961, (1961) *Journ. Trib.* (b), at 239 (with note L. Van Beirs).

[238] As confirmed in Art. 27 VCLT and Art. 3 ARSIWA.

[239] Waelbrouck, *loc. cit.*, supra n. 231, at 63-64. Against this, Bastid, *loc. cit.*, supra n. 236, at 374.

[240] Waelbrouck, *loc. cit.*, supra n. 231, at 63-64.

legal relevance (also from the perspective of international law). Such separation could indeed have – and did have – an impact on the liability under international law for debts incurred *post-1908* by the colonial government (*inasmuch as* these debts were made in the specific interest of the colony and its inhabitants).[241] Yet, its impact for the question of succession of the debts and obligations of the Congo Free State upon its extinction in 1908 seems inexistent.

And so we return to the text of the 1907 Treaty of Amity. As explained earlier, in Articles 1 and 3, Belgium accepted both the 'obligations' of the Congo Free State, as well as its 'debts and financial engagements'. The text thus seems broader in scope, and leaving less room for discussion than, for example, Article 24 of the German *Einigungsvertrag*. Pursuant to the latter provision, the settlement of 'claims and liabilities' arising from 'the performance of state tasks' by the German Democratic Republic would take place under the supervision of the Minister of Finance of the Federal Republic of Germany.[242] The extent to which this provision could be interpreted as acceptance by the Federal Republic of Germany of obligations arising from internationally wrongful acts committed by the German Democratic Republic gave rise to some controversy in legal doctrine[243] – controversy which was ultimately addressed in a judgment of the German Federal Administrative Court.[244] By comparison, the 1907 Treaty of Cession explicitly covers both the 'obligations' and the 'debts' of the Congo Free State. Admittedly, the second sentence of Article 1 refers to the obligations of the Congo Free State 'as detailed in Annex A'. This Annex specifically refers to the property and exploitation rights granted to two separate categories, viz. private persons, on the one hand, and religious institutions (such as the *Pères blancs* or the American Baptist Missionary Union), on the other hand. Must this provision be understood as implying that Belgium *only* assumed the obligations listed in this Annex, to the exclusion, for instance, of obligations flowing from the internationally wrongful conduct of the Congo Free State? This is indeed the reading suggested by de Visscher.[245] According to de Visscher, the fact that the Annex refers exclusively to the commitments undertaken by the Congo Free State under its own domestic law indicates *a contrario* that the Treaty did not entail a '*stipulation pour autrui*' (a third-party benefit) under international law. Put differently: the Treaty was not meant to regulate the succession of the Congo Free State's international obligations, a matter instead left to general international law[246] (which would, at the time, have meant non-succession in respect of matters of State responsibility). The present authors tend to disagree with the above reading. Before referring to the 'obligations… as detailed in Annex A', Article 1 of the 1907 Treaty indeed asserts in general terms that the Belgian State 'accepts the cession' by Leopold II, a cession which Leopold II declared to include 'all the rights and obligations' attached to the territories of the Congo Free State. This provision is accordingly sufficiently broad, textually, to be read as

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[241] Further: *ibid*., at 64 et seq.; de Visscher, *loc. cit*., supra n. 219, at 84-5; Louis, *loc. cit*., supra n. 231, at 747 et seq.; Dumberry, *op. cit*., supra n. 15, at 175-7. See also: Cour de Cassation, *Pittacos c. Etat belge*, 26 May 1966, (1965) 81 *Journ. Trib*., pp. 463-465 ; Cour de Cassation, *Etat belge c. Dumont*, 26 May 1966, (1965) 81 *Journal des Tribunaux*, pp. 465-466. Note : the Belgium Court of Cassation upheld the separation of accounts in respect of debts incurred by the Belgian Congo solely on the basis of domestic law. See also Article 38(1) of the 1983 Vienna Convention (*loc. cit*., supra n. 143).

[242] Article 24(1) provides as follows: "In so far as they arise from the monopoly on foreign trade and foreign currency or from the performance of other state tasks of the German Democratic Republic vis-à-vis foreign countries and the Federal Republic of Germany up to 1 July 1990, the settlement of the claims and liabilities remaining when the accession takes effect shall take place under instruction from, and under the supervision of, the Federal Minister of Finance." An English version of the Treaty of 31 August 1990 was reprinted in (1991) 30 *ILM* 30, 463.

[243] See Dumberry, *op. cit*., supra n. 15, at 86-87, note 134 (with references); ILC, *loc. cit*., supra n. 153, at 43/56, para. 159-160, and references under note 259.

[244] German Federal Administrative Court, Decision of 1 July 1999, *BVerwG* 7 B 2.99, reprinted in (1999) 52 *NJW*, 3354. The Court rejected, as a matter of principle, the responsibility of the Federal Republic of Germany for obligations arising from internationally wrongful acts committed by the former GDR. At the same time, since expropriated property was now part of a 'unified' Germany, the unfulfilled obligations of the GDR to pay compensation to the injured (Dutch) individual had passed to the successor State. Dumberry, *op. cit*., supra n. 15, at 90.

