

## **TRANSFERABLE SOVEREIGNTY: LESSONS FROM THE HISTORY OF THE CONGO FREE STATE**

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### ABSTRACT

*In November 1908, the international community tried to buy its way out of the century's first recognized humanitarian crisis: King Leopold II's exploitation and abuse of the Congo Free State. And although the oppression of Leopold's reign is by now well recognized, little attention has been paid to the mechanism that ended it—a purchased transfer of sovereign control. Scholars have explored Leopold's exploitative acquisition and ownership of the Congo and their implications for international law and practice. But it was also an economic transaction that brought the abuse to an end.*

*The forced sale of the Congo Free State is our starting point for asking whether there is, or should be, an exception to the absolutist conception of territorial integrity that dominates traditional international law. In particular, we ask whether oppressed regions should have a right to exit—albeit perhaps at a price—before the relationship between the sovereign and the region deteriorates to the level of genocide.*

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† Faculty, Duke Law School. For helpful comments and criticism, we thank Tony Anghie, Stuart Benjamin, Jamie Boyle, Curt Bradley, George Christie, Walter Dellinger, Deborah DeMott, Laurence Helfer, Tim Lovelace, Ralf Michaels, Darrell Miller, Shitong Qiao, Steve Sachs, Alex Tsesis, and Michael Wolfe. Rina Plotkin provided invaluable research and linguistic support, Jennifer Behrens helped us track down innumerable difficult sources, and the editors of the *Duke Law Journal* delivered exemplary edits and suggestions.

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## INTRODUCTION

On November 15, 1908, Belgium concluded an agreement with its own king, Leopold II. By the terms of the agreement, Leopold *sold* control over the Congo Free State—a massive private colony seventy times larger than Belgium itself. He did not give it up voluntarily, and Belgium did not accept it enthusiastically. But the documentation of abuses conducted by Leopold’s minions had resulted in one of the world’s first international human rights movements,<sup>1</sup> and the Belgian government—which had resisted the colony all along—had little choice but to purchase sovereign control of the Congo from its reluctant king.

In 1909, the *American Journal of International Law* published an article, “The Origin of the Congo Free State” by Jesse Siddal Reeves.<sup>2</sup> Like almost all discussion of the Congo Free State in international law literature, Reeves’s article addressed how the international community had allowed the king of Belgium, through a personally controlled entity, to take sovereign control of the country in 1885. Reeves noted that international pressure had brought the Free State to an end,<sup>3</sup> but

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1. See ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 2 (1999); JASON K. STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA 7 (2012).

2. Jesse S. Reeves, *The Origin of the Congo Free State, Considered from the Standpoint of International Law*, 3 AM. J. INT’L L. 99 (1909).

3. *Id.* at 99–100 (“The coercive power of ultranational public opinion . . . has been plainly evident in the case of the Congo State. Public sentiment, transcending national boundaries, has

neither he nor the wider literature that followed explored the significance of that event, nor the remarkable fact that Belgium paid King Leopold a hefty price to exit.

This Article is about such moments: transfers of sovereign control, and what they suggest about how international law and practice can respond to problems of oppression and bad governance. It focuses in particular on the specific mechanism—the forced sale—that brought Leopold’s reign to an end.<sup>4</sup> That method of transfer, we suggest, might sometimes be preferable to the alternatives. Why not permit an oppressed or even ill-governed region to either purchase its own freedom—or at least a change in government—or allow the international community to do so on its behalf?<sup>5</sup>

The story of the Congo is tragically illustrative. Leopold treated the Congo and its people as little more than a factory designed to enrich him, at immense human cost.<sup>6</sup> Eventually, reformers like George Washington Williams, Edmund Dene Morel, Roger Casement, and others were able to shine light on his atrocities, forcing the Western powers to confront the horrors unleashed when they recognized Leopold’s claim and brought the Congo Free State into existence in the first place.<sup>7</sup>

Modern international law and practice provide several options for addressing these kinds of tragedies, reflecting different approaches to sovereignty and state incentives. Some of these methods are external, originating outside the troubled state. Condemnation by the international community and economic sanctions are generally designed to deter bad behavior—to improve the exercise of sovereign control without necessarily changing *who* exercises it. Where those fail, if the level of abuse is truly awful—as has been the case in recent years in Rwanda, Kosovo, Libya, and Syria—members of the international community might intervene to constrain or remove the oppressive government. As of this writing in early 2020, there is talk of doing the same in Venezuela. Such external interventions are the subject of legal,

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demanded a responsible government for the Congo. It has accomplished practically all that the concerted action of the powers might have sought to do.”).

4. As we will emphasize throughout, the end of Leopold’s reign did not mean freedom for the Congo, which remained a Belgian colony. The improvement was nonetheless significant. *See infra* notes 173–85 and accompanying text.

5. We explore this possibility in Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. 797 (2017) [hereinafter Blocher & Gulati, *A Market for Sovereign Control*].

6. *See infra* Part I.B.

7. *See infra* Part I.B.

political, and scholarly debates about territorial sovereignty, human rights, and the responsibility to protect.

There are also internal options: things that the people of the nation can do to help themselves. They might try to improve their lot politically either by pressuring their current leaders to enact reforms or by choosing new leaders. Where “voice” fails, they might exit.<sup>8</sup> At the individual level, this often means migration—a status chosen by, or forced upon, more people today than ever before.<sup>9</sup> In extreme cases, entire regions might be able to secede, though that is costly and difficult, as the struggles of Kosovo, East Timor, and the Kurds demonstrate. Such internal options are the focus of legal, political, and scholarly debates about the rule of law, self-determination, migration, and borders.

External and internal remedies to the problems of bad governance are complex and distinct from one another. But at any rate they all alter the exercise of sovereign control—the power of a recognized sovereign, usually a nation-state, to exercise governing authority in a particular territory, without restriction by some superior authority.<sup>10</sup> Some remedies change how that power is exercised, shaping incentives through the application of sanctions, political pressure, or threats of military intervention. Others change who can exercise it, by breaking the malfunctioning link between the sovereign and the people.<sup>11</sup> But

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8. *See generally* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (examining the mechanisms of voice and exit that people use to demonstrate their displeasure to a controlling entity).

9. *See* Somini Sengupta, *60 Million People Fleeing Chaotic Lands*, *U.N. Says*, *N.Y. TIMES* (June 18, 2015), <https://www.nytimes.com/2015/06/18/world/60-million-people-fleeing-chaotic-lands-un-says.html> [<https://perma.cc/36F5-L4XK>] (quoting United Nations High Commissioner for Refugees António Guterres as calling the current mass displacement situation “unprecedented”).

10. We did not enter this project with a narrow position about what “sovereignty” means—one purpose of the project is to illustrate the forms it can take. For purposes of getting the analysis off the ground, though, our working definition is basically that of the positivists. *See generally* A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 27 (Liberty Fund 1982) (1885) (“[T]he term ‘sovereignty’ . . . is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit.”); *see also* NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* 127 (1999) (“Sovereign power is, then, territorial in character, and is power not subject to limitation by higher or coordinate power.”). For a historical and conceptual analysis, *see generally* DIETER GRIMM, *SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT* (Dick Howard ed., Belinda Cooper trans., Columbia Univ. Press 2015) (2009).

11. *Cf.* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (“When in the [c]ourse of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another . . .”).

sometimes these mechanisms do not work, especially when particular minority populations are disenfranchised and systematically oppressed by the majority, and the powerful nations of the world are unable or unwilling to expend the kinds of resources that would stop that oppression. The Rohingya in Myanmar—often referred to as the “World’s Least-Wanted”—come to mind.<sup>12</sup> Could some version of the 1908 forced sale help oppressed peoples like the Rohingya of the Rakhine State?

It is the latter kind of change that interests us here and that we find particularly arresting about the story of the Congo. Contemporary discussions about changing sovereign control tend to focus on toppling the government through military intervention and regime change,<sup>13</sup> separating the region from the rest of the nation through secession and liberation, or helping people escape through migration.<sup>14</sup>

Our goal is to recover and reevaluate the possibility of forced sales as solutions to problems of bad governance. As a matter of law, politics, and morality, King Leopold’s crimes are beyond the pale. The international community has internalized that lesson, at least. But in focusing on the substance of the wrong, there is a risk of missing the value of the remedy—it was not simply, as is sometimes said, an abdication,<sup>15</sup> a demand by Belgium,<sup>16</sup> or a simple annexation;<sup>17</sup> rather, it was a forced sale. Both elements of the transfer raise important questions: it was forced, and it was a sale.

As to the former, international pressure was such that Leopold had little choice but to give up sovereign control. This may seem obvious; a ruler who oppresses “his” people to such a degree must surely be stopped. But to treat sovereignty as something that can be

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12. *The Rohingya: World’s Least-Wanted People*, RADIO FREE ASIA, [https://www.rfa.org/english/news/special/rohingya-crisis/?\\_ga=2.229788570.74016411.1561381024-187834459.1561035733](https://www.rfa.org/english/news/special/rohingya-crisis/?_ga=2.229788570.74016411.1561381024-187834459.1561035733) [https://perma.cc/9J2U-ZHLF]; see also, e.g., Shibani Mahtani, *Vice President Pence Pushes Myanmar’s Suu Kyi on Rohingya, Jailed Journalists*, WASH. POST (Nov. 14, 2018, 6:21 AM), [https://www.washingtonpost.com/world/asia\\_pacific/vice-president-pence-pushes-myanmars-suu-kyi-on-rohingya-jailed-journalists/2018/11/14/f3fca8e8-e73d-11e8-b8dc-66cca409c180\\_story.html](https://www.washingtonpost.com/world/asia_pacific/vice-president-pence-pushes-myanmars-suu-kyi-on-rohingya-jailed-journalists/2018/11/14/f3fca8e8-e73d-11e8-b8dc-66cca409c180_story.html) [https://perma.cc/JF6S-B99V].

13. See *infra* note 270 and accompanying text.

14. See *infra* note 207 and accompanying text.

15. See, e.g., SAMUEL H. NELSON, COLONIALISM IN THE CONGO BASIN 1880–1940, at 79 (1994).

16. ROGER ANSTEY, KING LEOPOLD’S LEGACY: THE CONGO UNDER BELGIAN RULE 1908–1960, at 261 (1966).

17. Stefan Heym, *Introduction* to MARK TWAIN, KING LEOPOLD’S SOLILOQUY 11, 22–23 (Int’l Publishers & Seven Seas Books 1971) (1961) (“In 1908, the Congo Free State was taken out of the King’s hands and simply annexed to Belgium.”).

forfeited is radical in another sense. It suggests that sovereigns, supposedly unrestrained by legal limits,<sup>18</sup> in fact must answer to a higher authority or obligation—a point that would eventually become prominent in the theory and practice of international human rights. At the time, however, imperialism and colonialism were still thriving. Another half century would pass before concepts like “crimes against humanity,” “genocide,” “remedial secession,” and “responsibility to protect” truly became prominent in international law.<sup>19</sup>

In the context of the Congo and other colonial ventures, the contemporary debate tended to be about the duties accompanying the establishment of sovereignty—how much a would-be sovereign had to do to demonstrate the necessary exclusive control.<sup>20</sup> Describing that threshold meant putting meat on the bones of the concept of sovereignty and what it means to govern. If failure to govern could moot a claim to sovereignty at the moment of attempted acquisition, could it do the same on the back end, as a kind of forfeit? If so, at what cost?

For some, the intuitive answer is that sovereignty is noncommodifiable as a normative matter or nontransferable as a practical matter.<sup>21</sup> But as a matter of international law and practice, this is not true. Although history has repudiated Leopold’s brutal rule and law has evolved to prevent its recurrence,<sup>22</sup> international law and

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18. See *supra* note 10.

19. The origins and development of international human rights law are the subject of a rich scholarly literature. See, e.g., SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 10–11 (2018) (arguing, *inter alia*, for increased attention to social and economic equality in international human rights). But even genocide was not recognized as a crime under international law until the late 1940s. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. As for remedial secession, the keystone case did not come until 1998. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 138 (Can.) (“[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed . . . ; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.”).

20. See *infra* notes 57–83 and accompanying text.

21. For a sampling of scholarship making these and related points, and pressing on the potential weaknesses of our theory, see generally John F. Coyle, *Friendly and Hostile Deals in the Market for Sovereign Control: A Response to Professors Blocher and Gulati*, 66 DUKE L.J. ONLINE 37 (2017); Anna Gelpert, *Cinderella Sovereignty*, 67 DUKE L.J. ONLINE 65 (2017); Karen Knop, *A Market for Sovereignty? The Roles of Other States in Self-Determination*, 54 OSGOODE HALL L.J. 491 (2017); W. Mark C. Weidemaier, *A (Very Thin) Market for Sovereign Control*, 66 DUKE L.J. ONLINE 67 (2017).

22. See *supra* note 19 (noting developments in international law forbidding genocide and acknowledging the possibility of remedial secession).

practice in many ways still treat sovereign control as a thing that can be traded. The world map is largely a product of sovereign sales—most of the United States was purchased from other sovereign nations, after all<sup>23</sup>—and nations continue to negotiate with one another, as well as with nonstate actors, about where and how that control will be exercised.<sup>24</sup> Even as this Article was being written, President Trump caused a stir by floating the idea of purchasing Greenland<sup>25</sup>—an example that we will return to later in the piece.<sup>26</sup> These transfers prompt questions about the relationship between property and sovereignty,<sup>27</sup> questions that were key to the story of the Congo in the late nineteenth and early twentieth centuries, when the concepts of property and sovereignty became intertwined both in theory and in brutal practice.<sup>28</sup>

Such purchases can be and have been exploitative or otherwise undesirable; Leopold's acquisition of sovereign control in the 1880s is a cautionary tale in that regard. That raises hard questions, which are foundational to our understanding of states, governance, and the international order: *Who* can hold the power of sovereign control? *How* can that power be transferred? With conquest and discovery no longer viable means of acquiring sovereign territory, what about voluntary transactions? If the latter, who must give their approval—the governments or the governed?

The story of the Congo illustrates both the stakes and the difficulties of these conceptual questions. In less than a century, it saw

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23. Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241, 245–46 (2014). This does not include purchases (and “purchases”) from Native Americans.

24. See *infra* notes 280–86 and accompanying text.

25. *Greenland: Trump Warned That Island Cannot Be Bought from Denmark*, BBC NEWS (Aug. 16, 2019), <https://www.bbc.com/news/world-us-canada-49367792> [<https://perma.cc/2P5U-VS7P>].

26. See *infra* Part II.C.

27. The classic reference is Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). For a recent discussion, see generally 18 THEORETICAL INQUIRIES L. (2017) (compiling papers presented at a conference on “Sovereignty and Property,” held in 2015 at Columbia Law School, and including contributions by Eyal Benvenisti, Jean L. Cohen, Hanoch Dagan & Avihay Dorfman, Sergio Dellavalle, Larissa Katz, Martti Koskeniemi, Thomas W. Merrill, Katharina Pistor, Arthur Ripstein, Joseph William Singer, Laura S. Underkuffler, and Jeremy Waldron).

28. See MARTTI KOSKENIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 155–56 (2002) (referring to the Congo Free State as “[p]erhaps the most striking effort to create European sovereignty—and the greatest disappointment about the civilizing mission”); CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 214–26 (G. L. Ulmen trans., Telos Press Publishing 2006) (1950) (using the Congo Free State to illustrate the disintegration of a spatial legal order).

three transfers of sovereign control, each of which had market-like elements. First was Leopold's personal acquisition of sovereign control in the Congo Free State.<sup>29</sup> His abuse of that control led directly to the forced sale to Belgium, inaugurating decades of colonial rule.<sup>30</sup> The third transfer came in 1960, when the Congolese demanded and received independence, which came at a steep price.<sup>31</sup> Part I explores each of these transfers; Part II addresses some of the conceptual and practical benefits and challenges of transferable sovereignty.

The story begins in Brussels, in the late nineteenth century.

## I. THE CASE STUDY: CONGO FREE STATE

### A. *Transfer 1: Leopold Buys Sovereign Control (1885)*

While other European nations scrambled to acquire and maintain empires throughout the 1800s, Belgium was generally unenthusiastic about the colonial enterprise.<sup>32</sup> The Belgian royal family, however, saw things differently. Leopold I, father of Leopold II ("Leopold," hereafter), took up colonial ambitions even as he disparaged the son who would later achieve them.<sup>33</sup> Conquest by the Belgian army was not an option, so Leopold I's preferred mechanism of acquisition was purchase. He had plenty of models in that regard, both in Europe and

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29. *See infra* Part I.A.

30. *See infra* Part I.B.

31. *See infra* Part I.C.

32. MARTIN EWANS, EUROPEAN ATROCITY, AFRICAN CATASTROPHE: LEOPOLD II, THE CONGO FREE STATE AND ITS AFTERMATH 15 (2002). Belgium remained generally indifferent—albeit somewhat surprised—when Leopold's acquisition of the Congo became known decades later. *Id.* at 103. Some argued that the nation developed the taste, though, and that by 1906, Belgium was "not merely willing, but eager to acquire the inheritance that the King had obtained and fostered for her." DEMETRIUS C. BOULGER, 2 THE REIGN OF LEOPOLD II: KING OF THE BELGIANS AND FOUNDER OF THE CONGO STATE 1865–1909, at 171 (1925). Boulger's two-volume biography of Leopold shades into hagiography and might not be a reliable source on the matter, but the eminent Belgian historian Jean Stengers reached a similar conclusion, so it should not be dismissed out of hand. *See, e.g.*, Jean Stengers, *King Leopold's Imperialism*, in STUDIES IN THE THEORY OF IMPERIALISM 248, 262 (Roger Owen & Bob Sutcliffe eds., 1981) ("As the years passed, he did succeed in rallying the support of an increasing number of his countrymen, especially for his work in the Congo; and in some cases this support even became tinged with enthusiasm."); *see also* JESSE SIDDALL REEVES, THE INTERNATIONAL BEGINNINGS OF THE CONGO FREE STATE 71 (Herbert B. Adams ed., Baltimore, John Hopkins Press 1894) (asserting that "many Belgians" had a desire for "colonial enterprises," and also—improbably—that "[t]he motives of King Leopold were evidently of a scientific and philanthropic nature").

33. THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA: 1876 TO 1912, at 13 (1991); *see also* NEAL ASCHERSON, THE KING INCORPORATED: LEOPOLD II IN THE AGE OF TRUSTS 29 (1964) (noting that Leopold I "did not like [Leopold II] particularly").

farther afield. After all, it had only been a few decades since Thomas Jefferson's administration consummated the Louisiana Purchase, more than doubling the size of the United States and effectively guaranteeing its future as a geopolitical power.<sup>34</sup>

But Jefferson's purchase had been accomplished through the organs of the state, and the Belgian Parliament had little interest in paying for its king's colonial speculation—a theme that would continue for decades, culminating ironically in the expensive purchase of the Congo in 1908. Still, Leopold I had options. States were not the only entities buying up sovereign territory at the time; some nominally private entities were acquiring territory and behaving a lot like sovereigns. Most well known was the British East India Company, which had been chartered by Queen Elizabeth in 1600 as a trade company but ended up exercising quasi-sovereign powers.<sup>35</sup> Until 1858, as Leopold I's reign was coming to an end, the East India Company exercised sovereign control over most of the Indian subcontinent.<sup>36</sup>

Pursuing a similar model,<sup>37</sup> and without his country's support, Leopold I “turned to private enterprise,” establishing a failure of a colony at Santo-Tomas in Guatemala, trying to buy Crete and the Faroe Islands, and exploring prospects as diverse as Fiji, the New Hebrides, and West Africa.<sup>38</sup> He even tried to buy part of Texas,<sup>39</sup> which the United States had recently purchased as part of the spoils of the Mexican–American War.<sup>40</sup> He wrote, “I am specially interested in the Argentine Province of Entre Rios and the very small island of

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34. See generally JON KUKLA, *A WILDERNESS SO IMMENSE: THE LOUISIANA PURCHASE AND THE DESTINY OF AMERICA* (2003).

35. See PHILIP J. STERN, *THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA* 47–60 (2011) (describing state-like powers exercised by the East India Company in the seventeenth century, including issuance of passports, assertions of exclusive jurisdiction, and policing); see also M. F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 94 (1926) (“[W]hat was at first a mere trading Corporation came in the course of time to exercise sovereign rights over an immense area which afterwards passed under the direct administration of the British Crown.”). For further discussion of corporate sovereignty, see generally JOSHUA BARKAN, *CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM* (2013).

36. See sources cited *supra* note 35.

37. See STEVEN PRESS, *ROGUE EMPIRES: CONTRACTS AND CONMEN IN EUROPE'S SCRAMBLE FOR AFRICA* 81 (2017).

38. EWANS, *supra* note 32, at 15; HOCHSCHILD, *supra* note 1, at 38 (“He asked an aide to try to acquire Fiji, because one should not ‘let such fine prey escape’”).

39. *Id.*

40. See Treaty with Mexico, Mex.-U.S., art. I, Dec. 30, 1853, 10 Stat. 1031, 1032 (detailing the land to be ceded to the United States by Mexico).

Martin Garcia at the confluence of the Uruguay and the Parana. Who owns this island? Could one buy it, and establish there a free port under the moral protection of the King of the Belgians?”<sup>41</sup>

None of these ventures panned out, so when Leopold II, denied his father’s affection but inheriting his ambitions, ascended to the throne in 1865, he bemoaned, “*Petit pays, petits gens*”—small country, small people.<sup>42</sup> Stuck in a miserable arranged marriage and increasingly estranged from his own children,<sup>43</sup> he directed his attention to the project of empire-building.

From the beginning, Leopold was focused on economic gain.<sup>44</sup> Drawing on the model of the East India Company, he sought by his own account “to create an international company with its seat in Brussels which would become for China what the East India Company has become for the immense Indian Empire.”<sup>45</sup> As one historian notes, “[e]ven before assuming the throne, he had cast a wistful glance at Dutch Limburg, Constantinople, Borneo, Sumatra, Formosa (Taiwan), Tonkin (Vietnam), parts of China or Japan, the Philippines, a few islands in the Pacific or, if need be, a few islands in the Mediterranean.”<sup>46</sup>

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41. HOCHSCHILD, *supra* note 1, at 38. It would have taken a long time answer Leopold’s question: not until 1973 did the Treaty of Río de la Plata formally resolve ownership of the island as between Uruguay and Argentina, and legal disputes persist even decades later. *See generally* Lilian Del Castillo LaBorde, *Legal Regime of the Río De La Plata*, 36 NAT. RESOURCES J. 251 (1996).

42. HOCHSCHILD, *supra* note 1, at 36; *see also* PAKENHAM, *supra* note 33, at 13 (noting that he had a paperweight inscribed “*Il faut à la Belgique une colonie*”—Belgium needs a colony).

43. He would later go to extraordinary lengths to deny his daughters the proceeds of his estate, EWANS, *supra* note 32, at 231–32, and to transfer his Congolese riches to the former prostitute he married on his deathbed, Robert Harms, *King Leopold’s Bonds*, in *THE ORIGINS OF VALUE: THE FINANCIAL INNOVATIONS THAT CREATED MODERN CAPITAL MARKETS* 343, 357 (William N. Goetzmann & K. Geert Rouwenhorst eds., 2005) [hereinafter Harms, *King Leopold’s Bonds*] (noting that Leopold married his mistress, while wearing a dressing gown, the night before the surgery that killed him; his “last financial transaction was the transfer of those Congo Independent State bonds” to her).

44. EWANS, *supra* note 32, at 17; PRESS, *supra* note 37, at 84. To the degree that patriotism was also a motivation, it seems only incidental, though there is some room for debate. *See* DAVID VAN REYBROUCK, *CONGO: THE EPIC HISTORY OF A PEOPLE* 39 (Sam Garrett trans., Harper Collins Publishers 2014) (2010) (“Fully in tune with his times, the young king effortlessly reconciled warm-blooded patriotism with coolly calculating commercialism.”). *But see id.* at 61 (“His imperialism was based on decidedly economic motives.”).

45. EWANS, *supra* note 32, at 19; *see also* PRESS, *supra* note 37, at 85 (discussing negotiations to set up a commercial company in Borneo).

46. VAN REYBROUCK, *supra* note 44, at 39; *see also* 1 BOULGER, *supra* note 32, at 126 (“Various schemes were considered, and there was some talk of purchasing the Philippines from

But the Belgian Parliament still had not warmed to the idea of a colony.<sup>47</sup> And so, like his father, Leopold sought to buy an empire on his own. One failed start was an effort to purchase Sarawak, the northern half of Borneo, then owned as something of a personal state by the Englishman James Brooke.<sup>48</sup> Historian Steven Press explains that “Leopold . . . liked the idea that one man had acquired absolute, uncontested powers of ownership over tens of thousands of human beings—quite a contrast to Belgium, where government bureaucracy moved slowly, and where parliament had circumscribed the king’s powers in diplomacy.”<sup>49</sup>

The deal to purchase Sarawak did not work out, in part because Brooke did not trust Leopold’s motives vis-à-vis the native population.<sup>50</sup> But, Press notes, “Leopold had learned something else from Brooke: The idea of buying control of a country ‘out and out as a property’ was not necessarily outrageous.”<sup>51</sup> He was determined to set up a company that could make such a purchase under the “sovereignty of the King of the Belgians.”<sup>52</sup> But where would he find the territory? And what would it take to acquire it?

Leopold was not alone in this pursuit of empire. In fact, the ambitions of the other colonial powers were partly why he had such a hard time finding a suitable seller in the market for sovereignty. Every continent but Africa was already effectively occupied by European powers,<sup>53</sup> especially the French, British, and Germans,<sup>54</sup> but also the Spanish and Portuguese.<sup>55</sup> The Italians had not entirely given up on this endeavor either, though Ethiopia’s King Menelik II had dealt their

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Spain, or an African colony from Portugal. . . . A concession in China, or, still better, a base in Formosa or some other island off the coast of China, appealed to his judgment and imagination.”).

47. See 1 BOULGER, *supra* note 32, at 33 (“[T]he national character, or perhaps it would be more correct to say the national experiences, rendered the Belgian people averse to any policy of adventure outside their borders.”).

48. See LINDLEY, *supra* note 35, at 87–88 (describing Brooke’s ownership).

49. PRESS, *supra* note 37, at 86.

50. *Id.* at 85–86.

51. *Id.* at 87 (quoting Letter from James Brooke to Brooke (Aug. 26, 1862)). Later, “his apologists cited the British North Borneo Company, to which, as recently as 1881, the Sultan of Brunei had conceded such rights over a wide area.” EWANS, *supra* note 32, at 78.

52. PRESS, *supra* note 37, at 87 (quoting Memorandum from Leopold II (May 1873)).

53. See HOCHSCHILD, *supra* note 1, at 61.

54. See REEVES, *supra* note 32, at 27 (“It has been said of the three great powers of western Europe, ‘that France has colonies but no colonists, Germany has colonists but no colonies, and that England alone has both.’”).

55. See *id.* at 7.

imperial ambitions a serious blow.<sup>56</sup> The dwindling supply of feasible colonies, compounded by the colonial powers' pent-up demand in the market for sovereignty, partially explains the intensity of the "Scramble for Africa" at the end of the century.

But what would it mean for Leopold—or any colonial state—to acquire a colony? Was it like buying a piece of property<sup>57</sup> or like extending sovereign control over a country? There was not then, nor is there now, a clear dividing line between the two concepts of property and sovereignty<sup>58</sup>—scholars continue to debate whether property precedes or is produced by sovereignty, or whether it is simply a species thereof. But as a matter of rhetoric and emphasis, the notion that populated territory was essentially a type of governmental property was certainly much more prominent and influential in Leopold's time than it is now.<sup>59</sup>

On this view, establishing sovereign control was analogous to acquiring property and could be accomplished in a similar manner.<sup>60</sup> The Lockean Proviso, which still animates a great deal of property theory, held that a person encountering an unowned resource can establish ownership by mixing his labor with it and leaving enough and as good for others.<sup>61</sup> Locke heavily influenced the Framers of the U.S. Constitution,<sup>62</sup> and the U.S. government employed strains of his labor-

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56. Menelik defeated the Italians at the battle of Adwa; Ethiopia was one of the few African nations to retain its independence. For a thorough account of the battle and its broader context, see generally RAYMOND JONAS, *THE BATTLE OF ADWA: AFRICAN VICTORY IN THE AGE OF EMPIRE* (2011).

57. Cf. E. D. Morel, *The Congo Cession: What the New Treaty Means*, MANCHESTER GUARDIAN, Dec. 17, 1907, at 6 (describing the "assets" of the Congo, including that "[t]he principal items are what might be described as the State's 'fixtures'").

58. See *supra* note 27 for classic and contemporary investigations of the distinction between property and sovereignty.

59. As the story in this Article suggests, and as we have argued elsewhere, we think that there is nonetheless some value that can be redeemed from the property-like vision of sovereignty. See, e.g., Joseph Blocher & Mitu Gulati, *Markets and Sovereignty*, 54 OSGOOD HALL L.J. 465 (2017).

60. One common challenge was defining how much control suffices to establish a legal claim—a question familiar to students of property. See, e.g., *Pierson v. Post*, 3 Cai. 175 (N.Y. 1805). At the Berlin Conference, which effectively carved up the continent among the European powers, "[m]uch of the drafting process was constituted of the watering down of the duties of the colonizing power"—lessening the degree of authority necessary to establish sovereign control. KOSKENNIEMI, *supra* note 28, at 126.

61. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 329 (rev. ed., Cambridge University Press 1965) (1690).

62. Locke was the third most cited thinker of the Founding era, after Montesquieu and Blackstone. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE*

based theory to help justify the partial displacement of Native American claims to both property and sovereignty.<sup>63</sup>

These same themes of property and sovereignty are intertwined with the colonial experience in Africa. In the late 1800s, indigenous rulers held 80 percent of the African continent,<sup>64</sup> though Europeans were somewhat disinclined to respect their claims. The set of “civilized nations” whose boundaries and territorial sovereignty had to be respected were the white Christian ones, and by 1894, these nations had almost finished carving up the interior of the continent for themselves.<sup>65</sup> This made it possible for the European powers to cast the annexation of African territory as something like exploration, rather than violent conquest.

When the Portuguese explorer Diogo Cão reached the mouth of the Congo River in 1482, he erected a limestone pillar announcing that “King João II of Portugal did order this land to be discovered and this pillar of stone to be erected by Diogo Cão, an esquire in his household.”<sup>66</sup> Four centuries later, ironically on the same day in 1885 that the Congo Free State was officially proclaimed to exist, a royal decree from Brussels announced that all “vacant land” in the Congo was the property of Belgium.<sup>67</sup> “Vacant” was interpreted broadly, so

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PRECEDENTS AND PRINCIPLES WE LIVE BY 8 (2012) (citing DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 134–40 (1992)).

63. We say “partial” because Native Americans still possess a complex kind of sovereignty within the U.S. system, and because their rights to property—though limited—were never fully extinguished. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (invoking the theory of property acquisition by “discovery” while claiming to recognize that “the rights of the original inhabitants were, in no instance, entirely disregarded”). Chief Justice Marshall’s opinion in *M’Intosh* also suggested, in keeping with Locke, that the Native Americans were not, in fact, mixing their labor with the land in such a way as would justify a full property claim. *Id.* at 590 (“To leave them in possession of their country, was to leave the country a wilderness . . .”).

For analysis of the intertwined theories of property and imperialism animating Chief Justice Marshall’s opinion in *M’Intosh*, see generally Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M’Intosh*, 75 GEO. WASH. L. REV. 329 (2007), and see *id.* at 336 n.36 (“[T]he defendants in *Johnson*, arguing against Native American title, marshaled a set of arguments that had been designed precisely to justify colonial expropriation, specifically the accounts of property and sovereignty developed by Grotius, Locke, and Vattel.”).

64. HOCHSCHILD, *supra* note 1, at 42.

65. See REEVES, *supra* note 32, at 7 (noting that European powers such as France, Portugal, England, Spain, and Germany had largely portioned out the African continent by 1894).

66. HOCHSCHILD, *supra* note 1, at 8.

67. *Id.* at 117; see also EWANS, *supra* note 32, at 158 (noting that even though it “had been a practice, both in Africa and elsewhere, for colonial powers to declare ‘unoccupied’ land the property of the government, the extent to which this affected the inhabitants varied, and nowhere were the restrictions on exploitation so far-reaching as those which were now put into effect in the Congo”); PRESS, *supra* note 37, at 212 (“Fittingly, the most significant of [Congo Free State

that Belgium claimed a great deal of land, natives notwithstanding,<sup>68</sup> and quickly leased it out as concessions to private companies controlled largely by Belgians.<sup>69</sup> Nearly a century earlier, Locke had written, “In the beginning all the World was America.”<sup>70</sup> Now, only Africa was.

It is no surprise, then, that many of the major players in the Scramble for Africa were known primarily as explorers. For years, Leopold’s main emissary on the continent and the international stage was Henry Morton Stanley, already made famous by his possibly apocryphal greeting, “Dr. Livingstone, I presume?”<sup>71</sup> Stanley’s charge was not simply to explore, map, and build in the Congo, but to *buy* it. The king wrote to him:

It is indispensable you should purchase . . . as much land as you will be able to obtain, and that you should place successively under . . . suzerainty . . . as soon as possible and without losing one minute, all the chiefs from the mouth of the Congo to the Stanley Falls. . . . If you let me know you are going to execute these instructions without delay I will send you more people and more material. Perhaps Chinese coolies.<sup>72</sup>

The relationship between property and sovereignty was central in these exchanges, and along with it some friction between Stanley and the king. Stanley did not entirely trust Leopold’s supposedly humanitarian mission—namely, to bring civilization to the Congo and eradicate the slave trade<sup>73</sup>—and he did not always move as aggressively as the king wanted.

Significantly, Stanley—like Pierre de Brazza and others of his ilk—sought to accomplish these acquisitions by treaty. Across the continent, European nations obtained “sovereignty” through what

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Administrator General Francis] de Winton’s early acts had nothing to do with courts or welfare: It was to annul all preexisting contracts in the Congo Basin and to convert allegedly ‘vacant’ or ‘undeveloped’ lands into public—that is association—property.”)

68. VAN REYBROUCK, *supra* note 44, at 79 (“At one fell swoop the king nationalized some 99 percent of the country.”).

69. See HOCHSCHILD, *supra* note 1, at 117.

70. Herman Lebovics, *The Uses of America in Locke’s Second Treatise of Government*, 47 J. HIST. IDEAS 567, 567 (1986).

71. For a thorough examination of the phrase, its afterlife, and broader themes of imperialism, see generally CLARE PETTITT, *DR. LIVINGSTONE, I PRESUME? MISSIONARIES, JOURNALISTS, EXPLORERS, AND EMPIRE* (2007).

72. HOCHSCHILD, *supra* note 1, at 70 (omissions in original).

73. PRESS, *supra* note 37, at 97.

Thomas Pakenham calls an “orgy of treaty-making.”<sup>74</sup> Hundreds of treaties were written,<sup>75</sup> covering an incalculable amount of territory and people. In concluding them, the colonial powers were trying to create what Martti Koskenniemi calls an “irreproachable moral-legal basis for European title” that would distinguish them from the fifteenth- and sixteenth-century empires of conquest.<sup>76</sup> The thought was that this more civilized approach—colonialism by consent—might replace the Lockean façade.

