

THE INTERNATIONAL LAW OF COLONIALISM IN EAST AFRICA: GERMANY, ENGLAND, AND THE DOCTRINE OF DISCOVERY

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The non-European, non-Christian world was colonized under international law that is known today as the Doctrine of Discovery. This common-law international Doctrine was codified into European international law at the Berlin Conference of 1884–85 and in the Berlin Act of 1885 specifically to partition and colonize Africa. Thirteen European countries and the United States attended the four-month Conference, which ended with thirteen countries signing the Berlin Act on February 26, 1885. Under the Discovery Doctrine and the Berlin Act, these European countries claimed superior rights over African nations and Indigenous Peoples. European explorers planted crosses, signed hundreds of treaties, and raised flags in many parts of Africa to make legal claims of ownership and domination over the native nations and peoples, and their lands and assets. These claims were justified in the fifteenth and in the nineteenth centuries by racial, ethnocentric, and religious ideas about the alleged superiority of European Christian nations. This Article examines the application of the Doctrine and the Berlin Act by England and Germany in East Africa, which now comprises Kenya, Uganda, and Tanzania. This comparative law analysis demonstrates convincingly that the Berlin Act and these colonizing countries applied what we define as the ten elements of the Doctrine of Discovery. These elements had been developed and refined by European legal and political systems since the mid-1400s. Over 400 years later, the Berlin Conference of 1884–85 expressly and implicitly adopted and codified all ten elements to control the European partition and colonization of Africa.

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Germany and England used this international law to colonize East Africa. Needless to say, European domination, exploitation, and colonization seriously injured the human, property, sovereign, and self-determination rights of Indigenous nations and peoples. The effects of colonization are still felt today. The comparative legal analysis set out in this article sheds light on how law affected and directed African colonization. It also develops a better understanding of the international law of colonialism as well as its historical process and impacts. This Article concludes by explaining the crucial importance of this knowledge.

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“European law played a role which has been seriously underestimated in the [African] colonization process.”***

I. INTRODUCTION

International law seems to be a fairly straightforward idea. It is comprised of the principles, policies, treaties, and rules that nations agree to, and are expected to follow, in their relations with other nation-states.¹ The international law that European nations started developing in the fifteenth century for colonizing the non-European, non-Christian world is known today as the Doctrine of Discovery.² The Doctrine is one of the oldest examples of international law.

Beginning with the Crusades to the Holy Lands in 1096–1271, European countries and the Church began developing a legal regime to justify conquest, domination, and colonization of non-European nations and peoples.³ Portugal and Spain continued this process in their disputes over islands off the Iberian peninsula.⁴ The Church got involved and issued papal bulls in the 1450s that granted Portugal the legal authority to plunder and colonize Africa.⁵ Thereafter, Spain and Portugal applied this law of colonialism around the world. Other countries—including England, France, Holland, Russia, and the United States—soon did the same in their disputes over trade, colonies, and lands.⁶ Furthermore, in the nineteenth and twentieth centuries, European powers used the Doctrine of Discovery to claim rights over Indigenous nations, peoples, and their lands and assets in Africa.

The “scramble for Africa” came relatively late in the age of European

*** Bruce Fetter, *Introduction*, in COLONIAL RULE IN AFRICA: READINGS FROM PRIMARY SOURCES 5 (Bruce Fetter ed., 1979).

1. See CLIVE PARRY & JOHN P. GRANT, ENCYCLOPAEDIA DICTIONARY OF INTERNATIONAL LAW 300 (3d ed. 2009).

2. ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 9–23 (2006); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325–28 (1990).

3. WILLIAMS, *supra* note 2, at 13–14.

4. Robert J. Miller & Micheline D’Angelis, *Brazil, Indigenous Peoples, and the International Law of Discovery*, 37 BROOK. J. INT’L L. 1, 1–2 (2011); Robert J. Miller, Lisa Lesage & Sebastian Lopez Escarcena, *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. 819, 819–20 (2011).

5. See, e.g., *infra* notes 324, 389 and accompanying text.

6. Robert J. Miller, *The International Law of Discovery: Acts of Possession on the Northwest Coast of North America*, in ARCTIC AMBITIONS: CAPTAIN COOK AND THE NORTHWEST PASSAGE 191, 195–205 (James K. Barnett & David L. Nicandri eds., 2015); Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847, 865–921 (2012); ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 3–6 (2010); MILLER, NATIVE AMERICA, *supra* note 2, at 9–23.

international colonization.⁷ Although Portugal and other European nations had been trading with Africans and had been involved in the African slave trade for centuries, interest in other forms of economic activities and exploiting the continent for colonial empires began in earnest in the mid-1800s.⁸ As European interests began to conflict in Africa, and as Germany became more interested in acquiring an overseas empire, German Chancellor Otto von Bismarck convened the Berlin Conference in 1884–85. Fourteen countries, including the U.S., met to decide how to control commerce within Africa and how to manage conflicting interests over colonial possessions on the continent. The Conference produced the Berlin Act of 1885, which was their agreement on how to partition and colonize Africa. The Conference and the Act itself claimed to be “part of international law.”⁹ The Act expressly set out the rules and principles that European nations agreed to follow as they created colonies and trade in Africa and exploited the peoples and the continent.

The modern-day relevance of these historic events is crucial to African nations, cultures, and peoples today. Under modern international law, national borders depend on colonial history and law because the principle of “intertemporal law” defines borders and titles based on the international law that was in force at the time the titles were asserted “and not by the law of today.”¹⁰ Consequently, the boundaries of the colonies that Europeans created in the fifteenth to twentieth centuries pursuant to the Doctrine of Discovery, the international law of colonialism, and the Berlin Conference and Act of 1885 are all highly relevant to African nations and peoples today.

In this Article, we commence our examination of the application of the international law of colonialism in Africa over many centuries. Africa is a vast continent with numerous ancient empires, peoples, diverse cultures, and over forty independent nations today. Obviously, we cannot cover this entire timeline and all these countries in one article. Thus, we have chosen to focus our analysis on East Africa, Kenya, Uganda, and Tanzania, and on the European colonizers of those countries. This research conclusively demonstrates that Germany and England applied the elements of the

7. See generally THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: THE WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912* (1991).

8. See, e.g., 1 EDWARD HERTSLET, *THE MAP OF AFRICA BY TREATY: BRITISH COLONIES, PROTECTORATES AND POSSESSIONS IN AFRICA* 64 (photo. reprt. 1967) (1909) (describing how Portuguese settlements in the fifteenth century and British settlements in 1618 developed in connection with the supply of slaves to West Indies and America).

9. General Act of the Berlin Conference on West Africa arts. 13, 26, Feb. 26, 1885 [hereinafter Berlin Act]; 2 HERTSLET, *supra* note 8, at 468, 476; SYBIL EYRE CROWE, *THE BERLIN WEST AFRICAN CONFERENCE, 1884–1885* 101–02 (Negro Univ. Press 1970) (1942).

10. JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 113–14, 128 (2000).

Doctrine of Discovery to claim, legitimize, and govern their colonies in East Africa under the international law of colonialism.

The Article is organized as follows. Section II begins by setting out how European nations and the Church developed the Doctrine of Discovery and then provides our definition of the ten factors or elements that comprise the Doctrine. It also demonstrates how the Berlin Conference and Act of 1885 adopted the Doctrine. By examining history and law, one can determine whether a nation utilized the Doctrine by looking for the presence of these elements in the historical and legal colonization process. Section III explores the use of these elements by European countries in Africa and focuses specifically on whether and how Germany and England used these elements in East Africa. Lastly, Section IV concludes with our opinion that there is no question that colonization in Africa, and in Kenya, Uganda, and Tanzania, proceeded under the international law of colonialism in the form of the Doctrine of Discovery.

II. THE INTERNATIONAL LAW OF COLONIALISM

A wide array of nation or empires created by conquest have existed throughout human history. But in this Article, we focus on the specific development of international law to define, justify, and control such conquests and empires by European nations in Africa.

A. The Doctrine of Discovery

European nations attempted to justify their colonial empires using legal, social, and political arguments. Beginning as early as the Crusades, the Church and European nations began devising legal principles to justify their dominance and sovereignty over non-Christian peoples and non-European nations.

1. The Elements of Discovery

We have identified ten distinct elements or factors within the Doctrine.¹¹ We state them here so that readers may more easily follow the development, justifications, and applications of the Doctrine over the centuries.

a. First discovery. The first European country to discover lands unknown to other European countries allegedly acquired exclusive property and sovereign rights over the territory and native peoples. First discovery alone, however, was often considered to only create an inchoate title.

b. Actual occupancy and possession. To turn a first discovery into

11. MILLER, *NATIVE AMERICA*, *supra* note 2, at 3–5.

recognized title, a European country had to permanently occupy and possess newly discovered lands. This was usually accomplished by building forts or settlements.¹² This actual and physical possession had to be accomplished within a reasonable length of time after first discovery.

c. Preemption and European title. The European country that discovered the land gained the property right of preemption, that is, the sole right to buy the land from the Indigenous nations and peoples. This is a very valuable property right analogous to an exclusive option to purchase real estate. The government that held the preemption right could thus prevent, or preempt, any other European government or individuals from buying the lands.

d. Indigenous title. After a first discovery, Indigenous nations were considered by European legal systems to have automatically lost their full property rights. They were deemed to only possess the rights to occupy and use their lands. And, if they ever chose to sell, native nations were only allowed to sell land to the European government that held the preemption right.

e. Indigenous limited sovereign and commercial rights. Indigenous nations and peoples were also deemed to have automatically lost aspects of their inherent sovereignty and rights to engage in international trade and diplomatic relations. After first discovery, Indigenous nations were only supposed to interact politically and commercially with their discoverer.

f. Contiguity. This element provided that Europeans had a claim to significant amounts of land contiguous to their actual discoveries and settlements. This element became crucial when European countries had settlements and claims in the same region. In that situation, each country was deemed to hold rights to the halfway point between their settlements. Contiguity also often provided that discovery of a river mouth created a claim over all the lands drained by that river, even if it was thousands of miles of territory.¹³

g. Terra nullius. This Latin phrase means empty lands. Under one definition, this element meant that if lands were not possessed or occupied by any nation or people, then they were available for a European country to claim. Under a second definition, Europeans considered even lands that were occupied but not being governed or used in a fashion approved by European

12. *Id.* at 112; EDGAR PRESTAGE, THE PORTUGUESE PIONEERS 294–95 (Barnes & Noble eds., 1967) (1933) (explaining that pre-1500, Portugal built “a wooden fort . . . [as] a first step towards dominion”).

13. Compare the shapes of the Louisiana Territory and the Oregon Country in the United States. *Territorial Growth of the United States, 1783–1867*, MAPS ETC, <http://etc.usf.edu/maps/pages/6200/6207/6207.htm> (last visited Nov. 11, 2021).

legal systems to be “empty” and available for Discovery claims.¹⁴

h. Christianity. Non-Christians were deemed to not have the same rights to land, sovereignty, and self-determination as Christians. Furthermore, Europeans claimed a divine mandate to convert Indigenous peoples and nations.

i. Civilization. European ideals of “civilization” constituted important justifications for the Discovery Doctrine. European nations believed they were superior to Indigenous nations and peoples. Europeans argued that God had directed them to bring civilization and religion to natives and to exercise paternalistic and guardianship authority over them.

j. Conquest. Europeans could acquire title to Indigenous lands by military victories. But conquest had a dual meaning just like *terra nullius* did. “Conquest” was also used as a term of art to describe the property and sovereign rights Europeans claimed just by making a first discovery.

2. Johnson v. M’Intosh (1823)

The elements of Discovery that we defined above are explicitly and implicitly set out in the enormously influential U.S. Supreme Court case of *Johnson v. M’Intosh*.¹⁵ This case has influenced the development of the international law of colonialism around the globe.¹⁶

In a nutshell, the Supreme Court held in *Johnson* that the Doctrine of Discovery was an established legal principle of English and European colonial law in North America, and that it had also become the law of the U.S.¹⁷ The case involved land purchases made by British citizens from unknown Native Americans in 1773 and 1775, before the U.S. was even created.¹⁸ The ownership of this land was contested by the defendant who had received his title from the U.S.¹⁹ The Court had to decide whose

14. *Terra nullius* has two meanings: “a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all . . .” HENRY REYNOLDS, *THE LAW OF THE LAND* 12 (1987).

15. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).

16. *Johnson* has impacted scores of judicial decisions regarding Indigenous rights around the world. The case has been, and continues to be, cited extensively by courts in the United States, Australia, Canada, and New Zealand. *E.g.*, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005) (discussing the “doctrine of discovery” and citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 n.3, 235 (1985) (citing and discussing *Johnson*)); *Mabo v Queensland* (1992) 107 ALR 1, ¶¶ 33, 42, 67 (Austl.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 338, 377–78, 380 (Can.); *Calder v. Att’y Gen. for British Columbia*, [1973] S.C.R. 313, 315, 320, 335, 377, 380, 383–85 (Can.); *Attorney-General v. Ngati Apa* [2003] 3 NZLR 643 at [19], [136] (N.Z.). In 1918, the attorneys arguing to the English Privy Council cited *Johnson* and other American cases. *In re Southern Rhodesia* [1919] AC 212, 212 (PC) (appeal taken from S. Rhodesia) (U.K.).

17. *Johnson*, 21 U.S. at 571.

18. *Id.* at 571–72.

19. *Id.* at 560.

ownership rights prevailed.²⁰ In finding against ownership rights based on land transfers from American Indians, the Court adopted as the rule of law the legal precedent of colonialism.²¹ The Court held that, when European nations discovered lands unknown to other Europeans, the discovering country automatically acquired sovereign and property rights even though Indigenous nations and peoples possessed the lands.²² The real property right European nations acquired was a future right of ownership, a sort of limited fee simple title; an exclusive title held by the discovering European country that was subject, however, to the Indigenous nations' and peoples' use and occupancy rights.²³ In addition, the discovering country also gained sovereignty over the natives and their governments which restricted Indigenous political, commercial, and diplomatic rights.²⁴ This transfer of sovereign and property rights was accomplished without the knowledge or consent of native nations.

The U.S. Supreme Court made the meaning of the Doctrine clear: "discovery gave title to the government by whose subjects, or by whose authority, it was made against all other European governments, which title might be consummated by possession."²⁵ Consequently, a discovering European country gained exclusive property rights that were to be respected by other countries merely by first discovery.²⁶ Indigenous rights, however, were "in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired."²⁷ Indigenous nations still held some sovereign powers and retained the right to occupy and use their lands. However, they lost the rights to sell their lands to whomever they wished and for whatever price they could negotiate: "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."²⁸ As also defined by the Doctrine, a discovering European nation gained the right of preemption, that is, the right to prevent other nations from buying the lands of newly discovered Indigenous nations, and to preempt other Europeans from engaging

20. *Id.*

21. *Id.* at 572.

22. *Id.* at 573–74, 587.

23. *Id.* at 573, 574, 584, 588, 592, 603.

24. *Id.* at 574; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558–59 (1832).

25. *Johnson*, 21 U.S. at 573; *see also id.* at 574, 584, 588, 592; *id.* at 603 ("The absolute ultimate title has been considered as acquired by discovery.").

26. *Id.* at 573.

27. *Id.* at 574.

28. *Id.*

diplomatically and commercially with those native nations.²⁹

Obviously, this international law was developed to serve the interests of European nations. Through the Doctrine, and the 1885 Berlin Conference and Act, Europeans agreed to share the assets and empires to be gained from non-European lands. While they sometimes disagreed about the definitions of the Doctrine, and many times fought wars over discoveries, one thing they never disagreed about was that Indigenous nations and peoples lost significant property and governmental rights after a first discovery.

B. The European Development of the Doctrine

The Doctrine is one of the oldest examples of international law and was specifically developed to control European actions and conflicts regarding explorations, trade, and colonization in non-European countries.³⁰ The Doctrine was developed primarily by the Church, Portugal, Spain, and England, and was rationalized under the authority of Christianity and ethnocentric beliefs that Europeans could claim the lands and rights of Indigenous peoples and exercise dominion over them.³¹

Scholars have traced the Doctrine of Discovery to the Crusades of 1096–1271.³² As part of justifying the Crusades, the Church established the idea of papal jurisdiction to create a “universal Christian commonwealth.”³³ This authority led to the justification of holy wars against infidels.³⁴ In 1240, the canon-lawyer Pope Innocent IV pondered whether it “is licit to invade a land that infidels possess or which belongs to them?”³⁵ Innocent focused on

29. *Id.* at 574 (“[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished.”); *id.* at 584–85, 587–88 (noting that English and American governments “asserted title to all the lands occupied by Indians [and] asserted also a limited sovereignty over them”).

30. *Id.* at 572–73; WILLIAMS, *supra* note 2, at 7–8, 325–28; Antonio Truyló y Serra, *The Discovery of the New World and International Law*, 3 *TOL. L. REV.* 305, 308 (1971) (describing how the New World confronted Europeans “with the problem of the law of colonization, and . . . it finally became necessary to pose the problem of the law of nations in a global perspective”).

31. ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500–C. 1800* 8, 24, 126 (1995); JAMES MULDOON, *POPES, LAWYERS AND INFIDELS* 34–48, 107–52 (1979); *THE EXPANSION OF EUROPE: THE FIRST PHASE* 3–4, 155–57, 186, 191–92 (James Muldoon ed., 1977); CARL ERDMANN, *THE ORIGIN OF THE IDEA OF CRUSADE* 8–11, 155–56 (Marshall W. Baldwin & Walter Goffart trans., Duke Univ. Press 1977).

32. PAGDEN, *supra* note 31, at 8, 24, 126; WILLIAMS, *supra* note 2, at 14, 29–31; *EXPANSION OF EUROPE*, *supra* note 31, at 3–4, 155–57, 186; ERDMANN, *supra* note 31, at 155–56; JAMES A. BRUNDAGE, *MEDIAEVAL CANON LAW AND THE CRUSADER* 19–26, 136–38, 192–94 (1969).

33. WILLIAMS, *supra* note 2, at 29; *accord*. PAGDEN, *supra* note 31, at 24–30 (describing how under Roman and natural law, non-Christians were not part of the world); J.H. BURNS, *LORDSHIP, KINGSHIP AND EMPIRE: THE IDEA OF MONARCHY 1400–1525* 100 (1992) (explaining how philosophers stated that the world should be seen as a single system comprised of Christendom).

34. BRUNDAGE, *supra* note 32, at 19–26; ERDMANN, *supra* note 31, at 155–56.

35. *EXPANSION OF EUROPE*, *supra* note 31, at 191–92 (citing POPE INNOCENT IV, *Commentaria*

the right of Christians to dispossess pagans of their sovereignty and property.³⁶ He relied on the writings on holy war by St. Augustine who claimed that Christians had the right to wage war on heathens in some circumstances because it was a defense of Christianity, would “acquire peace,” and was a work of justice.³⁷

Under this canon law background, Portugal and Spain began to dispute colonization and trade in eastern Atlantic islands in the mid-1300s.³⁸ In 1341, Portugal claimed the Canary Islands, off the west coast of Africa, based on “priority of discovery and possession against any other European power” and its “right of conquest of the rest of the Canaries.”³⁹ Thereafter, Portugal discovered and claimed the Azore, Cape Verde, and Madeira island groups, the last two of which are off the northwest coast of Africa.⁴⁰ Spanish competition in the Canary Islands led to violence.⁴¹ The Church became involved because although it approved of invading foreign lands in the name of Christianity during the Crusades two centuries earlier, the pope in 1434 initially denied Portugal’s request to conquer and colonize the Canary Islands. Thus, Portugal also argued that its explorations and conquests were made on behalf of Christianity, and that converting infidel “wild men” was justified because they allegedly did not have a common religion or laws; lacked money, metal, writing, housing, clothing; and lived like animals.⁴² If the pope banned Portuguese colonization, Portugal said it would impede the advancement of civilization and Christianity.⁴³ Portugal then asked the pope to grant it the Canary Islands to carry out the Church’s guardianship duties.⁴⁴

The argument for European and Christian domination of Indigenous peoples was based on Portugal’s discovery and conquest rights and arose

Doctissima [Commentaries on the Doctrine of the Apostles], in *QUINQUE LIBROS DECRETALIU* [FIVE BOOK OF DECREES] (1581)).