[245] de Visscher, *loc. cit*., supra n. 219, at 64.

[246] *Ibid*. (de Visscher does appear to suggest that under *general* international law, Belgium took over the obligations of the Congo Free State).

encompassing succession in respect of obligations resulting from the internationally wrongful acts of the Congo Free State.[247] And while it is unlikely that the possibility of being held liable for the wrongful acts committed by the Congo Free State against its own population figured in the minds of the *éminences* signing the 1907 Treaty on behalf of the Kingdom of Belgium, the provision is also sufficiently broad to be interpreted as providing for succession in this context too. Inasmuch as the text and context of the Treaty were to leave room for doubt, a number of additional elements tip the scale in favour of such broad and evolutive reading.

4.3.2 Tipping the scale: continuation of wrongful conduct and unjust enrichment

4.3.2.1 Continuation and unjust enrichment as relevant factors

Two final elements merit further attention. First, a successor State may not only conclude a treaty or make a unilateral declaration in which it (expressly) accepts the obligations for the predecessor State's internationally wrongful conduct. It may also incur responsibility where it 'acknowledges and adopts' such conduct as its own. Article 11 ARSIWA indeed confirms that such scenario gives rise to international responsibility. While the provision primarily envisages a State 'acknowledging and adopting as its own' the conduct of private individuals,[248] it is equally relevant in situations of State succession.[249] This is expressly confirmed in the ILC Commentary to Article 11 ARSIWA, which asserts that "if the successor State, faced with a continuing wrongful act on its territory, *endorses and continues that situation*, the inference may readily be drawn that it has assumed responsibility for it" (our emphasis).[250] The specific wording used by the ILC finds it origins in the *Lighthouse* arbitration, where the tribunal held Greece liable for the breach of a cabotage concession agreement initiated by Crete at a period when it was still an autonomous empire of the Ottoman Empire.[251] In particular, Greece (as successor State) was found to have endorsed the breach and eventually continued it, even after the acquisition of sovereignty over the island.[252] A breach of a 'continuing' character can take several forms. Examples include situations of unlawful occupation, enforced disappearance, *de facto* expropriation, or continuing violations of the right to peaceful enjoyment of property.[253] For the sake of clarity, it must be observed that the situation envisaged – that is, where the successor State *continues* the unlawful conduct of the predecessor State – is one where the wrongful conduct itself is attributed to the successor State.[254] The question thereby arises "whether there is joint responsibility shared by the predecessor State (if it continues to exist) and the successor State, whether each State is responsible for the relevant period of time in which it actually committed the wrongful act, or if there is succession/responsibility for the entire continuing act by the successor State."[255] The ILC's ARSIWA Commentary leaves the question unanswered, as does the ILC Special Rapporteur in his Second Report.[256] The

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[247] It may also be observed that, as far as the cession of the assets of the Congo Free State to Belgium was concerned, the Belgian Courts took the view that the lists of assets in Annex was merely indicative, and not exhaustive. Cour d'Appel de Bruxelles, 2 April 1913, (1913) *Pasicrisie Vol. 2*, 145-158, at 145 (« *les énumérations sont indicatives et nullement limitations* »). On this case, see also *infra* note 297.

[248] For a well-known illustration, see: ICJ, *Case concerning United States Diplomatic and Consular Staff in Tehran*, (1980) ICJ Rep. 3, para. 74.

[249] In this sense, e.g., ILC, *loc. cit.*, supra n. 147, at 33/35, para. 122.

[250] ILC, *loc. cit.*, supra n. 97, at 52.

[251] *Concession des phares, loc. cit.*, supra n. 201.. Further, see : Monier, *loc. cit.*, supra n. 141, at 82-85.

[252] *Concession des phares, loc. cit.*, supra n. 201, at 198 (« *Dans le cas d'espèce, il s'agit de la violation d'une clause contractuelle par le pouvoir législatif d'un Etat insulaire autonome dont la population avait durant des dizaines d'années passionnément aspiré, même par la force des armes, à s'unir à la Grèce, considérée comme mère-patrie, violation reconnue par ledit Etat lui-même comme constituant une infraction au contrat de concession, réalisée en faveur d'une compagnie de navigation ressortissant à ladite mère patrie, endossée par cette dernière comme si cette infraction était régulière et finalement maintenue par elle, même après l'acquisition de la souveraineté territoriale sur l'île en question.* »).

[253] ILC, *loc. cit.*, supra n. 153, at 15/56-17/56.

[254] *Ibid.*, at 16/56, para. 59; IDI, *loc. cit.*, supra n. 148, at 551, para. 112.

[255] IDI, *loc. cit.*, supra n. 148, at 551, para. 112.

[256] ILC, *loc. cit.*, supra n. 153, at 16/56, para. 59 (raising the question without answering it).