As early as 1884, Stanley had concluded more than 300 treaties with natives in the Congo,<sup>77</sup> though Leopold still complained that Stanley was moving too slowly<sup>78</sup> and generously. At one point, the king expressed displeasure at Stanley’s apparent belief that African chiefs should be able to retain sovereignty over their land, even as private companies plundered their property. He wrote:

The terms of the treaties Stanley has made with the native chiefs do not satisfy me. *There must at least be added an article to the effect that they delegate to us their sovereign rights over the territories which are the subject of the said conventions . . . The treaties must be as brief as possible and in a couple of articles must grant us everything.*<sup>79</sup>

But what was “everything”? Many of the treaties—and some of Leopold’s missives to Stanley—referred to “suzerainty” rather than “sovereignty.”<sup>80</sup> It was unclear what either term exactly meant, let alone whether they are equivalent.<sup>81</sup> It has been said that the Africans did not know what they were selling;<sup>82</sup> it could also be said that the Europeans did not entirely know what they were buying.<sup>83</sup>

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74. PAKENHAM, *supra* note 33, at 291.

75. PRESS, *supra* note 37, at 1.

76. KOSKENNIEMI, *supra* note 28, at 138.

77. REEVES, *supra* note 32, at 20.

78. ASCHERSON, *supra* note 33, at 114.

79. EWANS, *supra* note 32, at 71 (omissions in original) (emphasis added); *see also* VAN REYBROUCK, *supra* note 44, at 50–51 (providing a slightly different translation).

80. PRESS, *supra* note 37, at 125.

81. *See id.* (“‘Suzerainty’ as ceded to the foreign agents would not give Leopold’s association any control over the land itself; it would merely give it the title and duties of a protector.”).

82. VAN REYBROUCK, *supra* note 44, at 51 (“[E]ven if they had been able to read the texts, they would not have been familiar with concepts of European property and constitutional law like ‘sovereignty,’ ‘exclusivity,’ and ‘perpetuity.’”).

83. PRESS, *supra* note 37, at 108–09 (noting confusion over Pierre de Brazza’s contracts with a king in the Congo; “[t]he most important of them, complained the American ambassador to Paris, was ‘drawn up in such language’ that it was ‘not easy to understand exactly its meaning’” (quoting GRAHAM SAUNDERS, A HISTORY OF BRUNEI 83 (1994)); *id.* at 110 (“European treaty

These treaties raised questions not only of what sovereignty entailed and how it could be transferred, but also *who* could possess it, and specifically whether sovereignty could be held by a nonstate actor. The Congo Free State was not the only place where those questions were relevant. In fact, chartered company governments owned roughly three-quarters of British territory acquired in sub-Saharan Africa after 1880.<sup>84</sup>

Such territories are the focus of Steven Press's recent book, *Rogue Empires*. Press's goal is to "examine[] the global confusion over sovereignty wrought by the Independent State of the Congo and a host of related political forms" and to show how the Scramble for Africa "was a race, not necessarily to conquer or take land by force—most of that came later, starting in the 1890s—but to claim treaties, or paper deeds, which nominally sold to Europeans the titles to govern various territories."<sup>85</sup> Press documents how a market for sovereign territory emerged at the end of the nineteenth century, and how that market included not only existing states but also individuals like Leopold and corporate entities like the East India Company.<sup>86</sup>

Even before it brought suffering to the Congolese, King Leopold's control of the Congo Free State presented a foundational challenge for international law. Beginning with the Treaty of Westphalia of 1648, the building block of the international order was the sovereign state.<sup>87</sup> Despite the existence of pseudovereigns like the East India Company, and states' recognized role in protecting their citizens and investors abroad,<sup>88</sup> some perceived the exercise of sovereignty by nonstate actors as anomalous and threatening to the world order.

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negotiators, who ordinarily dealt with kings or emirs in other, non-Christian parts of the world, frequently misread the powers of such men as Iloo in Sub-Saharan Africa.”)

84. *Id.* at 219 (citing Hartmut Pogge von Strandmann, *The Purpose of German Colonialism, or the Long Shadow of Bismarck's Colonial Policy*, in *GERMAN COLONIALISM: RACE, THE HOLOCAUST, AND POSTWAR GERMANY* 193, 202 (Volker Langbehn & Mohammad Salama eds., 2011)).

85. *Id.* at 4; see also Edward Keene, *The Treaty-Making Revolution of the Nineteenth Century*, 34 *INT'L HIST. REV.* 475, 491 (2012) (noting that the increase in treaty-making by the European powers in the 1880s was primarily due to treaties dealing with matters outside Europe).

86. *Id.* at 6.

87. Jan Aart Scholte, *The Globalization of World Politics*, in *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 13, 20 (John Baylis & Steve Smith eds., 2d ed. 2001).

88. PRESS, *supra* note 37, at 65 (“The court at Madrid had insisted since the days of Hernán Cortés that European powers must hold sovereignty over any provinces acquired by *conquistadores* overseas.”). Leopold was keenly aware of this precedent, and in fact his ambitions

American scholar Jesse Siddall Reeves echoed an unnamed diplomat's description of the Congo Free State as a "monstrosity."<sup>89</sup> John Westlake, perhaps the most prominent British scholar of international law at the time, bemoaned "adventurers . . . who in recent times have led the way to the partition of Africa, [and who] have had a sufficient tincture of the forms and language of international law to hope for an advantage over European competitors, through what have really been travesties of them."<sup>90</sup> Westlake argued that sovereignty itself was strictly a European concept and that African chiefs had no power to transfer it.<sup>91</sup>

But others resolved this difficulty in the other direction, arguing that entities like the Congo Free State must be recognized as sovereigns in their own right precisely because they could not be privately owned. Émile de Laveleye—an expert on the history of property—suggested that Leopold's nominally philanthropic association, formed for the purpose of acquiring the Congo, "must become a state because Belgium did not own, and would not buy, the association's sovereign rights."<sup>92</sup> Égide Arntz, secretary general of the Institute of International Law in Geneva, challenged Leopold's critics to show a rule against such private ownership of sovereignty.<sup>93</sup>

Although the evidence indicates that Leopold's primary goals were economic all along, he and his proxies insisted that he was motivated by humanitarian goals like the elimination of the slave trade instead.<sup>94</sup> Leopold hired some of the most eminent scholars of the day

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in China were largely guided by the idea that, in Stengers's words, "concessions for mines and railways would serve as a stepping-stone to territorial control." Stengers, *supra* note 32, at 256.

89. REEVES, *supra* note 32, at 74 (quoting an unnamed diplomat).

90. PRESS, *supra* note 37, at 237 (quoting JOHN WESTLAKE, CHAPTERS ON INTERNATIONAL LAW, reprinted in THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 153 (L. Oppenheim ed., Cambridge Univ. Press 1914)).

91. KOSKENNIEMI, *supra* note 28, at 127 (citing J. Westlake, *Le Conflit Anglo-Portugais*, 18 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 247–48 (Brussels, 1891)). George Washington Williams and Roger Casement, among others, expressed similar views. JOHN HOPE FRANKLIN, GEORGE WASHINGTON WILLIAMS: A BIOGRAPHY 217 (Duke Univ. Press 1998) (1985).

92. PRESS, *supra* note 37, at 235.

93. *Id.*

94. GUY VANTHEMSCHE, BELGIUM AND THE CONGO 1885–1980, at 19 (Alice Cameron & Stephen Windross trans., 2012). Historian Guy Vanthemsche writes:

For the king, the fight against slavery was nothing more than a blind aimed at hiding his material ambitions. Leopold's anti-slavery campaigns were simply a means of establishing trade and political domination in the heart of Africa. It is true that . . . the traditional slave trade was eliminated, but the Congo Free State authorities immediately introduced other forms of coercion and forced labour.

to help translate that dubious claim into a rationale for sovereign control of the Free State by arguing that private individuals and entities can and should be vested with sovereign rights.<sup>95</sup>

Leopold's most significant scholarly defender was Sir Travers Twiss, an Oxford professor who later occupied Arntz's position as secretary general in Geneva and who drafted the constitution of the Congo Free State.<sup>96</sup> Twiss had been laid low by personal scandal involving his wife Marie, who he had presented in society as a Polish aristocrat but was discovered to be a French prostitute.<sup>97</sup> Incidentally, just before his death, Leopold was involved in a similar scandal, transferring an immense amount of his Congo-earned wealth to his mistress, Caroline, who after his death went on to marry the pimp who had introduced her to the king.<sup>98</sup>

Roughly a decade after the scandal that forced Twiss to leave high society and its associated incomes, he contacted Leopold with a proposal. Twiss's initial pitch to Leopold regarding international law reform was, on its face, progressive. Twiss wanted "Oriental[s]" to be given an equal place in international law.<sup>99</sup> The trick was that this would help support claims by private parties such as Leopold that they had legitimately contracted to purchase sovereign control from tribes in Africa. This was a position that Twiss himself, along with eminent scholars such as Emer de Vattel, had opposed in prior work.<sup>100</sup> But Twiss was in desperate need of both financial support and a means to get back into the elite international law arena. The end result: Twiss wrote reports supporting the right of private actors to act as sovereigns when entering into treaties with natives.<sup>101</sup>

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*Id.* at 22.

95. KOSKENNIEMI, *supra* note 28, at 143.

96. *Id.* at 33, 108. Arntz and Twiss's expert statements were presented to the Senate Committee on Foreign Relations in 1884, prior to the U.S. recognition of the Congo Free State. *Id.* at 122–23.

97. On Twiss and the scandal, see Andrew Fitzmaurice, *The Expansion of International Franchise in the Late Nineteenth Century*, 28 DUKE J. COMP. & INT'L. L. 449, 451–57 (2018); and Twiss, *Sir Travers*, 27 ENCYCLOPEDIA BRITANNICA 493 (Hugh Chisolm ed., 11th ed. 1911).

98. As Hochschild notes dryly, "If she shared some of her fortune with him, his was surely one of the most successful feats of pimping of all time." HOCHSCHILD, *supra* note 1, at 266. For Caroline's own telling of the story, see BARONESS DE VAUGHAN, *A COMMONER MARRIED A KING* (1937).

99. Fitzmaurice, *supra* note 97, at 458–59.

100. *Id.* at 459.

101. See, e.g., Travers Twiss, *An International Protectorate of the Congo River*, 250 L. MAG. & REV. 1, 15 (1883) (discussing the benefits of personal sovereignty as quelling unrest).

Press argues that for legal scholars like Twiss, “discussions centering on ethics missed the point. What really mattered was that everyone legally could participate in a worldwide market for sovereignty, be they monarchs, entrepreneurs, or missionaries.”<sup>102</sup> By dramatically increasing the range of possible buyers of sovereignty—and, therefore, later sellers—Leopold and his cronies had significantly expanded the possibility of participation in the market for sovereignty. Still, sovereign control itself could only be traded after it had been legitimized by the international community.

In 1884, after the American recognition of Leopold’s new nation, the major colonial powers met in Berlin to resolve the borders of their African claims.<sup>103</sup> It was at the Berlin Conference that Leopold’s claim to the Congo was formally recognized—its sovereignty, under his leadership, achieved.<sup>104</sup> British Prime Minister Lord Salisbury described the bizarre nature of these negotiations and transfers:

We have been engaged . . . in drawing lines upon maps where no white man’s feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.<sup>105</sup>

It hardly needs mentioning that no Africans participated in the discussions.<sup>106</sup>

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102. PRESS, *supra* note 37, at 235 (footnote omitted) (“Other famous professors, each hired by Leopold, supported the proposition by claiming the world was a marketplace for sovereignty.”).

103. Koskenniemi describes the Conference as “a multilateral attempt to channel the scramble in Africa into pacific channels.” KOSKENNIEMI, *supra* note 28, at 123. Press similarly noted:

[T]he conference only addressed certain parts of Africa, and its official agenda did not so much authorize new colonization as approve colonization that had already gotten underway. . . . Those who believe its resolutions carried out the partition of Africa surely exaggerate. But those who dismiss it as meaningless also go too far.

PRESS, *supra* note 37, at 195 (footnote omitted). See also RUTH SLADE, KING LEOPOLD’S CONGO: ASPECTS OF THE DEVELOPMENT OF RACE RELATIONS IN THE CONGO INDEPENDENT STATE 41 (1962) [hereinafter SLADE, KING LEOPOLD’S CONGO] (arguing that the Conference was animated by the belief that “European Powers had the right to annex African territory for their own advantage”).

104. Whether Berlin created or simply recognized the Congo Free State is a matter of debate. See 1 BOULGER, *supra* note 32, at 160 (“It is . . . quite erroneous to state that the Congo State was the creation of the Berlin Conference . . .”).

105. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, 53 (Feb. 3) (separate opinion by Ajibola, J.) (alteration in original) (quoting Lord Salisbury, Memorial of Libya (1890)).

106. HOCHSCHILD, *supra* note 1, at 84.

Leopold had long expressed his determination to get “a slice of this magnificent African cake.”<sup>107</sup> Now he had it. As one prominent Belgian historian put it, he owned the colony in the way that John Rockefeller owned Standard Oil.<sup>108</sup> Never was there a suggestion that Belgium itself would govern the Congo as a sovereign territory. In fact, by the terms of the Belgian constitution, Parliament had to specifically approve Leopold becoming king of another state.<sup>109</sup> That said, once other nations had recognized Leopold’s claim, Belgium itself had little choice but to do the same,<sup>110</sup> and ultimately Parliament’s agreement was procured through a promise from Leopold that the colony would never be a financial drain on the Belgian state.<sup>111</sup> It would be only a few years before this promise was broken.

*B. Transfer 2: Belgium Buys the Congo Free State (1908)*

Edmund Dene Morel was not the kind of person one might expect to ignite what has been called one of the world’s first international human rights movements.<sup>112</sup> He began his career as a shipping clerk, not a fire-breathing reformer.<sup>113</sup> But it was his training and instincts as a clerk that revealed the scale of the exploitation in the Congo Free State to him. While observing the port in Antwerp, Morel marveled at the volume of rubber, ivory, and other goods brought in from Africa ... and that the boats left Europe empty.<sup>114</sup> This suggested pillage, not trade. It was a Sherlock Holmes moment—a dog that did not bark.<sup>115</sup>

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107. *Id.* at 58. The invocation of appetite is appropriate; Leopold regularly consumed half a dozen eggs at breakfast as well as “a whole pot of marmalade.” ASCHERSON, *supra* note 33, at 263; HOCHSCHILD, *supra* note 1, at 169. In keeping with the theme, Jean Stengers describes Leopold’s “territorial voracity.” Stengers, *supra* note 32, at 249.

108. SLADE, KING LEOPOLD’S CONGO, *supra* note 103, at 175–76 (citing Jean Stengers, *La Place de Léopold II dans l’Histoire de la Colonisation*, 9 NOUVELLE CLIO 515, 527 (1950)).

109. EWANS, *supra* note 32, at 103.

110. 1 BOULGER, *supra* note 32, at 161–67 (describing the reconciliation of dual roles); PRESS, *supra* note 37, at 211. Ruth Slade notes a similar point:

Although officially we do not have to answer for the treatment meted out to the Congo natives, our honour and the good name of Belgium are at stake if a country which is governed by our King and largely administered by Belgians, is not worthy of the esteem and confidence of civilised humanity.

SLADE, KING LEOPOLD’S CONGO, *supra* note 103, at 203 (quoting a Belgian commentator).

111. HOCHSCHILD, *supra* note 1, at 91; *see also* EWANS, *supra* note 32, at 104.

112. *See* HOCHSCHILD, *supra* note 1, at 2.

113. CATHERINE ANN CLINE, E.D. MOREL, 1873–1924: THE STRATEGIES OF PROTEST 67 (1980).

114. HOCHSCHILD, *supra* note 1, at 2, 180.

115. As it happens, Sir Arthur Conan Doyle would later become a close friend of Morel’s and a leading voice in the Congo reform movement. *See* A. CONAN DOYLE, THE CRIME OF THE

As Morel said, “[i]t must be bad enough . . . to stumble upon a murder. I had stumbled upon a secret society of murderers with a King for a croniman.”<sup>116</sup>

What motivated that society of murderers was, in part, a seemingly innocuous development: John Boyd Dunlop’s invention of the pneumatic tire.<sup>117</sup> Dunlop’s innovation helped precipitate an international frenzy for rubber that simultaneously and symmetrically saved Leopold financially<sup>118</sup> and spelled doom for millions of Congolese.

At the time, rubber was harvested from vines, of which the Congo Free State had a great many.<sup>119</sup> But extracting rubber from those vines without destroying them was backbreaking work, a task that became harder as desperate workers chopped vines in two to collect as much rubber as possible and ranged farther into the jungle to meet their quotas.<sup>120</sup> As with his early efforts to buy colonies, Leopold found that there was simply no price at which labor could be profitably

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CONGO (1909) (providing a powerful account of the atrocities in the Congo intended to raise public awareness); HOCHSCHILD, *supra* note 1, at 180 (noting that the men became “good friends”).

116. PAKENHAM, *supra* note 33, at 591.

117. Paul Valley, *Forever in Chains: The Tragic History of Congo*, INDEPENDENT (July 28, 2006), <https://www.independent.co.uk/news/world/africa/forever-in-chains-the-tragic-history-of-congo-6232383.html> [<https://perma.cc/DU9V-XPKG>] (“[A] Scot called Dunlop invented the pneumatic tyre for his bicycle, and the worldwide boom in rubber began. In the Congo, wild jungle vines that yielded the stuff grew everywhere.”).

118. EWANS, *supra* note 32, at 169 (“At that point, fate intervened on Leopold’s side, with the mushrooming in the demand for rubber, . . . the Congo was about to become highly profitable.”); CRAWFORD YOUNG & THOMAS TURNER, *THE RISE AND DECLINE OF THE ZAIRIAN STATE* 33 (1985).

119. Robert Harms, *What a New Scramble Could Mean for Africans*, WASH. POST (Dec. 3, 2019) [hereinafter Harms, *What a New Scramble Could Mean for Africans*], <https://www.washingtonpost.com/outlook/2019/12/03/what-new-scramble-could-mean-africans> [<https://perma.cc/M22C-SM5W>].