36. WILLIAMS, *supra* note 2, at 13 n.4; BURNS, *supra* note 33, at 17–18 (discussing the Church’s theory of *dominium*, “an absolute and exclusive right of ownership and control,” over society and property).

37. ERDMANN, *supra* note 31, at 8–11; PAGDEN, *supra* note 31, at 98 (citing AUGUSTINE, 19 *DE CIVITATE DEI* [THE CITY OF GOD] ch. 13).

38. EXPANSION OF EUROPE, *supra* note 31, at 47–48; CHARLES R. BOXER, *THE PORTUGUESE SEABORNE EMPIRE 1415–1825* 21–29 (1969); PRESTAGE, *supra* note 12, at 8–9, 27, 38–41, 43–50, 54–59, 96–97, 100–02; 1 ROGER BIGELOW MERRIMAN, *THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW* 142, 144, 146, 155–56, 171–72, 180, 189 (Cooper Square 1962) (1918).

39. 1 MERRIMAN, *supra* note 38, at 144; 2 MERRIMAN, *supra* note 38, at 172; *accord.* BOXER, *supra* note 38, at 21–29; PRESTAGE, *supra* note 12, at 8–9, 27, 38–41, 43–50, 54–59, 96–97, 100–02.

40. EXPANSION OF EUROPE, *supra* note 31, at 48; BOXER, *supra* note 38, at 21–29; PRESTAGE, *supra* note 12, 8–9, 27, 38–41, 43–50, 54–59, 96–97, 100–02.

41. EXPANSION OF EUROPE, *supra* note 31, at 54.

42. *Id.* at 54–56.

43. *Id.* at 55.

44. *Id.* at 56.

from the alleged need to both protect native peoples and convert them. Pope Eugenius IV concluded that while the islanders had sovereignty and property under Roman international law (*ius gentium*), the papacy possessed jurisdiction over their secular affairs.⁴⁵ In light of this conclusion, in 1436, Eugenius issued a papal bull and authorized Portugal to convert and control the Canary Islands.⁴⁶ This bull was reissued several times in the fifteenth century and extended Portugal's jurisdiction and rights along the west coast of Africa.⁴⁷ In 1455, Pope Nicholas V even granted Portugal title to lands in Africa that Portugal had "acquired and that shall hereafter be acquired," and he authorized Portugal "to invade, search out, capture, vanquish, and subdue all Saracens [Muslims] and pagans," and to place them into perpetual slavery and to seize their property.⁴⁸ The bulls granted Portugal title and sovereignty over the lands it acquired in Africa.⁴⁹

Under the threat of excommunication if it violated Portugal's rights, Catholic Spain had to look elsewhere. Consequently, Spain funded Columbus' westward voyages "to discover and acquire certain islands and mainland," and sent him forth under contracts that would make him the Admiral of lands he "may thus discover and acquire."⁵⁰

After Columbus' first voyage to the New World, Spain sought papal ratification of his new discoveries. In 1493, Pope Alexander VI issued the bull *Inter caetera* ordering that these lands which were "not hitherto discovered by others" now belonged to Spain along with "power, authority, and jurisdiction of every kind."⁵¹ The pope also granted Spain any lands it discovered in the future if they were not "in the actual possession of any Christian king" and he placed Indigenous peoples under Spanish guardianship.⁵²

Portugal, however, made claims to the same islands Columbus had discovered in the Caribbean.⁵³ D. João II relied on the element of contiguity and claimed that Portugal already owned those islands because they were

45. WILLIAMS, *supra* note 2, at 71–72; MULDOON, *supra* note 31, at 126–27.

46. WILLIAMS, *supra* note 2, at 72.

47. CHURCH AND STATE THROUGH THE CENTURIES 146–53 (Sidney Z. Ehler & John B. Morrall eds. & trans., 1967); EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648 23 (Frances G. Davenport ed., 1917).

48. EUROPEAN TREATIES, *supra* note 47, at 23–24.

49. CHURCH AND STATE, *supra* note 47, at 145, 150.

50. THE SPANISH TRADITION IN AMERICA 32–333 (Charles Gibson, ed., 1st ed. 1968) (translating 1492 documents); SAMUEL ELIOT MORISON, THE EUROPEAN DISCOVERY OF AMERICA: THE SOUTHERN VOYAGES A.D. 1492–1616 31–44 (1974).

51. EUROPEAN TREATIES, *supra* note 47, at 61–62 (translating *Inter caetera*).

52. *Id.* at 9–13, 23, 53–56, 77–78; WILLIAMS, *supra* note 2, at 79.

53. H.V. Livermore, *Portuguese History*, in PORTUGAL AND BRAZIL, AN INTRODUCTION 61 (H.V. Livermore ed., 1953); MORISON, *supra* note 50, at 97–98; 2 MERRIMAN, *supra* note 38, at 199.

located near the Azore Islands that Portugal possessed.⁵⁴ Portugal and Spain then requested another bull to delineate Spain's ownership rights in the New World. Alexander VI issued *Inter caetera II* and drew a line of demarcation from the north to the south poles, one hundred leagues west of the Azore Islands and granted Spain title to all the lands "discovered and to be discovered" and jurisdiction over Indigenous peoples west of the line, and granted Portugal the same rights to the east.⁵⁵ This bull also assigned Spain and Portugal the duty to convert Indigenous peoples.⁵⁶

But Portugal continued to argue for rights in the New World. Thus, in 1494, Portugal and Spain signed the Treaty of Tordesillas and moved the papal line of demarcation five hundred miles westward to ensure Portugal part of the New World and, subsequently, Portugal discovered and colonized Brazil.⁵⁷

Thereafter, Spain and Portugal argued that if they merely discovered new lands within their spheres of influence, and undertook symbolic acts of possession, that it established their ownership of the lands.⁵⁸ The Portuguese, for example, ordered that stone and wooden crosses be erected along the coasts of Africa and Brazil to prove first discoveries and symbolic occupation, and Spanish and other European explorers did the same to claim newly discovered lands.⁵⁹

England, France, Holland, Russia, and later the United States also used international law and the Doctrine of Discovery to claim rights of first discovery, sovereign and commercial rights, and titles in various parts of the world.⁶⁰ England, France, Holland, and Spain, for example, claimed first discoveries and sovereign and commercial rights in North America.⁶¹

54. PRESTAGE, *supra* note 12, at 237.

55. SPANISH TRADITION, *supra* note 50, at 38 (translating the bull); CHURCH AND STATE, *supra* note 47, at 157.

56. SPANISH TRADITION, *supra* note 50, at 36–37.

57. PRESTAGE, *supra* note 12, at 241–42; 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1684 (W. Keith Kavenagh ed., 1973); SPANISH TRADITION, *supra* note 50, at 42–51 (translating a treaty); MORISON, *supra* note 50, at 98.

58. PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492–1640 9 n.19, 69–73, 101–02 (1995); James Simsarian, *The Acquisition of Legal Title to Terra Nullius*, 53 POL. SCI. Q. 111, 113–14, 117–18, 120–24 (1938); Friedrich August Freiherr von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 453–54, 460–61 (1935).

59. ANTÔNIO HENRIQUE R. DE OLIVEIRA MARQUES, HISTORY OF PORTUGAL 219–20 (2d ed. 1972); Heydte, *supra* note 58, at 453–54, 460–61; MORISON, *supra* note 50, at 63, 151; SEED, *supra* note 58, at 69–73, 101–02.

60. See, e.g., Miller, *Acts of Possession*, *supra* note 6, at 195–205; MILLER, NATIVE AMERICA, *supra* note 2, at 12–23, 44–48, 120–26, 131–36.

61. Miller, *Acts of Possession*, *supra* note 6, at 195–205; MILLER, NATIVE AMERICA, *supra* note 2, at 17, 25, 70; PAGDEN, *supra* note 31, at 90.

England claimed rights in the 1640s by “first discovery, occupation, and the possession” of lands due to its colonial settlements.⁶² In turn, France contested England’s claims of first discovery in North America and argued that it had discovered the areas and possessed them first.⁶³

France and England faced problems, however, due to the papal bulls granting Spain and Portugal preeminence in exploring and colonizing the world. As Catholic countries, their monarchs risked excommunication if they violated the bulls. But legal scholars in England and France analyzed canon law and history, and developed new theories of Discovery that allowed their countries to colonize the New World.⁶⁴ England decided that King Henry VII would not violate the bulls if English explorers only sought out and claimed lands that had not yet been discovered by any Christian country.⁶⁵ In addition, another new element of international law was created by Elizabeth I and her advisers when they demanded that Spain and Portugal actually occupy and possess non-Christian lands if they wanted to prevent England from making Discovery claims.⁶⁶ Consequently, Catholic Henry VII as well as the Protestants Elizabeth I and James I ordered their explorers to discover lands “unknown to all Christians” and “not actually possessed of any Christian prince.”⁶⁷ Over the subsequent centuries Europeans used that element in diplomatic arguments against each other in many parts of the world and claimed that they were operating only in places where the other country was not in actual occupation.⁶⁸

62. 7 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS 1607–1789 30–32 (Alden T. Vaughan & Barbara Graymont eds., 1998).

63. See, e.g., PAGDEN, *supra* note 31, at 34; Joseph Jouvenoy, *An Account of the Canadian Mission from the Year 1611 Until the Year 1613*, in 1 THE JESUIT RELATIONS AND ALLIED DOCUMENTS: TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NORTH AMERICA (1610-1791) 3, 7 (Edna Kenton ed., 1925); 2 THE JESUIT RELATIONS AND ALLIED DOCUMENTS: TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE 33, 127, 199, 203 (Reuben Gold Thwaites ed., 1959); 3 THE JESUIT RELATIONS AND ALLIED DOCUMENTS: NEW FRANCE, *supra*, at 33, 39, 41; 34 THE JESUIT RELATIONS AND ALLIED DOCUMENTS: NEW FRANCE, *supra*, at 217–19.

64. WILLIAMS, *supra* note 2, at 126–225.

65. *Id.*

66. *Id.* at 133; Heydte, *supra* note 58, at 450–54, 458–59 (Elizabeth I wrote Spain that first discovery alone “cannot confer property”); EUROPEAN TREATIES, *supra* note 47, at 219; 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 164 (1922).

67. 1 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 57, at 18, 22–29; 3 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 57, at 1690–98; SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1775 24–25 (William MacDonald ed., 1899).

68. England, France, Portugal, and Holland argued in 1500–1700 about colonies and trade in North America and Brazil on the basis that other countries were not in actual occupation of the lands at issue. Simsarian, *supra* note 58, at 111, 113, 115–17; Miller & D’Angelis, *supra* note 4, at 31–34; 7 EARLY AMERICAN, *supra* note 62, at 30–31; see also 2 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 57, at 1260–61.

Thereafter, England and France added even another element to Discovery: *terra nullius* or vacant lands. It seems logical to claim that lands that were truly empty of any person were available to be claimed by the first explorers. But, England, Holland, France, and the United States relied on this element to falsely claim that lands actually occupied and being used by Indigenous nations were legally *terra nullius* and available for appropriation.⁶⁹

In sum, the Doctrine was developed as international law by European nations as the legal authority for colonization and domination of Indigenous nations.⁷⁰ Europeans occasionally disagreed about the Doctrine, and often violently disputed their claims, but one point they never disagreed on was that Indigenous nations lost sovereign, property, and human rights under international law upon their discovery by Europeans.

C. The Berlin Conference of 1884–85 and the Doctrine of Discovery

In November 1884, German Chancellor Otto von Bismarck opened the Berlin Conference, which had been called to address issues concerning the exploration and colonization of Africa. The Conference ended with the signing of the Berlin Act on February 26, 1885.⁷¹ Thirteen European countries and the U.S. attended.⁷²

The attendance of the U.S. is very intriguing. Why would the U.S. attend a European conference on colonizing Africa? One commentator, in 1886, stated that the U.S. was included because of its experience with colonizing American Indian nations and that this knowledge would greatly assist the participants of the Berlin Conference in colonizing Africa.⁷³ The U.S. representative spoke at the Conference on several occasions and did provide advice on colonizing Africa. He said the U.S. wanted to help define “effective occupation of African territory.”⁷⁴ He also told the Conference that

69. See, e.g., Alex C. Castles, *An Australian Legal History* 63 (1982), reprinted in ABORIGINAL LEGAL ISSUES, COMMENTARY AND MATERIALS 10 (H. McRae et al. eds., 1991); LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 24 (1949); SPANISH TRADITION, *supra* note 50, at 9; MILLER, NATIVE AMERICA, *supra* note 2, at 21, 27–28, 49, 56, 63–64, 156, 159–60.

70. MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 6, at 249–64; Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849, 898–914 (2009).

71. 2 HERTSLET, *supra* note 8, at 468, 476; CROWE, *supra* note 9, at 101–02.

72. CROWE, *supra* note 9, at 95.

73. Daniel De Leon, *The Conference at Berlin on the West-African Question*, 1 POL. SCI. Q. 103, 136–38 (1886); see also M.P.K. SORRENSON, ORIGINS OF EUROPEAN SETTLEMENT IN KENYA 196 (1968) (stating that a Kenyan official used the fate of American Indians as a caution against putting confidence “in the sense of justice of a future generation of white colonists in East Africa.”).

74. Robert Ellsworth Elder, *The United States and the Berlin Congo Conference of 1884–85* 11–12 (June 1937) (unpublished MA dissertation, University of Chicago) (on file with the University of

the “excess Negro population in the United States would be well suited to return to Africa to help civilize the area.”⁷⁵ Moreover, the U.S. Executive Branch informed Congress that it should participate in the Conference because an American citizen, Henry Morgan Stanley, made many of the first discoveries in Africa, and that the U.S. could “possibly enlarge the territory of the Republic of Liberia,” which was a quasi-American possession in Africa.⁷⁶

The U.S. representative also expressly warned the Conference about European and U.S. experiences with Indian nations and the internecine wars that occurred in North America in which Indian nations took sides.⁷⁷ Furthermore, he unsuccessfully argued to the Conference that modern international law recognized the rights of native peoples to dispose of themselves and their territories only by voluntary consent.⁷⁸ It is puzzling why the Conference rejected this suggestion since, as discussed below, every European country relied on native consent and treaty-making in acquiring the majority of their lands and sovereign claims in Africa.

The Conference delegates memorialized their agreements in the General Act of the Berlin Conference on West Africa, and it was signed by thirteen European countries on February 26, 1885.⁷⁹ The Conference “formed a link in the chain of European congresses and conferences in the nineteenth century . . . at which *general international law* was constantly being *expanded* and becoming increasingly more *codified*.”⁸⁰ It is clear that the “international law” that the Conference relied on and codified in the Berlin Act to control the partition and colonization of Africa was the Doctrine of Discovery.

Chicago).

75. *Id.* at 29.

76. *Id.* at 9–14, 20; see also Christopher Fyfe, *Freed Slave Colonies in West Africa*, in 5 THE CAMBRIDGE HISTORY OF AFRICA 170, 189–96 (John E. Flint ed., 1977) (recounting the history of Liberia from 1816–51). The American Colonization Society established Liberia in 1821 for freed American slaves; see Fetter, *supra* note ***, at 6.

77. Elder, *supra* note 74, at 88–89.

78. *Id.* at 72, 107–08.

79. See Berlin Act, *supra* note 9, arts. 13, 26; CROWE, *supra* note 9, at 101–02.

80. Jörg Fisch, *Africa as Terra Nullius: The Berlin Conference and International Law*, in BISMARCK, EUROPE, AND AFRICA: THE BERLIN AFRICA CONFERENCE 1884–1885 AND THE ONSET OF PARTITION 347, 371 (Stig Förster et al. eds., 1988) (emphasis added); accord. W.J. Mommsen, *Preface to BISMARCK, EUROPE, AND AFRICA*, *supra*, at vi–viii (explaining that the Conference was a major landmark in the history of imperialism and “la[id] down an international code of conduct for future territorial expansion”); CROWE, *supra* note 9, at 4 (“[T]he feature of international law most commonly associated with it, the conference made an attempt to regulate future acquisitions of colonial territory on a legal basis.”).

1. The Conference

European countries had conducted trade in Africa and made sovereign and territorial claims for centuries. Portugal had claimed lands and conducted trade under the papal bulls since the fifteenth century, and many European nations were active in the African slave trade from the 1500s to the early 1800s.⁸¹ However, when France conquered Algeria in 1830, and missionary societies and exploration activities began in earnest in Africa from 1840 onwards, it radically increased European interest in Africa. By the late nineteenth century, Europeans were focused on partitioning and colonizing Africa.

The struggle to establish European colonies in Africa, which came to be called the “scramble for Africa,” began in the 1870s and 1880s as Western governments attempted to acquire interests over African lands and kingdoms.⁸² In the late 1870s, King Leopold II of Belgium dispatched expeditions and began treaty-making and colonizing efforts in the Congo Basin which challenged pre-existing Portuguese and French claims in the area.⁸³ Furthermore, simmering conflicts between France, England, and Portugal over Africa were coming to a boil.⁸⁴ European missionaries and explorers were operating in Africa. Additionally, English, French, and Belgian representatives began signing treaties with Indigenous nations, allegedly acquiring territorial, commercial, and sovereign rights. This activity attracted the interest of German corporations in 1883–84 and the German public in the election of 1884, which led Bismarck to develop an interest in acquiring colonies in Africa.⁸⁵

In light of all this activity, Portugal tried to protect its claims by negotiating a treaty with England in 1884. But France, Germany, and the United States rejected the proposed treaty because it would have recognized exclusive rights for Portugal and granted England favorable trading status.⁸⁶

81. See Fetter, *supra* note ***, at 5–6.

82. Mommsen, *supra* note 80, at v; Fetter, *supra* note ***, at 7; EVANS LEWIN, THE GERMANS AND AFRICA, THEIR AIMS ON THE DARK CONTINENT AND HOW THEY ACQUIRED THEIR AFRICAN COLONIES 151 (1915).

83. See, e.g., ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 37–38, 43–46, 57–74, 82–90 (1998); Elder, *supra* note 74, at 5–6.

84. See CROWE, *supra* note 9, at 17–18, 20, 23.

85. See, e.g., DAVID OLUSOGA & CASPER W. ERICHSEN, THE KAISER’S HOLOCAUST: GERMANY’S FORGOTTEN GENOCIDE AND THE COLONIAL ROOTS OF NAZISM 27–28, 31, 36, 38 (2010); FRITZ STERN, GOLD AND IRON: BISMARCK, BLEICHRÖDER, AND THE BUILDING OF THE GERMAN EMPIRE 403–11 (1977) (showing that Bismarck became interested in colonies during the scramble for Africa and after the Berlin Conference, the German flag was hoisted across Africa and its territory increased five times).

86. See *Nr. 287 bis 421 und Sachregister* [No. 287 to 421 and Subject Index], in 6 VERHANDLUNGEN DES REICHSTAGES [MEETINGS OF THE WEIMAR REPUBLIC] 1884/85 1647, 1655 (Julius Sittenfeld ed., 1885) (Ger.); Elder, *supra* note 74, at 6–7.

