ABSTRACTS

Public International Law in the Age of Colonialism: Genesis, Importance and Consequences

By *Jörn Axel Kämmerer*, Hamburg

Decolonisation has by no means put an end to colonialism as a matter for Public International Law. This has been evidenced e.g. by lawsuits filed by Herero people, who claimed that German colonial troops had virtually annihilated this ethnic community in 1904; or, yet to be launched, by victims of British countermeasures as a consequence of the Kenyan Mau Mau revolt in the 1950s. Analysing legal rules of the colonial era is not only a means to evaluate the legitimacy of acts committed by colonial powers to the detriment of indigenous peoples, and thus the likelihood of claims to be successful. As will be shown, it also helps understand the evolution of public international law between about 1850 and present.

One of the main characteristics of contemporary international law is that it is a postcolonial order, for it has evolved from Ius Publicum Europaeum. While European states formed a "closed shop", rejecting participation of most overseas powers in international law-making, they nevertheless claimed their legal order to be exclusive and also globally applicable. Before the mid-19th century, the existence of concurring international orders had still been admitted by European public international law, when states sought to establish relations with non-European peoples on a (de facto) non-hierarchic basis. Colonialism degraded non-European peoples to objects of international law. Yet, its legal features are far from being clear-cut. European states avoided to agree on a common perception of "colonies" or "protectorate" in order to prevent international law from penetrating overseas dependent territories. Regarding the only partial integration of many of these lands into the legal order of the governing European powers, this practice opened a "normative gap" regarding colonies and their indigenous inhabitants. Forced labour systems and cruel punishment, deprivation of land and property were widely accepted inhumane practices. The colonial powers intentionally prevented the application of European standards to dependent overseas territories (although their territorial sovereignty extended to these territories). Furthermore, there is little evidence of "positive" colonial international law apart from a set of conventions, which, *inter alia,* focussed on the treatment of the indigenous population. However, apart from the prohibition of slavery, they were hardly respected in state practice. This is also true for the Congo Act of 1885, although its Art. 6 and 9 may be considered to reflect basic standards of contemporary "colonial" customary law.

Colonial public international law has by no means vanished. On the contrary: Upon acquisition of independence, the political entities representing the indigenous peoples acceded to

the legal order that until then had disfavoured them. By discarding discrimination and the European monopoly on international law-making likewise, international law evolved from a European to a universal order *ratione personae,* but was not replaced by a different regime. This is the reason why newly independent states, at the very moment of becoming subjects of public international law, inherited rules that had been made without their participation and in some cases against their interest. It is unclear whether and to what extent the inevitable structural disadvantage protects former colonial powers from demands for compensation for damages inflicted upon indigenous peoples by acts which today would constitute a breach of (humanitarian) international law. Even if the hurdle of sovereign immunity could be taken, the applicable law in general would remain the one being in force at the time of the incident. Because of the discriminatory nature of these rules, this result appears to be unsatisfactory, and attempts have been made to declare posterior rules retroactively applicable as long as they reflect peremptory international law. However, it cannot easily be ascertained whether the mere idea of *ius cogens* existed in public international law at the end of the 19th century. Furthermore, as even compulsory rules are rooted in customary law, the absence of a historical evidence of a states' will should not be neglected. In order to mitigate the unsatisfactory consequences of the due respect that must be paid to sovereign law-making, former colonizing states could be deemed to be under a duty to negotiate with the concerned newly independent states, provided that the damaging action would constitute a breach of peremptory public international law if committed today. This at least is a viable and realistic perspective for forthcoming customary international law.

´The Khmer Rouge Tribunal

By *Jörg Menzel*, Phnom Penh

Between 1975 and 1979 the Khmer Rouge under their leader Saloth Sar (Pol Pot) governed the country they called „Democratic Kampuchea". Within less then four years probably about 1.7 Mio people died of system related reasons, hundreds of thousands were killed on so called "killing fields" around the country. More than thirty years after their seizure of power, some of the surviving senior leaders and those most responsible for the crimes of the Khmer Rouge will now be prosecuted and face trial in a special court. The "Extraordinary Chambers in the Courts of Cambodia" (ECCC) are a hybrid court consisting of Cambodian and international judges, based on an agreement between the United Nations and the State of Cambodia and a Cambodian law. Its task will be to bring at least some late justice to the victims of the Khmer Rouge, to document the truth about their barbaric system and – hopefully – to provide some momentum for urgently necessary improvements in the Cambodian judicial system. The work of the ECCC will be of major interest for the development of international criminal law and it will be a landmark event in Cambodia

itself. The article outlines background, structure and perspectives of this "Khmer Rouge Tribunal".

The expropriation of real estate in the context of South Africa's land reform from a legal perspective

By *Konstantin Krukowski*, Berlin

The article deals with the problem of land reform in South Africa. At first introducing into the backgrounds, the difficulties and the different components of the major national endeavor of land reform, the objective of the article is to give a brief description of the South African constitutional and statute law concerning property and expropriation, all seen from the point of view of Germany's expropriation rules. The description is set upon the basis of a recent land expropriation case which occurred in South Africa's North West province and which became publicly known as the first case in which the – until then usual – principle of "willing seller and willing buyer" was renounced by the state's authorities.
It is to make clear that in spite of a policy change, the land reform measures taken so far have generally been in accordance with the rule of law. Fears about South Africa becoming like the adjacent Zimbabwe in regard to land reform are generally unfounded. Still, especially as far as the aspect of land distribution is concerned, the importance of the principle of proportionality, of a fair, value-orientated determination of compensations, and of a calculable and uniform interpretation of nondescript legal terms must be underlined.
As a conclusion of the article, it can be stated that Section 25 of the South African Constitution 1996 provides a rather detailed constitutional framework for land reform measures, there is explicit and sophisticated statutory legislature to substantiate that framework (for example the significant Restitution of Land Rights Act 1994) and there is a system of judicial control, legal instruments which altogether leave no room for any possible continuity of executive arbitrariness.

Democratic Republic of Congo – the Constitution of 2005 (I)

By *Dietrich Nelle*, Brüssel

The Democratic Republic of Congo, the sleeping giant of Sub-Saharian Africa, has acquired from the very start of its independence a firmly rooted reputation as a country of civil war, ethnic strife, autocratic leadership, impunity of crime, systematic mismanagement at all levels and large-scale pilling of natural resources. At the same time, taking into account

its natural wealth, it is one of the richest countries of the world. The new Constitution endorsed by a clear majority earlier this year could prove to become a turning point in the country's history. In legal terms it marks the end of the transition period created by the peace-process five years earlier and the starting point of the so-called 3rd Republic. Many attach great hopes to these developments although a long way still needs to be gone in order to turn the immense wealth of the country into prosperity for its own inhabitants. The present paper traces the major lines of debate in the process of elaboration of the new Constitution, analyses the major orientations of the reforms adopted and links them to the backdrop of the current state of developments in the relevant fields of Congolese reality. This first part covers the history of congolese constitutions as well as the new governance model.