120. Harms, *King Leopold’s Bonds*, *supra* note 43, at 354 (“Of late the people have been compelled to so frequently tap the vines that the latter soon dry up and die.”) (quoting a 1901 report by company agent Edgar Canisius); Harms, *What a New Scramble Could Mean for Africans* (“Rubber tappers had to travel farther and farther into the forest to find vines to exploit, leading to violent clashes and warfare between villages over the last remaining strands of rubber vines.”); *see also* NELSON, *supra* note 15, at 84 (“Because of ignorance or unconcern, there was little attempt at resource conservation until 1903, when the State set requirements for replanting and penalties for incorrect tapping procedures. But such measures were too little and too late.”). *See generally* E. D. MOREL, *RED RUBBER: THE STORY OF THE RUBBER SLAVE TRADE FLOURISHING ON THE CONGO IN THE YEAR OF GRACE 1906* (1906) (revealing the exploitation and brutality in Leopold’s rubber trade).

purchased.<sup>121</sup> And so again, he set up a system that allowed him to take what he wanted.

To call rubber harvesting a system of forced labor is too gentle; it was more akin to slavery.<sup>122</sup> As an institution, slavery was not new to the Congo—long before the arrival of the Europeans, Africans in what was then the Kingdom of the Kongo, owned and traded slaves.<sup>123</sup> But European slavers were more thorough and barbaric.<sup>124</sup> In 1526, King Affonso I of the Kongo wrote to Portugal's King João III: "Each day the traders are kidnapping our people . . . . This corruption and depravity are so widespread that our land is entirely depopulated."<sup>125</sup> King João III responded to the claim of scarcity, not depravity; answering Affonso's claim to the people, not to the people's self-ownership: "You . . . tell me that . . . this trade is depopulating your country. . . . The Portuguese there, on the contrary, tell me how vast the Congo is, and how it is so thickly populated that it seems as if no slave has ever left."<sup>126</sup>

From a legal perspective, the fundamental fact of slavery is that it entails one person's ownership of another.<sup>127</sup> The power of Leopold and those who abetted him was near absolute, and they achieved submission over the Congolese by using local variants of the means

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121. HOCHSCHILD, *supra* note 1, at 161 ("No payments of trinkets or brass wire were enough to make people stay in the flooded forest for days at a time to do work that was so arduous—and physically painful.").

122. *See, e.g.*, FRANKLIN, *supra* note 91, at 217 ("A Congolese could not sell the ivory he had carefully hoarded. His lands were not his own. He could not dispose of his produce in the open market. Indeed, the work of his own hands were not his."); GEORGES NZONGOLA-NTALAJA, *THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE'S HISTORY* 20 (2002) ("Colonial accumulation was based on forced labour, which took on aspects of slave labour in the [Congo Free State], a political unit that was supposedly created as a humanitarian venture against slavery."); PAKENHAM, *supra* note 33, at 629 ("Brazza 'saw the concessionary companies, rapacious and cynical, trying to create a new form of slavery . . .'" (quoting FÉLICIEN CHALLAYE, *LE CONGO FRANÇAIS* (1909))). Forced labor was not limited to the rubber industry. *See* VAN REYBROUCK, *supra* note 44, at 62 ("Leopold had sworn to put an end to the Swahilo-Arab slave trade, but in essence there was no difference between the life of a Central African domestic slave on the Arab peninsula and a boy in the household of a European official in Congo.").

123. HOCHSCHILD, *supra* note 1, at 9–11.

124. *Id.* at 10.

125. *Id.* at 13.

126. *Id.* at 14 (first and last omissions in original).

127. As a famous antebellum case from the United States put it: "The power of the master must be absolute to render the submission of the slave perfect." *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829). For examinations of the role of contract and property frames in the system of slavery, see generally AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING* (2018).

employed against slaves in the American South. For instance, Congolese were subjected to lashes from the *chicotte*—a whip made from a corkscrewed and razor-sharp strip of dried hippopotamus hide.<sup>128</sup> Twenty-five lashes could render a person unconscious; one hundred were often fatal.<sup>129</sup> But because the rubber barons' goal was primarily economic, such measures were costly from their perspective. Bodies, especially grown male bodies, were valuable, just as they had been to the slavers. Some therefore adopted another solution: holding family members hostage,<sup>130</sup> and cutting off their hands or sometimes entire limbs if a laborer failed to make his quota. The pictures were, and are, devastating.<sup>131</sup>

In his capacity as sovereign, Leopold built government-style institutions to support this regime. In 1888, he created a paramilitary police force, the *Force Publique*, to maintain order and punish those who fought against the industrial machine.<sup>132</sup> It would remain in power for most of the next century, even after independence, and was instrumental in suppressing Congolese resistance.<sup>133</sup> As for the international law community, which had been so centrally engaged with the questions of sovereignty attending the Free State's founding, it had little to say as the horrors of that State came to light, especially in the later years.<sup>134</sup>

But despite Leopold's best efforts and the complicity of those who profited, reformers began to—in the words of a poem sometimes displayed at Congolese protests—“flood his deeds with day” by writing extensively about the atrocities in the Free State.<sup>135</sup> In 1890, a black missionary from the United States, George Washington Williams, penned a remarkable open letter to King Leopold,<sup>136</sup> and then followed

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128. NZONGOLA-NTALAJA, *supra* note 122, at 22.

129. HOCHSCHILD, *supra* note 1, at 120.

130. *Id.* at 161.

131. Twain imagined Leopold's reaction: “Then all of a sudden came the crash! That is to say, the incorruptible *kodak* – and all the harmony went to hell!! The only witness I have encountered in my long experience that I couldn't bribe.” TWAIN, *supra* note 17, at 68.

132. EWANS, *supra* note 32, at 115.

133. HOCHSCHILD, *supra* note 1, at 301 (noting that the *Force Publique* helped repress the independence movement in 1950s).

134. KOSKENNIEMI, *supra* note 28, at 163 (noting the “indifference of international lawyers,” and that “[a]part from the apologies by [Belgian international lawyers Ernest] Nys and [Baron Édouard] Descamps, the international law community stayed silent during the peak years of the Congo controversy, 1903–1908”).

135. HOCHSCHILD, *supra* note 1, at 215.

136. FRANKLIN, *supra* note 91, at xxiii (detailing Williams's trip to the Congo).

it up with a scathing report enumerating many of the Congo's central problems.<sup>137</sup> William Sheppard, another black American missionary, lived in the Congo for years, describing and decrying the violence of the rubber "trade" in increasingly strident terms.<sup>138</sup> Roger Casement, a British diplomat famous for his documentation of colonial abuses—and later for his role in Ireland's Easter Rising, a role that would see him hung for treason—also wrote powerfully of the brutality in the Congo.<sup>139</sup>

Leopold fought back, and those who were making money off his personal colony had incentives to accept his defenses. As early as the mid-1890s, Leopold had paid "large indemnity payments to the British and German governments" after the *Force Publique* executed an Irish trader, threatening the security of Europeans in the country and—perhaps more importantly to those other governments—the freedom of trade in the Congo.<sup>140</sup>

But Leopold's efforts to buy his way out of the problem backfired. One key misstep was the hiring—and eventual firing—of Henry Kowalsky, a notorious lawyer and lobbyist from San Francisco. Kowalsky was a larger-than-life figure with unsavory connections and a predilection for drama; he was once nearly shot by a furious Wyatt Earp, but succumbed to a bout of narcolepsy before Earp pulled the trigger.<sup>141</sup> When Leopold cut off Kowalsky's retainer, he went to the press with messages from the king outlining his efforts to purchase U.S. support for his claim to sovereign control. The effect of Kowalsky's report was that "Americans woke up to discover that agents of a foreign power had been paid to corrupt their representatives in Congress—and had succeeded in bribing an official of the Senate Committee on Foreign Relations."<sup>142</sup>

The most devastating reports, though, were those coming from the Congo itself. In the summer of 1890, a young man named Konrad

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137. *Id.* at 264.

138. See generally WILLIAM E. PHIPPS, WILLIAM SHEPPARD: CONGO'S AFRICAN AMERICAN LIVINGSTONE (2002).

139. See BRIAN INGLIS, ROGER CASEMENT 13 (1973).

140. HOCHSCHILD, *supra* note 1, at 174; Paul McStallworth, The United States and the Congo Question, 1884–1914, at 340 (1954) (unpublished Ph.D. dissertation, Ohio State University) (on file with the Ohio State University) ("Beyond the shadow of a doubt, [U.S.] interest and initiative in the Congo were in the strictest sense economic.").

141. *Col. Kowalsky Dozed Under Bad Man's Gun: King Leopold's American Lobbyist Disconcerted Wyatt Earp*, N.Y. TIMES, Dec. 12, 1906, at 11.

142. PAKENHAM, *supra* note 33, at 659.

Korzeniowski arrived in Congo, where he would remain for six miserable months.<sup>143</sup> Nearly a decade later—then known as Joseph Conrad—he shaped this experience into the acclaimed novel, *Heart of Darkness*,<sup>144</sup> which he said “pushed a little (and only very little) beyond the actual facts of the case.”<sup>145</sup> As the novel draws to a close, the narrator, Marlow, has reached his goal: a post deep in the jungle where the mysterious, mercurial, and powerful Mr. Kurtz is stationed. Kurtz has been extraordinarily successful in collecting ivory but has adopted brutal methods, staking the heads of natives on fenceposts outside his home. Kurtz, who is seriously ill and has descended into madness, has a moment of clarity in his final lines:

Anything approaching the change that came over his features I have never seen before, and hope never to see again. . . . He cried in a whisper at some image, at some vision—he cried out twice, a cry that was no more than a breath—“The horror! The horror!”<sup>146</sup>

Morel, Williams, Casement, and their allies built what was one of the first international human rights movements of the century.<sup>147</sup> In doing so, they had to overcome Leopold’s secrecy and lobbying, the public’s general lack of knowledge, and detractors’ political opposition. Some voices in the United States, for example, opposed intervention, comparing Leopold’s reign to the United States’ own struggles with its identity as an imperial power in the wake of the Spanish–American War. In February 1906, Secretary of State Elihu Root actually expressed sympathy for Leopold’s difficulties, analogizing the Congo to the Philippines, which the United States had recently acquired from Spain.<sup>148</sup> In a series of prominent *Chicago Tribune* articles collectively

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143. JEFFREY MEYERS, *JOSEPH CONRAD: A BIOGRAPHY* 102–08 (1991) (describing Conrad’s arrival in June and departure in December of that year.)

144. JOSEPH CONRAD, *HEART OF DARKNESS* (Alfred A. Knopf 1993) (1902).

145. HOCHSCHILD, *supra* note 1, at 143; *see also* CHINUA ACHEBE, *HOPES AND IMPEDIMENTS: SELECTED ESSAYS 1965–1987*, at 2 (1988) (noting the racism implicit in *Heart of Darkness*).

146. CONRAD, *supra* note 144, at 98.

147. *See* HOCHSCHILD, *supra* note 1, at 2. It should be noted that they did so in part by emphasizing the fact that trade was restricted in the Congo, in contravention of the promises Leopold had made to the international community. *See* PAKENHAM, *supra* note 33, at 586 (“What was new was that these humanitarians had now joined hands with the men of commerce, God with Mammon.”).

148. McStallworth, *supra* note 140, at 334 (“If the United States had happened to possess in Darkest Africa a territory seven times as large and four times as populous as the Philippines, we too, might find good government difficult and come in for our share of just or unjust criticism.” (quoting a February 20, 1906, letter from Root to Congressman Edwin Denby)); *id.* at 330 (“If I

published in 1907 as “The Truth About Congo,” journalist and scholar Frederick Starr railed against American “interfere[nce]” in the Congo, accusing the would-be reformers of having unclean hands:

The Bantu in the Congo we love. . . . Yet, here he may be whipped, put on the chain-gang, murdered, and if any raise an outcry he is a sentimentalist. . . .

We took the Philippines and Filipinos for their good. So we said. Of course, we took them just as the European nations have taken Africa—for exploitation. . . .

When our hands are clean and when we have given the Filipinos their well-deserved independence and free government, and left them to work out their own salvation, then and not till then, should we intervene in the Congo Free State for reasons of humanity.<sup>149</sup>

Starr was not alone in raising the issue of hypocrisy,<sup>150</sup> but arguments like his could not silence the outrage. When the nature and scale of Leopold’s brutality against the Congolese people became undeniably apparent, the “Belgian Solution”—referring to Belgium’s acquisition of the colony—was generally regarded by reformers as the best, and perhaps only viable, option for the future of the Congo.<sup>151</sup> The pressure from those reformers, especially those in the United States, was the immediate predicate for King Leopold’s capitulation.<sup>152</sup>

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mistake, not, we had a great deal of trouble and worry in carrying out reforms in the Philippines after annexation—and if the Powers had demanded a categorical schedule of effective reforms as a condition of recognizing our annexation of the islands, we might have been embarrassed.”(quoting another State Department official)); *see also* PAKENHAM, *supra* note 33, at 659 (describing the U.S. Secretary of State’s opinion of the situation in the Congo.)

Remarkably, Leopold inserted himself into the peace negotiations between Spain and the United States, suggesting that the Spanish lease the Philippines back from the United States. This proposal collapsed when the United States decided to keep the Philippines for itself. Stengers, *supra* note 32, at 255.

The United States would eventually pledge to recognize Philippine independence, stripping its residents of U.S. nationality in the process. *See* Jones Act, ch. 416, 39 Stat. 545, 546 (1916) (declaring the intention of the United States to recognize the independence of the Philippine Islands in the preamble); Treaty of General Relations and Protocol (“Treaty of Manila of 1946”), Phil.-U.S., July 4, 1946, 61 Stat. 1174.

149. FREDERICK STARR, *THE TRUTH ABOUT THE CONGO* 121–22, 127 (1907).

150. McStallworth, *supra* note 140, at 322 (“As if to divert attention from their own inadequacies, the Belgians criticized the treatment of the Negro in America . . .”).

151. HOCHSCHILD, *supra* note 1, at 257 (“Even Morel, frustrated by the lack of other politically viable choices, reluctantly advocated what was known as ‘the Belgian solution.’”).

152. E. D. MOREL’S *HISTORY OF THE CONGO REFORM MOVEMENT* 194 (Wm. Roger Louis & Jean Stengers eds., 1968) (“The immediate reason for the King’s decision to hand his African domain over to Belgium was that the anti-Congo campaign in America threatened to catch fire.”).

Although he would be able to delay the final transfer with a series of obfuscations and drawn-out negotiations, by the end of 1906, it was clear that King Leopold would have to give up his private colony, and that Belgium would have to take it.<sup>153</sup> Indeed, in some sense, the sale had already been made: Félicien Cattier's contemporary research showed that Belgium had already poured money into the colony and that Leopold had already taken the proceeds.<sup>154</sup>

Why *Belgium* agreed to the deal, however, is a bit more of a mystery.<sup>155</sup> Part of the concern might have been reputational. A 1906 book by Jesuit writer Arthur Vermeersch argued that “our honour and the good name of Belgium are at stake if a country which is governed by our King and largely administered by Belgians, is not worthy of the esteem and confidence of civilized humanity.”<sup>156</sup> Adam Hochschild reached a similar conclusion in his 1999 book, *King Leopold's Ghost*: “Oddly enough, Leopold had the Belgian government cornered. The Congo reform movement had reached such a pitch of fervor that Belgium's international reputation was at stake.”<sup>157</sup> Perhaps more concretely, if Belgium did not step in to address its king's misdeeds, it faced the very real possibility that some other country would.<sup>158</sup>

In any event, neither the buyer nor the seller was happy. As for the Belgians, the *Daily News* reported, “[n]ever before . . . was greatness forced by circumstances on a more reluctant people.”<sup>159</sup> The *Washington Post* echoed the point: “The annexation of the independent state has been received by the public generally, either

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153. Harms, *King Leopold's Bonds*, *supra* note 43, at 356 (“Despite Leopold's liberal use of money to keep friendly journalists on his payroll and to subsidize friendly publications, the international pressure was so great that in 1906 he was forced to enter into negotiations with the Belgian government for the transfer of control over the Congo.”).

154. PAKENHAM, *supra* note 33, at 657; *see also* EWANS, *supra* note 32, at 218 (“Cattier's conclusion was that immediate annexation was the only way out of the situation.”).

155. We explore this mystery—and why Belgium saw fit to pay Leopold's debts at all—in more detail elsewhere. *See* Joseph Blocher, Mitu Gulati & Kim Oosterlinck, *King Leopold's Bonds and the Odious Debts Mystery*, 60 VA. J. INT'L L. (forthcoming 2020).

156. ASCHERSON, *supra* note 33, at 258 (quoting Vermeesch's book and saying that it was “widely-read”).

157. HOCHSCHILD, *supra* note 1, at 257–58.

158. PAKENHAM, *supra* note 33, at 657 (“How could little Belgium now prevent the Great Powers intervening against her King? Only by becoming a colonial power herself.”).