The rejection of the treaty led Portugal to call for a European conference to settle the African issues.⁸⁷ In turn, Germany, which claimed to be magnanimously interested only in assisting to solve the disputes between England, France, and Portugal, was happy to join in the call for a conference.⁸⁸

Officially, Germany, and in particular Bismarck, had no interest in colonizing Africa because of the costs with little hope of a return.⁸⁹ Bismarck might have been interested in colonies all along and was engaged in nothing more than political posturing, but he certainly recognized the need to adapt when German companies began requesting government protection for lands and claims they had acquired in Africa. Bismarck may have also recognized the need to acquiesce to the pursuit of a colonial empire after political pressure and when the public began talking of a “German India.”⁹⁰ Whatever the actual situation, there is no question that Bismarck wrote the British government in September 1884 and requested that the upcoming Conference be expanded to cover the colonization requirements for all of Africa, not just the Congo Basin.⁹¹

The Berlin Conference commenced on November 15, 1884. At the beginning, only Portugal, Britain, and France had possessory claims in the Congo.⁹² But as Bismarck had requested, the attendees agreed to transform

87. Elder, *supra* note 74, at 7; 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1655.

88. See Eric Axelson, *The Berlin Conference*, in NINETEENTH-CENTURY AFRICA 209–10 (P.J.M. McEwan ed., 1968); Elder, *supra* note 74, at 6–7.

89. Otto von Bismarck, Reichskanzler [Chancellor], Speech before the Reichstag (June 26, 1884) (Ger.); See RALPH A. AUSTEN, NORTHWEST TANZANIA UNDER GERMAN AND BRITISH RULE, COLONIAL POLICY AND TRIBAL POLITICS, 1889–1939 19 (1968).

90. See 1 Johannes Hohlfeld, *Deutsche Reichsgeschichte [History of the German Weimar Republic]*, in DOKUMENTEN, URKUNDEN UND AKTENSTÜCKE ZUR INNEREN UND ÄUßEREN POLITIK DES DEUTSCHEN REICHES [DOCUMENTS ABOUT THE DOMESTIC POLITICS AND FOREIGN POLICIES OF GERMANY] 185–86 (1935) (Ger.); Speech Before the Reichstag, *supra* note 89; STERN, *supra* note 85, at 407; R. Hyam, *Partition: A General View*, in NINETEENTH-CENTURY AFRICA, *supra* note 88, at 292 (stating that prestige was a motive for African colonies); 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1664; RICHARD LESSER, DEUTSCHE KOLONIALZEITUNG: ORGAN DES DEUTSCHEN KOLONIALVEREINS [GERMAN COLONIAL NEWSPAPER: PUBLICATION OF THE GERMAN COLONIAL SOCIETY] 4 (1885) (Ger.), <https://babel.hathitrust.org/cgi/pt?id=hvd.h1h6o&view=1up&seq=5&size=125> (stating that trade in Africa will expand beyond the current “Kongobecken” [“Congo Basin”], resulting in all rivers becoming important trading posts, ultimately requiring the Conference to consider the bigger picture of Africa’s value); WEIßBUCH 1-2.T. [WHITEPAGES 1-2.T.] (1885) 4, 19 (1885) (Ger.) (stating that the German *Handelskammer* (Chamber of Commerce) requested Germany’s protection because trade in West Africa was important).

91. 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1660 (“It would be useful to discuss the formalities necessary to effectively occupy the African coastlines in order to ensure the natural development of European trade in Africa.”).

92. WHITEPAGES 1-2.T., *supra* note 90, at 6; 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1645–47, 1658–59 (stating that in July 1884, Germany offered to help find a solution to the Central African dispute).

the Conference into a discussion about acquiring any and all parts of Africa.⁹³ Bismarck's requested colonization terms were specifically memorialized in the Berlin Act.⁹⁴

Some historians disparage the importance of the Conference and the Act because they say it did not actually partition any lands and had been called only to address the Congo Basin.⁹⁵ But these points overlook the fact that the Conference shifted its focus to all of Africa, that it lasted so long because European countries were actually partitioning Africa by negotiating side-deals during the Conference, and that European countries began immediately claiming colonies all over Africa based on the Berlin Act as soon as it was signed.⁹⁶ After months of meetings, the Conference ratified its Act on February 26, 1885 and expressly codified the Doctrine of Discovery into written "international law" to facilitate the colonization of all of Africa.⁹⁷

2. Codifying the Doctrine of Discovery

The General Act of the Berlin Conference on West Africa expressly states that it was "henceforth a part of international law."⁹⁸ Many of the provisions of the Act, that were now part of written international law, came directly from the Doctrine of Discovery.

While the Act did not use the term "first discovery," there can be little dispute that the "scramble for Africa" was a race among European nations for first discoveries.⁹⁹ For instance, France had long invoked the primacy of

93. WEIBBUCH 3-4.T. [WHITEPAGES 3-4.T.] (1885-1889) 49 (1885) (Ger.); CROWE, *supra* note 99, at 3, 178-79, app. I; 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1661, 1663; MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING A COMMUNICATION FROM THE SECRETARY OF STATE IN RELATION TO THE CONGO CONFERENCE, 48th Cong., 2nd sess., H.R. Exec. Doc. No. 247, at 4 (1885).

94. 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1670.

95. Matthew Craven, *Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade*, 3 LONDON REV. INT'L L. 31, 33-34 n.10 (2015); CROWE, *supra* note 9, at 4-5.

96. Ronald Robinson, *The Conference in Berlin and the Future in Africa, 1884-85*, in BISMARCK, EUROPE, AND AFRICA, *supra* note 80, at 1-2 (1988); Elder, *supra* note 74, at 7.

97. Berlin Act, *supra* note 9, arts. 13, 26; *accord*. 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1664; CROWE, *supra* note 9, at 101-02.

98. Berlin Act, *supra* note 9, arts. 13, 26; CROWE, *supra* note 9, at 101-02.

99. The "scramble for Africa" was already underway by 1885 and increased exponentially after the Conference. *See, e.g.*, Berlin Act, *supra* note 9, arts. 1(6), 32; G. Macharia Munene, *The United States and the Berlin Conference on the Partition of Africa, 1884-1885*, 19 TRANSAFRICAN J. HIST. 73, 75 (1990) (explaining that the United States participated in the Conference to help define how to annex "territories that had 'not yet been subjected to the flag of any civilized state.'"). *But see* MESSAGE FROM THE PRESIDENT, *supra* note 93, at 7, 10. U.S. President Arthur stated in 1885 that an American citizen had officially explored Africa in 1874, *id.* at 7, and he disparaged first discovery claims in the Congo because the "older assumption of right by original discovery, apart from actual settlement, is practically abandoned," *id.* at 10.

first discoveries by demanding that countries scale back their ambitions in Africa and limit new colonization efforts to those parts of the African coastline that had not already been occupied.¹⁰⁰ In addition, the Act itself expressly defined the “*future* rights of sovereignty” that European nations would acquire by being the first to find new territories and native nations and to undertake “*new* occupations on the coast of the African Continent.”¹⁰¹ Further, an actual requirement to make first discoveries, and to respect the first discoveries of others, is evident from the Act mandating that a European country had to notify the other “Signatory Powers of the present Act” when they took new “possession of a tract of land on the coasts of the African continent outside of its present possessions” so that other countries might “make good any claims of their own.”¹⁰² There is no question that before and after the Conference, European nations were well aware of the necessity of making first discoveries; in fact, they attempted to prove them all over Africa by building the first forts and trading posts, raising flags, and signing first treaties with native nations.¹⁰³

The Conference and the Act of 1885 clearly adopted the element of actual occupancy before a European country could make a recognized claim in Africa. The Act required European nations to make “effective” occupations of claimed territory.¹⁰⁴ The term “effective occupation” meant that a European country had to exercise sufficient sovereignty and jurisdiction over the land, native nations, and peoples “to insure the establishment of authority in the regions occupied by them,” to maintain peace, and guarantee free trade and safety.¹⁰⁵ The U.S. State Department noted that the Conference complied with the established principles of Discovery by requiring effective occupation “within a reasonable time, [to] furnish evidence . . . of [a country’s] intention and ability to exercise its rights there.”¹⁰⁶

The Act also impliedly incorporated the idea of preemption and European title. As already cited with regard to first discovery, a European country that wanted to establish its exclusive rights over a particular region and native nations had to give notice of its new claims to fellow conference

100. See CROWE, *supra* note 9, at 178–79.

101. Berlin Act, *supra* note 9, arts. 1(6), 32, Ch. VI (emphases added).

102. *Id.* art. 34.

103. See, e.g., OLUSOGA & ERICHSEN, *supra* note 85 (noting that Germany raised its flag where African tribes had signed contract-treaties and over the territories it claimed).

104. Berlin Act, *supra* note 9, arts. 34–35, Ch. VI; *accord.* 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1670.

105. Berlin Act, *supra* note 9, art. 35; *accord.* 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1670; CROWE, *supra* note 9, at 181.

106. MESSAGE FROM THE PRESIDENT, *supra* note 93, at 34.

members.¹⁰⁷ This notice allowed any other European country who claimed a first discovery and preemption right to that same territory the opportunity to object and demonstrate its pre-existing interests in those lands.¹⁰⁸ Thus, the Act successfully promoted a European country's sole property interest, or title, over African lands to the exclusion of other Western governments.¹⁰⁹ The principles of first discovery, occupation, and preemption also applied to pre-Conference claims because they would supersede any post-Conference claims.¹¹⁰

The Indigenous title element, the pre-existing rights of native nations and peoples to their lands and assets, is not expressly recognized in the Act. The subject was discussed at the Conference when the United States raised the requirement for colonizers to get the voluntary consent of Indigenous peoples to land transfers and colonization.¹¹¹ Moreover, the native title right to land is inferred in the Act from the fact that European nations were expressly authorized to proclaim protectorates over native lands.¹¹² By declaring a protectorate, a European country was recognizing there were native nations and peoples already there that possessed sovereign and land rights that the European country was claiming to protect.¹¹³ In addition, most European nations assumed protectorates in Africa based on treaties they entered with tribal governments and that also demonstrated a recognition of existing native title and sovereign rights.

The Act expressly recognized some aspects of Indigenous sovereignty because it required the Conference powers engaging in trade in East Africa to deal with "the Governments established on the African shore of the Indian Ocean."¹¹⁴ This was no doubt a reference to the Sultan of Zanzibar, an island off the coast of modern-day Kenya. Further, similar to the native title element discussed immediately above, native sovereignty and commercial rights are impliedly recognized and allegedly protected by European nations signing treaties and declaring protectorates.¹¹⁵ Native commercial rights were also expressly addressed in the Act because they were to be treated equally with

107. Berlin Act, *supra* note 9, arts. 34–35; 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1670.

108. Berlin Act, *supra* note 99, arts. 34–35; 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1670.

109. See CROWE, *supra* note 9, at 184.

110. WHITEPAGES 1-2.T., *supra* note 90, at 36, 38.

111. Elder, *supra* note 74, at 78, 107.

112. Berlin Act, *supra* note 9, arts. 7–8, 11, 34.

113. See *id.* arts. 34–35; Fisch, *supra* note 80, at 358.

114. Berlin Act, *supra* note 9, arts. 1(3), 10, 11.

115. *Id.* art. 34; Fisch, *supra* note 80, at 358.

respect to European imposed tariffs and tolls.¹¹⁶

The element of contiguity is referenced at several points in the Act because it used watersheds and river systems as territorial markers to define the European spheres of influence and areas of free trade.¹¹⁷ Furthermore, the Act used degrees of latitude to define other areas of European control.¹¹⁸

We find no express provision in the Act regarding the first definition of *terra nullius*, lands that are actually empty of any persons. This point, however, was discussed at the Conference. For example, the American representative told the Conference that non-European Africa remained “unexplored and unoccupied.”¹¹⁹ In addition, one reason Germany recognized Belgium’s claims in the Congo was because the territory was thought to be empty.¹²⁰ In contrast, we detect the use of the second definition of *terra nullius* throughout the Conference and in the tenor of the Act, because even though Africa was governed by nations, legal systems, and cultures, and was full of hundreds of millions of peoples, Europeans were not required to recognize or respect those powers and governments, and instead could just claim land as *terra nullius* and overlook existing African sovereignty and law.¹²¹

Christianity played a minor role in the Conference. Religion and Christian missionaries are mentioned and protected in the Berlin Act, however.¹²² During the Conference, the value of Christianity to help colonize and civilize Africans was widely promoted.¹²³

The importance of civilization was crucial to European justifications to colonize Africa. The Conference and the Act whole-heartedly adopted the idea that African nations and peoples were uncivilized “savages.” In his opening remarks at the Conference, Bismarck stated that the Conference’s goal included “civilization” of the African continent.¹²⁴ Not surprisingly, the express obligation of Europeans to civilize Africans was stated in the Act and emphasized throughout the Conference.¹²⁵

We do not perceive in the Act any use of the first definition of the

116. Berlin Act, *supra* note 9, art. 29.

117. *Id.* arts. 1(1), 28, 30–31; *see also* MESSAGE FROM THE PRESIDENT, *supra* note 93, at 11; 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1667–70.

118. Berlin Act, *supra* note 9, arts. 1(1)–(3).

119. MESSAGE FROM THE PRESIDENT, *supra* note 93, at 10.

120. *See* 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1663.

121. *Cf.* Berlin Act, *supra* note 9, arts. 1, 2, 8, 20(1), 34, 35.

122. *Id.* art. 6.

123. *Id.*; *see also infra* notes 355–57, 372 and accompanying text.

124. LESSER, *supra* note 90, at 1 (stating that “[a]ll invited states agree to introduce culture into the Indigenous population of Africa.”).

125. *Id.*; Berlin Act, *supra* note 9, at 1; *see also infra* notes 360–562, 372 and accompanying text.

element of conquest, which entails the acquisition of new territory by military conquest. The Conference members, however, did agree that military force could be employed to obtain legitimate title.¹²⁶ We see our second definition of conquest included by implication throughout the Act. Namely, European domination and sovereignty is evidenced upon the mere arrival of Europeans in Africa, their subsequent claims to vacant lands, and their establishment of protectorates over occupied lands that created the same results as a military conquest.

In sum, the countries at the Berlin Conference were well aware of the Doctrine of Discovery and what international law required of them to claim sovereignty and rights over new lands. That is not surprising since they had been using these international law principles since the 1400s to establish internationally recognized colonies. The Conference and Act codified the common-law Doctrine into written international law and expressly used most of its ten elements to legitimize the partition and colonization of Africa.¹²⁷ It is clear that the Doctrine of Discovery had become the international law of colonialism for Africa.

III. THE DOCTRINE OF DISCOVERY AND COLONIALISM IN EAST AFRICA

We now examine the use of the elements of the Doctrine and the law of colonialism in East Africa. We address our ten elements separately to examine whether Germany and England applied those elements in East Africa. In our opinion, this legal history demonstrates the truth of this statement from 2010: “the first stage in the colonisation of [] Africa was to be a legal rather than a military affair.”¹²⁸

A. First Discovery

Over the centuries, European nations placed great emphasis on the rights they acquired due to first discovery and the taking of symbolic possession of new lands by engaging in ceremonies.¹²⁹ Portuguese explorers, for example, were ordered to erect stone monuments, *padraos*, along the coasts of Africa and Brazil in the fifteenth and sixteenth centuries to mark

126. CROWE, *supra* note 9, at 826; MESSAGE FROM THE PRESIDENT, *supra* note 93, at 177.

127. See Mommsen, *supra* note 80, at vi, viii (discussing how the Conference was major landmark in the history of imperialism and laid out “an international code of conduct for future territorial expansion”); *id.* at 151, 157 (discussing how Bismarck respected other countries’ claims if they “were recognized in terms of international law.”); Robinson, *supra* note 96, at 25 (stating that the Conference created European international law).

128. OLUSOGA & ERICHSEN, *supra* note 85, at 44.

129. Miller & D’Angelis, *supra* note 4, at 35–37; Miller, Lesage & Escarcena, *supra* note 4, at 850–53; see generally SEED, *supra* note 58.

their first discoveries and as “emblem[s] of Portuguese sovereignty.”¹³⁰ Similarly, the British Admiralty ordered Captain Cook in 1776 to engage in symbolic acts proving his first discoveries: “You are also with the consent of the Natives to take possession . . . in such Countries as you may discover, that have not already been discovered or visited by any other European Power, and to distribute among the Inhabitants such Things as will remain as Traces and Testimonies of your having been there”¹³¹ Cook was also ordered to claim any empty lands he found: “if you find the Countries so discovered are uninhabited, you are to take possession of them for His Majesty by setting up proper Marks and Inscriptions as first Discoverers and Possessors.”¹³²

In analyzing the colonization of East Africa, it is important to note that England initially operated through corporate surrogates. Although England had used this strategy in the U.S. and other parts of the world, England implemented additional strategies in Africa.¹³³ In Africa, England also used surrogates to explore the continent, raise the flag, sign treaties with native leaders, govern and enact laws, operate courts, conquer regions, and commence the English exploitation of new areas.¹³⁴ Using private entities was an inexpensive way for countries to begin their colonizing efforts.¹³⁵ In East Africa, England was represented at first by the privately funded British East Africa Company (BEA) from 1885 to 1888, when the company changed its name to the Imperial British East Africa Company (IBEA) after receiving a charter from the Crown.¹³⁶ In 1895, the IBEA transferred its operation and rights to the Crown, and the Crown proclaimed a protectorate in East Africa.¹³⁷ Germany followed the same process in East Africa in 1884 with Carl Peters and his company, the *Deutsche Ost-Africa Gesellschaft* (German

130. OLUSOGA & ERICHSEN, *supra* note 85, at 17, 40–41; MORISON, *supra* note 50, at 227.

131. 3 THE JOURNALS OF CAPTAIN JAMES COOK ON HIS VOYAGES OF DISCOVERY: THE VOYAGE OF THE RESOLUTION AND DISCOVERY 1776–1780 ccxxiii (J.C. Beaglehole ed., 1967).

132. *Id.*

133. England operated in North America by chartering private colonies and the Hudson’s Bay Company. In other parts of the globe, England used the British East India Company. See MILLER, NATIVE AMERICA, *supra* note 2, at 31; see generally JOHN KEAY, THE HONOURABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY (1991); JOHN S. GALBRAITH, THE HUDSON’S BAY COMPANY AS AN IMPERIAL FACTOR, 1821–1869 (1957).

134. Fetter, *supra* note ***, at 68–69; 1 HERTSLET, *supra* note 8, at 29.

135. Felix K. Ekechi, *The Consolidation of European Rule*, in 3 COLONIAL AFRICA 27, 48 (Toyin Falola ed., 2002).

136. 1 HERTSLET, *supra* note 8, at 122, 125, 345–50; see also Fetter, *supra* note ***, at 9; G.H. MUNGEAM, KENYA: SELECT HISTORICAL DOCUMENTS 1884 – 1923 19–25, 28 (East Africa Publishing House 1978).

137. SORRENSEN, *supra* note 73, at 46; Sean Stilwell, *The Imposition of Colonial Rule*, in 3 COLONIAL AFRICA, *supra* note 135, at 3, 12.

East Africa Company). This company ultimately transferred the rights and privileges it had acquired via contract-treaties to the German Empire in 1890.¹³⁸ These corporate entities, as surrogates for their countries, applied many of the elements of Discovery in East Africa.