Institut's Tallinn resolution is premised on the idea that the successor State is responsible 'for its own conduct since the date of the State succession and for the whole period during which the act continues…'.[257] Be that as it may, certainly *in situations where the predecessor State ceases to exist*, the fact that the successor State continues the wrongful conduct (coupled with the desire to avoid a legal vacuum for injured parties), counts as an important factor indicating that it would be 'reasonable'[258] for the successor State to succeed in the obligations resulting from the wrongful conduct of the predecessor State.

By the same token, another aspect that merits consideration in examining whether State succession in matters of international responsibility is reasonable (and which may impact our interpretation of the 1907 Treaty of Cession) is the question of 'unjust enrichment'. 'Unjust enrichment' is recognized as a 'principle of law' under both civil law and common law.[259] As the Iran-US Claims Tribunal confirms, it has also on occasion been invoked before international tribunals,[260] for instance, in cases involving expropriation of property.[261] It presupposes 'an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.'[262] There is some support in legal doctrine that it constitutes a general principle of international law,[263] and some indications in case-law that it may also be relevant in cases involving State succession.[264] Writing in support of its application to State succession in respect of international responsibility, Dumberry in 2006 nonetheless insisted that this was a proposition *de lege ferenda*, rather than established positive law.[265] In the meantime, the *Institut* acknowledged in its Tallinn resolution, that 'unjust enrichment' is one of the criteria to be considered for the equitable apportionment of rights and obligations of the predecessor and successor States.[266] Similarly, the ILC Special Rapporteur finds that, even if it does not constitute an independent basis for succession to responsibility, the need to avoid unjust enrichment constitutes one of the criteria and circumstances relevant to the case.[267] While it is mostly referenced in an inter-State context, there is *a priori* no reason why 'unjust enrichment' could not be relevant in connection with State succession in respect of international responsibility for wrongful conduct by a predecessor State against its own nationals.

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[257] IDI, *loc. cit.*, supra n. 148, at 551, para. 112. Statement by Marcelo Kohen clarifying Article 9(1) of the resolution. Kohen adds that "with regard to the situation prior to the date of State succession, the specific rules for each category apply".

[258] Paraphrasing the Venice Commission, which considers that "the correct approach is to judge each specific case by reference to all the factors to determine how reasonable it is to impose continuity of responsibility of a successor state for a specific wrongful act by a predecessor state." Venice Commission, *loc. cit.*, supra n. 174, at 9, para. 41.

[259] Dumberry, *loc. cit.*, supra n. 183, at 516. Further: C.M. Fombad, 'The principle of unjust enrichment in international law', (1997) 30 *Comp. & Int'l L.J. Southern Afirca*, pp. 120-130.

[260] *Sea-Land Service, Inc. v. The Islamic Republic of Iran*, et al., Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 Iran-U.S. C.T.R., 149, at 168–169.

[261] Dumberry, *loc. cit.*, supra n. 183, at 517.

[262] *Sea-Land Service, loc. cit.*, supra n. 260, at 168-9.

[263] Dumberry, *loc. cit.*, supra n. 183, at 517-8. Also: C. Binder, 'Unjust Enrichment as a General Principle of Law in Investment Arbitration' in A. Gattini, A. Tanzi and F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (Brill: Dordrecht) (2018), pp. 269-289.

[264] For a discussion of these cases, see Dumberry, *loc. cit.*, supra n. 183, at 519-521 (as Dumberry acknowledges, however, the cases did not involve State succession in connection with international responsibility. In addition, in none of the cases was the principle actually used to decide the case on the merits).

[265] Dumberry, *loc. cit.*, supra n. 183, at 524.

[266] IDI, *loc. cit.*, supra n. 148, at 521, para. 21; Article 7(2) and 12(5) of the Tallinn resolution (*loc. cit.*, supra n. 149). The *Institut* had previously included considerations of 'unjust enrichment' in its 2001 Resolution on the question of State Succession in matters of Property and Debts (adopted on 26 August 2001, available at https://www.idi-iil.org/app/uploads/2017/06/2001_van_01_en.pdf, Articles 8, 11, 13).

[267] ILC, *loc. cit.*, supra n. 153, at 28/56, para. 106.

4.3.2.2 Relevance for the situation of the Congo Free State and its cession to Belgium

How then do the elements of 'endorsement and continuation' and 'unjust enrichment' play out in the situation of the Congo Free State?