159. EWANS, *supra* note 32, at 230; *see also* VAN REYBROUCK, *supra* note 44, at 105 (“Belgium assumed its role as colonizer with more gravity than pride.”); Morel, *supra* note 57 (“It would be the grossest unfriendliness towards Belgium to give any moral support or sympathy to the Belgian Government to thrust this white elephant upon the shoulders of the Belgian people.”).

with indifference or the opinion that the Congo will prove a burden upon the country.”<sup>160</sup>

Leopold had long insisted that his goals in the Congo were humanitarian and that he had pursued them at great personal cost.<sup>161</sup> The terms of the deal largely reflected this narrative of self-sacrifice. Never mind the castles and museums he was constructing, or the millions he secreted away to himself and his mistress.<sup>162</sup> The Belgian government would assume the Congo Free State’s enormous debts (many owed to Belgium itself), commit to pay for a considerable number of Leopold’s ongoing pet projects, and pledge a fifty-million franc payment to Leopold “*as a mark of gratitude for his great sacrifices made for the Congo.*”<sup>163</sup>

Perhaps more significantly, Leopold squeezed every last bit of profit out of his personal colony. With the endgame approaching, he worked hard to separate his roles as sovereign and owner and to effectively retain the latter even as he sold the former.<sup>164</sup> He would spend the next two years setting up concessions and companies to continue exploiting the Congo’s national resources even after he handed over formal “governance” authority to Belgium.<sup>165</sup> He established a foundation in Germany and transferred twenty-five million francs worth of jewelry and other valuables to it.<sup>166</sup> Other secret companies held valuable real estate across Belgium and the Cote d’Azur,<sup>167</sup> some of it earmarked for Belgian royals, others for officers returning from the Congo.<sup>168</sup> Ultimately, Belgium purchased a hollow

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160. *Congo Deficit Likely. Belgium Bound Morally To Stand Sponsor. Securities’ Holders May Sue*, WASH. POST, Aug. 22, 1908, at 3.

161. EWANS, *supra* note 32, at 226 (“Is it not wretched to have been the King of this State for twenty-two years *and to have kept nothing for oneself?* After all, I am seventy-two years old and will not have long to benefit from it.” (emphasis added) (quoting Leopold)).

162. HOCHSCHILD, *supra* note 1, at 168, 266.

163. *Id.* at 259 (emphasis added).

164. EWANS, *supra* note 32, at 224 (“Leopold was trying to ensure that in the event of a takeover, a large part of the Congo would continue to provide revenues which he could use for his own purposes.”); PAKENHAM, *supra* note 33, at 660 (“[H]e would give up the territory, but not the profits of the Congo.”).

165. EWANS, *supra* note 32, at 227 (“In October and November of 1906, he announced the formation of several companies to which would be transferred prospecting and mining rights in various areas of the country.”); Harms, *King Leopold’s Bonds*, *supra* note 43, at 356 (“Between 1901 and 1907 he had transferred nearly 100 million francs to his Crown Foundation while putting the Congo Independent State deeply in debt.”).

166. EWANS, *supra* note 32, at 231; HOCHSCHILD, *supra* note 1, at 275–76.

167. EWANS, *supra* note 32, at 231.

168. HOCHSCHILD, *supra* note 1, at 275–76.

shell of a state,<sup>169</sup> and at a hefty price. But in light of the increasing fervor about atrocities in the Congo and the threat of international intervention, Belgium had little choice.

In the end, Leopold got to have his “magnificent African cake” without the calories,<sup>170</sup> but he was bitter and resentful nonetheless. The King’s attendant noted, “[t]he day had been for him one of definitive abdication from his personal overseas empire, and he felt a deep resentment at the manner in which the transfer of sovereignty had come about. . . . It was base and unjust.”<sup>171</sup> Demetrius Boulger, who wrote a fawning two-volume biography of the king in 1925, channeled that resentment in jaw-dropping fashion: “Human injustice has rarely given a more painful exhibition than the treatment meted out to King Leopold for his action in the Congo during the last ten years of his life. Posterity and history will pay a just tribute to all he accomplished . . . .”<sup>172</sup> Indeed.

Thanks in part to Leopold’s machinations, it is all but impossible to know how much money he made from the Congo. But what is certain is that, in 1908, he gave up control peacefully for a price. The Congo Free State escaped his clutches, and did so without a war. This was not freedom—it was still a colony. But it was a major improvement, achieved in a remarkable way. For our purposes, the most significant fact is that despite major obstacles—a tragedy of unfathomable size, unclear international rules, and reluctant parties—sovereignty was transferred away from the person who had purchased it twenty years prior.

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169. ASCHERSON, *supra* note 33, at 263 (“It had served its purpose; cleared of its essential installations, it could be left to Belgium as an empty house is left to a new landlord.”); PAKENHAM, *supra* note 33, at 661. Of course, it was described to the public in precisely the opposite terms. In Morel’s acerbic contemporary account:

The transfer is presented to Belgium in this way:—“Here is a potential dependency of incalculable wealth which already pays its way out of local revenue; with trifling liabilities and magnificent assets, and a moral obligation towards the founder which it will be the privilege of the nation to carry out in order to show its profound gratitude for benefits conferred.”

Morel, *supra* note 57.

170. Harms, *King Leopold’s Bonds*, *supra* note 43, at 344 (“Historians have generally depicted the Belgian government’s takeover of the Congo in 1908 as a major blow to Leopold, but . . . it may have been his grandest scheme of all. He managed to pawn off a bankrupt and debt-ridden colony onto the Belgian government while augmenting his personal fortune.”).

171. EWANS, *supra* note 32, at 230.

172. 2 BOULGER, *supra* note 32, at 187.

C. *Transfer 3: Congo Pays for its Sovereignty (1960)*

Life improved for the Congolese when Belgium took over,<sup>173</sup> but the changes were not immediate, and they were mostly in degree rather than in kind.<sup>174</sup> Congo had gone from being a personal colony to a public one. To some, this shift represented a significant breakthrough for the Congo because at the very least “as a colony it will be subject to government by discussion.”<sup>175</sup> But as a matter of self-governance, according to one Congolese scholar, “the transformation of the Congo from Leopold’s personal possession to a Belgian colony in 1908[] did not represent a major advance for the Congolese people and their quest for freedom and self-determination.”<sup>176</sup>

The Belgians retained Leopold’s policy with regard to “vacant” lands, meaning that such lands—broadly defined, of course—were subject to expropriation by mining and agricultural enterprises.<sup>177</sup> The Congolese people could not vote,<sup>178</sup> still suffered violence and abject poverty, and were still pressed into harvesting cash crops.<sup>179</sup> The fact that the value of rubber had plummeted in the years leading up to the transfer<sup>180</sup> did not help. Notably, the first Belgian minister of colonies

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173. EWANS, *supra* note 32, at 236 (referring to reports of British consuls); VAN REYBROUCK, *supra* note 44, at 104–10 (noting that “drastic administrative reforms” were put in place, along with “a change . . . in the attitude with which the colony was governed,” including improvements to medical treatment).

174. NZONGOLA-NTALAJA, *supra* note 122, at 57 n.63 (“[T]he dominant historiography speaks of King Leopold’s Congo and the Belgian colony as though they were two different countries, when in fact the laws and regulations as well as colonial agents, settlers and administrators remained in place, and repression was carried on as usual.”); *id.* at 26 (“The Leopoldian system was replaced by a colonial regime that was just as oppressive, albeit in a less brutal manner.”); *see also* Heym, *supra* note 17, at 23 (“Under the benevolent rule of the Belgian parliament, the cutting off of human hands was discontinued, but not so the practice of forced labor.”); NELSON, *supra* note 15, at 114 (“[T]he Belgian annexation of the Congo ultimately produced no substantial departures from the policies of Leopold’s Free State.”); VAN REYBROUCK, *supra* note 44, at 104 (noting that there was “no complete break with the years before 1908”).

175. Reeves, *supra* note 2, at 118.

176. NZONGOLA-NTALAJA, *supra* note 122, at 26.

177. EWANS, *supra* note 32, at 237.

178. *See* VAN REYBROUCK, *supra* note 44, at 106.

179. EWANS, *supra* note 32, at 239 (“A system of forced labour thus effectively remained a feature of the Belgian colonial regime, and this also extended to the compulsory cultivation of cash crops by peasant farmers.”).

180. *Id.* at 236.

“was a former official of a company that had used thousands of forced laborers to build railways in the eastern Congo.”<sup>181</sup>

Medical services, labor contracts, and educational opportunities all improved after Leopold’s reign, however, and were probably comparable to those in neighboring colonies.<sup>182</sup> There seemed to be no large-scale atrocities like the German slaughter of Hereros, at least.<sup>183</sup> In 1913, even Morel claimed victory, noting that the one major goal not yet achieved was African ownership of land.<sup>184</sup> Even as he folded up his advocacy tents, Morel nonetheless warned that “the root of the evil [will remain] untouched . . . till the native of the Congo becomes once more owner of his land and of the produce which it yields.”<sup>185</sup>

In a profound sense, the inability of “the native of the Congo” to be “owner of his land”—recalling, again, the interplay between property and sovereignty—would remain the central issue during, and even after, the colonial period. As one report put it at the time: “Such wrongs could only cause to be born, in the hearts of the natives, feelings of hate and revolt, feelings which caused them to await patiently the day when they would be stronger.”<sup>186</sup> The Congolese natives needed both the concept and the reality of self-determination, and it would take decades for those to arrive in Congo.

As late as 1955, Belgians were considering a thirty-year plan for Congolese independence.<sup>187</sup> Just four years later, in January 1959, mass demonstrations broke out in Leopoldville—today known as

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181. HOCHSCHILD, *supra* note 1, at 271; *see also id.* (“The head of the Belgian Senate committee that approved the new colonial budget—which *increased* ‘taxes in kind’ on Africans, Morel pointed out—was a shareholder in the notorious rubber concession company, A.B.I.R.”).

182. EWANS, *supra* note 32, at 241 (“In fairness to the Belgians, it has to be said that in some ways, their record in the Congo was no worse, and possibly even better, than that of other African colonial regimes.”).

183. Between 1904 and 1908, as Leopold’s rule in the Congo Free State was coming to an end, German colonial troops slaughtered more than one hundred thousand indigenous peoples in what is now Namibia. *Germany Sued for Damages of “Forgotten Genocide” in Namibia*, GUARDIAN (Jan. 5, 2017, 5:07 PM), <https://www.theguardian.com/world/2017/jan/05/germany-sued-forgotten-genocide-namibia-herero-nama> [<https://perma.cc/G2JJ-ZUVH>].

184. HOCHSCHILD, *supra* note 1, at 273.

185. *Id.* at 272 (alteration in original) (omission in original).

186. EWANS, *supra* note 32, at 237 (quoting VAN DE KERKEN, *LES SOCIÉTÉS BANTOUES DU CONGO BELGE* 180 (1920)).

187. *See generally* A. A. J. Van Bilsen, *Un Plan de Trente Ans pour l’Émancipation Politique de l’Afrique Belge* 33 *LE DOSSIERS DE L’ACTION SOCIAE CATHOLIQUE* 83 (Feb., 1956) (covering, as translated, “A Thirty-Year Plan for the Political Emancipation of Belgium Africa”).

Kinshasa—heralding the end of the colonial era.<sup>188</sup> These initial demonstrations were put down violently by the *Force Publique*,<sup>189</sup> but the momentum for independence could not be stopped. Martin Ewans identifies two “essential causes” of the January riots: a recession caused by falling commodity prices and “the beginnings of political consciousness among the Congolese.”<sup>190</sup> Whatever the causes, the Belgians ultimately did not put up much resistance, reflecting both the strength of the independence movement and the Belgians’ lingering ambivalence about their status as a colonial power.<sup>191</sup> France theoretically could have asserted a claim, but renounced its *droit du preference*.<sup>192</sup>

But just as Congo was effectively made to pay for the transfer from Leopold to Belgium, it was in many ways pillaged again at the moment of independence. The transfers of private assets from Congo to Belgium were so vast and so quick that they had to be capped.<sup>193</sup> Companies operating in the Congo were permitted to choose either Congolese or Belgian affiliation. Most opted for the latter.<sup>194</sup> As David Van Reybrouck explains, “[t]hey remained active in Congo, but chose for a registered office in Belgium, effectively placing their company under Belgian rather than Congolese governance. That transfer cost the Congolese treasury a vast amount of tax revenue.”<sup>195</sup> More costly,

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188. RUTH SLADE, *THE BELGIAN CONGO* 17 (2d ed. 1961) [hereinafter SLADE, *THE BELGIAN CONGO*].

189. HOCHSCHILD, *supra* note 1, at 301.

190. EWANS, *supra* note 32, at 243.

191. *Id.* (“[I]n the spirit of their traditional reluctance to sustain a colonial role, the Belgians had little stomach for argument . . . [T]heir abdication of power developed, over a period of a mere eighteen months, into an almost full scale rout.”); NZONGOLA-NTALAJA, *supra* note 122, at 6 (“Shocked by the violence of their presumably happy subjects and lacking the political will for an Algerian-type colonial war in an international context in which decolonization was the order of the day, the Belgians opted for a negotiated independence.”).

192. NZONGOLA-NTALAJA, *supra* note 122, at 17 (“In 1960, on the eve of Congo’s independence from Belgium, France had to renounce this right of imperial succession.”). This was not the *droit* that Leopold had given it in the 1880s, but one received—along with the island of Bomo, located in Stanley Pool—from Belgium in 1908 in exchange for resolving a disputed border and recognizing the transfer from Leopold. *New Congo Agreement: Boundary Question Settled by France and Belgium*, MANCHESTER GUARDIAN, Dec. 24, 1908, at 10.

193. SLADE, *THE BELGIAN CONGO*, *supra* note 188, at 76.

194. See JACQUES DEPELCHIN, *FROM THE CONGO FREE STATE TO ZAIRE: HOW BELGIUM PRIVATIZED THE ECONOMY: A HISTORY OF BELGIAN STOCK COMPANIES IN CONGO-ZAIRE FROM 1885 TO 1974*, at 82 (Ayi Kwei Armah trans., 1999) (“The old companies were still present, but that did not mean they operated in the same way as before. As we shall see later, they had been emptied of their substance.”).

195. VAN REYBROUCK, *supra* note 44, at 262.

three days before independence, the Belgian Parliament and the Congolese government effectively denied the new state control over Union Minière, the mining giant that helped drive the nation's economy.<sup>196</sup> As Van Reybrouck puts it, "The political keys were already in [Congo's] pocket, but the economic ones were now safely tucked away in Belgium."<sup>197</sup>

But even the political keys were not entirely turned over. The fact that Belgium and its Western allies accepted a nominally independent Congo did not mean that they were willing to accept any and all choice by the Congolese.<sup>198</sup> Only a few months after leading the country to independence, the Pan-Africanist hero Patrice Lumumba—the Congo's first democratically elected prime minister—was assassinated, his body chopped up and dissolved in acid, apparently with the complicity of Belgian intelligence forces and the American CIA.<sup>199</sup> Not until decades later would the Belgian government—confronted with direct evidence—acknowledge and apologize for its involvement in Lumumba's murder, which was motivated in part by a desire to maintain control over the Congo's resources.<sup>200</sup>

Lumumba's death opened the door for Joseph-Désiré Mobutu, a former officer in the *Force Publique*,<sup>201</sup> who would become one of the world's most notorious kleptocratic dictators. For decades, Mobutu (who changed his name to Mobutu Sese Seko in 1972) would rule Congo (renamed Zaire in 1971) with an iron fist, murdering political opponents, generating debts in the name of the state, and generally plundering its wealth for his own personal use.<sup>202</sup> The profits, as in the days of old, went to Mobutu himself or to a variety of Western

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196. *Id.* at 263.

197. *Id.*

198. See NZONGOLA-NTALAJA, *supra* note 122, at 101–12 (describing efforts by external powers to shape Congolese government, including by contributing to the fall and assassination of Patrice Lumumba and the quelling of the Katanga secession).

199. VAN REYBROUCK, *supra* note 44, at 305–08 (describing the assassination).

200. See Alan Riding, *Belgium Confronts Its Heart of Darkness; Unsavory Colonial Behavior in the Congo Will Be Tackled by a New Study*, N.Y. TIMES (Sept. 21, 2002), <https://www.nytimes.com/2002/09/21/arts/belgium-confronts-its-heart-darkness-unsavory-colonial-behavior-congo-will-be.html> [<https://perma.cc/XC9N-27R6>].

201. HOCHSCHILD, *supra* note 1, at 302.

202. See Reuben Loffman, *In the Shadow of the 'Great Helmsman': Mobutu Sese Seko's Life and Legacy in the DR Congo*, AFR. LSE BLOG, (Sept. 7, 2017), <https://blogs.lse.ac.uk/africaatlse/2017/09/07/in-the-shadow-of-the-great-helmsman-mobutu-sese-sekos-life-and-legacy-in-the-dr-congo> [<https://perma.cc/8U2D-2CBB>] ("Rather than a by-word for the optimistic nationalism of the late 1960s, Mobutism became a synonym for kleptocratic rule and remains one of Mobutu's lasting legacies to this day.").

companies.<sup>203</sup> When Laurent Kabila's forces rose in power against Mobutu in the 1990s, foreign companies cut lucrative mining deals with the rebel forces as well.<sup>204</sup>

By the time Mobutu was overthrown in 1997, the Congo had once again been hollowed out, reduced to "a shell, with a worthless currency, a decomposed civil service, and a President apparently indifferent to the hollow nature of his power or to the fact that he symbolised grotesque theft."<sup>205</sup> King Leopold's ghost still haunted the Congo.

## II. THE THEORY: TRANSFERABLE SOVEREIGNTY

Our goal is not to cast new light on the horror and oppression that the Congo has experienced over the past century, but to explore them through a particular lens: the acquisition, transfer, and purchase of sovereign control. In the preceding Part, we have tried to highlight the ways in which sovereign control has been treated as a thing that can be "owned" and transferred.

For much of the Congo's history, the very idea that sovereignty can be owned made life worse for millions of Congolese. It allowed Leopold to "buy" their country—although really the nominal purchases mattered less than the international community's complicity and recognition—and exploit them for financial gain. But it was also the transferability of sovereignty that ultimately brought the horror to an end, via Belgium's purchase of the Congo Free State. That raises several questions: Can transfers of sovereignty—including forced sales of the kind that took place in 1908—be used to prevent oppression from reaching the point of genocide? Under what conditions, and with what risks? Finally, how could the model apply to concrete

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203. HOCHSCHILD, *supra* note 1, at 303; Bill Berkeley, *Zaire: An African Horror Story*, ATLANTIC (Aug. 1993) <https://www.theatlantic.com/magazine/archive/1993/08/zaire-an-african-horror-story/305496> [<https://perma.cc/RPR5-N3AB>] ("By 1980 it was estimated that officials were skimming off at least \$240 million a year from the nationalized [mining] resource. More recently a World Bank investigation estimated that up to \$400 million . . . inexplicably vanished from the country's foreign-exchange accounts in 1988.").