In fact, we see a direct correlation between the Portuguese *padraos* and England's "Marks and Incriptions" with European nations' first discovery claims in Africa that were based on missionary activities, explorers, corporate surrogates signing first treaties with Indigenous nations, the hoisting of European flags in newly discovered areas, and building the first forts and trading posts.¹³⁹ We detect express evidence of first discoveries in the race for explorers and surrogates to find new lands and to sign the first treaties with African chiefs. The scramble for Africa epitomizes the European rush to establish first discoveries. One modern-day French diplomat agrees because he stated that the Berlin Conference and Act "encouraged various powers . . . to place their flag wherever they managed to arrive the first."¹⁴⁰

Other evidence of first discovery is clear from the expeditions dispatched by European nations in Africa that were often undertaken to establish their countries in new locations. Portugal used expeditions to try to validate its claim to the interior lands between its colonies of Angola on the Atlantic Ocean and Mozambique on the Indian Ocean.¹⁴¹ France's military officer de Brazza and the representative of Belgium, Henry Morgan Stanley, were clearly involved in a race to find new lands first and to sign the first treaties with chieftains.¹⁴² We should point out here that the African leaders who signed these treaties often did not realize that, from the perspective of the Europeans, they were signing away their sovereignty. Since the European explorers did not fully explain the content and implications of the treaties,

138. Stilwell, *supra* note 137, at 9; Robert Cornevin, *The Germans in Africa Before 1918*, in 1 COLONIALISM IN AFRICA 1870-1960 410 (L.H. Gann & Peter Duignan eds., 1969).

139. See, e.g., Robinson, *supra* note 96, at 2-3 (explaining that urgent competition commenced to sign treaties); OLUSOGA & ERICHSEN, *supra* note 85, at 28-29, 39-40; G.N. Uzoigwe, *European Partition and Conquest of Africa: An Overview*, in 7 GENERAL HISTORY OF AFRICA: AFRICA UNDER COLONIAL DOMINATION 1880-1935 19, 28-29, 31 (A. Adu Boahen ed., 1985) (showing that the scramble for Africa changed in 1876-80 and especially following the Berlin Conference); Mommsen, *supra* note 80, at vii (discussing how missionaries paved the way for colonization); *id.* at 157, 164; Cornevin, *supra* note 138, at 383, 390; CROWE, *supra* note 9, at 199 (explaining that in 1734, Portugal built a fort in Angola "to protect Portuguese sovereign rights"); MARY EVELYN TOWNSEND, EUROPEAN COLONIAL EXPANSION SINCE 1871 26, 64 (1941).

140. Geoffrey de Courcel, *The Berlin Act of 26 February 1885*, in BISMARCK, EUROPE, AND AFRICA, *supra* note 80, at 247, 258.

141. Alan K. Smith, *Portuguese Colonies and Madagascar*, in 6 THE CAMBRIDGE HISTORY OF AFRICA, FROM 1870 TO 1905 493, 503, 516 (Roland Oliver & G.N. Sanderson eds., 1985); Uzoigwe, *supra* note 139, at 19, 28.

142. See Uzoigwe, *supra* note 139, at 28.

the Africans believed that through signing, they were simply building diplomatic and commercial ties.¹⁴³

Finally, Christian mission societies were allies and adjuncts of European imperialism and helped to make first discoveries and advance the Western penetration of Africa.¹⁴⁴ Missionaries were often the first Europeans in new regions and they helped their countries establish first discovery claims and even to create strategies for imperial expansion.¹⁴⁵ Missionary societies actively served as agents and enthusiastic supporters of European colonialism in Africa and “paved the way” for colonization.¹⁴⁶ For “centuries, Christian missionary work and European colonial conquest were closely related.”¹⁴⁷

We assert that many of the actions of explorers, missionaries, corporate surrogates, and European nations themselves are direct evidence of the use of first discovery in Africa.

1. Germany and England in East Africa

Germany and England engaged in multiple acts of first discovery in East Africa to legally justify their rights to colonize. Both countries relied on explorers, missionaries, and commercial entities to first encounter Indigenous peoples and to begin opening a territory and its nations to European penetration.¹⁴⁸ As mentioned above, German and English surrogates labored to sign the first treaties regarding land, sovereignty, and trade with Indigenous nations. Representatives of both countries also engaged in ceremonies of raising flags and building forts and settlements to legally establish their first discoveries, possessions, and sovereignty.

The English presence preceded Germany in East Africa. English

143. STEVEN PRESS, *ROGUE EMPIRE: CONTRACTS AND CONMEN IN EUROPE’S SCRAMBLE FOR AFRICA* 225 (2017).

144. Horst Grunder, *Christian Missionary Activities in Africa in the Age of Imperialism and the Berlin Conference of 1884–85*, in BISMARCK, EUROPE, AND AFRICA, *supra* note 80, at 92; CROWE, *supra* note 9, at 15; K. Asare Opoku, *Religion in Africa During the Colonial Era*, in 7 GENERAL HISTORY, *supra* note 139, at 508, 513, 525.

145. L.H. Gann & Peter Duignan, *Reflections on Imperialism and the Scramble for Africa*, in 1 COLONIALISM IN AFRICA, *supra* note 138, at 119–20.

146. Opoku, *supra* note 144, at 508, 513; *accord.* Mommsen, *supra* note 80, at vii; Ekechi, *supra* note 135, at 44, 46–47 (stating that missionaries condemned African cultures, societies, and religions and taught subservience and not the biblical themes of freedom and justice).

147. Grunder, *supra* note 144, at 85; *see also* TOWNSEND, *supra* note 139, at 29–30 (stating that one Christian society even provided funding to the BEA to enable it to remain in Uganda).

148. *See, e.g.*, LOTTE HUGHES, *MOVING THE MAASAI: A COLONIAL MISADVENTURE* 23 (2006) (stating that the Royal Geographical Society and its 1883–84 expedition is credited with including the first Europeans to cross Maasai land); 2 HERTSLET, *supra* note 8, at 687 (explaining that England argued against German claims in East Africa in 1886 because the English Missionary Society had settlements in the contested areas as early as 1876 and 1879).

explorers and missionary work in East and Central Africa included the famous David Livingstone as early as the 1840s when he began establishing his program of “Commerce and Christianity.”¹⁴⁹ Livingstone influenced the English public and promoted the idea of colonizing Africa.¹⁵⁰ Other English missionaries also operated in East Africa including in Mombasa and in what is now Uganda.¹⁵¹ Ultimately, British influence in East Africa “owed a great deal [] to the activities of missionaries.”¹⁵² England’s political connection with the Sultan of Zanzibar also helped England establish its colonial position in Kenya prior to 1871.¹⁵³ And in the early 1880s, English explorers traveled inland to the region around Kilimanjaro and were the first to sign treaties with a variety of chiefs and nations.¹⁵⁴

On the diplomatic level, England first began operating in East Africa through one of its client states, the Sultan of Zanzibar. The Sultan exercised some control and sovereignty over the coast of Kenya.¹⁵⁵ In 1885, the BEA was formed to explore, sign treaties, and make first discoveries to establish England’s presence and governance in East Africa. Therefore, it signed an agreement with the Sultan in 1887 to be allowed to operate on the coast of Kenya and to make first discoveries.¹⁵⁶ The company signed treaties with at least twenty-one chiefs and allegedly secured English sovereignty for up to 200 miles inland.¹⁵⁷ This success in extending English influence led the Crown to grant it a royal charter in 1888 and it became the Imperial British East Africa (IBEA) company. The IBEA also succeeded at creating first discovery claims in Kenya and Uganda by exploring the interior and signing treaties with native tribes.¹⁵⁸ The BEA and IBEA always hoisted a flag to symbolize English sovereignty over these newly found areas and tribes, and sometimes built trading posts.¹⁵⁹

The IBEA, however, faltered in its operations and in 1895 transferred

149. Opoku, *supra* note 144, at 512.

150. Gruner, *supra* note 144, at 85, 93; Charles Pelham Groves, *Missionary and Humanitarian Aspects of Imperialism from 1870 to 1914*, in 1 COLONIALISM IN AFRICA, *supra* note 138, at 470; TOWNSEND, *supra* note 139, at 57–58 (noting that Livingstone was both missionary and explorer).

151. SORRENSEN, *supra* note 73, at 256; TOWNSEND, *supra* note 139, at 103.

152. L.H. Gann & Peter Duignan, *Introduction to 1 COLONIALISM IN AFRICA*, *supra* note 138, at 8.

153. TOWNSEND, *supra* note 139, at 99.

154. 2 HERTSLET, *supra* note 8, at 686; TOWNSEND, *supra* note 139, at 100.

155. G.N. Sanderson, *The European Partition of Africa: Origins and Dynamics*, in 6 THE CAMBRIDGE HISTORY, *supra* note 141, at 117.

156. 1 HERTSLET, *supra* note 8, at 299–300, 339.

157. TOWNSEND, *supra* note 139, at 101.

158. *Id.* at 104 (showing that the 1892 treaty forced upon King Mwanga of Uganda brought him under the IBEA);

1 HERTSLET, *supra* note 8, at 373–78 (showing that the IBEA signed 84 treaties between 1887 and 1891).

159. 1 HERTSLET, *supra* note 8, at 349.

all of its rights and holdings to the Crown.¹⁶⁰ Thereafter, English governors and officials carried on the work of making first discoveries through explorations, treaties, flag raising, military conquests, and trade.¹⁶¹

Similarly, Germany's claims and its colony in modern-day Tanzania in East Africa were also based on first discoveries. German missionary activities were underway in Dar es Salaam, Tanzania at least a decade before official colonial efforts commenced.¹⁶² In addition, German commercial activities were present in East Africa before the government undertook official colonial efforts. Not surprisingly, the German government also followed in the steps of the missionaries and commercial interests just like England.

The primary force behind German East Africa was the explorer and commercial agent Carl Peters. He was Germany's first East African colonizer and pioneered Germany's colonization strategies to conquer East Africa under the guise of expeditions.¹⁶³ In order to accomplish his goal, Peters created the German East Africa Company (*Deutsch-Ostafrikanische Gesellschaft* "DOAG") to enable colonization through expeditions and contracts.¹⁶⁴ Peters entered into numerous contracts with East African tribes.¹⁶⁵ The earliest agreements were concluded before the Berlin Conference ended in February 1885.¹⁶⁶ Thereafter, Peters and Germany expressly claimed that these contracts proved Germany's first discoveries in East Africa.¹⁶⁷

Peters implemented a tactic that became known as "*Expeditionspolitik*" (political expeditions), which allowed him to expand on his original *Schutzbrief* (letter of safe conduct) to claim new territories and tribes that he encountered.¹⁶⁸ The contracts Peters signed with chiefs transferred their

160. See Erik Gilbert, *East Africa*, in 3 COLONIAL AFRICA, *supra* note 135, at 363, 369 (stating that by 1894 the IBEA was in financial trouble and the Crown had to take over); MUNGEAM, *supra* note 136, at 65–67.

161. J. Flint, *The Background in East Africa*, in NINETEENTH-CENTURY AFRICA, *supra* note 88, at 237.

162. Cornevin, *supra* note 138, at 383, 385, 390, 411.

163. CARL PETERS, HOW GERMAN EAST AFRICA WAS FOUNDED 10–11, 14 (Philip O'Connor ed., 2001) (1912).

164. *Id.* at 10–11, 14.

165. LEWIN, *supra* note 82, at 173–74; TOWNSEND, *supra* note 139, at 99–100. East African tribes were familiar with contracting with outsiders after dealing with Arab traders for centuries. AUSTEN, *supra* note 89, at 14–16.

166. LEWIN, *supra* note 82, at 173–74.

167. See 2 HERTSLET, *supra* note 8, at 681 (stating that his contracts were signed with tribes "outside of the suzerainty of other Powers").

168. See BRUNO KURTZE, DIE DEUTSCH-OSTAFRIKANISCHE GESELLSCHAFT: EIN BEITRAG ZUM PROBLEM DER SCHUTZBRIEFGESELLSCHAFTEN UND ZUR GESCHICHTE DEUTSCH-OSTAFRIKAS [THE

sovereign powers and property rights to DOAG.¹⁶⁹ This era also became known as the “*Periode des Flaggenhissens*” (flag raising period) because once a new contract-treaty was signed, Peters had the German flag raised and saluted by gunshots.¹⁷⁰ Peters undertook eighteen expeditions in two years and established claims throughout East Africa.¹⁷¹

Chancellor Bismarck and the German government quickly came to appreciate Peters’ first discoveries. On February 27, 1885, one day after Germany signed the Berlin Act, Bismarck issued a *Kaiserlicher Schutzbrief*, which accepted and legitimized Peters’ contracted-for rights and granted protectorate status to the territories discovered by Peters, and allegedly acquired, through his contract-treaties.¹⁷² Peters continued expanding his claims by signing even more contracts and by claiming the contiguous lands between the actual regions claimed via his contracts.¹⁷³ Peters established German claims to approximately 5,000 square miles, although one authority claims that he actually acquired 60,000, which encompasses almost all of modern-day Tanzania.¹⁷⁴

Under his contracts, Peters and DOAG were tasked with regulating and governing these territories.¹⁷⁵ They were themselves governed by German law, and thus in effect, Germany governed the territories.¹⁷⁶ Some sources claim that Bismarck actually supervised DOAG once it was transformed into a *Reichskorporation*.¹⁷⁷ Eventually, Germany officially claimed the territories as colonies in the early 1900s, and thereafter significantly

GERMAN EAST AFRICA COMPANY: A COMMENT ABOUT THE PROBLEMS OF THE PROTECTORATE AND THE HISTORY OF GERMAN EAST AFRICA] 53 (1913) (Ger.).

169. See, e.g., LESSER, *supra* note 90, at 213.

170. KURTZE, *supra* note 168, at 52; TOWNSEND, *supra* note 139, at 27; see also 2 HERTSLET, *supra* note 8, at 693 (showing that the German baron wrote to England’s Foreign Secretary that treaties with independent chiefs had placed the area under German protection and was demonstrated “by hoisting the Imperial military standard and planting frontier poles”).

171. KURTZE, *supra* note 168, at 54–56.

172. See, e.g., *id.* at 173–74; Hohlfeld, *supra* note 90, at 186–87; LEWIN, *supra* note 82, at 168; TOWNSEND, *supra* note 139, at 100; 2 HERTSLET, *supra* note 8, at 681–82.

173. See KURTZE, *supra* note 168, at 76–77.

174. *Id.* at 182–83; TOWNSEND, *supra* note 139, at 27.

175. See Hohlfeld, *supra* note 90, at 186–87 (“We [Germany] grant the Company all rights necessary to exercise the rights arising under the contract, including the right of the judiciary over the Indigenous population.”); AUSTEN, *supra* note 89, at 21.

176. See ARCHIV DES DEUTSCHEN KOLONIALRECHTS [ARCHIVE OF THE GERMAN COLONIAL LAWS] 128 (Norbert B. Wagner ed., 2008) (Ger.); KARL VON GEREIS, DEUTSCHES KOLONIALRECHT [German Colonial Laws] 5 (1902) (Ger.).

177. Raan, *Deutsch-Ostafrikanische Gesellschaft (D.-O.-A.G.)* [German East African Company], DEUTSCHE-SCHUTZGEBIETE.DE (May 6, 2018), <https://deutsche-schutzgebiete.de/wordpress/deutsch-ostafrikanische-gesellschaft-d-o-a-g/> (Ger.); see also ARCHIVE OF THE GERMAN COLONIAL LAWS, *supra* note 176, at 135, art. 1.

expanded its territory to cover most of what is today the United Republic of Tanzania.¹⁷⁸

Clearly, England and Germany utilized first discovery claims in East Africa.

2. Other European Powers in Africa

Other European countries also engaged in acts of first discovery for centuries across Africa. As mentioned, Portuguese explorers erected *padraos* to mark the areas Portugal claimed by first discovery. Portugal clearly relied on the element of first discovery to make territorial, sovereign, and commercial claims to parts of Africa, islands along the African coast, Asia, and Brazil.¹⁷⁹ The Portuguese Crown claimed a monopoly on trade in part of Africa on the grounds of both first discovery and the papal bulls.¹⁸⁰ Portuguese explorers in Africa, like other European explorers, named mountains and natural features and drafted maps because these were common maneuvers for Europeans to prove first discoveries.¹⁸¹ By the mid-1880s, when Portugal was trying to establish its claims to the lands between its Angola and Mozambique colonies, it dispatched numerous expeditions, including its Royal Scientific Society, to make territorial claims by first discoveries and distributing flags.¹⁸²

Other Europeans also used first discoveries that included encouraging religious missions and scientific and commercial explorations in Africa, attempting to sign first treaties with native leaders, raising flags, and building trading posts. For example, Leopold of Belgium hired the American explorer Henry Morgan Stanley from 1879–85 to make first discoveries in the Congo, sign hundreds of treaties, and establish trade stations.¹⁸³ France worked

178. JOHANNES GERSTMAYER, AUSFÜHRLICHES VERZEICHNIS DER GUTTENTAG'SCHEN SAMMLUNG DEUTSCHER REICHS- UND PREUBISCHER GESETZE, DAS SCHUTZGEBIETSGESETZ [DETAILED DIRECTORY OF THE GUTTENTAG'SCHEN COLLECTION OF GERMAN WEIMAR REPUBLIC LAWS AND PRUSSIAN LAWS, THE PROTECTORATE LAWS] 15–16 (1910) (Ger.). Compare KURTZE, *supra* note 168, at 183, with *Tanzania – Introduction*, FOREIGN LAW GUIDE, http://dx.doi.org/10.1163/2213-2996_flg_COM_324137 (last visited Nov. 12, 2021). See also Sarah Phillips, *The Scramble for Africa: Then and Now*, ARCGIS, <https://www.arcgis.com/apps/MapJournal/index.html?appid=07278c2bb1254949ad277e26d55a074d> (last visited Dec. 14, 2020) (containing maps of Africa pre- and post-Berlin Conference).

179. H.V. LIVERMORE, A NEW HISTORY OF PORTUGAL 127–30 (2d ed. 1976); J.H. PARRY, THE AGE OF RECONNAISSANCE: DISCOVERY, EXPLORATION AND SETTLEMENT 1450 TO 1650 131 (1969); PRESTAGE, *supra* note 12, at 5, 9.

180. PARRY, *supra* note 179, at 131, 134; accord. MORISON, *supra* note 50, at 5.

181. CHARLES E. NOWELL, THE ROSE-COLORED MAP: PORTUGAL'S ATTEMPT TO BUILD AN AFRICAN EMPIRE FROM THE ATLANTIC TO THE INDIAN OCEAN 6 (1982); MARQUES, *supra* note 59, at 218; SEED, *supra* note 58, at 1–2, 5–6, 9 n.19, 17–19, 69–73, 101–02.

182. NOWELL, *supra* note 181, at 2, 10, 19, 30, 55, 60, 72, 82, 88, 89.

183. CROWE, *supra* note 9, at 14; HOCHSCHILD, *supra* note 83, at 71; Uzoigwe, *supra* note 139, at

through Lieutenant de Brazza in the Congo from 1880 to 1885 in its race to find new tribes and lands, sign first treaties, hoist flags, proclaim sovereignty, and build posts and forts as legal proof of first discoveries.¹⁸⁴

In conclusion, there is no question that European countries relied on the international law element of first discovery. They engaged in the activities that established first discoveries through missionaries, explorers, corporate entities, government officials, treaty-making, and flag raising in East Africa and across Africa.

B. Actual Occupancy and Current Possession

European countries had long operated under the legal principle that a country had to physically occupy and actually possess an area in order to transform an inchoate first discovery claim to newly discovered lands into an internationally recognized colonial asset.¹⁸⁵ The Berlin Conference and Act of 1885 expressly codified this principle into international law for colonizing Africa and called it effective occupation.¹⁸⁶

1. Germany and England in East Africa

England and other European colonizers in Africa often utilized an inexpensive form of colonialism that was called informal or indirect rule.¹⁸⁷ This tactic allowed England and others to profit from colonial assets without taking on the problems and costs of actually governing a colony. Under indirect rule, a European power might only be minimally involved in occupying, governing, and administering a colony while it allowed native leaders and Indigenous political structures to continue governing. Under indirect rule, Europeans were making a form of first discovery claim similar to what Spain and Portugal executed under the papal bulls.