On the one end, when Leopold II first set his (greedy) eyes on a vast territory in Central Africa, with all of its natural resources, the Belgian government and public were unwilling to be dragged along in the King's megalomaniac colonial ambitions (in large part for fear that that it would be a costly and loss-making enterprise). And so it was without support or involvement of the Belgian government that Leopold II funded H.M. Stanley's mission to the Congo, masterminded the creation of the International African Association, and – partly under humanitarian (anti-slavery) pretences – secured recognition of his Congo Free State from the major powers of the day, including at the 1884 Berlin Conference. While the Congo Free State was mostly run from the *Rue Bréderode* in Brussels (just behind the Royal Palace), Leopold II managed it as his private possession, as the absolutist monarchs of yore. As Hochschild recounts, '[h]is power as king-sovereign was shared in no way with the Belgian government, whose Cabinet ministers were as surprised as anyone when they opened the newspaper to find that the Congo had promulgated a new law or signed a new international treaty.'[268]

Upon closer scrutiny, however, the picture appears more mixed. It is recalled that the Belgian Parliament had given its approval for the Belgian King to become monarch of another State.[269] To convince the Belgian government and parliament of this 'personal union', Leopold II had made assurances that his colonial 'project' would not drag the Kingdom of Belgium along into a financial quagmire. These assurances quickly proved futile, as the 'Congo Free State' was a heavily loss-making 'enterprise' in its early years (in spite of financial injections from the King's own funds), and Leopold II quickly turned to the Belgian State as a financial lifeline. As the Belgian State became the main creditor, extending several loans to the Congo Free State, the prospect of a future Belgian annexation repeatedly surfaced. Thus, in 1890 Belgian entered into an agreement with the Congo Free State under which it provided an interest-free loan of 25 million francs.[270] The 'Convention' provided that the Congo Free State would henceforth provide information on its financial situation to Belgium, and would not contract any new loans without the consent of the Belgian government.[271] What is more, it granted Belgium the right to 'annex the Congo Free State with all the property, rights, and advantages attached to the sovereignty of that State…' 'if it desire[d]' to do so upon six months after the expiry of the ten-year loan term (i.e., in 1901).[272] Around the same time, the King made public his will, in which he announced that he bequeathed to Belgium all sovereign rights over the Congo Free State upon his death[273] (international pressure would ultimately force Leopold II to cede his 'possession' to Belgium prematurely – shortly before his death

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[268] Hochschild, *op. cit.,* supra n. 16, at 87.

[269] Pursuant to Article 62 of the Belgian Constitution, Leopold II required the agreement of both Chambers of Parliament in order to become the Head of State of another State. Such agreement was indeed given in April 1885. In the legislative act, it was stressed that the link between Belgium and the newly-founded Congo Free State would be exclusively that of a personal union. Law of 28 April 1885, *Assentiment des deux chambres à ce que le roi soit le chef de l'Association Internationale du Congo*, *Pasinomie* 1885, at 133-134.

[270] Convention between Belgium and the Congo Free State, 3 July 1890, translation reprinted in (1909) 3 *AJIL Supp*., pp. 61-2.

[271] *Ibid*., Article III. The provision asserts that the "information shall have no other object than to furnish information to the Belgian Government, and the latter shall not in any way interfere in the administration of the Congo Free State, which will continue to be attached to Belgium solely by the personal union of the two crowns."

[272] *Ibid*., Article II. The clause also stipulates that if Belgium were to 'annex' the Congo Free State, it would also take over "the obligations of the said state to third States, the Sovereign King refusing expressly all indemnity on account of the personal sacrifices which he has made" (sic).

[273] The King's Testament, 2 August 1889, translation reproduced in (1909) 3 AJIL Supp., pp. 26-27. According to Hochschild, the King's move was part of a deal with Belgian policy-makers: "If Parliament gave him the loan he wanted, Leopold declared, he would leave the Congo to Belgium in his will. … When the king made public his will, it was backdated, so that his bequest looked like an act of generosity instead of part of a financial bargain." Hochschild, *op. cit.,* supra n. 16, at 94-95.

in 1909). Further, in 1895, as the Congo Free State remained financially in heavy weather, an agreement was signed that paved the way for annexation and placed the Congo Free State under Belgium's financial guardianship.[274] This agreement was ultimately not taken further, but was instead supplanted with another loan agreement.[275] In subsequent years, as the financial tide turned and the Congo Free State (or at least its 'controlling shareholder') 'profited' from the rubber boom, the prospect of a Belgian annexation (temporarily) disappeared from the horizon. Some form of entanglement nonetheless continued between Belgium and the Congo Free State, both financially (through the various loans) but also in other ways.[276] For instance, both the administration of the Congo Free State and the officers of the feared *Force Publique* were made up in large part of Belgian nationals, including regular officers detached from the Belgian army.[277] Dozens of these individuals in fact remained on the payroll of the Belgian State throughout.[278] The famed writer Arthur Conan Doyle put it as follows in his *Crime of the Congo*:[279]

> "*The Congo State was founded by the Belgian King, and exploited by Belgian capital, Belgian soldiers and Belgian concessionaires. It was defended and upheld by successive Belgian Governments… In spite of legal quibbles, it is an insult to common sense to suppose that the responsibility for the Congo has not always rested with Belgium. The Belgian machinery was always ready to help and defend the State, but never to hold it in control and restrain it from crime*."