204. *Id.* at 286–87; Cindy Shiner, *U.S. Firms Stake Claims in Zaire's War*, WASH. POST, Apr. 17, 1996, at A01. Decades earlier, Depelchin alleges, Union Minière had financed the Katanga secession bid after its economic interests were threatened by political change. DEPELCHIN, *supra* note 194, at 181.

205. EWANS, *supra* note 32, at 245 (quoting Kaye Whiteman, *The Single-Minded Pursuit of Wealth*, GUARDIAN NEWS SERV., Sept. 9, 1997).

contemporary scenarios? The following Sections address those three questions in order.

A. *The Possible Benefits of Forced Sales of Sovereign Control*

King Leopold's sale of sovereign control to Belgium was hardly a perfect solution, but it did bring the mass murder to an end. Could such a solution be employed today to resolve similarly thorny situations of arguable oppression? Would the world be a better place if the Kurds had the right to buy their sovereignty from Iraq and either become independent or join some other sovereign? The Uyghurs from China? The Tamils from Sri Lanka? The Kashmiris from India and Pakistan?

Each situation is complex and distinct, and there is no single approach that could resolve them all. Faced with a situation like that in Leopold's Congo in 1908—or, for that matter, Joseph Kabila's Congo today<sup>206</sup>—the international community might first resort to diplomacy. If that fails, the next step might be economic sanctions. Where the situation is truly horrific and not responsive to pressure, international law might provide a right of exit for the oppressed people, either individually as refugees or *en masse* in the form of a secession.<sup>207</sup> And there is a lively debate about whether the rest of the world has a responsibility to protect (“R2P”) in certain circumstances.<sup>208</sup>

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206. See Kimiko de Freytas-Tamura, *After Tarnished Election, Opposition Figure Becomes Congo's President*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/world/africa/congo-president-inauguration-tshisekedi-kabila.html> [<https://perma.cc/ZR89-S6FN>] (noting that Congo's recent election is “widely considered to be illegitimate,” and that Kabila's most vociferous opponent is “widely believed to have won the election”).

207. Although it is not necessary to our argument here, we believe there to be growing agreement on the existence of a right to remedial secession. That said, it is not clear what precisely counts as severe oppression and how much support the international community will provide, if at all. The right goes back at least to 1920 and the claim of the Aalanders and their right to separate from Finland and unite with Sweden. See *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7/21/68/106 (1921); see also Milena Sterio, *Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia*, 22 ASIL INSIGHTS (2018), <https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan> [<https://perma.cc/GT7N-XLKV>].

208. For a broad overview, see generally INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/QTR5-RX9G>]. For a collection of criticism, see CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT (Philip Cunliffe ed., 2011). Given the unprecedented scale of the mass displacement, the debate is particularly important as it relates to the ongoing refugee crisis. For an examination of that intersection, see generally E. Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility To Protect Refugees*, 100 MINN. L. REV. 687 (2015).

Forced sales of sovereignty potentially represent another arrow in the quiver of humanitarian activists. Indeed, they combine several characteristics of some of the standard options. Like secessions, they deprive oppressive leaders of sovereign territory. And like migration, they involve a change in who exercises sovereign control over a particular group of people.

That said, both essential characteristics of forced sales are worth exploring in more detail: first, that they are forced, and second, that they are sales. As to the former, it is significant that the kinds of transfers we have in mind here do not necessarily involve straightforward offer and acceptance, although such notions have indeed been suggested for the removal of dictators.<sup>209</sup> The precise terms of the Congo Free State's sale involved a fair bit of negotiation,<sup>210</sup> but Leopold ultimately had no choice but to sell.

This structure of entitlement is not unusual in law. It corresponds to what Guido Calabresi and Douglas Melamed call a "liability rule" — an entitlement that can be taken, but only at a price determined by a third party.<sup>211</sup> In U.S. law, takings are an example: a property owner cannot refuse to turn over her land for public use but is entitled to just compensation for doing so.<sup>212</sup> By contrast, a "property rule" gives the holder of the entitlement the power to set the reserve price: if Leopold had demanded \$500 billion, the international community would have had to pay it to acquire the Congo from him.<sup>213</sup>

There is an extensive literature about when and why liability rules or property rules are to be preferred. One thread is that liability rules tend to make more sense when bargaining costs are prohibitive and the holders of the property rights are unwilling to move assets to their best

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209. See, e.g., Brian Klaas, *Golden Handcuffs: Getting Dictators To Exit*, GLOBALIST (Feb. 25, 2017), <https://www.theglobalist.com/golden-handcuffs-getting-dictators-to-exit> [<https://perma.cc/QZ6M-8WQM>]. It is notable in this regard that the Mo Ibrahim Foundation already offers a \$5 million prize for former African leaders who, among other things, have peacefully transferred power to a successor. *Id.*; see *Ibrahim Prize for Achievement in African Leadership*, MO IBRAHIM FOUND., <http://mo.ibrahim.foundation/prize> [<https://perma.cc/4NU8-PDVK>].

210. See *supra* notes 151–72 and accompanying text.

211. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

212. See U.S. CONST. amend. V.

213. As detailed above, Belgium did in fact pay an extraordinary amount for the Congo Free State—though, it seems, not enough to satisfy Leopold. See *supra* notes 163–72 and accompanying text.

uses.<sup>214</sup> And in situations of oppressive governance, that seems almost inevitable: the situations are complex, there are innumerable stakeholders, a high potential for inefficient holdout behavior, and so on. As legal remedies, liability rules correspond with damages; property rules correspond with injunctions. Another way to conceptualize our project, then, is as reorienting international responses away from the equivalent of injunctions—R2P, for example—and toward damages remedies; away from property rules and toward liability rules.

That raises the second notable feature of the forced-sales alternative: that it involves sales. One might object to the label on the basis that the selling party has no choice but to accept the offer—we are happy to accept any other label, though we think that this one works well enough.<sup>215</sup> What is notable about the sales aspect is not the name but the fact of using money to effectively buy a way out of a humanitarian crisis. For some, this will raise concerns of commodification. But it is worth noting that international responses to humanitarian crises already rely on—or, depending on one’s perspective, suffer from—economic incentives. Economic sanctions, for example, precisely reflect that preoccupation with financial motivations, as do many other diplomatic interventions.<sup>216</sup> Moreover, as the international response to the current refugee crisis has demonstrated—and vividly so in the case of Myanmar’s Rohingya population—nations privilege their perceived economic self-interest, even in the face of what might seem to be overwhelming moral imperatives.<sup>217</sup>

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214. Eric Posner and Glen Weyl make an analogous point in the preface to their recent book, using the example of the favelas in Rio. See ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* xiii–xvii (2018) (detailing how Rio’s distribution of property rights has not resulted in the best use of city spaces: “[s]lum dwellers hang on to property that could instead be a public park, a nature preserve, or modern housing,” whereas the wealthy monopolize the city center while being “too fearful of crime to enjoy it”).

215. See GUIDO CALABRESI, *THE FUTURE OF LAW & ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION* 129 (2016) (noting that “liability-rule charges often look like, and are properly described as, prices”).

216. For an explanation of one prominent contemporary example, see generally CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., IF10715, *VENEZUELA: OVERVIEW OF U.S. SANCTIONS* (2019).

217. Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 *COL. HUM. RTS. L. REV.* 53, 58–59 (2016) (advocating for a debt-based approach to certain refugee situations).

Responding to our prior work describing economic transfers of sovereign control,<sup>218</sup> some have argued that the market we describe is exceptionally thin and that there will not be enough demand to support it.<sup>219</sup> The purchase of the Congo Free State provides a kind of proof of concept—a successfully culminated sale, under the most difficult of conditions.

Of course, the fact that this solution worked once in unusual circumstances does not mean that it would work again. Nor does the extraordinary situation in the Congo Free State—a private colony, subject to a type and level of oppression that today is fortunately rare—provide a clear “test” for when such solutions should be invoked again. And yet it is hard not to ignore contemporary possibilities.

Consider the Russian takeover of Crimea in 2014.<sup>220</sup> Following a popular revolt and the ouster of Ukraine’s pro-Russian president, Viktor Yanukovich, Russia took control of Crimea, a Ukrainian territory with long-standing ties to Russia.<sup>221</sup> Conflict with Russia—until then, Ukraine’s primary trading partner<sup>222</sup>—had put Ukrainian finances under stress, and it was on the brink of defaulting on its external debt.<sup>223</sup> Ukraine’s biggest creditor was none other than Russia, which had lent Yanukovich’s government \$3 billion some months prior to his ouster in an attempt to prop it up.<sup>224</sup> Another complicating factor was that the population of Crimea seemed to favor joining Russia rather than staying with Ukraine.<sup>225</sup> Indeed, Russia’s official position was that it had not taken Crimea, but that the Crimeans had chosen to

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218. See Blocher & Gulati, *A Market for Sovereign Control*, *supra* note 5.

219. See *supra* note 21.

220. See generally Joseph Blocher & Mitu Gulati, *Ukraine and Russia: “You Break It, You Bought It,”* 111 FIN. HIST., Fall 2014, at 28 [hereinafter Blocher & Gulati, *Ukraine and Russia*].

221. See *id.* at 29; Andrew Roth, *Ukraine’s Ex-President Viktor Yanukovich Found Guilty of Treason*, GUARDIAN (Jan. 25, 2019, 8:12 AM), <https://www.theguardian.com/world/2019/jan/25/ukraine-ex-president-viktor-yanukovich-found-guilty-of-treason> [https://perma.cc/8QLZ-GK8U].

222. See Blocher & Gulati, *Ukraine and Russia*, *supra* note 220, at 29 (noting that Russia was Ukraine’s “primary backer” and a crucial trading partner to countries in the West).

223. *Id.* at 30 (noting that Russia’s government-owned gas company was demanding \$11.4 billion in past subsidies from Ukraine and speculating that Ukraine’s “debt-to-GDP might soon be in the 100% range”).

224. Andrey Ostroukh, *Russia Files Suit Against Ukraine over \$3 Billion Loan*, WALL ST. J., (Feb. 17, 2016, 10:47 AM), <https://www.wsj.com/articles/russia-files-suit-against-ukraine-over-3-billion-loan-1455722776> [https://perma.cc/AUC9-SHCU].

225. See Blocher & Gulati, *Ukraine and Russia*, *supra* note 220, at 29.

secede from Ukraine to avoid oppression and discrimination that they faced because of their largely Russian roots.<sup>226</sup>

Assume for a moment that there is truth to this—that the people of Crimea were indeed subject to severe, albeit not genocidal, mistreatment. If so, then perhaps the taking of Crimea could be viewed by the world as a kind of forced sale, conceptually akin to Belgium’s purchase—a justifiable transfer, but not a free one. Of course, there is no way that Ukraine can get Russia to cut a check, but that is not the only way for it be compensated. After taking Crimea, Russia went on to sue Ukraine for its defaulted debt in a U.K. court.<sup>227</sup> And one of the Ukrainian responses could have been that Russia had stolen Ukrainian property—that is, Crimea—worth a great deal more than \$3 billion.<sup>228</sup> Even if Ukraine has no way to force Russia to pay, surely it could offset the value of Crimea against the debt incurred to Russia by its puppet, Yanukovich.

To be clear, we are not endorsing the Russian account of Crimea’s treatment, nor endorsing the takeover. We mean it as an illustration. And we recognize that the possibility of a forced sale in these circumstances is not likely to make everyone—perhaps anyone—happy. But as of now, Russia has taken Crimea and paid nothing. Ukraine has no realistic possibility of getting the territory back. Under the forced-sale alternative, they would at least get out from under the Russians’ thumb with regard to the debt.

Similar questions might be asked about other contemporary secessionist movements: Catalonia, Scotland, and Rakhine, to name a

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226. See Anton Moiseienko, *What Do Russian Lawyers Say About Crimea?*, OPINIO JURIS (Sept. 24, 2014, 9:51 AM), <http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea> [<https://perma.cc/QJD3-VZST>]; Valerie Pacer, *Vladimir Putin’s Justification for Russian Action in Crimea Undermines His Previous Arguments over Syria, Libya and Iraq*, LSE EUROPP BLOG (Mar. 11, 2014), <https://blogs.lse.ac.uk/europpblog/2014/03/11/vladimir-putins-justification-for-russian-action-in-crimea-undermines-his-previous-arguments-over-syria-libya-and-iraq> [<https://perma.cc/3S4L-882T>].

227. For a discussion of this dispute, see generally W. Mark C. Weidemaier, *Contract Law and Ukraine’s \$3 Billion Debt to Russia*, 11 CAP. MKTS. L.J. 244 (2016). A miniature version of this dispute is also playing out in a dispute over artifacts from a set of Crimean museums that had been loaned to a museum in Amsterdam before the Russian takeover. The museums, which are under Russian control, and Ukraine and Russia are each demanding that the artifacts be returned to them. See Yuliya Talmazan, *Russia and Ukraine Are Locked in a Legal Dispute over Ancient Gold*, NBC NEWS (Mar. 16, 2019, 4:01 AM), <https://www.nbcnews.com/news/world/russia-ukraine-are-locked-legal-dispute-over-ancient-gold-n982606> [<https://perma.cc/42TN-VRXJ>].

228. See Weidemaier, *supra* note 227, at 245–46 (noting that since Russia annexed Crimea, Ukraine’s economy has been “severely hamstr[u]ng” so that “it would be exceedingly difficult if not impossible for Ukraine to pay the \$3 billion” debt).

few. International law does not provide a satisfactory range of options in these situations. In particular, other than the narrow circumstances of genocide, ethnic cleansing, or the equivalent, international law seems to have no mechanism by which regions that are stuck in bad relationships with parent sovereigns can escape and improve their situation. Our comparatively modest suggestion is that in the proper circumstances, and with due restrictions, forced sales could be such an option.

### *B. The Challenge of “Owning” Sovereignty*

Sovereignty is not typically conceptualized as a species of property—as a thing that can be owned. If anything, scholars have tended to focus on the converse question of whether and how property is a kind of sovereignty<sup>229</sup>: the “sole and despotic dominion” that Blackstone described.<sup>230</sup> And yet in many ways sovereign control has standard characteristics of property that manifest in some of the most prominent challenges of international law and relations. The refugee crisis, to take just one example, is in part a product of nations exercising their right to exclude.<sup>231</sup> Perhaps, then, a property-like approach—treating sovereign control as a thing that can be owned and transferred—can provide a partial solution. Such is the basic normative framework of our project.

But the history of the Congo Free State also illustrates the challenges of a property-like approach to sovereignty. First, who really gets to “own” sovereignty? An individual? The nation? The people? We think that international law and practice have effectively repudiated the first alternative, namely Leopold’s, and is currently struggling to accommodate the second and third. Indeed, the Congo Free State itself can be understood as an important harbinger of the tension between nations’ right to territorial integrity and the right of peoples to self-determination. Ultimately, and especially in cases of oppression, we think that the ownership right must rest with the people.

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229. See *supra* note 27.

230. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

231. For a discussion of the complicated interaction between these concepts, with particular reference to the right of exclusion, see generally Matthias Goldmann, *The Entanglement of Sovereignty and Property in International Law: From German Southwest Africa to the Great Land Grab?* (Oct. 2018) (unpublished manuscript) (on file with the *Duke Law Journal*).

That raises the second question: Does, or should, the ownership of sovereignty really carry with it a power to transfer, and under what conditions? There is no easy answer to this question; elsewhere we have tried to sketch a general framework.<sup>232</sup> For present purposes, the most important point is that transfers of sovereign control can, in cases like that of the Congo Free State, help reduce oppression and improve welfare.

We can begin with the issue of ownership itself. As a matter of sovereign control, what makes the Congolese example extraordinary is that the Congo Free State was owned by Leopold in his individual capacity: he had purchased sovereignty, and the members of the recognized international community, many of whom were involved in similar deals, went along.<sup>233</sup> As Félicien Cattier noted at the time, “In a word, Leopold II possesses personally . . . save where he thinks it advisable to delegate them to others, all the prerogatives that popular custom recognises to Sovereign States.”<sup>234</sup> He was “the titular of sov[e]reignty. All the rights and all the duties of government are summarised and incorporated in his person.”<sup>235</sup> He used those rights to his personal economic benefit, and ignored the duties.

International law and practice no longer allow this kind of private sovereign control for personal benefit. But the notion that sovereignty can be owned has never been repudiated. Instead, traditional conceptions of international law continue to treat sovereignty as the property of *states*. There is perhaps no better evidence of this than the traditional rule that countries have a nearly unbridled power to cede sovereign territory to one another without approval of the affected regions.<sup>236</sup> This means that, while the Leopolds of the world can no

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232. Blocher & Gulati, *A Market for Sovereign Control*, *supra* note 5.

233. PRESS, *supra* note 37, at 224 (“In the case of Africa . . . the salient point was that governing rights were up for sale to the highest bidder, whether state, man, or company.”).

234. EWANS, *supra* note 32, at 106 (quoting F. CATTIER, *DE L'ÉTAT INDÉPENDANT DU CONGO* 134 (Paris, 1898)).

235. *Id.* at 105.

236. On this point, an international law treatise states:

The hardship involved for the inhabitants of the territory who remain and lose their old citizenship and are handed over to a new sovereign whether they like it or not, created a movement in favour of the claim that no cession should be valid until the inhabitants had by a plebiscite given their consent to the cession. . . . But it cannot be said that international law makes it a condition of every cession that it should be ratified by a plebiscite.