Germany and other European states began to make arguments about actual occupancy against England and France in the nineteenth century identical to those that England, France, and Holland had made against Portugal and Spain in the sixteenth century. Germany especially advocated that European countries should be required to establish effective occupancy

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184. CROWE, *supra* note 9, at 14; TOWNSEND, *supra* note 139, at 26–27 (explaining that Brazza was in competition with Stanley); 2 HERTSLET, *supra* note 8, at 634–41.

185. See, e.g., *supra* notes 63–65 and accompanying text; DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS* 157 (2001).

186. Berlin Act, *supra* note 9, arts. 34–35; see also, *supra* notes 100–102 and accompanying text; Uzoigwe, *supra* note 139, at 29.

187. See, e.g., TOWNSEND, *supra* note 139, at 64 (“Nowhere is the British system of ‘indirect rule’ more developed.”); *supra* notes 128–133 and accompanying text.

and actual governance of the colonies they claimed.¹⁸⁸ This put at risk the British first discovery claims of “paramountcy,” the strategy of indirect rule from German explorers, commercial interests, and actual occupancy and governance.¹⁸⁹ Thereafter, the Berlin Act and its requirement of effective occupancy forced England to undertake the actual possession and governance of its colonies, which included maintaining the peace and administering justice among other responsibilities.¹⁹⁰ The Berlin Conference and Act of 1885 adopted and codified the Discovery element of actual occupation in international law for Africa.¹⁹¹ At least one historian states, however, that England was successfully able to restrict the Act’s requirement of effective occupation to just the coastlines, and not to the hinterlands, and that left open claims to interior lands by indirect rule and did not require occupation and governance.¹⁹²

England was thus forced by the 1885 Berlin Conference and Act to abandon its preferred strategy of indirect rule and now had to actually occupy and effectively govern its colonies. It is noteworthy that this marked the moment that England began delegating those very duties to its new corporate surrogates in East Africa: the BEA and the IBEA.¹⁹³ Ultimately, the English government was forced to assume the duties and obligations of the IBEA in 1895 and took over governing and effectively occupying East Africa. In the early 1890s, Germany, England, and Italy devised a new way around this requirement by signing treaties with each other that divided the territories amongst themselves, established recognized borders, and proclaimed that those treaties met the requirement of effective occupation.¹⁹⁴

In contrast, Germany had been the primary proponent at the Berlin Conference of requiring actual occupancy and governance of colonies. Thus,

188. CROWE, *supra* note 9, at 64, 178; *see* Uzoigwe, *supra* note 139, at 28–29 (describing the events that compelled Germany to support a formal policy rather than “informal control and influence”); 6 MEETINGS OF THE WEIMAR REPUBLIC, *supra* note 86, at 1660 (showing correspondence by Bismarck which noted that “It would be useful to discuss the formalities necessary to effectively occupy the African coastlines in order to ensure the natural development of European trade in Africa.”); BISMARCK, EUROPE, AND AFRICA, *supra* note 80, at 3, 255.

189. Sanderson, *supra* note 155, at 96, 134.

190. Courcel, *supra* note 140, at 255.

191. Berlin Act, *supra* note 9, arts. 34–35.

192. Mommsen, *supra* note 80, at vii, ix.

193. 1 HERTSLET, *supra* note 8, at 125–26, 336, 347–48.

194. Uzoigwe, *supra* note 139, at 33–35; *see* TOWNSEND, *supra* note 139, at 100 (describing Germany and England’s compromise to mark their respective “spheres of interest”); 3 HERTSLET, *supra* note 8, at 948–49; 1 HERTSLET, *supra* note 8, at 410 (showing that on May 5, 1894 an agreement was signed by Britain and Italy to define their respective spheres of influence on the Somali coast); *id.* at 338 (showing that Great Britain and Germany, and Britain and Italy signed agreements that defined their spheres of influence).

it is no surprise that in East Africa Carl Peters attempted to occupy and govern the lands that he allegedly acquired by contracts. Peters implemented what became known as *Stationpolitik* (settlement politics).¹⁹⁵ To comply with the Berlin Act's governance requirements, Peters established numerous strongholds, *Stationen* (settlements), throughout his newly acquired East African territories.¹⁹⁶ He also built other governmental stations such as "*Zoll- und Handelsstationen*" (customs stations).¹⁹⁷

Peters' political *Stationen* were implemented to meet the Berlin Act's effective occupation requirements.¹⁹⁸ The stations attempted to police the territories, and also acted as a direct support for the surrounding commercial and agricultural stations.¹⁹⁹ Additionally, station chiefs were tasked with establishing a police force and judiciary.²⁰⁰ Peters thought these departments were required to ensure peace and that station chiefs would provide the necessary governance to legitimize the colony.²⁰¹ Later, Germany even went as far in its attempt to govern and to administer its colony that it created a formal legislature to spearhead discussions between the DOAG and the Sultan of Zanzibar.²⁰² In addition, Germany created a colonial court system in East Africa that was divided into two distinct jurisdictions or "*Behörden*" (agencies).²⁰³ One court's jurisdiction was invoked when a complaint involved a German or any other "*völkerrechtlich anerkannter Staat*" (a state recognized under international law).²⁰⁴ In those cases, a German "*Assessor*" acted as judge.²⁰⁵ The second court's jurisdiction covered matters between Indigenous peoples.²⁰⁶ The station chiefs served as judges in the Indigenous courts but the law that governed were the rules and traditions of the respective tribes.²⁰⁷

195. See KURTZE, *supra* note 168, at 92 (referring to "Stationenpolitik"); MATTHIAS GOLDMANN, "ICH BIN IHR FREUND UND KAPITÄN," DIE DEUTSCH-NAMIBISCHE ENTSCHÄDIGUNGSFRAGE IM SPIEGEL INTERTEMPORALER UND INTERKULTURELLER VÖLKERRECHTSKONZEPTE ["I AM YOUR FRIEND AND CAPTAIN." GERMAN-NAMIBIAN REPARATION CLAIMS AND THE INTERTEMPORAL AND INTERCULTURAL DIMENSIONS OF INTERNATIONAL LAW] 1, 10 (2020) (Ger.).

196. GOLDMANN, *supra* note 195, at 11–12; KURTZE, *supra* note 168, at 54–56.

197. KURTZE, *supra* note 168, at 84.

198. *Id.* at 79–80.

199. PETERS, *supra* note 163, at 62 (describing the efforts to establish direct connections between the administrative posts in the colony and commercial and agricultural institutions in order to create a "genuine system of self-administration").

200. KURTZE, *supra* note 168, at 78.

201. *Id.*

202. *Id.* at 91.

203. *Id.* at 90.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*; Jakob Zollmann, *German Colonial Law and Comparative Law, 1884–1919*, in

Peters and DOAG failed in their governance attempts. Germany replaced him in 1890, hoping to create a semblance of the effective governance and occupation required by the Berlin Act.²⁰⁸ Germany looked to the practices of other European countries and primarily focused on British rules and procedures.²⁰⁹ Germany ultimately attempted to establish a uniform system of laws in East Africa.²¹⁰ In an attempt to ensure occupation and possession, Germany required that anyone claiming new land had to establish actual occupancy by either farming or building housing.²¹¹ Germany continued Peters' dual court system when it took over governance of DOAG territories.²¹² The courts continued to apply local laws, and even occasionally used native judges.²¹³

In sum, Germany and England realized that international law required them to actually occupy and effectively govern their East African colonies, and they attempted to do so.

2. Other European Powers in Africa

All of the European powers in Africa realized that to legally and practically protect their colonial claims, they had to actually occupy and govern the territories. Portugal long used actual occupancy to claim islands, lands, and exclusive rights in Africa.²¹⁴ As early as 1498, for example, Portugal had a first discovery claim in Mombasa, Kenya, and later solidified that claim by building a fort and stationing troops there for over one hundred years.²¹⁵ Portugal also recognized the need to occupy colonies to sustain its colonization of Africa, Asia, and Brazil. Accordingly, the Portuguese built

ENTANGLEMENTS IN LEGAL HISTORY 253, 272 (Thomas Duve ed., 2014).

208. See KURTZE, *supra* note 168, at 161; AUSTEN, *supra* note 89, at 25–26 (describing various private ventures of Germans and their expeditions to “establish order within the German sphere”).

209. Zollmann, *supra* note 207, at 259.

210. See, e.g., Benethelin Bernie P. Zaaruka, *Indicators of Political and Economic Institutions in Tanzania: 1884–2008*, 1 J. DEV. PERSPS. 213, 223 (2017) (describing various laws that regulated movement of black Africans, civil procedure, crime, and labor); GERSTMAYER, *supra* note 178, at 128.

211. GERSTMAYER, *supra* note 178, at 153.

212. *Id.* at 4; see ARCHIVE OF THE GERMAN COLONIAL LAWS, *supra* note 176, at 182 (assigning governors, “Landeshauptmänner,” as the judges for the native courts).

213. W. HÖPFNER, DAS SCHUTZGEBIETSGESETZ UND SEINE ERGÄNZENDEN RECHTLICHEN BESTIMMUNGEN MIT ERLÄUTERUNGEN VERSEHEN [THE PROTECTORATE LAWS AND ITS ADDITIONAL LEGAL DETERMINATIONS WITH COMMENTS] 53–55 (1907).

214. PARRY, *supra* note 179, at 147, 258; MARQUES, *supra* note 59, at 148, 152; CROWE, *supra* note 9, at 199 (describing that the 1734 Portuguese fort in Angola was “to protect Portuguese sovereign rights”).

215. PRESTAGE, *supra* note 12, at 5, 9, 44–46, 165, 251, 258; *id.* at 294–95 (stating that pre-1500, Portugal built “a wooden fort and garrisoned it to safeguard the factory and protect their ally. This was a first step towards dominion”); F.J. Berg, *The Coast from the Portuguese Invasion to the Rise of the Zanzibar Sultanate*, in ZAMANI: A SURVEY OF EAST AFRICAN HISTORY 119, 123, 126–29 (Bethwell A. Ogot & J. A. Kieran eds., 1968).

feitorias, trading posts, along the coasts of its claimed territories.²¹⁶ European countries built forts and posts in non-European lands as “an extension of sovereignty for commercial purposes” and as “a first step towards dominion.”²¹⁷

In the mid-1880s, when Portugal’s first discovery claims in Africa were at risk from other Europeans, it undertook extensive efforts to effectively occupy and govern its colonies and the interior lands where it only had first discovery or contiguity claims.²¹⁸ But in 1887, England disputed Portugal’s claims by contiguity to the lands between Angola and Mozambique because Portugal’s claims were not based on actual occupation.²¹⁹ England and France also challenged Portugal’s claim to a monopoly on African trade because they claimed their “ships traded only in places not frequented by the Portuguese.”²²⁰

France also realized the absolute necessity of occupying its African colonies. The French officer de Brazza, who signed dozens of treaties in the Congo, also built outposts, flew the French flag, and stationed troops.²²¹ Both France and Belgium made efforts to occupy the areas they claimed in the Congo.²²²

Germany, England, and other European countries were well aware both before and after the Berlin Act that to turn a first discovery claim in Africa into an internationally recognized colony, they had to actually and effectively occupy and govern it.

C. Preemption and European Title

The Doctrine provided that a European country that perfected a first discovery claim by actually occupying the lands of non-Christian nations acquired a recognized form of ownership and title. After that, other European countries were preempted from attempting to claim or buy the territory of that particular Indigenous nation. The first discovering and occupying nation held the sole right to purchase that land from the native nations.²²³

The Berlin Conference and Act of 1885 expressly adopted the international legal principle of preemption, but it added some new

216. JAMES LANG, *PORTUGUESE BRAZIL: THE KING’S PLANTATION* 23–25 (1979).

217. MORISON, *supra* note 50, at 43; *accord.* PRESTAGE, *supra* note 12, at 294–95.

218. CROWE, *supra* note 9, at 11; NOWELL, *supra* note 181, at 76, 111, 118–29.

219. 2 HERTSLET, *supra* note 8, at 705–06.

220. Livermore, *supra* note 53, at 155–56.

221. HOCHSCHILD, *supra* note 83, at 70.

222. Sanderson, *supra* note 155, at 127, 129.

223. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543–44 (1832); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 585–87 (1823).

requirements. First, a country had to be the first European nation to discover new tribes and lands along the African coastline. Second, it had to announce its intention to effectively occupy that area to all the signatories of the Act.²²⁴ Third, the Act also allowed European countries to declare protectorates over lands and peoples to establish recognized rights in those areas.²²⁵

In practice in Africa, this preemption/European title element appears to have been claimed, established, and enforced principally through treaties signed with Indigenous leaders. This process varied somewhat from how the Doctrine had primarily been applied for centuries. Consequently, what we call the race for “first discovery” and actual occupation was, in Africa, a race to sign the first treaties with native nations. The reason for the treaties is obvious because they “were basically acknowledged as *titles* against other Europeans.”²²⁶ Moreover, announcing protectorates over Indigenous nations, as allowed by the Berlin Act, usually followed treatymaking and was an additional avenue to prevent, or preempt, the interference of any other colonial power.²²⁷

England and Germany applied the methods set out in the Act to claim preemption and the recognized title to their colonies. Both countries and their surrogates signed a multitude of contracts and treaties in East Africa and across the continent that granted them the rights of preemption and European title over the lands of native nations. We only need to recount a few of these treaties and their provisions to establish the truth of that statement.

England’s surrogate, the BEA, for example, entered into an 1888 treaty with the Sultan of Zanzibar regarding modern-day Kenya, in which the Sultan granted the company the right of preemption: “No other but themselves [BEA] shall have the right of purchasing public land on the mainland, or anywhere in His Highness’ territories, Possessions, or Dependencies.”²²⁸ The successor, IBEA, also relied on these contract-treaty rights of preemption when it issued a notice in 1891 declaring that certain lands in East Africa could not be purchased at all, and that natives could not sell land to foreigners if the titles and the transactions had not been sanctioned by the IBEA.²²⁹ Once the Crown acquired the IBEA’s rights, it also signed treaties, including one in 1896 in Kenya with a native chief, that effectively granted the Queen sovereignty and preemption over the chief’s territory. The Crown took away the chief’s right to sell land or make treaties

224. Berlin Act, *supra* note 9, art. 34.

225. *Id.*

226. Fisch, *supra* note 80, at 359–60 (emphasis added).

227. TOWNSEND, *supra* note 139, at 10.

228. 1 HERTSLET, *supra* note 8, at 340, 352.

229. *Id.* at 372–73.

with foreign states or any person without the consent of the English government.²³⁰

Germany also claimed title and preemptive rights over Indigenous lands via contracts and treaties.²³¹ German authorities respected the exclusive preemption rights of other Europeans because they cautioned Carl Peters not to take his *Expeditionspolitik* into contested spheres, “*strittige Interessensphären*” (contentious spheres of influence).²³² However, Peters’ desire for more land soon put Germany in conflict with British interests. Peters’ successful expeditions signed contract and treaties with native tribes over a wide swath of land including contested areas. Thus, Germany now possessed a strong justification to claim priority, or preemption, even in areas beyond Peters’ original *Schutzbrief*.²³³ In effect, through Peters expeditions and contracts, Germany had established first discovery claims to the sole right to purchase the territories. In the end, both Germany and England were content to settle any possible conflicts by just dividing the spoils. For example, Germany, England, and Italy entered into several agreements in 1888, 1890–91, and 1894 to divide the “*Interessen-Sphären*” (contentious spheres of influence) in East Africa.²³⁴

Other European powers established recognized titles and preemption claims across Africa in similar fashions. Portugal argued for its right of preemption to exploit and buy lands under the papal bulls, but it also began using explorers and military officers in the 1880s to sign treaties that expressly transferred the preemptive right to Portugal. In 1884, for example, a Lt. Cardozo signed treaties in which tribal leaders promised not to sell any part of their territories without Portugal’s permission.²³⁵ France also tried to protect its titles and preemption rights by including specific clauses in treaties. An 1862 treaty with West African chiefs, for example, bound them to inform France of any proposal to sell land to a foreign government and to reject the sales if the French Emperor dissented.²³⁶

In East Africa and beyond, Germany, England, and other European

230. *Id.* at 387; *see also id.* at 56 (listing fifteen treaties in which West African chiefs agreed not to sell land to other governments without the consent of the British); *id.* at 106 (noting that in 1888, a native king agreed not to sell any territory or sign treaties without the “full understanding and consent of the Governor . . . on behalf of Her Majesty the Queen”).

231. *See, e.g.*, 2 HERTSLET, *supra* note 8, at 683 (noting that in December 1884 Peters signed a treaty with a female African “Sultana” in which she allegedly transferred to him and DOAG “her whole territory, with all civil and public rights, for all time and without any condition”).

232. *See* KURTZE, *supra* note 168, at 56–57.

233. *See id.* at 52–53.

234. *Id.* at 181–82; 1 HERTSLET, *supra* note 8, at 73, 410.

235. NOWELL, *supra* note 181, at 100, 102.

236. 2 HERTSLET, *supra* note 8, at 628.

colonizers claimed titles to land and their rights to preempt any other nations from buying the lands they claimed by first discovery, effective occupation, and treaties. They worked to prevent other European countries from buying lands in the areas they claimed under the Doctrine and the Berlin Act.

D. Indigenous Title

In the colonization of North America, international law and European countries assumed that Indigenous nations owned the complete title to their lands before a European first discovery.²³⁷ But under the Doctrine, after first discovery, Indigenous nations and peoples immediately and without their knowledge, consent, or payment were deemed to have lost the complete ownership of their territories.²³⁸ Similarly, the colonizers in Africa at first recognized that the complete ownership of lands and assets were held by Indigenous nations and peoples but after the arrival of Europeans, some of those rights passed automatically to Europeans and thereafter many of those rights were allegedly surrendered by native nations via treaties.

We thus perceive another slight difference in the application of the Doctrine in Africa. It does not appear that Europeans expressly claimed that they immediately and automatically limited the Indigenous titles and acquired some form of land ownership rights over native lands through just the application of first discovery. They appear to have only claimed those rights after signing treaties with native leaders or after proclaiming protectorates. We will see that Europeans did automatically limit some Indigenous rights because they claimed that native nations did not, and never had, owned the waste lands, *terra nullius*, or in Kenya that they had never owned the mineral rights in their own territories.²³⁹ Instead, Europeans claimed that ownership of waste lands and minerals had automatically passed to the colonizer.

In East Africa, England and its surrogates initially treated the Sultan as possessing land ownership and sovereign rights in Kenya.²⁴⁰ After the Berlin Conference and Act, England had to alter its indirect rule relationship with the Sultan and had to actually occupy and effectively govern its colony in East Africa. Because England and Germany could no longer rely on the Sultan's rights and powers, they disregarded and even began to dispute his

237. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43, 559 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574, 588, 591 (1823).

238. See *Johnson*, 21 U.S. at 574, 584–85.

239. See *infra* notes 296–300 and accompanying text; MUNGAM, *supra* note 136, at 322 (noting that the Kenya colony claimed “[a]ll mines and minerals being in, under, or upon any lands in the occupation of any native tribe or any members thereof . . . vest in the Commissioner . . .”).