Doyle continues: "When Belgium took over the Congo State, she took over its history and its responsibilities also."[280]

What of the period following the cession to Belgium? In certain respects, the international campaign against the reign of terror of the Congo Free State was certainly successful and several of the most horrendous practices of that era were brought to a halt.[281] Thus, Hochschild reports how '[r]eports of abuses against gatherers of wild rubber in the Congo did drop off markedly… [T]here was far less news of villages burned or of women and children held hostage. There was no more officially sanctioned severing of hands.'[282] Forced labour was prohibited by the Colonial Charter.[283] In 1913 – the year when the Congo Reform Association held its final meeting – Edmund Morel acknowledged that "[t]he revenues are no longer supplied by forced or slave labour. … A responsible Government has replaced an irresponsible despotism".[284]

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[274] See G. Leloup, ' "Fait accompli", de controversiële controle van de Congolese financiën (1885-1914)', (2015) 93 *Revue belge de philologie et d'histoire*, pp. 487-531, at 496-498. The Agreement provided, for instance, that expenses of the Congo administration had to receive prior approval from the Belgian minister of finance.

[275] *Ibid.*, at 497. A draft law on annexation remained exactly that (a draft). According to Leloup, after 1901, there was no form of (financial) control whatsoever on the part of the Belgian government vis-à-vis the Congo Free state. *Ibid.*, at 500. See also: Blocher and Gulati, *loc.. cit.,* supra n. 74, at 499.

[276] In a similar vein : de Visscher, *loc. cit.*, supra n. 219, at 60 (de Visscher speaks of a gradual rapprochement between the two States by the King on the economic, commercial and human level, as a result of which public opinion in Belgium came to see its King's colonial project as '*une oeuvre essentiellement belge*').

[277] The officers of the *Force Publique* also consisted of volunteers and mercenaries from various other European countries and from elsewhere in Africa. Hochschild, *op. cit.,* supra n. 16, at 123, 127.

[278] Leloup, *loc. cit.*, supra n. 274, at 501. This was discovered in 1889 by the Belgian *Cour des Comptes*.

[279] A. Conan Doyle, *The Crime of the Congo* (1909), at vii.

[280] *Ibid.*, at viii.

[281] See e.g., Blocher and Gulati, *loc.. cit.,* supra n. 74, at 1248-9.

[282] Hochschild, *op. cit.,* supra n. 16, at 278 (note, however, that Hochschild attributes this change at least in part to the transition from wild to cultivated rubber).

[283] Ironically, although forced labour was prohibited by the Colonial Charter, Belgium made extensive use of the reservations to the ILO Forced Labour Convention (1930) to prevent large parts of this ILO Convention from applying to Congo (see supra note 91) These reservations expose the true meaning of the prohibition of forced labour by the colonial charter.

[284] Reproduced in Hochschild, *op. cit.,* supra n. 16, at 273 (further: 'the atrocities have disappeared. … The rubber tax has gone. The native is free to gather the produce of his soil.").

On the other hand, there was also a degree of continuity after 1908, going beyond the 'mere' continuation of the colonial system imposed on the population of the Congo and of the various concessions granted by the Congo Free State to private undertakings. Thus, the structure of the Congo Free State and the *Force Publiqu*e were largely maintained: "The same men who had been distinct commissioners and station chiefs for Leopold would now simply get their paychecks from a different source."[285] More importantly, notwithstanding the formal abolition of forced labour, a system of compulsory labour remained in place in the form of a heavy head tax that forced people to go to work on the plantations or in harvesting cotton, palm, oil and other products, or to continue collecting wild rubber.[286] Thus, according to Hochschild, "[t]he central part of what Morel had called the 'System', forced labour, remained in place, applied to all kinds of work" (and was even intensified during the period of the two World Wars).[287]

Lastly, what of unjust enrichment? There exists no doubt that, while the early years of the Congo Free State were loss-making for Leopold II, the King later secured a fortune from trade revenues and the granting of concessions (esp. in the years of the rubber boom) and from issuing long-term bonds.[288] The profits from the enterprise were channelled into a wide range of grand construction projects, including monuments, new palace wings, museums and pavilions in Brussels, Ostend, and elsewhere in Belgium, but also e.g. in real estate in the French Riviera and various shadow companies. They were also lavishly spent e.g. on dresses and villas for the King's young mistress.[289] While it took the Belgian authorities many years to untangle the financial morass created by Leopold II and historians have struggled greatly to map and quantify the proceeds of the Congo Free State, one supposedly 'conservative' estimate puts the profit at 220 million francs of the time, or well over USD 1 billion in today's dollars.[290]

To what extent did the unjust proceeds of the Congo Free State pass on to the Belgian State after 1908? Again, a complex picture emerges. As explained above (see Section 2.3), Leopold II did not give up the Congo Free State without a fight, but made Belgium 'pay dearly'.[291] Thus, Belgium agreed to assume the Congo Free State's outstanding debts (estimated at 110 million francs), much of them in the form of bonds which Leopold had freely dispensed over the years (including to his mistress)[292] (and including debts owed to Belgium itself). On the other hand, the King was forced to accept the transfer to the State of the '*Domaine de la Couronne*' (the 'Crown Foundation'),[293] the legal entity that covered the King's extensive real estate in Belgium, the Congo and elsewhere, as well as other valuable assets. As part of the deal, however, the Belgian government agreed to pay another 45.5 million francs 'toward completing certain of the king's pet building projects' (within Belgium, that is),[294] in addition to further annuities to the benefit of the King.[295] After Leopold's death, it was further discovered that the King had managed to keep an important part of his fortune out of sight, by siphoning off assets in the amount of 45 million francs to a Foundation he had created

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[285] *Ibid*., at 271. On the continuity at the political-administrative level, see also: Leloup, *loc. cit*., supra n. 274, at 508-9.