1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 684 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (footnote omitted); *see also* Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L. L. 808, 811

longer barter sovereign control, *states* can—the United States, for example, could theoretically sell or simply cast off Puerto Rico.<sup>237</sup>

One of our goals is to pinpoint a clear limit on this startling principle. Treating sovereign territory as the property of states fails to account for the rights and interests of the *people* living on that territory.<sup>238</sup> On the other hand, territorial sovereignty of states remains a basic principle of international law. Indeed, reconciliation of self-determination and territorial sovereignty is a central challenge for contemporary international law.<sup>239</sup>

That challenge is not new. The eighteenth-century European scholar Emer de Vattel, to take one illustration, accepted the power of nations to alienate public property<sup>240</sup> but would have placed some restrictions on their ability to transfer sovereign control over people:

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(2006) (“[S]tates generally are free to agree on the disposition of disputed . . . territory . . . as they see fit. . . . [S]tates are still under no general duty to consult . . . the population of a disputed territory with respect to its future status.”); cf. Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT’L L. 1, 10 (2000) (“International law does not seem to prescribe any specific limits on the right of a state to cede its territory.”).

237. See Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 801–02 (2005) (arguing that the Supreme Court’s decisions in the *Insular Cases* “stood for the proposition that the acquisition of a territory by the United States could be followed by its separation from the United States . . . [creating] a constitutional doctrine of territorial deannexation.”). *But see* Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT’L L. 229, 235 (2018) [hereinafter Blocher & Gulati, *Puerto Rico and the Right of Accession*] (arguing that international law would not, and should not, allow this).

238. See generally Blocher & Gulati, *Puerto Rico and the Right of Accession*, *supra* note 237, at 234 (“[I]t is no longer acceptable to treat former colonies as property . . . . We have argued elsewhere that this political and legal transformation also included a right of colonies to resist unwanted ‘independence’ and to remain part of the metropole—an alternative form of self-determination.”).

239. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT’L L. & POL’Y 373, 373 (2003) (“[T]he defining issue in international law for the 21<sup>st</sup> century is finding compromises between the principles of self-determination and the sanctity of borders.” (quoting Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace,”* 6 ILSA J. INT’L & COMP. L. 455, 465 (2000))).

240. As Vattel puts it:

The nation, being the sole mistress of the property in her possession, may dispose of it as she thinks proper, and may lawfully alienate or mortgage it. This right is a necessary consequence of the full and absolute domain . . . . Those who think otherwise, cannot allege any solid reason for their opinion . . . .

EMMERICH DE VATTTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* bk. I, ch. XXI, § 257, at 116 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758).

Some have dared to advance this monstrous principle, that the conqueror is absolute master of his conquest,—that he may dispose of it as his property . . . and hence they derive one of the sources of despotic government. But, disregarding such writers, who reduce men to the state of transferable goods or beasts of burthen,—who deliver them up as the property or patrimony of another man,—let us argue on principles countenanced by reason and conformable to humanity.<sup>241</sup>

But even Vattel did not conclude that transfers were forbidden.<sup>242</sup> He argued instead that approval must be given by the true “owners” of the territory—the people. He explained: “as the nation alone has a right to subject itself to a foreign power, the right of really alienating the state can never belong to the sovereign, unless it be expressly given him by the entire body of the people.”<sup>243</sup>

In the Congo, it was in significant part the reduction of “men to the state of transferable goods or beasts of burthen,”<sup>244</sup> to take Vattel’s phrase, that produced a change in the Congo’s status. The United States had—ironically, given its hand in enabling Leopold to take sovereignty in the Congo—been innovators in taking the position that sovereignty belonged to the people and not to some distant European monarch. And, in fact, the United States very nearly took this position during the Berlin Conference, where the international community recognized Leopold’s claim to the Congo.

The United States’ position was advanced by John Kasson, a famous Iowa lawyer and politician and close associate of Abraham Lincoln; he had helped draft the antislavery platform for the Republican National Convention of 1860.<sup>245</sup> As the U.S. representative

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241. VATTEL, *supra* note 240, bk. III, ch. XIII, § 201, at 388.

242. Stéphane Beaulac, *Vattel’s Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America*, 63 LA. L. REV. 1327, 1345 (2003) (noting that Vattel would allow states to make such sales without the consent of the residents of the transferred territory in times of emergency).

243. VATTEL, *supra* note 240, bk. 1, ch. V, § 69, at 31. Beaulac adds:

Vattel is clear that the *express and unanimous consent* of the individuals living in the part of the territory ceded is required because ‘sovereignty’ belongs to the people and is thus unalienable. The only exception is in situations of pressing necessity or danger to public safety (such as in the context of wars), which validate the cession of territory as between the parties to such treaties. As for individuals living there, they are not bound by even such a necessary transfer unless they consent to it, which may be implied by their mere silence.

Beaulac, *supra* note 242, at 1345.

244. VATTEL, *supra* note 240, bk. III, ch. XIII, § 201, at 388.

245. See BENJAMIN F. GUE, 4 HISTORY OF IOWA FROM THE EARLIEST TIMES TO THE BEGINNING OF THE TWENTIETH CENTURY 149–51 (1903).

in Berlin, Kasson declared that “the Government of the United States would gladly adhere to a more extended rule to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression.”<sup>246</sup> This bit is particularly fascinating because the U.S. government had the dubious honor<sup>247</sup> of being the first nation to recognize Leopold’s sovereignty, with promises of free trade being essential to the endorsement.<sup>248</sup>

The Kasson proposal, although not explicitly rejected, was bypassed. Koskenniemi notes, “Despite the (somewhat ambiguously formulated) proposal by the American delegate at the Berlin Conference, Mr. Kasson, . . . no requirement of native consent was included in the Berlin Act—although the conference did recommend that such consent be normally secured.”<sup>249</sup> Perhaps this was because Leopold and his proxies were able to persuade others of their humanitarian motives and that the treaties with the natives did actually constitute consent. If that is the case, then one could argue that some combination of the promise to be a benevolent ruler and the consent of the natives—regardless of their religion and color—was, as early as the late 1800s, considered a requirement for a sale of sovereign control.<sup>250</sup> A more cynical view, however, is that the Kasson proposal was implicitly rejected in part because the treaties that Stanley and others had secured surely failed to meet this requirement, and also because of the more conceptual objection that treaties of cession could

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246. REEVES, *supra* note 32, at 47.

247. Mark Twain imagines Leopold’s view of the decision ten years later: “Possibly the Yankees would like to take that back, now, but they will find that my agents are not over there in America for nothing. But there is no danger; neither nations nor governments can afford to confess a blunder.” TWAIN, *supra* note 17, at 37.

248. See 15 CONG. REC. 2274, 2275–76 (1884) (statement of Sen. Morgan) (referring a report to the Appropriations Committee, “expressing the views of the committee [on Foreign Relations] in reference to that country and its political situation” and recommending a provision of money to send diplomatic agents to the Congo); see also REEVES, *supra* note 32, at 51 (noting that American recognition came six months before the Berlin Conference). See generally James Thuo Gathii, *How American Support for Freedom of Commerce Legitimized King Leopold’s Territorial Ambitions in the Congo*, 37 STUD. TRANSNAT’L LEGAL POL’Y 97 (2005) (describing the role played by the United States’ desire for trading access in Africa in its legitimation of King Leopold’s sovereignty over the Congo Free State).

249. KOSKENNIEMI, *supra* note 28, at 138; see also McStallworth, *supra* note 140, at 342 (“Significantly, the formalities of occupation on a basis of native consent, was a new emphasis which we introduced to the Powers.”).

250. For a discussion of these issues in context of the German occupation of Southwest Africa, see Goldmann, *supra* note 231.

only be concluded between “States that recognize international law.”<sup>251</sup> In any event, the end result was that the Berlin Conference solidified Leopold’s claim to the Congo Free State.<sup>252</sup>

Even the reformers seemed unable to imagine a role for the Congolese in determining their own future. As Hochschild notes, “only one alternative to Leopold’s control of the Congo was ever really considered: its becoming a colony of Belgium.”<sup>253</sup> Morel himself accepted “the Belgian solution,”<sup>254</sup> though a few years later he would argue—in the context of World War I—that no territory should change hands without a plebiscite of its residents.<sup>255</sup> In July 1906, the Belgian solution became official British policy,<sup>256</sup> and it was echoed in signals from the United States, Germany, and France.<sup>257</sup> American support had legitimized Leopold’s acquisition in the first place;<sup>258</sup> without it, he stood to lose everything.<sup>259</sup>

As at the Berlin Conference, the real party in interest was absent from the negotiations: the Congolese who would ultimately foot the bill.<sup>260</sup> Effectively, they were made—with no say in the matter—to pay for an escape from one particularly cruel European imperialist to one

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251. KOSKENNIEMI, *supra* note 28, at 138 (quoting a report by Ferdinand Martitz); *see also* ANDREW FITZMAURICE, *SOVEREIGNTY, PROPERTY AND EMPIRE, 1500–2000*, at 285–87 (2014) (describing the competing contemporary legal theories on this point).

252. The United States never actually ratified the Berlin Act—the election of 1884 brought Grover Cleveland into office, and with him a return to isolationism. McStallworth, *supra* note 140, at 338–39.

253. HOCHSCHILD, *supra* note 1, at 257; *see also* ANSTEY, *supra* note 16, at 13 (“Amongst the Congo Reformers Belgian annexation was a solution which some were loath to espouse, but to which there was no effective alternative.”); VAN REYBROUCK, *supra* note 44, at 97 (“The international pressure on King Leopold II was mounting. Something had to give, and the only option was for Leopold to part with his overseas territory and for Belgium to take over Congo.”); McStallworth, *supra* note 140, at 328 n.61 (noting that British Foreign Minister Edward Grey “stated that it was senseless to prevent annexation. Belgium was the only logical contender”).

254. HOCHSCHILD, *supra* note 1, at 257.

255. *Id.* at 289.

256. EWANS, *supra* note 32, at 225.

257. *Id.* at 225–26.

258. PRESS, *supra* note 37, at 3 (“So forceful and efficacious was this support that, for a time, European diplomats referred to the Independent State as ‘the United States of the Congo.’” (quoting Letter from Richard von Schmidthals to Otto von Bismarck (May 14, 1885) (on file with the Politisches Archiv des Auswärtigen Amts, London 388))).

259. *See* EWANS, *supra* note 32, at 227.

260. *See* HOCHSCHILD, *supra* note 1, at 259 (“Those funds were not expected to come from the Belgian taxpayer. They were to be extracted from the Congo itself.”); PAKENHAM, *supra* note 33, at 662 (“On these modest terms – that would cost the Africans of the Congo ninety-five million francs (£3.8 million) – the King agreed to hand over the whole Congo, lock, stock and barrel, to little Belgium.”).

that pledged to be less so.<sup>261</sup> Compounding the perversity, much of the purchase price ended up back in Belgium, as Leopold poured funds into construction projects, museums, and the like,<sup>262</sup> burnishing his own legacy while the Congolese were saddled with the debt.<sup>263</sup> In a scathing article, Morel wrote of the Congolese living in the crown domain, “The natives who have the privilege of being enslaved in this particular area, will have the honour of contributing substantial sums to the Civil List of future Belgian monarchs and their offspring.”<sup>264</sup>

The Belgian construction projects left a tangible legacy of the horrors of the Congo Free State. But the end of Leopold’s reign also helped lay conceptual foundations in international law itself. The impact of the Congo’s acquisition and the Berlin Conference is well recognized in that regard, but so too are there lessons to be learned from its forced sale. Why did Belgium pay the cost, when after all it had not facilitated the acquisition and was one of the *last* countries to recognize Leopold’s claim?<sup>265</sup> Why did the international community respond as strongly as it did? Were the stakes purely political and moral, or were they in some sense “legal”?

We cannot make a strong causal claim, but it is worth noting that in the demise of the Congo Free State, one sees glimpses of what would later be regarded as important principles of international law. U.S.

261. Specifically:

The Congolese taxpayer was left with responsibility not only for the Free State’s debt of 110 million francs but also for a ‘gratitude fund’ given to the king ‘in testimony for his great sacrifice in favor of the Congo created by him,’ as well as for another 40 million francs for the so-called Niederfulbach Foundation, one of the king’s financial instruments, which was ultimately transferred to the Belgian state in 1923.

L. H. GANN & PETER DUIGNAN, *THE RULERS OF BELGIAN AFRICA 1884–1914*, at 151 (1979); see also Steven P. Johnson, *King Leopold II’s Exploitation of the Congo From 1885 to 1908 and Its Consequences* 70 (2014) (unpublished B.A. thesis, University of Central Florida), <https://stars.library.ucf.edu/cgi/viewcontent.cgi?article=2641&context=honorstheses1990-2015> [<https://perma.cc/Y9WV-ZHYF>] (“Instead of cancelling the debt that was amassed forcefully and unethically, Belgium only sought to increase the Congo Free State’s debt which added to the taxation burden during the [Belgian] Great Depression.”).

262. HOCHSCHILD, *supra* note 1, at 168.

263. *Fury Caused by Leopold’s Trick*, N.Y. TIMES, Sept. 15, 1907, at C1; see also HOCHSCHILD, *supra* note 1, at 259 (“Those funds were not expected to come from the Belgian taxpayer. They were to be extracted from the Congo itself.”). That the debts were seen as obligatory *at all* has serious implications for the doctrine of odious debts. See generally Blocher, Gulati & Oosterlinck, *supra* note 155.

264. Morel, *supra* note 57.

265. For some initial thoughts on this question, see Joseph Blocher, Mitu Gulati & Kim Oosterlinck, *Why Did Belgium Pay Leopold’s Bonds?*, LAW & CONTEMP. PROBS. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3468518](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468518) [<https://perma.cc/YP56-GQPX>].

President Woodrow Wilson—whose views on race were hardly progressive—said in 1918: “[P]eoples . . . are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game . . . .”<sup>266</sup>

Over the next few decades, haltingly at first and then quickly in the 1950s and 1960s, the principle that Wilson described would become part of international practice, at least in the colonies. This concept was the right of *self-determination*—the power of “peoples” to decide their own national affiliation.<sup>267</sup> Although its precise legal status remains unclear,<sup>268</sup> the general trajectory of self-determination has been from a political principle to a right recognized in foundational legal documents such as the U.N. Charter.<sup>269</sup> It reflected and helped generate a fundamental change in the way people conceptualize the relationship between sovereign territory and who should get to control it.

The development of human rights law is often traced to the post-World War II era, but the denunciation of Leopold suggests the possibility that sovereigns had humanitarian obligations decades earlier—and that failure to meet them could mean a forfeit of sovereign control. Scholars today debate the existence of a “responsibility to protect” through military or other intervention.<sup>270</sup>

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266. Woodrow Wilson, Address to Congress, Analyzing German and Austrian Peace Utterances, Delivered in Joint Session (Feb. 11, 1918), in 1 THE MESSAGES AND PAPERS OF WOODROW WILSON 472, 478 (Albert Shaw ed., 1924); cf. VATTEL, *supra* note 240, bk. I, ch. XXI, § 263, at 118 (arguing that a nation “has not . . . a right to traffic with their rank and liberty, on account of any advantages it may expect to derive from such a negotiation”).

267. See SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 36–37 (1996) (tracing the domestic principle to the French Enlightenment, and citing Vattel to support the international version); see also Goldmann, *supra* note 231, at 5–6 (describing the transformation of views about what sovereignty in the colonial context was supposed to entail in the early nineteenth century from one where the colony was the property of the imperial power to one where the imperial power was engaged in a civilizing mission).

268. See Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFFAIRS 31, 33 n.2 (1997) (“The consensus among legal scholars at this time is that international law does not recognize a right to secede in . . . circumstances [other than decolonization], but that it does not unequivocally prohibit it either.”).

269. See U.N. Charter art. 1, ¶ 2; see also International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social, and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3, 5; G.A. Res. 1541 (XV) (Dec. 15, 1960) (explaining that self-determination could lead to secession and the formation of a new state, association of a territory with an existing state, or integration of a territory into an already existing state); SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 9 (1997) (“Practice since the establishment of the United Nations leaves no doubt that self-determination has been transformed into a binding rule of international law (*ius cogens*).”).

270. See Achiume, *supra* note 208, at 712–16 (applying the R2P to refugee crises).

But what was Belgium's purchase but merely a costly and reluctant discharge of such a responsibility?

Almost a century later, Judge Hardy Cross Dillard of the International Court of Justice would write that “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people.”<sup>271</sup> That is a complicated principle to instantiate in a world of territorial sovereignty. But the history of the Congo Free State helps illustrate what it means in practice: that ultimately the people's claim to self-determination must include, in some form, the ownership of sovereign control.

It must be noted that the power to transfer sovereignty can be, and has been, subject to abuse. History is full of examples of sovereign rights being effectively stolen through abusive treaties and the like. Hochschild provides one example from the Congo, in which the chiefs of Ngombi and Mafela, in return for “one piece of cloth per month to each of the undersigned chiefs, besides present of cloth in hand,” agreed to:

[F]reely of their own accord, for themselves and their heirs and successors for ever . . . give up to the said Association the sovereignty and all sovereign and governing rights to all their territories . . . All roads and waterways running through this country, the right of collecting tolls on the same, and all game, fishing, mining and forest rights, are to be the absolute property of the said Association.<sup>272</sup>

But such exploitative sales are not the entire story. Though the Congo Free State's status as a personal colony was arguably unique, its commodification of sovereign control was not. By 1908, the United States had reached the apex of its territorial authority,<sup>273</sup> having just acquired Puerto Rico and the Philippines from Spain, and was grappling with questions of imperial identity.<sup>274</sup> But holding aside its new colonial possessions, and even holding aside the conquest or purchase of territory from Native Americans—a practice that Leopold

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271. *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12, 116, 122 (Oct. 16) (separate opinion by Dillard, J.).