240. See *supra* notes 114, 153–156, 228 and accompanying text.

titles and sovereignty in East Africa.²⁴¹ In fact, England ultimately took control of his trade, land titles, and sovereign powers.²⁴²

Following the same model, England and its surrogates at first attributed complete ownership to native chiefs and tribes. This is evident because the BEA, IBEA, and later the Crown, claimed to have acquired the full ownership rights of these lands from native nations via treaties. Thereafter, Indigenous property rights were severely limited, although sometimes some rights were protected by the Crown.²⁴³ Just as the United States Supreme Court held in *Johnson*, Indigenous peoples and tribes in East Africa were considered to have retained rights only to the lands that they actually occupied and actively used.²⁴⁴ In one treaty, for example, the Queen guaranteed “the native inhabitants . . . the full, free, and entire possession of so much of the said lands as it is now held and occupied by them”²⁴⁵

The surrogates, Crown, and colonists also blatantly ignored native land rights regimes. In Kenya, the Kikuyu Tribe enforced a legal system called *githaka*. The English misunderstood it, or probably purposely ignored it.²⁴⁶ This land system recognized ownership of land based on lineage, and the exact boundaries were well known to the Kikuyu.²⁴⁷ In 1912, a colonial official in Kenya conducted a study of *githaka* and found that everyone honored and recognized land boundaries. Some Kikuyu showed the official 300 land boundaries and there was not a single disagreement about them or the ownership of the lands.²⁴⁸ In addition, the Masaaï Tribe’s development, ownership, and use of pasturelands were misunderstood, and valuable and well-tended lands were considered by English officials and colonists to be empty, without owners, and available to be taken.²⁴⁹

In reality, England, the colony, and colonists did not want to recognize any more Indigenous land rights than they absolutely had to.²⁵⁰ The colonists

241. See TOWNSEND, *supra* note 139, at 100.

242. Gilbert, *supra* note 160, at 363, 366–67 (the British even took control of the Sultan’s finances and foreign affairs, and the Sultan allowed Germany and England to colonize the coasts); see also *supra* notes 155–161 and accompanying text.

243. SORRENSON, *supra* note 73, at 26, 47 (noting that Kikuyu were paid some compensation and a governor stated that land sales by natives were not valid unless recognized by Royal officers).

244. *Id.* at 32, 47, 188 (noting that the colonial governor of Kenya said that Kikuyu title amounted to nothing more than a right of occupancy).

245. 1 HERTSLET, *supra* note 8, at 50.

246. SORRENSON, *supra* note 73, at 178.

247. *Id.*

248. *Id.* at 186–87.

249. *Id.* at 190–98.

250. See *id.* at 179, 188 (showing that the Foreign Office denied that Africans possessed title and that the colonial governor was unconvinced the Kikuyu ever had effective possession “to render an obligatory on Government to compensate them for dispossession.”).

were well aware that the desirable and valuable lands were already occupied and being fully utilized by Africans. These were the lands the colonists wanted.²⁵¹ In the end, while England gave lip service to Indigenous title and land rights in East Africa, it disregarded those rights for its own political and economic benefits.²⁵² In a 1915 ordinance, for example, the Crown proclaimed that “all lands occupied by . . . the ‘native tribes’” of Kenya and “. . . all lands reserved for the use of any members of any native tribe,” were Crown lands, reducing Africans to mere tenants at the will of the Crown.²⁵³

In turn, Germany and its surrogates also assumed that native nations owned the full title to their lands before it signed contracts and treaties with tribal chiefs. However, once that occurred, Germany considered that their forms of possession, use, and occupation of land failed to meet the required European standards. The Germans used the term “*Nomadisierende Barbaren*” (nomadic barbarians) to define African cultures and peoples because their land ownership, cultures, and rights did not meet the Western standards so as to be protected.²⁵⁴ Germany decided that it deserved land rights because Africans only possessed a limited title.

England and Germany clearly relied on the principle of complete native title before native nations signed treaties and allegedly transferred many of those rights to Europeans. Thereafter, both colonizers limited Indigenous title rights in several ways, and tried to acquire all the valuable lands and real property rights in East Africa for themselves.

E. Indigenous Limited Sovereign and Commercial Rights

Indigenous governmental, sovereign, diplomatic, and commercial powers were presumed to have been automatically limited upon the arrival of Europeans. In essence, this meant that Indigenous nations were only supposed to deal politically and commercially with the European country that first discovered them.²⁵⁵ Again, it is ironic that European countries at first assumed that African chiefs and nations possessed full sovereign and

251. *Id.* at 176, 181, 236.

252. *Id.* at 76 (quoting 1905 English governor of Kenya: “this has never prevented us from taking whatever land we want”); MUNGEAM, *supra* note 136, at 314–15, 318–22.

253. SORRENSON, *supra* note 73, at 189; HUGHES, *supra* note 148, at 26; TOWNSEND, *supra* note 139, at 198.

254. Matthias Goldmann, “*Ich bin Ihr Freund und Kapitän*,” *Die Deutsch-Namibische Entschädigungsfrage im Spiegel Intertemporaler und Interkultureller Völkerrechtskonzepte* [“*I Am Your Friend and Captain*.” *German-Namibian Reparation Claims and the Intertemporal and Intercultural Dimensions of International Law*] 10 (Max Planck Inst. for Compar. Pub. L. & Int’l L. (MPIL) Research Paper No. 2020-29, 2020) (Ger.).

255. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573–74 (1823) (demonstrating in Sections C and D other ways in which native sovereign and commercial rights were limited but we will not repeat that evidence here).

commercial rights before they signed treaties that allegedly transferred most of those rights to Europeans. Most European nations in Africa, however, remained content after treaty-making to rely on native sovereignty and governance structures and leaders to help administer the colonies through indirect rule.²⁵⁶

Germany and England followed this same template and expressly recognized the sovereignty and existence of African governments by entering treaties with them. As already mentioned, England and its surrogates were content to utilize native leaders, governments, and their bureaucracies to some extent to govern the colonies.²⁵⁷ These actions were recognition of the sovereignty of native nations. Moreover, when Germany and England declared protectorates in Tanzania, Uganda, and Kenya, they were also expressly recognizing native sovereignty. This is crystal clear under international law because protectorates were created to protect something, and what they were supposedly protecting were the existing governments, cultures, and rights of African nations.²⁵⁸

England and Germany also recognized Indigenous sovereign and commercial rights in other ways. These countries and their surrogates at first relied heavily on the sovereignty of the Sultan over the East African coastline.²⁵⁹ In 1887 and 1888, the administration of the Sultan's territories on the mainland was transferred to the BEA and the IBEA.²⁶⁰ In fact, the IBEA was authorized to exercise all the Sultan's authority on the mainland, to engage in war under his flag, to enact laws, establish courts and appoint judges, to engage in trade, to control the fisheries, roads, railroads, canals, and telegraphs, and to levy tolls.²⁶¹ Ultimately, England and Germany decided they no longer needed the Sultan and they began to ignore his and native nations' sovereignty entirely. In 1886 and 1890, respectively,

256. Prosser Gifford, *Indirect Rule: Touchstone or Tombstone for Colonial Policy*, in *BRITAIN AND GERMANY IN AFRICA: IMPERIAL RIVALRY AND COLONIAL RULE* 351, 374 (Prosser Gifford & WM. Roger Louis eds., 1967).

257. *Id.* at 351, 374; Stilwell, *supra* note 137, at 14; MUNGEAM, *supra* note 136, at 46, 111–12 (discussing that in 1910, Sir Percy stated that a basic principle was that native laws and customs be used); Fetter, *supra* note ***, at 12 (explaining that Britain co-opted African chiefs into subordinate positions in the colonial hierarchy); Femi J. Kolapo, *The Political Impact of European Rule*, in 3 *COLONIAL AFRICA*, *supra* note 135, at 87, 98 (discussing that in Kenya the British named and removed chiefs who helped rule and collect taxes).

258. Fisch, *supra* note 80, at 358; TOWNSEND, *supra* note 139, at 10.

259. Robert I. Rotberg, *Resistance and Rebellion in British Nyasaland and German East Africa, 1888-1915: A Tentative Comparison*, in *BRITAIN AND GERMANY IN AFRICA*, *supra* note 256, at 667, 668; MUNGEAM, *supra* note 136, at 6; 1 HERTSLET, *supra* note 8, at 301, 340 (noting that in 1888, the administration of the Sultan's lands on the mainland was transferred to the German company).

260. 1 HERTSLET, *supra* note 8, at 299–300, 339.

261. *Id.* at 350, 353–54; MUNGEAM, *supra* note 136, at 28–29.

Germany assigned Zanzibar to England and the two countries partitioned East Africa among themselves.²⁶²

The Crown and its surrogates had long worked to limit the extent of African nations' sovereignty and the authority of chiefs. In 1885, one native king allegedly granted the BEA the sole right to trade and possess workplaces in his territory and agreed that he would have no communications with foreigners except the BEA.²⁶³ In addition, in 1889, the IBEA signed a treaty with one chief who "placed himself and all his territories, countries, peoples, and subjects under the protection, rule, and government" of the IBEA and "ceded to the said Company all his sovereign rights and rights of government . . . in consideration of the said Company granting the protection of the said Company to him . . ."²⁶⁴ This chief agreed to raise "the flag of the said Company."²⁶⁵ Other tribes in and around modern-day Kenya also agreed not to enter commercial arrangements with non-natives unless the Queen approved.²⁶⁶ In 1892–1893, in Uganda, the IBEA signed treaties with many chieftains, which also brought them under the company's rule, and one of the most powerful chiefs promised not to make treaties with any European or to engage in warfare without the consent of the Queen, and to place the foreign relations of Uganda in her hands.²⁶⁷

Germany also worked to limit native sovereign and commercial rights in East Africa. Carl Peters obtained sovereign and commercial powers over native nations for his company, and subsequently for Germany, by transferring tribal powers to himself and DOAG by contracts.²⁶⁸ For example, Peters' agreement with a Nguru chief transferred the chief's sovereign powers to DOAG, stating "the rights transferred to Dr. Carl Peters mean/include sovereign rights as recognized/defined by German law."²⁶⁹ Similarly, in December 1884, Peters acquired for himself and DOAG a Usagara chief's sovereignty and the unlimited use of Usagara lands.²⁷⁰

262. MUNGEAM, *supra* note 136, at 6–8; TOWNSEND, *supra* note 139, at 97, 100; M.S.M. Kiwanuka, *Uganda Under the British*, in ZAMANI, *supra* note 215, at 314.

263. 2 HERTSLET, *supra* note 8, at 122.

264. MUNGEAM, *supra* note 136, at 45; 1 HERTSLET, *supra* note 8, at 378

265. *Id.*; see also TOWNSEND, *supra* note 139, at 104.

266. 2 HERTSLET, *supra* note 8, at 387.

267. *Id.* at 392–94; TOWNSEND, *supra* note 139, at 104.

268. See, e.g., LESSER, *supra* note 90, at 213.

269. *Id.*; see also KURTZE, *supra* note 168, at 178–79 (documenting the Nguru tribal chief's transfer of all "Hoheitsrechte" [sovereign right]); ARCHIVE OF THE GERMAN COLONIAL LAWS, *supra* note 176, at 350–56, 364 (reprinting various Carl Peters contracts).

270. See Carl Peters, *Carl Peters' Vertrag mit dem Sultan von Usagara vom 4. Dezember 1884* [Carl Peters' Contract 1884: Carl Peters' contract with the Sultan of Usagara dated December 4, 1884], DEUTSCHE-SCHUTZGEBIETE.DE, [https:// deutsche- schutzgebiete.de/ wordpress/ projekte/ kolonien/ deutsch-ostafrika/carl-peters-vertrag-1884](https://deutsche-schutzgebiete.de/wordpress/projekte/kolonien/deutsch-ostafrika/carl-peters-vertrag-1884) (last visited Nov. 12, 2021) ("Sultan Mfuinin Sagara transfers

Germany sanctioned Peters' conduct and his contracts when it issued its *Schutzbrief* and officially assumed Peters' governance efforts.²⁷¹ Of course, native sovereignty and governance continued to receive little respect. Among the first German regulations enacted were the Native Jurisdiction Order of 1896 and the Governor's Council Ordinance of 1903 that limited the political and civil rights of Indigenous peoples.²⁷² These ordinances were soon followed by many more that further infringed on African peoples' rights and freedom of movement.²⁷³

Germany and England also limited the commercial rights of individuals. They imposed hut and poll taxes on Africans to try to cover the costs of their colonies, but more insidiously, to coerce Africans to work for wages for the colonies and colonists.²⁷⁴ The most extreme example of the limitations Europeans placed on the commercial and human rights of African families and individuals was the imposition of slavery.²⁷⁵ In addition to being an outrageous abuse of human rights, it was also the pinnacle of hypocrisy and cruel irony because one of the primary reasons Europeans used to justify colonization was that they would stop the slave trade and bring "civilization" to Africa.²⁷⁶ In contrast, they actively utilized slavery in many instances and tried to sanitize it by calling it compulsory or forced labor.²⁷⁷ Anglican and Scottish Christian missions suggested using the term "forced labour" instead of slavery.²⁷⁸ In a 1919 memo, British administrators in Kenya also discussed the need to avoid ugly terms like "slavery" or "forced labour" and suggested that the term "compulsory labour" was less repugnant to British ears but that slavery "should be *definitely legalised*."²⁷⁹ Various laws in East Africa in 1909, 1918, and 1920 forced Africans to work for free on government

all rights of complete and unlimited private law use over all of Usagara to Dr. Carl Peters. . . . additionally, the Sultan transfers all rights [which mean/include sovereign rights/powers/sovereignty] to Dr. Carl Peters."); see also KURTZE, *supra* note 168, at 178–80.

271. 2 HERTSLET, *supra* note 8, at 681 (Germany granted protection to the German Colonization Society and its land acquisitions on February 27, 1885, the day after the Berlin Act was signed.).

272. Zaaruka, *supra* note 210, at 222.

273. *Id.* at 223.

274. See, e.g., Courcel, *supra* note 140, at 260; MUNGEAM, *supra* note 136, at 407–08, 416–17; Fetter, *supra* note ***, at 10; see also Bethwell A. Ogot, *Kenya Under the British, 1895 to 1963*, in ZAMANI, *supra* note 215, at 255, 258.

275. Alan K. Smith, *Angola and Mozambique, 1870-1905*, in 6 THE CAMBRIDGE HISTORY, *supra* note 141, at 518, 520 (stating that slaves were bought from the interior and many were sold to the mines).

276. Berlin Act, *supra* note 9, arts. 6, 9; 2 HERTSLET, *supra* note 8, at 490 (noting that the 1890 Brussels Act stated that the means to fight the slave trade was the progressive organization of Africa).

277. See Courcel, *supra* note 140, at 260–61 (giving examples of scandalous abuses); Smith, *supra* note 141, at 518, 520.

278. TOWNSEND, *supra* note 139, at 199; see Fetter, *supra* note ***, at 10.

279. MUNGEAM, *supra* note 136, at 395, 399 (emphasis added).

projects up to sixty days a year.²⁸⁰ In 1921, England's Secretary of State for the Colonies, Winston Churchill, stated that he did not want to hear the arguments against compulsory labor and forcing Africans to work for the colonial governments in Kenya and Uganda.²⁸¹ The most horrific abuses and forms of slavery probably occurred under King Leopold in the Belgian Congo.²⁸² Unsurprisingly, native populations fell dramatically in the areas where Africans were subjected to slavery.²⁸³

The evidence is clear that Germany and England worked to limit the sovereign and commercial rights of the nations and peoples in East Africa and applied this element of Discovery. The indirect rule that most Europeans imposed in Africa, and the use of native leaders and governmental structures to operate colonies might be seen as a positive recognition of Indigenous sovereignty; but assisting European nations to operate and control colonies could not possibly have served the long-term interests of African sovereignty, commerce, and human rights. In addition, working with European nations to impose colonialism surely disrupted and warped native governments and native sovereignty.

F. Contiguity

As part of the Doctrine, Euro-American nations made claims to enormous areas of land contiguous to the locations where they actually planted flags and built forts and settlements. The papal bulls, for example, were very expansive because they granted Spain and Portugal rights to all the non-Christian world.²⁸⁴ Usually, however, under the element of contiguity, the discovery of a river mouth gave a Euro-American country a legal claim to the entire drainage system of the river.²⁸⁵ In fact, the principle of contiguity was discussed at the 1885 Berlin Conference and defined in the Berlin Act.²⁸⁶ But the Act only established an express rule for claiming the

280. HUGHES, *supra* note 148, at 159–60.

281. MUNGEAM, *supra* note 136, at 405–06.

282. See generally HOCHSCHILD, *supra* note 83, at 118–23, 130–31, 162–66, 189–97, 214–15, 226–29, 233 (explaining that Leopold and his private company used horrific means to force adults and children to work); FETTER, *supra* note ***, at 85–86 (referencing a 1890 decree of Leopold that created a cheap labor force, while allegedly assuming guardianship of children and orphans, because they “shall be liable to work . . . up to the expiration of their 25th year”).

283. Stilwell, *supra* note 137, at 12; HOCHSCHILD, *supra* note 83, at 233 (explaining that contemporaneous official and academic reports for the Belgian Congo estimated that the population dropped by half, by 10 million people in 1880–1920).

284. EUROPEAN TREATIES, *supra* note 47, at 13, 23.

285. MILLER, NATIVE AMERICA, *supra* note 2, at 4, 19, 56, 69–70; see also Courcel, *supra* note 140, at 251 (demonstrating that the Conference defined the Congo as the lands drained by the Congo river).

286. Berlin Act, *supra* note 9, arts. 1(1)–(3), 28, 30(v)–32; see also 1 HERTSLET, *supra* note 8, at viii.

African coastlines and it required actual and effective occupancy, as discussed above. Obviously, England and Germany were also interested in dividing up the interior lands in East Africa even though they did not occupy and maybe had never even seen them. The Berlin Act called these interior lands the “hinterlands.” England, Germany, and other European countries made claims to the hinterlands and to enormous areas of land in Africa that they had neither explored, discovered, or even allegedly acquired rights to through treaties.²⁸⁷ All of these countries were eager to divide up Africa using any and all available means and justifications.

In East Africa and beyond, Germany and England claimed the hinterlands and areas well beyond their actual explorations, occupations, and governance.²⁸⁸ They defined these lands by rivers, mountains, watersheds, and sometimes by latitude and longitude.²⁸⁹ Although Carl Peters had originally contracted with native chiefs for expressly defined territories, and the *Schutzbrief* he and his company were granted by Germany covered only those territories governed by his contracts, Peters did not feel bound by those explicitly defined territories. He continued his explorations into the “*Hinterland des Schutzbriefgebietes*” (land behind the protectorate territories).²⁹⁰ Interestingly, the Berlin Conference had only addressed occupation of the African coastlines, but by viewing the interior lands as “*Hinterland des Schutzbriefgebietes*,” Peters justified including these additional areas within his claims.²⁹¹ When German borders and claims conflicted with British claims, the countries avoided conflicts by creating the contiguity inspired idea of “spheres of interests,” and artificially created

287. See, e.g., 1 HERTSLET, *supra* note 8, at 29, 33 (explaining that in 1887 England and Germany agreed “that possession of a coast implied ownership of hinterland to an almost unlimited distance”); Sanderson, *supra* note 155, at 143 (demonstrating that Europeans divided up the interior in East Africa using contiguity); Marcia Wright, *East Africa 1870–1905*, in 6 THE CAMBRIDGE HISTORY, *supra* note 141, at 539 (demonstrating that England and Germany used contiguity in Tanzania, Kenya, and Uganda); 1 HERTSLET, *supra* note 8, at 86, 304 (showing that in 1893 England and Germany used a river as a boundary even though the land “has not yet been actually settled”).

288. See Uzoigwe, *supra* note 139, at 29, 33; 3 HERTSLET, *supra* note 8, at 899, 902, 948–49; Wm. Roger Louis, *Great Britain and German Expansion in Africa, 1884–1919*, in BRITAIN AND GERMANY IN AFRICA, *supra* note 256, at 3, 35 (explaining that Germany drew a line halfway between the Belgian Congo and Portuguese Angola); 2 HERTSLET, *supra* note 8, at 691 (explaining that the German protectorate claimed islands “within gun-shot distance of the mainland . . . according to the Law of Nations”).