[286] Hochschild, *op. cit.,* supra n. 16, at 278. In a similar vein: Leloup, *loc. cit*., supra n. 274, at 508 (noting that a tax system based on compulsory labour continued to exist).

[287] Hochschild, *op. cit.,* supra n. 16, at 278-279. It also remained legal for mine management to use the notorious *chicotte* for corporal punishment. See also *ibid*., at 225: "important elements of the king's system of exploitation endured for many years after its official end."

[288] E.g., Hochschild, *op. cit.,* supra n. 16, at 168.

[289] *Ibid*., at 168, 223-4, 275-7.

[290] *Ibid*., at 276-7.

[291] *Ibid*., at 257.

[292] *Ibid*., at 259. Further: J. Stengers, *Combien le Congo a-ti-il coûté à la Belgique?* (Mém. Acad. Royale Sciences Colon.) (1956), 394 p., at 170 et seq. (explaining the sums secured by extending bonds were mostly used for non-Congolese purposes, such as the Crown Foundation or ultimately transferred to the King's Niederfüllbach Foundation).

[293] Decree suppressing the Foundation of the Crown, 5 March 1908, reproduced in (1909) 3 *AJIL Supp*., at 87.

[294] Hochschild, *op. cit.,* supra n. 16, at 259; Leloup, *loc. cit*., supra n. 274, at 523 (explaining that the Crown Foundation had initially planned construction works in the amount of 150 million francs, but that the government negotiated a funding cap of 45.5 million francs).

[295] In the amount of 50 million francs. See Leloup, *loc. cit*., supra n. 274, at 523; A. Hochschild, *op. cit.,* supra n. 16, at 259 (according to Hochschild, these funds were not expected to come from the Belgian taxpayer, but rather to be extracted from the Congo itself).

in Germany (the Niederfüllbach Foundation).[296] A legal battle ensued between the Belgian State and Leopold's daughters (Princesses Stéphanie and Louise) as to who could take possession of the assets. According to the Belgian government, since Belgium had taken over the Congo Free State, it was also entitled – *nota bene* on account of the Treaty of Cession – to its assets, including those controlled by the Niederfüllbach Foundation. The Belgian government eventually carried the day.[297] As a result, Leloup concludes, all of the Congolese revenues ended up in the hands of the Belgian State and only a relatively minor share in the hands of the King's daughters - ironically, the outcome which the King had always intended.[298] Calculating the precise extent to which Leopold II's exploitation of the Congo Free State enriched the Belgian State is an extremely complex exercise – and any methodology is arguably open to critique.[299] The most detailed estimation is that of Stengers, who arrives at the conclusion that the revenues to the benefit of the Belgian State exceeded the expenses borne by it in relation to the Congo Free State in the amount of ca. 26 million francs.[300] The conclusion that the cession of the Congo Free State (and the concomitant dismantling of the Crown Foundation and the Niederfüllbach Foundation) resulted in a net positive balance for the Belgian State is confirmed by other authors.[301] Strong indications thus exist that some form of unjust enrichment was indeed present.

In conclusion, inasmuch as the 1907 Treaty were to leave room for doubt as to the question of succession in respect of the obligations flowing from internationally wrongful conduct committed by the Congo Free State against its own nationals, the aforementioned elements of disentanglement, continuity and unjust enrichment arguably tilt the balance towards succession.

5 CONCLUDING OBSERVATIONS

Historical injustices, and the quest for reparation for such injustices – such as the massacres of the Armenians in the Ottoman Empire or of the Herero in modern-day Namibia – continue to speak to the imagination. The present article has zoomed in on a particularly brutal episode of the colonial era, i.e. the atrocities committed in the Congo Free State under the rule of Leopold II. Against the background of the recent apologies by the Belgian King to the Congolese people in 2020, and the creation of a parliamentary commission of inquiry mandated to look into the legacy of the Congo Free State and Belgium's colonial past, as well as the consequences to be attached thereto, we have sought to examine whether Belgium bears international responsibility for those atrocities.

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[296] Further on Leopold II's fortune, see: J. Stengers, 'Léopold II et le patrimoine dynastique', (1972) 58 *Bulletins de l'Académie Royale de Belgique*, pp. 63-134.