272. HOCHSCHILD, *supra* note 1, at 72 (second omission in original). The agreement also ominously pledged “to assist by labour or otherwise” with the Association's “works, improvements or expeditions.” *Id.*

273. BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 216 (2006) (“[T]he United States never encompassed as large an area as it did between March 1899 and May 1902.”).

274. JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS* 4 (1979).

and his supporters invoked in the context of the Congo Free State<sup>275</sup>—the majority of the United States’ landmass was in fact acquired through transactions, including Louisiana from France in 1803,<sup>276</sup> Florida from Spain in 1819,<sup>277</sup> and Alaska from Russia in 1867.<sup>278</sup> In fact, nearly a decade *after* Leopold sold Congo to Belgium, the United States bought the Virgin Islands from Denmark.<sup>279</sup>

Even today, voluntary transfers of territory between states are constantly altering the map of sovereign power through purchases, long-term leases, and other transactions. Governments often sell servitudes to one another<sup>280</sup> and lease territory to foreign investors<sup>281</sup> in ways that directly or indirectly limit their own sovereign control.<sup>282</sup>

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275. REEVES, *supra* note 32, at 21–22 (noting that Arntz and Twiss invoked this precedent); *see also* Goldmann, *supra* note 231, at 10–14 (describing how the Germans used the purchase of territory in Southwest Africa as an initial step towards taking sovereignty).

276. The United States paid France \$15 million for nine hundred thousand square miles of territory. *See* KUKLA, *supra* note 34, at 335.

277. *See* Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Spain-U.S., Feb. 22, 1819, 8 Stat. 252.

278. The United States paid Russia \$7.2 million for 586,412 square miles of territory. *See* Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russians to the United States of America, art. 6, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539.

279. *See* Convention Between the United States and Denmark for Cession of the Danish West Indies, Den.-U.S., Aug. 4, 1916, 39 Stat. 1706 (purchasing the Danish West Indies and ceding claims to portions of Greenland); *see also* LINDLEY, *supra* note 35, at 167–68 (describing the provisions of the treaty).

280. MICHAEL J. STRAUSS, *THE VIABILITY OF TERRITORIAL LEASES IN RESOLVING INTERNATIONAL SOVEREIGNTY DISPUTES* 91–97 (2010) (providing the main groupings of types of servitudes).

281. *See, e.g.*, Duncan Bartlett, *Ethiopia Weighs Benefits of Foreign ‘Land Grabs,’* BBC NEWS (June 10, 2011), <http://www.bbc.com/news/business-13725431> [<https://perma.cc/QUR4-4XY7>]; Alex Spillius, *China ‘To Rent Five Per Cent of Ukraine,’* TELEGRAPH (Sept. 24, 2013, 7:18 PM), <http://www.telegraph.co.uk/news/worldnews/asia/china/10332007/China-to-rent-five-per-cent-of-Ukraine.html> [<https://perma.cc/Z6CZ-JCGB>].

282. Jochen von Bernstorff, *The Global “Land-Grab”, Sovereignty and Human Rights*, 2 ESIL REFLECTIONS 1, 3 (2013) (noting that when governments enter into large-scale land deals with foreign investors, “territorial sovereignty is affected for instance if large parts of the territory is [sic] leased to foreign governments for a period of 99 years, which is a standard clause in these land deals”). *See generally* PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007) (arguing that the use of private contractors to perform essential government functions can undermine the effectiveness and morale of public government officials).

Nations seek control over territory for ports, military bases, farmland,<sup>283</sup> canals,<sup>284</sup> tax revenue, trade gains,<sup>285</sup> and other reasons.<sup>286</sup>

Such transfers are not necessarily exploitative, or even undesirable, in every instance. Like exchanges of property between private citizens, they can provide means of welfare-enhancing exchange. After all, although Leopold's purchase of sovereign control from the Congolese put the horror of the Congo Free State in motion, it was also Belgium's eventual purchase from Leopold that brought it to an end. Of course, the latter is hardly a model to be emulated. The Congolese were not part of the negotiation, and ended up being stuck with the bill for the purchase, which they effectively had to pay *again* in 1960 at the moment of independence.<sup>287</sup> However, the fundamental problem was not the transfer but the terms: the Congolese were not treated as legitimate owners of their own land, or given the power to govern it. Once again, Morel himself might be the best source. Even as he accepted the victory of the reform movement he led, Morel warned that "the root of the evil [will remain] untouched . . . till the native of the Congo becomes once more owner of his land and of the produce which it yields."<sup>288</sup>

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283. See John Vidal, *How Food and Water Are Driving a 21st-Century African Land Grab*, GUARDIAN (Mar. 6, 2010, 7:06 PM), <https://www.theguardian.com/environment/2010/mar/07/food-water-africa-land-grab> [<https://perma.cc/7597-BF2F>] ("Ethiopia is only one of 20 or more African countries where land is being bought or leased for intensive agriculture on an immense scale in what may be the greatest change of ownership since the colonial era.").

284. Jude Webber, *Nicaragua Breaks Ground with \$50bn Canal*, FIN. TIMES (Dec. 22, 2014), <http://on.ft.com/1wYBUHe> [<https://perma.cc/HQK9-32NZ>] (describing the Chinese-funded project).

285. See Nancy Birdsall, *The True True Size of Africa*, CTR. FOR GLOB. DEV. BLOG (Nov. 11, 2010), <http://www.cgdev.org/blog/true-true-size-africa> [<https://perma.cc/6FCW-PHCC>] (noting that sub-Saharan Africa's "economic size" is roughly equivalent to that of Chicago plus Atlanta, which is "why Africa's leaders wish they could overcome the politics of sovereignty and eliminate the cost of all those borders—something the Europeans have been working on for half a century").

286. See Andrea Janus, *Turks and Caicos Premier 'Not Closing the Door' on Canadians' Caribbean Dreams*, CTV NEWS (May 26, 2014, 4:45 PM), <http://www.ctvnews.ca/politics/turks-and-caicos-premier-not-closing-the-door-on-canadians-caribbean-dreams-1.1838466> [<https://perma.cc/Q9MM-UY9S>] (quoting Peter Goldring, a member of the Canadian parliament, on the century-old idea of acquiring Turks and Caicos: "The United States has a Hawaii. Why can't Canada have a Hawaii?"); *The Market for State Territory: Pass the Hemlock*, ECONOMIST (Nov. 19, 2011), <https://www.economist.com/international/2011/11/19/pass-the-hemlock> [<https://perma.cc/53K7-RGUS>] ("Arturas Zuokas, the mayor of Vilnius, has made a teasing offer to Greece; he suggested his country acquire an island as 'an exclusive place for rest in the Mediterranean' and 'a great global advert for Lithuania', featuring a spa, museums and a theatre.").

287. See *supra* Part I.C.

288. HOCHSCHILD, *supra* note 1, at 272.

C. *The Relevance of the Framework Today: From Greenland to Kashmir*

The horror of the Congo Free State was in many ways unique not just in scale, but in terms of its legal structure. It was, as Jesse Siddall Reeves put it, a “monstrosity,”<sup>289</sup> and over the past century international law has driven a stake into its heart; the kind of atrocities King Leopold inflicted on the Congolese, and the way in which he did so, are forbidden. What, then, is to be gained by studying this depressing historical episode, other than cautionary tales?

Our first major contention has been that, despite Leopold’s abuse of the mechanism, the transfer of sovereign territory by sale was not and has not been repudiated by international law. To the contrary, it was the mechanism by which his rule was brought to an end. And if one closes the chapter too quickly on the history of the Congo Free State, it would be too easy to miss that final line.

But what relevance does it have in the modern world, where the right to self-determination receives broad support, and substantive rules of international law forbid the kind of maniacal exploitation and murder in which Leopold engaged? Can the theory we have described—of using sales, including forced sales, as a solution to the problem of bad or oppressive governance—help address contemporary challenges, or is it simply a historical curio?

As this Article was being written, those questions came to the fore of international political discussion in a very odd way. Word got out that President Trump was interested in purchasing Greenland from Denmark. It is hard to know how serious this idea ever was, and whether he truly meant to pursue it, but it was earnest enough that Trump cancelled a meeting with Danish Prime Minister Mette Frederiksen when she rejected the idea. Likewise, press coverage was a mixture of serious,<sup>290</sup> humorous,<sup>291</sup> and indignant.<sup>292</sup>

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289. REEVES, *supra* note 32, at 74 (quoting an unnamed diplomat).

290. Scott R. Anderson, *Why Trump Can’t Buy Greenland*, LAWFAREBLOG (Aug. 16, 2019, 1:12 PM), <https://www.lawfareblog.com/why-trump-cant-buy-greenland> [<https://perma.cc/2Y8T-VBRT>].

291. Andy Borowitz, *Denmark Offers To Buy U.S.*, NEW YORKER: BOROWITZ REP. (Aug. 16, 2019), <https://www.newyorker.com/humor/borowitz-report/denmark-offers-to-buy-us> [<https://perma.cc/C8UT-69VH>].

292. Dana Milbank, Opinion, *The U.S. Must Take Greenland by Force!*, WASH. POST (Aug. 19, 2019, 6:46 PM), [https://www.washingtonpost.com/opinions/the-us-must-take-greenland-by-force/2019/08/19/fc87ada8-c2b3-11e9-9986-1fb3e4397be4\\_story.html](https://www.washingtonpost.com/opinions/the-us-must-take-greenland-by-force/2019/08/19/fc87ada8-c2b3-11e9-9986-1fb3e4397be4_story.html) [<https://perma.cc/E9YL-Y86V>].

But critics of the President’s “plan”—if that is what it was—went too far when they claimed that the United States could not purchase sovereign territory.<sup>293</sup> Again, the acquisition of territory via purchase is not forbidden by international law. Trump’s error was in assuming that he would have to buy Greenland from Denmark, which, he said, “essentially owns it.”<sup>294</sup> Greenland and Denmark were both quick to correct his mildly Leopoldian misconception of their relationship.<sup>295</sup>

Unfortunately, the circumstances of the story, and the proponent of the deal, have understandably made it hard for analysts to get a clear view of the underlying questions about the legality and *potential* value in purchased transfers of sovereign territory. Because that is the question that interests us here, let us alter a few of those circumstances so as to better focus the lens. Greenland is a former colony, home to roughly fifty thousand people whose standards of living lag far behind the Danish metropole.<sup>296</sup> Let us assume that those fifty thousand people are suffering even worse, and not despite but because of their relationship to Denmark, which instead of granting autonomy to the island has tightened its grasp and shut down any democratic responsiveness. For good measure, let us also say that the Danes are plundering the resources that President Trump apparently sees as valuable and that the U.S. president is a less divisive figure, with a proven track record of respecting the rule of law.

In that stylized scenario, if the United States offered to purchase Greenland—perhaps for a lump sum payment to Denmark, plus \$10 million to each of the native Greenlanders, along with U.S. citizenship—what would the reaction be? What if the Greenlanders themselves proposed the sale? In such circumstances, it is easy to imagine that “principled” objections would fall by the wayside, and the

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293. Joseph Blocher & Mitu Gulati, *Sure, Trump Can Buy Greenland. But Why Does He Think It’s Up to Denmark?*, POLITICO MAG. (Aug. 23, 2019), <https://www.politico.com/magazine/story/2019/08/23/donald-trump-greenland-purchase-sovereignty-denmark-227859> [<https://perma.cc/3FE6-RBGZ>] [hereinafter Blocher & Gulati, *Sure*].

294. Scott Neuman, *No Joke: Trump Really Does Want To Buy Greenland*, NPR (Aug. 19, 2019, 2:32 AM), <https://www.npr.org/2019/08/19/752274659/no-joke-trump-really-does-want-to-buy-greenland> [<https://perma.cc/34KE-HWQ7>].

295. *Id.*

296. Rebecca Hersher, *Numbers Lie Even More Than Usual in Greenland*, NPR (Apr. 21, 2016), <https://www.npr.org/sections/goatsandsoda/2016/04/21/475003055/numbers-lie-even-more-than-usual-in-greenland> [<https://perma.cc/74KK-CCGG>] (noting that male life expectancy in Greenland is a decade lower than in Denmark, and that at least a quarter of the island’s 56,000 residents “still live in tiny settlements and do not have access to basic services like adequate emergency health care and schools”).

major questions would be about the practicalities, like what supermajority of Greenlanders would have to approve the deal, how to effectuate the money transfer, what legal status Greenland would have within the U.S. system, and so on. We have no easy answers to those questions, as they depend in part on domestic law. Our point is simply that they are consistent with the legality—even desirability—of the sale itself, and also with the principle of self-determination.

We can even complicate the scenario and say that Denmark plays its part and really leans in to the Leopoldian role, refusing to give up the colony in which it has invested so much. The problem for that position is that it did not work even for Leopold, and a century's worth of growth in the direction of self-determination, remedial secession, and decolonization would leave the Danes with even less of a foundation to stand on. This is not to say that their claim of territorial integrity would fall by the wayside—sanctity of borders remains a foundational principle of international law—only that its foundations have been so eroded that it would probably, like Leopold's, eventually give way in the face of determined international opposition. And the Danes would, as Leopold did, in all likelihood seek to negotiate some kind of a deal.

Improving the standard of living of Greenlanders might not appear to be a sufficiently serious crisis to rethink the status quo in international law. So let us close with a more pressing case: that of Kashmir. As of this writing in March 2020, that region is in immense turmoil because of the removal of the special protections that were promised by Hindu-majority India to Muslim-majority Kashmir in 1947.<sup>297</sup> Ever since the British partitioned the Indian subcontinent into India and Pakistan, the two have been engaged in a tussle over Kashmir. The cost of that struggle has, in significant part, been borne by the people of Kashmir itself. Under international law, as per the dictates of the United Nations Commission on India and Pakistan and the U.N. Security Council, from as far back as 1948–49, the people of Kashmir were supposed to have a right of self-determination—that is, the right to have a plebiscite to decide which country they want to join

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297. E.g., Jeffrey Gettleman, Suhasini Raj, Kai Schultz & Hari Kumar, *India Revokes Kashmir's Special Status, Raising Fears of Unrest*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/world/asia/india-pakistan-kashmir-jammu.html> [<https://perma.cc/NK4U-LULM>]; Amy Kazmin, *India Accuses Pakistan of Stoking Violence in the Kashmir Valley*, FIN. TIMES (Sept. 7, 2019), <https://www.ft.com/content/acc1a028-d1d9-11e9-8367-807ebd53ab77> [<https://perma.cc/644H-N9ML>].

or whether they wish to be independent.<sup>298</sup> Neither India nor Pakistan, however, has allowed that to happen,<sup>299</sup> perhaps because both nations realize that their behavior over the years toward the Kashmiris might dissuade them from wanting to join either country.<sup>300</sup>

Imagine, though, a world in which India and Pakistan were not fighting over Kashmir using soldiers, warplanes, nuclear threats, and terrorists. Instead, imagine that there was going to be the promised United Nations-administered vote where the Kashmiri people would get to decide which offer they would take from a variety of nations vying for Kashmir to join them. Each country, including India and Pakistan, would have to offer the Kashmiris a package of financial, economic, and political rights. Put differently, imagine if India and Pakistan were to use the financial resources they have been expending on fighting against each other to instead make attractive offers to the Kashmiris. And imagine also that other countries such as China, which is nearby, were allowed to make offers, so that there would enough competition to bid the price up. Surely, this would produce a better state of affairs.

## CONCLUSION

The horror of the Congo Free State may seem distant, but its legacy lives on in the Congo, and the forces animating it still shape the modern world. Across the globe, states continue to make calculations about the value of sovereignty and try to adjust their “holdings” accordingly, even as the people living in that territory often struggle to make their own rights and interests part of the equation.

Such scenarios raise questions about the end of sovereignty, not as a concept or legal tool—though scholars are also exploring that angle<sup>301</sup>—but as exercised by particular entities in particular places.

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298. For a discussion of this history, see Karen Heymann, *Earned Sovereignty for Kashmir: The Legal Methodology To Avoiding A Nuclear Holocaust*, 19 AM. U. INT'L L. REV. 153, 154–68 (2003). More contemporaneously, see generally Ahmed Farooq, *Kashmir Dispute Redux: What of the Right of Self-Determination?* (Sept. 10, 2019), FORDHAM INT'L L.J. ONLINE, <https://www.fordhamilj.org/iljonline/2019/9/10/kashmir-dispute-redux-what-of-the-right-of-self-determination> [<https://perma.cc/V9GA-E3Q7>].

299. Heymann, *supra* note 298, at 162–63.

300. See Maria Abi-Habib, Jalaluddin Mughal & Salman Masood, *In Pakistan-Held Kashmir, Growing Calls for Independence*, N.Y. TIMES (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/world/asia/pakistan-kashmir-independence.html> [<https://perma.cc/ZA4Q-JQ6B>].

301. See generally JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY?: THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* (1992); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

Whatever its trajectory, sovereignty and its connection to territory remain important to the world order;<sup>302</sup> consider how many people struggle and die every day to defend, alter, or cross borders. But while international law has traditionally focused on ways in which sovereignty can be acquired, less attention has been paid to how it can be given up peacefully. Perhaps secession is the counterpart to conquest. What, then, is the bookend concept for a purchased cession?

These questions remain a part of international law and practice. Millions of people still live in colonies whose connection to the metropole is tenuous or disfavored—Americans need look no further than the millions of U.S. citizens living in our own colony, Puerto Rico. In an era of unprecedented mass displacement, refugees face oppression at home and resistance abroad, as persecution and states' economic self-interest combine to deny them safety. King Leopold's ghost haunts not only the Congo, but also international law. Our hope is to help exorcise it. The right of sovereign control, which includes the right to *transfer* sovereign control, must ultimately lie with the people. It should be an instrument to protect their interests, not one used to oppress them.

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302. Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 81, 81 (Thomas J. Biersteker & Cynthia Weber eds., 1996) (“[I]n most instances the existence of a system of more or less distinct territorial units as the foundation for human governance is not even questioned.”).