289. Wright, *supra* note 287, at 119, 567, 571; MUNGEAM, *supra* note 136, at 7–8; Mommsen, *Bismarck, the Concert of Europe*, in BISMARCK, EUROPE, AND AFRICA, *supra* note 80, at 158; 1 HERTSLET, *supra* note 8, at 20, 27–29, 32–33, 56–57, 66–67, 78, 122, 384, 397 (explaining the order in Council 1901, England and Germany claimed the lands between their colonial borders; a native king granted the BEA rights to the river Benue and up to a ten hour journey from each bank).

290. KURTZE, *supra* note 168, at 52–57.

291. *Id.*

zones between their actual settlements that they then just divided.²⁹²

Other European powers also made enormous claims over lands and nations in Africa that were contiguous to regions that they had actually occupied. Portugal, for example, published a map in 1887 to stake claims to huge amounts of territory in the interior between its established colonies of Angola and Mozambique and north to the border of the German colony of Tanzania.²⁹³ Germany and Portugal ultimately agreed to just divide those hinterlands between their colonies.²⁹⁴ France, Italy, and Belgium also made claims to lands contiguous to their actual possessions and used natural features and latitude and longitude to define the areas.²⁹⁵

It is unnecessary to lay out more examples of the use of contiguity by Europeans in Africa. Unquestionably, Germany, England, and other European powers applied the Discovery element of contiguity to claim and partition Africa.

G. *Terra Nullius*

Under international law and the Doctrine of Discovery, European nations claimed lands that were truly devoid of any people.²⁹⁶ But Europeans also applied a second and more pernicious definition to this element. They considered lands that were populated and governed to be “empty” and available to be claimed if the extant legal system or forms of government were ones that European nations did not recognize as valid.²⁹⁷ European countries broadly applied *terra nullius* across Africa. The hypocrisy and fraud of European nations claiming legal authority to determine whether territories were *terra nullius* is well demonstrated by King Leopold in the Belgium Congo when he stated that any lands that had access to ivory or

292. AUSTEN, *supra* note 89, at 21; 1 Hohlfeld, *supra* note 90, at 256; MUNGEAM, *supra* note 136, at 1, 6.

293. Luís de Albuquerque, *in* THE ROSE-COLORED MAP, *supra* note 181, at xiii; 2 HERTSLET, *supra* note 8, at 703–06.

294. 2 HERTSLET, *supra* note 8, at 703.

295. *Id.* at 410, 564, 642; Fetter, *supra* note ***, at 88.

296. See *supra* notes 14, 66 and accompanying text. This principle also derives from Roman law, and Islamic law because “*mawat*” or empty and unclaimed lands, can be turned into privately owned land by fencing, occupying, or farming. SIRAJ SAIT & HILARY LIM, LAND, LAW AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD 12, 22, 61, 70, 170 (2006).

297. Fisch, *supra* note 80, at 356 (stating that subjects of international law are only those states that exercise all rights of sovereignty and function like modern European states. Africa had political organizations but not sufficient to speak of as real states; their territory was ownerless because it was “inhabited territory in which no rights of sovereignty were exercised.”); Robinson, *supra* note 135, at 3 (showing that Bismarck understood this second definition; he told the Conference that Europeans should have rights “in all unoccupied parts of the world not yet legally occupied by a recognized Power.”); *In re Southern Rhodesia* [1919] A.C. 212, 215 (PC) (appeal taken from S. Rhodesia) (explaining that tribal laws and governments in Rhodesia were unrecognized by Europeans and the land *terra nullius*).

rubber were automatically vacant and *terra nullius* and thus belonged to him.²⁹⁸ In addition, one international law expert stated that if territory in Africa “was not already under European dominion, [it] was considered a *terra nullius*.”²⁹⁹ European nations claimed many lands that African nations and peoples owned, used, governed, and occupied. Since *terra nullius* was already a part of the Doctrine, it is no surprise that it was discussed at the Berlin Conference and is included in the Berlin Act that codified international law for Africa.³⁰⁰

England, its surrogates, and settlers aggressively applied the principle of *terra nullius* in Kenya and Uganda.³⁰¹ Notwithstanding the presence of multiple nations, communal and individual property rights, and large populations, the English assumed from the earliest days of colonization that the 10,000 square miles of arable land in the highlands of Kenya were “nearly empty of people and accordingly nearly useless to the world.”³⁰² England and its settlers were eager to appropriate what they claimed were “waste and unoccupied lands.”³⁰³ But England and Germany willfully deluded themselves into thinking that Africa was nearly empty and that productive lands were under-utilized and unowned.³⁰⁴

If a region was truly empty and vacant of any people, then it would likely be available for any country to claim. Consequently, England made those kinds of claims in modern-day Kenya and Uganda.³⁰⁵ But as mentioned above, English settlers did not want the “waste” or unoccupied lands that Africans were not farming or not using. Instead, European settlers wanted the best lands, the very lands that Africans were actually using because they were the productive farming and grazing lands.³⁰⁶ Therefore, the challenge

298. JEAN STENGERS, *King Leopold's Congo, 1886-1908*, in 6 THE CAMBRIDGE HISTORY, *supra* note 141, at 339.

299. Fisch, *supra* note 80, at 347, 356.

300. Berlin Act, *supra* note 9, arts. 8, 20, 34–35.

301. I HERTSLET, *supra* note 8, at 350, 353 (demonstrating that in 1888, the Sultan granted IBEA the right “to regulate, and dispose of the occupation of *all lands not yet occupied*”) (emphasis added); SORRENSON, *supra* note 73, at 220 (noting that in 1895, the Sultan vested the waste and public lands on the coast of Kenya in the Crown).

302. Fetter, *supra* note ***, at 122 (quoting NORMAN LEYS, *KENYA 177–78* (1925)).

303. HUGHES, *supra* note 148, at 24, 26; CHARLES ELIOT, *THE EAST AFRICA PROTECTORATE 1–2* (1905) (explaining that East Africa was white man’s country “[w]ith a scanty native population”).

304. Christian Jennings, *African Environments in the Colonial Era*, in 3 COLONIAL AFRICA, *supra* note 135, at 123, 129 (demonstrating that Europeans thought Africa was nearly empty and made policies based on that mistake); Fisch, *supra* note 80, at 356, 358 (showing how Africa was densely populated and organized into various political systems; very little of it was actually *terra nullius*).

305. MUNGEAM, *supra* note 136, at 314–15, 319–20; I HERTSLET, *supra* note 8, at 11 (showing that the 1827 treaty with the King of Combo allowed England to possess lands that “are not actually possessed by any other person at the time”).

306. *Supra* notes 244–246 and accompanying text.

for England was how to transfer desirable, profitable lands from natives to English settlers.

That challenge was addressed by the second meaning of the element of *terra nullius*. Using that definition, England, the British East Africa colony, and settlers ignored the governance, land rights, and legal systems of the Indigenous peoples and governments. Since the English did not “recognize” those legal regimes, they deemed the lands to be ownerless, waste, vacant, and available to be leased and sold to European settlers.³⁰⁷ For example, the Kikuyu Tribe was compensated for some of its lands but their centuries old property rights regime, mentioned above, was ignored in the colonial rush to declare lands waste and *terra nullius*.³⁰⁸ Another way that England ignored native property rights regimes was to define them as temporary rights. Consequently, if an African moved or stopped farming land for a while their ownership rights were lost according to the colony. One commissioner of British East Africa made this policy evident when he stated in 1895 that Africans only owned the lands that they occupied or cultivated and the moment they moved the land became “waste.”³⁰⁹

The colonial effort to acquire land ownership in East Africa became the topic of a protracted legal debate among the Law Officers of the Crown and various departments in charge of the colonies. The debate arose because the surrogates of the Crown had signed numerous treaties with chiefs in East Africa and later the Crown had declared a protectorate over East Africa. Under international law, signing a treaty and proclaiming a protectorate both assumed that there were existing nations and pre-existing legal and property rights systems.³¹⁰ Thus, the Crown was faced with a conundrum of how it could claim that East Africa was *terra nullius* and legally empty of people, nations, laws, and legal systems. The resulting debate demonstrated the malleability of England’s theories and its greed to acquire as much land and assets in East Africa as possible. Notwithstanding the legal nuances, the Crown came to claim most of the lands in East Africa as *terra nullius* and began leasing and selling it to settlers.³¹¹ By 1915, almost all native lands in

307. See, e.g., *In re Southern Rhodesia* [1919] A.C. 212 (PC) 215 (appeal taken from S. Rhodesia); see also *supra* notes 14, 66 and accompanying text.

308. See *supra* notes 240–243 and accompanying text; SORRENSON, *supra* note 73, at 25–26, 220 (explaining that most of British East Africa was treated as ownerless and that the government confiscated and sold waste lands on the coast of Kenya).

309. HUGHES, *supra* note 148, at 26; see also SORRENSON, *supra* note 73, at 47–48.

310. MUNGEAM, *supra* note 136, at 317–18; NORMAN LEYS, *KENYA* 79–80 (2nd ed. 1913) (showing that the Crown’s Law Officers, Secretary of State, Foreign Office, and others argued about taking Indigenous lands because under international law, England had declared a protectorate over Kenya and Uganda and that presupposed that there were existing governments and property rights).

311. MUNGEAM, *supra* note 136, at 314–22; SORRENSON, *supra* note 73, at 52–53 (noting that 1900

Kenya were defined as Crown lands and this made Africans into mere tenants at the will of the Crown.³¹² The commissioners of East Africa even “lease[d] areas of land containing native villages or settlements without specifically excluding [the] village or settlement[], but land in the actual occupation of natives . . . shall, so long, as it is actually occupied by them, be deemed to be excluded from the lease.”³¹³

Similarly, Germany and Carl Peters used *terra nullius* to claim vacant lands in East Africa. First, Peters viewed East Africa as “*herrenlos*” (empty, without ownership).³¹⁴ Peters’ *Flaggenhissen* (flag raising) demonstrates the theory of *terra nullius* because the term embodies the idea of conquest over unoccupied lands.³¹⁵ With the new German presence and Peters’ *Stationpolitik*, Western property systems were established in East Africa and triumphed over native rights. In addition, Bismarck clearly demonstrated that the German government understood and relied on the second definition of *terra nullius* to claim “all unoccupied parts of the world *not yet legally occupied by a recognized Power*.”³¹⁶ Thus, the German government and law assumed that the cultures, governments, and legal regimes of Indigenous peoples did not amount to the legal occupation of their territory, and thus their lands were “empty” and available for German claims.³¹⁷ Furthermore, Germany’s colonial laws equally embraced the philosophy of empty, unoccupied lands in East Africa.³¹⁸ For example, in the 1884 Crown Land Ordinance, Germany explicitly codified what Peters’ actions had only implicitly demonstrated: German East African lands were presumed “unowned” unless proven otherwise.³¹⁹

Interestingly, Peters conflated, or perhaps was confused about, the idea of truly empty lands and the property rights of Indigenous peoples so that he could contractually acquire those rights. If the lands were empty and unoccupied, who was Peters signing contracts/treaties with and why? Further, if the people living there lacked full title to the lands because their laws and legal systems were *terra nullius*,³²⁰ then how could these chiefs

regulations stated “all waste and unappropriated lands belong to her Majesty”).

312. SORRENSEN, *supra* note 73.

313. EAST AFRICA PROTECTORATE, 4 ORDINANCES AND REGULATIONS 57 (1903).

314. LESSER, *supra* note 90, at 1.

315. *See id.* at 213.

316. Robinson, *supra* note 135, at 3 (emphasis added).

317. *See* GOLDMANN, *supra* note 195, at 7.

318. *See id.*

319. *See* Zaaruka, *supra* note 210, at 221; GERSTMAYER, *supra* note 178, at 147–48.

320. *See* Micheal Pesek, *Eine Gründungszene des Deutschen Kolonialismus—Carl Peters’ Expedition nach Usagara [A Founding Scene of German Colonialism—Carl Peters’ Expedition to Usagara]*, in DIE (KOLONIALE) BEGEGNUNG [THE (COLONIAL) ENCOUNTER] 255 (Marianne Bechhaus-

transfer full ownership rights to Peters by contract? Peters was not bothered by this legal conundrum; instead, he claimed to have successfully transferred full rights to himself and DOAG by first artificially recognizing those rights in the tribal chiefs in the very same contracts that then transferred them to himself and DOAG.³²¹ In turn, just as England did, Germany ignored this troublesome legal issue and acknowledged Peters' contracts through its *Schutzbrief* and claimed all rights allegedly acquired thereunder.³²²

Other European nations also used *terra nullius* explicitly and implicitly to claim lands, sovereignty, and economic rights in Africa. Portugal had claimed empty and ungoverned land for centuries under the papal bulls. Under medieval law, in fact, popes were assumed to have the authority to dispose of unoccupied lands.³²³ Consequently, in 1434, a Portuguese explorer was granted a bull authorizing him to settle any of the Canary Islands, off the coast of modern-day Morocco, if they were unoccupied.³²⁴ On other occasions, Portugal made claims to own islands based on the argument that they were empty and had no owner.³²⁵ Moreover, Belgium's King Leopold claimed "a right of absolute and exclusive ownership over virtually the whole" of the Congo due to the alleged sparseness of population and because "the greater portion of the land in the Congo is not under cultivation"³²⁶

The evidence highlighted above demonstrates that England and Germany used both definitions of *terra nullius* in their land confiscations in East Africa, and that European nations used this element all over Africa to "clothe the[ir] annexations with legitimacy."³²⁷

H. Christianity

One of the primary justifications for the Doctrine of Discovery was that European Christian nations had the right and duty to convert non-Christians all over the world. The papal bulls ordered Portugal and Spain to spread Christianity through explorations and conquests, and thereafter these countries used religion to justify their activities in Africa, Asia, and the Americas.³²⁸ Similarly, the English charters that authorized colonies in North

Gerst et al. ed., 1884).

321. *Id.*

322. Hohlfeld, *supra* note 90, at 186–87.

323. PRESTAGE, *supra* note 12, at 8.

324. PARRY, *supra* note 179, at 147.

325. BOXER, *supra* note 38, at 21; LIVERMORE, *supra* note 179, at 112; PRESTAGE, *supra* note 12, at 43–44.

326. Fetter, *supra* note ***, at 88.

327. Fisch, *supra* note 80, at 348, 354.

328. Miller, Lesage & Escarcena, *supra* note 4, at 871–73; BOXER, *supra* note 38, at 21–23;

America set out England's duty to spread Christianity.³²⁹ In addition to their duties to convert, Europeans also used their religions as further proof that they were superior to non-Christian peoples and religions and deserved to colonize them.³³⁰ Well into the twentieth century, European nations continued to use religion to claim the lands and rights of non-Christian nations and peoples in Africa. In fact, by 1875 European priests, ministers, and lay-workers were established in almost every part of Africa and the missions were active centers of political and cultural influence.³³¹

In 1823, the United States Supreme Court expressly recognized the religion element of Discovery and, apparently without irony, stated that Discovery claims were partially justified by religion: "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity."³³² This same twisted logic was applied by Christian religious theorists in Africa. According to some, the non-white races of Africa, Asia, and the Americas were simply holding their lands in trust for white people in accordance with a divine plan.³³³ Then, when the "higher race" was ready to take possession of its inheritance, non-whites would simply fade away because the "irreclaimable savages" were destined "to disappear."³³⁴ This form of religious and Social Darwinism foretold the destruction of Indigenous peoples and came to be increasingly explained by science, and eugenics, rather than solely by scripture.³³⁵

As already mentioned, Christian missionaries were among the leading

EUROPEAN TREATIES, *supra* note 47, at 13; Livermore, *supra* note 53, at 84; J.H. Plumb, *Introduction to BOXER, THE PORTUGUESE SEABORNE EMPIRE*, *supra* note 38, at xxi, xxiii, xxvi (explaining that Portuguese "exploration from the very first was encased in religious zeal" and conducted in the service of God; killing and enslaving heathens was righteous and just); EXPANSION OF EUROPE, *supra* note 31, at 58–59.

329. MILLER, NATIVE AMERICA, *supra* note 2, at 19 (quoting James I, 1606 Charter for Virginia and 1620 Charter for New England).

330. PAGDEN, *supra* note 31, at 8; WILLIAMS, *supra* note 2, at 325–28; TOYIN FALOLA, *Introduction to 3 COLONIAL AFRICA*, *supra* note 135, at xviii (noting that European imperialism in Africa had strong elements of racism and assumed Africans were inferior and Europeans superior).

331. Courcel, *supra* note 140, at 247, 258; ROBIN HALLETT, *Changing European Attitudes to Africa*, in 5 THE CAMBRIDGE HISTORY, *supra* note 76, at 458, 464–66.

332. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572–73 (1823).

333. OLUSOGA & ERICHSEN, *supra* note 85, at 71.

334. *Id.* at 72 (stating that General George Washington foretold the same fate for American Indians in advice he gave the U.S. Congress in 1783); MILLER, NATIVE AMERICA, *supra* note 2, at 28, 39, 78, 168.

335. OLUSOGA & ERICHSEN, *supra* note 85, at 72; Robert J. Miller, *Nazi Germany's Race Laws, the United States, and American Indians*, 94 ST. JOHNS L. REV. 751, 778–83 (discussing the development and principles of the eugenics movement which began in the 1890s); Stilwell, *supra* note 137, at 5 (stating that the scramble for Africa was justified by scientific racism); HALLETT, *supra* note 331, at 474–81 (noting that Europeans used racism, the Bible, measuring skulls, and Social Darwinism).

advocates and forerunners of European colonization in Africa.³³⁶ The flag often followed the gospel in Africa.³³⁷ In fact, English and German missionary societies were active in East Africa before organized colonization efforts commenced. The European pacification and occupation of African lands “involved missionaries at almost every stage.”³³⁸ Thus, it is no surprise that the Berlin Act of 1885 granted protection to Christian missionaries in Africa.³³⁹

In East Africa and across the continent, England was well aware of the colonizing benefits derived from the “promulgation of British Christian principles.”³⁴⁰ Protestant missionaries furthered Britain’s colonial interests and “much of the opening of Africa . . . was by missionaries . . .”³⁴¹ One historian even refers to these facts as the “politics of religion.”³⁴² In what is now Uganda, both England and Germany benefitted from missionary activities in 1884–85 because they “promoted the vision of a Christianised state.”³⁴³

Germany also used religious missions as part of its colonization efforts because the advocates of expansion saw Christianity as another means to impress the German image on Indigenous peoples and to solidify Germany’s governance.³⁴⁴ Religious groups, such as the Benediktiner, attempted to control Indigenous tribes.³⁴⁵ And by 1878, the *Missiongesellschaft der Weissen Väter* (Mission Society of the White Fathers) had established six stations throughout East Africa.³⁴⁶ These missionaries bound their parishioners by contract and imposed church rules through church courts.³⁴⁷ Missionaries also began offering education in schools financed by the

336. See, e.g., *supra* notes 139–142, 146–147 and accompanying text.

337. Sanderson, *supra* note 155, at 96, 115; PAKENHAM, *supra* note 7, at 413–33.

338. Groves, *supra* note 150, at 472.

339. Berlin Act, *supra* note 9, art. 6.

340. I HERTSLET, *supra* note 8, at 11; see *supra* notes 139–142, 146–147 and accompanying text.

341. KENNETH SCOTT LATOURETTE, *The Spread of Christianity: British and German Missions in Africa*, in BRITAIN AND GERMANY IN AFRICA, *supra* note 256, at 393, 406, 415.

342. Smith, *supra* note 141, at 516 (noting that Portugal used Catholic missionaries to restrain Protestant missions because they were complicit with other colonial powers and a “denationalising” influence against Portugal).