[297] Cour d'Appel de Bruxelles, 2 April 1913, (1913) *Pasicrisie Vol. 2*, 145-158 (According to the Court, the assets of the Congo Free State never became the personal property of the State's Head of State. Furthermore, the Treaty of Cession had imposed a cession of all assets and debts of the Congo Free State in their entirety, and without any reservations. The lists of specific assets in Annex was merely illustrative and not exhaustive). See also Leloup, *loc. cit.*, supra n. 274, at 528 (noting, however, that the Belgian State agreed to grant the two Princesses 5.7 million francs worth in shares). As Hochschild pointedly observes, "[t]here was no lawyer [in the proceedings before the Belgian courts] to argue that the money should have been returned to the Congolese" Hochschild, *op. cit.,* supra n. 16, at 277. Further: Blocher, Gulati, Oosterlinck, *loc.. cit.,* supra n. 74, at 503-4; Stengers, *op. cit.* supra n. 292, at 256 et seq.

[298] Leloup, *loc. cit.*, supra n. 274, at 528. Note: on the King's troubled relationship with his daughters, see e.g. Hochschild, *op. cit.,* supra n. 16, at 39, 88-89.

[299] On the complexity of this exercise, see Stengers, *op. cit.* supra n. 292, at 5 et seq. (Stengers clarifies that his calculation is based purely on an analysis of the expenses and revenues of the Belgian State, but leaves aside e.g., the revenues made by private Belgian companies in the Congo).

[300] Stengers, *op. cit.* supra n. 292, at 324-338. Note: on the 'cost side', Stengers refers inter alia to the loans extended by Belgium to the Congo Free State, as well as the salary costs of Belgian officers active in the Congo Free State that remained on Belgium's payroll. On the revenue side, Stengers' analysis covers i.a. the constructions works commissioned by Leopold II to the benefit of the Belgian State, or the real estate of the Congo Free State and of the Crown Foundation ultimately transferred to the Belgian State, as well as part of the assets of the Niederfüllbach Foundation.

[301] See e.g., the analysis of Donny, cited in *ibid.*, at 16-7.

It is recalled that, at the time of the events, international law arguably did not yet know a prohibition against colonialism, forced labour or crimes against humanity. What is more, the principle of intertemporality precludes past conduct retroactively being qualified as such. Evidently, this finding is open to critique from a moral perspective, and critical theory and TWAIL scholars[302] have amply exposed the pro-European bias in this approach. However, rather than seeking to circumvent the principle of intertemporality (which remains firmly embedded qua *lex lata*), we have examined how, similar to other historical injustices, treaty law may fill the void and provide some foundation to establish legal responsibility. In particular, in the case of the Congo Free State, a plausible case can at least be made that the widespread abuses against the Congolese population – which was subject to a system of *de facto* slavery, brutally enforced through mutilations, hostage-takings and even punitive expeditions against entire villages – contravened the provisions of the 1885 Berlin Act.

The analysis subsequently turned to the question of State succession in matters of State responsibility – or, to put it more accurately, State succession in the obligations resulting from the internationally wrongful conduct of the predecessor State – a topic which is often ignored in legal doctrine, but which is currently on the agenda of the ILC. In particular, the article has sought, for the first time, to provide an in-depth analysis as to how this question plays out in relation to the cession of the Congo Free State to the Kingdom of Belgium in 1907. It was noted how there is increasing support in legal doctrine – shared by the *Institut de droit International* and the ILC Special Rapporteur working on the topic – for succession in scenarios where the predecessor State ceases to exist. While it remains doubtful whether that approach can be regarded as extant customary law, the provisions of the 1907 Treaty of Cession provide a powerful argument to conclude that Belgium has effectively succeeded in the obligations flowing from the wrongful conduct of the Congo Free State. Inasmuch as the Treaty were to leave room for doubt, additional factors related to the Belgian involvement (financial and other) in the Congo Free State enterprise, the continuity of certain practices (esp. the system of compulsory labour) and institutions (such as the *Force Publique*) post 1907, and the 'unjust enrichment' resulting from the cession, conclusively tilt the balance in favour of succession in this case.

More generally, notwithstanding its unique features – and notwithstanding the fact that most instances of State succession do not involve the actual disappearance of the predecessor State – the case of the Congo Free State illustrates both the importance and the complexity of the question of State succession in matters of State responsibility. It raises the question whether this topic can simply be reduced to a binary choice between succession and non-succession depending on the 'type' of State succession involved (cession, secession, merger,…). It confirms the importance of *ad hoc* treaty arrangements to sort out questions of State succession, and illustrates the role that factors such as continuity and unjust enrichment can and should play absent such agreements. The analysis has also revealed certain gaps in existing doctrine on the topic as well as in the relevant work of the ILC. In particular, the extent to which the work of the ILC on State succession in matters of international responsibility also extends to internationally wrongful conduct by the predecessor State *against its own nationals* awaits clarification. Further, inasmuch as the law is moving towards a (rebuttable?) presumption of succession in at least certain scenarios of State succession, the application of the intertemporality principle to the very rules of State succession merits clarification. It remains to be seen whether these issues will be addressed in the ILC's ongoing work, and whether the outcome of the ILC's work find broad support with States for that matter. The fate of the ILC's earlier work on distinct aspects of State succession does not bode well in this regard, also having regard to the limited State practice available.