343. Wright, *supra* note 287, at 539, 566.

344. Groves, *supra* note 150, at 472; John Lonsdale, *The European Scramble and Conquest in African History*, in 6 THE CAMBRIDGE HISTORY, *supra* note 141, at 684–85 (noting that missionaries in Uganda in 1877 were very influential and even intensified military efforts).

345. Derek R. Peterson, *Morality Plays: Marriage, Church Courts, and Colonial Agency in Central Tanganyika, ca. 1876–1928*, 111 AM. HIST. REV. 938, 983 (2006); see KURTZE, *supra* note 168, at 101.

346. GEREIS, *supra* note 176, at 44.

347. Peterson, *supra* note 345, at 985, 988.

German administration.³⁴⁸ As more natives attended schools, the population surrounding the schools grew and the towns that developed made up new missionary stations.³⁴⁹ Life in missionary stations was governed by mission rules, and Indigenous peoples were taught and forced to follow Western and Christian traditions.³⁵⁰

Other European countries also heavily relied on religion in their colonization efforts in Africa. Starting in the mid-1400s, Portugal claimed rights based on the alleged superiority of Christianity and the papal mandate to convert heathens. Priests accompanied most of the early Portuguese explorers in Africa and helped claim and occupy newly discovered areas.³⁵¹ Moreover, France and Belgium also used Christianity to justify their colonial claims.³⁵² In fact, “French missionaries had always been France’s best supporters in its overseas territories.”³⁵³

In addition, the United States expressly argued that it should participate in the Berlin Conference because it was interested in converting and civilizing Africans.³⁵⁴ The U.S. representative stated that peace in the Congo was of interest to the United States because it would reserve Africa for American citizens who wanted to exercise their rights to promote civilization and Christianity there.³⁵⁵ One U.S. Congressman argued that the United States needed to participate in the Conference because “American liberality, enterprise, and fortitude have largely contributed to what has been done toward opening the ‘dark continent’ to civilization, Christianity, and freedom of trade.”³⁵⁶

In sum, Christianity was undoubtedly used by European nations as an element of international law to justify their colonial empires in Africa.

I. Civilization

European nations always justified colonialism by claiming they were bringing civilization to “savage” Indigenous peoples. The Berlin Conference and the Act of 1885 expressly adopted this element of the Doctrine into international law for African colonization.³⁵⁷ Thereafter, Europeans

348. *Id.* at 996.

349. *Id.*

350. *Id.* at 998–1000.

351. *See, e.g.,* HOCHSCHILD, *supra* note 83, at 8, 17.

352. TOWNSEND, *supra* note 139, at 57; HOCHSCHILD, *supra* note 83, at 38, 86.

353. Grunder, *supra* note 144, at 94.

354. Elder, *supra* note 74, at 19, 29.

355. *Id.* at 29.

356. *Id.* at 24.

357. Berlin Act, *supra* note 9, arts. 1, 6. It was the height of ignorance and ethnocentrism for Europeans to call Africans savages. *See, e.g.,* TOWNSEND, *supra* note 139, at 47–53 (recounting some of

promised to civilize and care for Africans because they agreed to the “preservation of the native tribes, and to care for the improvement of their moral and material well-being.”³⁵⁸ This fraudulent promise was never enforced, of course, and instead European cultural impositions were used to “buttress the political, economic and social superstructure which colonialism represented.”³⁵⁹

Accordingly, England justified colonization with the tenet that it would bring civilization and education to Africans and protect them in a guardian-ward relationship.³⁶⁰ England even argued that European settlement was the only way to bring civilization to East Africa.³⁶¹ It was, of course, very useful that English officials assumed that the existence of protectorates “in an uncivilized country implies the right to assume whatever jurisdiction.”³⁶² In the British colonies of Uganda and Kenya, multiple official documents demonstrate the widespread belief that England was exercising a trustee’s duty to protect and educate Africans and help them advance towards civilization.³⁶³ The most famous of missionaries in Africa, David Livingstone, advocated tirelessly from 1840 onwards for Christianity, commerce, and civilization for Africans.³⁶⁴

Germany also considered Africans uncivilized. In East Africa, Carl Peters was convinced he was doing Africans a favor by bringing them German governance and civilization.³⁶⁵ Peters believed that Indigenous peoples would quickly realize “that things will go much better for them when whites are living among them as the rulers of the land.”³⁶⁶

The other European colonizers also believed in their superiority and the uncivilized state of Africans. The Portuguese argued that the “superiority” of their government, culture, and civilization justified their conquests and authority over barbarian Indigenous peoples.³⁶⁷ Portugal’s Constitution of 1950 even stated that “it is intrinsic in the Portuguese nation to fulfill its historic mission of colonization in the lands of the [sic] Discoveries under

the sophisticated native cultures and governments across Africa).

358. PHILPOTT, *supra* note 185, at 137.

359. Opoku, *supra* note 144, at 508.

360. See, e.g., 1 HERTSLET, *supra* note 8, at 49 (noting that in an 1877 treaty, an African king ceded his country and sovereignty to the Queen “to promote commerce and civilization”).

361. TOWNSEND, *supra* note 139, at 56–57; MUNGEAM, *supra* note 136, at 36–37.

362. SORRENSON, *supra* note 73, at 52.

363. Fetter, *supra* note ***, at 120–22, 130–31.

364. Ekechi, *supra* note 135, at 44; TOWNSEND, *supra* note 139, at 57–58.

365. PETERS, *supra* note 163, at 22.

366. *Id.*

367. C. R. BOXER, RACE RELATIONS IN THE PORTUGUESE COLONIAL EMPIRE 1415-1825 90–91, 94–96 (1963).

their sovereignty and to diffuse among the populations inhabiting them the benefits of their civilization.”³⁶⁸ Moreover, France claimed a “mission to bring civilization, moral and social progress, [and] economic prosperity” to its colonial empire and that Africa could only enter “into the empire of civilization” under European guidance.³⁶⁹ In addition, King Leopold of Belgium claimed in 1876 that he was interested in opening up equatorial Africa to European civilization.³⁷⁰

The United States representative told the Berlin Conference that it agreed that Western culture should be introduced amongst African tribes to allow them to understand that “civilization and dominion of the white man means . . . peace and freedom.”³⁷¹ He also claimed that civilizing Africans would “crown the work of civilization” and ensure “the safety of all the white race who shall reside in the region”³⁷² He also warned the Conference that those “reducing Africa to civilization, [must be] save[d] from a repetition of the fatal experiences which characterize the like conditions in America.”³⁷³ While his point was perhaps obscure, he was warning the Conference that Indigenous peoples in Africa might react negatively to having European “civilization” forced upon them just as the Indian nations did in North America.

The saccharine talk of caring for Africans and promoting civilization flies in the face of the actual history of colonization, slavery, and the unspeakably racist attitudes that most European countries had regarding Africans. These attitudes made plain that the putative goals of “civilization” were nothing more than additional justifications for colonization and exploitation. For example, the British Foreign Office wrote the Law Officers of the Crown in 1899 that “the natives . . . [were] practically savages,”³⁷⁴ and the Commissioner of British East Africa wrote in 1905 that the “[African] mind is far nearer to the animal world than is that of the European or Asiatic, and exhibits some of the animal’s placidity”³⁷⁵ A nineteenth century British theologian stated that the “irreclaimable savages” of Africa would “disappear” because they were unable to embrace civilization, but that it was the white man’s duty to attempt to spread civilization in Africa.³⁷⁶

368. Fetter, *supra* note ***, at 106.

369. *Id.* at 29, 84.

370. CROWE, *supra* note 9, at 13.

371. Munene, *supra* note 99, at 76–77.

372. Elder, *supra* note 74, at 88.

373. *Id.* at 89.

374. MUNGEAM, *supra* note 136, at 318–19.

375. ELIOT, *supra* note 303, at 92, 103 (1905) (“[I]t is mere hypocrisy not to admit that white interests must be paramount, and that the main object . . . should be to found a white colony.”).

376. OLUSOGA & ERICHSEN, *supra* note 85, at 71–73.

European colonizers adopted the element of civilization into international law, applied it in Africa, and used it to justify their colonization of the continent.

J. Conquest

We assert that *Johnson v. M'Intosh* and the Doctrine of Discovery defined this element in two ways. First, a conquest in actual warfare passed to the conquering country many rights and powers. Second, the mere arrival of Europeans in newly discovered lands was analogous to a physical, military conquest because first discovery alone granted similar rights under international law.³⁷⁷ European countries claimed Discovery rights in Africa after successful military campaigns and after merely making first discoveries.

Many Indigenous nations did not capitulate to English and German domination. In East Africa, there was fierce fighting and prolonged military efforts primarily in 1893–1898 to oust the German, English, and Italian colonizers.³⁷⁸ Some chiefs and tribes successfully repelled the English and Germans for a time before being subdued by conquest.³⁷⁹ In Southwest Africa, for example, German military activities killed more than 10,000 Hereros and Namas.³⁸⁰ Colonial rule was often brought about by military conquest.³⁸¹

Some historians have also highlighted the subtle difference we perceive in the second meaning of conquest: that Europeans claimed the rights of conquest upon their mere arrival.³⁸² Germany, for instance, relied on this definition in acquiring colonies and its most important explorer in East Africa clearly utilized this second definition. Carl Peters considered his expeditions and treaty-making efforts to be a form of “*Besitzergreifung*” (occupation or seizure).³⁸³ The German government agreed and codified his

377. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590–92 (1823); MILLER, *NATIVE AMERICA*, *supra* note 2, at 4–5; Fisch, *supra* note 80, at 360; Stilwell, *supra* note 137, at 3 (explaining that Africa was partitioned and subjected to European rule by conquest).

378. Uzoigwe, *supra* note 139, at 19, 36–38; H.A. Mwanzi, *African Initiatives and Resistance in East Africa, 1880-1914*, in 7 *GENERAL HISTORY*, *supra* note 139, at 149, 152–62; SORRENSON, *supra* note 73, at 23; Kiwanuka, *supra* note 262, at 316; Stilwell, *supra* note 137, at 7, 9; *see* Cornevin, *supra* note 138, at 405–06.

379. Fetter, *supra* note ***, at 7; TOWNSEND, *supra* note 139, at 65; *see* Mwanzi, *supra* note 378, at 160–61; Uzoigwe, *supra* note 139, at 36–38.

380. Lonsdale, *supra* note 344, at 722.

381. Stilwell, *supra* note 137, at 12; *see, e.g.*, Cornevin, *supra* note 138, at 399–401, 405.

382. Kiwanuka, *supra* note 262, at 315 (showing that British conquest often consisted of a series of agreements); Fetter, *supra* note ***, at 29 (showing that France engaged in “almost always peaceful conquest.”).

383. Pesek, *supra* note 320, at 12.

peaceful occupations in a September 10, 1900 law *Schutzgebietsgesetz* (the Protectorate Law).³⁸⁴

When Germany's attempts at peaceful conquest failed, it resorted to actual conquest. Although Peters and the German East African Company entered into an agreement with the Sultan in 1888 that the Company would govern the mainland in the Sultan's name, the Company was unable to live up to its promise.³⁸⁵ Violent conflicts ensued when native tribes rebelled against the Peters administration and drove the Company out.³⁸⁶ The German government responded by sending troops and replacing Peters with military personnel.³⁸⁷ Whether through clever legal transactions or bloody military engagements, Peters and Germany "conquered" East Africa to acquire Doctrine of Discovery rights.

Other European colonizers also availed themselves of both forms of conquest in Africa. Spain and Portugal, for example, had been expressly authorized by papal bulls to engage in wars against all Muslims and pagans to acquire colonies and convert heathens.³⁸⁸ In 1415, Portugal gained its first foothold in Northern Africa when it militarily conquered Ceuta.³⁸⁹ Portugal claimed sovereign and commercial rights from military conquests.³⁹⁰ Portugal also used the second definition and claimed that its mere arrival in non-Christian lands was the equivalent of an actual conquest.³⁹¹ For example, one historian alleges that the "fifteenth-century voyages of discovery have often been described as a continuation of the Crusades" and were thus military conquests.³⁹² France also engaged in military conquests

384. GERSTMAYER, *supra* note 178, at 12.

385. LEWIN, *supra* note 82, at 187–89; AUSTEN, *supra* note 89, at 22; ARCHIVE OF THE GERMAN COLONIAL LAWS, *supra* note 176, at 136, 333 (noting that in 1890, the Sultan transferred his "Hoheitsrechte" (sovereign rights) to DOAG).

386. LEWIN, *supra* note 82, at 187–89; AUSTEN, *supra* note 89, at 22; John Iliffe, *Tanzania Under German and British Rule*, in ZAMANI, *supra* note 215, at 295, 297 (showing that German conquest was initiated peacefully by Carl Peters in 1884 via treaties; but Germany had to send troops in 1889 because African resistance forced Germany to take over from DOAG).

387. AUSTEN, *supra* note 89, at 22, 25–26; LEWIN, *supra* note 82, at 187–89; ARCHIVE OF THE GERMAN COLONIAL LAWS, *supra* note 176, at 174.

388. EUROPEAN TREATIES, *supra* note 47, at 17 (showing that on January 8, 1455 Pope Nicholas authorized Portugal "to invade, conquer, take by storm, defeat, and subjugate any Saracens and other Pagans as well as whatever dominions, possessions, movable and immovable property are detained or possessed by them").

389. EXPANSION OF EUROPE, *supra* note 31, at 47–48; Livermore, *supra* note 53, at 59; MARQUES, *supra* note 59, at 131.

390. See C.R. Boxer, *The Portuguese in the East 1500-1800*, in PORTUGAL AND BRAZIL 223 (H.V. Livermore ed. 1953) (Portugal claimed "India had been gained with the sword, and with the sword it would be defended.").

391. See BOXER, RACE RELATIONS, *supra* note 367, at 2.

392. PARRY, *supra* note 179, at 22, 25; accord. BOXER, RACE RELATIONS, *supra* note 367, at 2.

in Africa beginning with its invasion of Algeria in 1830.³⁹³ Furthermore, France conquered Senegal in 1860 and engaged in a series of military campaigns in 1880 in Senegambia and against the Samori in West Africa in 1886-87 before signing a peace treaty and acquiring colonial rights.³⁹⁴

European countries were well acquainted with the ancient international law of war and the rights they acquired by military victories. They were also well aware of the rights they claimed to have acquired by the “conquest” of making first discoveries in Africa and exercising the powers of the Doctrine of Discovery and the Berlin Act.

IV. CONCLUSION

This Article represents our initial research into the law and history of African colonization to examine whether the Doctrine of Discovery was used in the partition and colonization of the countries of Kenya, Uganda, and Tanzania. We are certain that we have uncovered only a small portion of all the evidence that bears on the application of the Doctrine in the 1885 Berlin Conference and Act and in the colonization of these three countries. We commenced this effort to add to the body of work that has been undertaken to expose the Doctrine’s role in international law, international history, and in subjugating Indigenous nations and peoples all over the world.

Further research is needed to tell a more complete history of the application of the international law of colonialism in these three countries and across Africa. This could include research on whether any of the elements of the Doctrine and colonial law are still present in the legal regimes and everyday life in Kenya, Uganda, and Tanzania.³⁹⁵ These additional objectives are worthy endeavors to both uncover and perhaps help root out any vestiges of colonial rule in these three countries.

The evidence examined above, however, is more than sufficient to demonstrate conclusively that for centuries, European countries applied the Doctrine of Discovery in Africa to exploit the continent’s lands, assets, and peoples. There is also no question that the Berlin Conference and Berlin Act of 1885 codified the Doctrine into international law. The ten elements that we assert constitute the Doctrine were part of customary international law

393. CROWE, *supra* note 9, at 122; Fetter, *supra* note ***, at 29.

394. CROWE, *supra* note 9, at 122–23; Stilwell, *supra* note 137, at 8–9.

395. See, e.g., Migai Akech, *Judicial Review in Kenya: The Ambivalent Legacy of English Law*, in JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: ORIGINS AND ADAPTATION ACROSS THE COMMON LAW WORLD 1, 3–7, 35–36 (Swati Jhaveri & Michael Ramsden eds., 2020); H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism*, 80 TULANE L. REV. 1 (2006); MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996).

for centuries and then most of them were expressly codified into written international law in the Berlin Act. Finally, we think there is no question that the European countries that exploited African colonies used all ten elements of the Doctrine of Discovery to justify their acquisition of sovereignty and rights and to brutally exploit those nations, peoples, and cultures.

Undoubtedly it is appropriate to probe the value of this kind of comparative law research, and what one should do with this knowledge. We did not undertake this work just to cast blame. As Professor Frank Pommersheim stated when discussing American Indian law issues: “The point is not to assign blame—an essentially fruitless exercise—but rather to comprehend more deeply the forces at work [in the ex-colonies.]”³⁹⁶ We absolutely agree that assigning blame or guilt is a waste of time and effort. Instead, we believe that the value of this research is to better understand shared histories and modern-day political and legal regimes, and perhaps to be better equipped to move forward with a more complete understanding of the actual facts and law. In addition, a comparative law analysis allows one to better understand history, the evolution of law and political affairs, and the current conditions of formerly colonized peoples and nations.³⁹⁷

We must also emphasize that the Doctrine of Discovery is not some ancient legal regime that is relegated only to the history books. Clearly, the Doctrine is still the law in the United States and in other former English colonies and continues to impact Indigenous rights today.³⁹⁸ In addition, this international law of colonialism created many of the national boundaries and divisions that countries around the world are still dealing with today. And, perhaps surprisingly, some countries are still engaging in symbolic acts of possession in the twenty-first century to claim lands and assets. In 2007, Russia planted its flag on the bottom of the Arctic Ocean and in 2010, China planted its flag on the bed of the South China Sea.³⁹⁹ Both countries did so to claim the oil and gas resources located under those sea beds and sovereign rights on the surfaces of those seas.⁴⁰⁰ Consequently, our research into international law and the Doctrine of Discovery in Africa is important for

396. Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy and History*, 49 IDAHO L. REV. 519, 523 (2013).

397. See Miller & Ruru, *supra* note 70, at 916–17 (“[T]he motivation for us to pursue comparative legal work is . . . to examine how the Western legal system has developed and applied a property theory based in fiction to substantiate the continuing colonization of Indigenous peoples’ land and resources.”).

398. See generally MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 6.

399. Alan Cullison, *Russia to Deploy Troops to Defend Interests in Arctic*, WALL ST. J., July 2, 2011, <http://online.wsj.com/article/SB10001424052702303763404576419862777063804.html>; William J. Broad, *China Explores A Rich Frontier, Two Miles Deep*, N.Y. TIMES, Sept. 12, 2010, at A1.

400. Jane Perlez, *China Asserts Sea Claim With Politics and Ships*, N.Y. TIMES, Aug. 12, 2012, at A6; Robert J. Miller, *Finders Keepers in the Arctic?*, L.A. TIMES, Aug. 6, 2007, at A19.

many reasons. “We live in an era in which it is, moreover, especially important to decipher the deepest origins of Western Law and Civilization. Scholars within the emerging “legal origins” tradition have now produced an impressive body of empirical work, which suggests that we can explain a broad range of features of modern societies in terms of the origins of their laws.”⁴⁰¹ Another commentator also stated: “Law in society can only be explained by its history, often its ancient history and frequently its contacts with foreign legal history.”⁴⁰² We completely agree with these statements.

In conclusion, we believe that this comparative analysis of the application of the Doctrine of Discovery and the international law of colonialism in East Africa helps develop a clearer understanding of the law, its historic process and impacts, and its crucial importance to us all.

401. Robin Bradley Kar, *On the Origins of Western Law and Western Civilization (in the Indus Valley)* 3 (Ill. Public Law and Legal Theory Research Paper No. 10–16, 2011) (citations omitted).

402. Alan Watson, *Legal Culture v. Legal Tradition, in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 1 (Mark Van Hoeck ed., 9th ed. 2004).