[302] Consider e.g. T. Thipanyane, 'Current Claims, Regional Experiences, Pressing Problems: Identification of the Salient Issues and Pressing Problems in an African Post-colonial Perspective', (2001) 7 *Human Rights In Development Yearbook*, pp. 33-55; ; V. Nesiah, 'German colonialism, reparations and international law', Völkerrechtsblog, 21 November 2019, doi: 10.17176/20191121-122114-0.

Overall, our analysis points towards the conclusion that Belgium bears not only *moral*, but arguably also *legal* responsibility for the reign of terror in the Congo under Leopold II, and that it cannot escape that responsibility by hiding behind the separate sovereign status of the Congo Free State up to 1907. That is not to say that such legal responsibility can easily be established at the judicial level. Indeed, various obstacles arise, relating e.g. to State immunity, *locus standi,* jurisdiction, etc., that may ultimately doom any unilateral attempt on the part of the Congolese authorities to hail Belgium before a domestic or international court. Further, we have not sought to pronounce on the appropriate form of reparation, be it compensation or satisfaction. It is to be hoped that the parliamentary committee referenced above will provide concrete recommendations to this end – as it appears to be mandated to. Inspiration can be found in the Dutch settlement scheme to compensate widows and children of victims of executions in the Dutch East Indies (and the concomitant official apologies of Dutch King Willem-Alexander),[303] the British settlement agreement in connection with the Mau Mau uprising in Kenya,[304] or the recently concluded agreement between Germany and Namibia.[305] Inasmuch as compensation is not the only, nor necessarily the most appropriate form of reparation, or most conducive towards reconciliation, reference can also be made to a Communiqué issued by the Burundian Senate in 2020.[306] This statement goes beyond claims for financial or material reparations, which are generally not enthusiastically received by former colonial powers, and suggests various other steps forward. Proposals include Belgian support for a Burundian Truth and Reconciliation Commission, the inclusion of the colonial past in the curriculum of Belgian students, support to Burundian historians to map the crimes committed during the colonial era and the concrete number of victims, or assistance for the reform of the ethnicity laws promulgated at the time of the Belgian colonial rule. What is clear in any case is that Belgium cannot escape confronting the legacy of the Congo Free State indefinitely. It is high time that it forms the topic of a constructive dialogue with the Congolese people and negotiations with the Congolese authorities.

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[303] In the context of the court cases about Rawagedeh and South-Sulawesi, the Netherlands drew up a civil settlement scheme in 2013 to compensate widows of victims of executions in the former Dutch East Indies. Bekendmaking van de Minister van Buitenlandse Zaken en de Minister van Defensie van 10 september 2013, nr. MinBuZa.2013-256644, van de contouren van een civielrechtelijke afwikkeling ter vergoeding van schade aan weduwen van slachtoffers van standrechtelijke executies in het voormalige Nederlands-Indië van vergelijkbare ernst en aard als Rawagedeh en Zuid Sulawesi, *Staatscourant nr. 25383*, 10 September 2013. In 2020, the Netherlands extended these monetary compensations to the children of the victims and promised 5,000 euros to everyone with a credible claim to their father's execution during the Indonesian Independence war. Contouren civielrechtelijke schikking ter vergoeding schade van kinderen van slachtoffers van standrechtelijke executies in het voormalige Nederlands-Indië, 1945–1949, Ministerie van Buitenlandse Zaken, *Staatscourant nr. 50507*, 19 October 2020.

[304] In response to the court case concerning the Mau Mau uprising, the UK reached a settlement agreement with more than 5,000 elderly Kenyans who suffered torture and abuse during the Mau Mau uprising in the 1950s, and paid out £19.9m in costs and compensation. The Rt Hon William Hague, Statement to Parliament on settlement of Mau Mau claims, available at https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims.

[305] See supra, notes 4 and 5 and accompanying text. It needs to be noted that this agreement is not free from criticism as the Herero and Nama people were not directly involved in the negotiations. Namibian Vice President Nangolo Mbumba also expressed his displeasure as he believes that the amount of money pledged by Germany is far from sufficient to correct the wrongdoing. X., 'Namibia genocide: Mbumba says Germany's payment is not enough', *Deutsche Welle* (5 June 2021), available at https://www.dw.com/en/namibia-genocide-mbumba-says-germanys-payment-is-not-enough/a-57785288

[306] Communiqué final sanctionnant la retraite sénatoriale tenue au grand séminaire Jean Paul II en province de Gitega, 14 August 2020, available at https://medialibrary.uantwerpen.be/oldcontent/container49546/files/Burundi/ethnic/310720(1).pdf.