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*“La mentalité de nos confrères à l’égard de ce qui fut jadis et sera demain”<sup>1</sup>*

The Neutralities of Belgium, the Congo Free State and the Belgian Congo (1885-1914) seen  
through the *Journal des Tribunaux*<sup>2</sup>

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## I. Introduction

The Great War fought between 1914 and 1918 involved each and every imperial power and devastated the entire world. In that respect, the centenary commemoration generated a disproportionately large attention to the heroic battles in Flanders and the North of France. The war experience in the colonies, where European powers found the required manpower and resources<sup>5</sup>, has been barely looked at. The African Theatre of War, where Germany started its East African Military Campaign to force allied governments to keep their armed forces and supplies on the dark continent, generated new interest<sup>6</sup>. In comparison, the case of the Belgian Congo during the First World War and the key question on its neutrality, remains until now largely unexplored<sup>7</sup>.

The recent wave of international scholarship on the neutrality doctrine directly inspired this contribution : Isabel Hull’s monograph *A Scrap of Paper* covers the classical discussion on the actual violation of neutrality<sup>8</sup>. Maartje Abbenhuis produced a synthetic monograph on neutrality as the standard political attitude – and not the exception – in 19<sup>th</sup> century great power politics<sup>9</sup>. Finally, the early modern origins of the concept have been thoroughly examined by

<sup>1</sup> Adaptation of a quote by Guy Delfosse in : "Soixantequinze ans d'histoire du Congo à travers soixantequinze ans d'histoire du *Journal des tribunaux*", in *JT*, 1960, p. 240-245.

<sup>2</sup> We express our thanks to the anonymous reviewers of this article for their valuable suggestions.

<sup>3</sup>.

<sup>4</sup>.

<sup>5</sup> Colonial powers increased the mining of gold, diamond and copper to keep the war machine running. Especially the copper mines in the Katanga province served for the production of shells fired at the European front.

<sup>6</sup> BYRON FARWELL, *The Great War in Africa, 1914-1918*, New York, 1986 ; MELVIN PAGE, *Africa and the First World War*, New York, 2014 ; ANNE SAMSON, *World War I in Africa : the Forgotten Conflict Among the European Powers* (International library of twentieth century history, 50), London, 2012 ; HEW STRACHAN, *The First World War in Africa*, Oxford/New York, 2004 ; GORDON MCGREGOR and MANNFRED GOLDBECK, *Keine Chance : der Erste Weltkrieg in Namibia, August 1914-July 1915*, Windhoek, 2014.

<sup>7</sup> ENIKA NGONGO (University of Saint Louis, Brussels) prepares a doctoral thesis on the war experience in the Belgian Congo. See also : LUCAS CATHERINE, *Loopgraven in Afrika (1914-1918) : de vergeten oorlog van de Congolezen tegen de Duitsers*, Berchem, 2013.

<sup>8</sup> ISABEL V. HULL, *A Scrap of Paper : Breaking and Making International Law during the Great War*, Ithaca/London 2014, p. 16-50. See also : CHRISTOPH WAMPACH, "Der Rechtsstreit um die Verletzung der belgischen Neutralität im Ersten Weltkrieg", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 2016, p. 404-439 ; KIRSTEN SELLARS, "The First World War, Wilhelm II and Article 227: the Origin of the Idea of 'Aggression' in International Criminal Law", in CLAUS KRESS and STEFAN BARRIGA (eds.), *The Crime of Aggression : A Commentary*, Cambridge, 2016, p. 30-60 ; VINCENT GENIN, *Un "laboratoire belge" du droit international (1869-1940) ? Réseaux internationaux, expériences et mémoires de guerre des juristes belges*, unpublished doctoral thesis, University of Liège, 2017, p. 347-373.

<sup>9</sup> MAARTJE ABBENHUIS, *An Age of Neutrals : Great Power Politics, 1815-1914*, Cambridge, 2014. On neutral powers outside the conflict, see also : ALAIN CLAVIEN and CLAUDE HAUSER, "Les états neutres et la neutralité pendant la Grande Guerre : une histoire pas si marginale", *Relations internationales*, 2014, n° 159, p. 3-6.

Eric Schnakenbourg<sup>10</sup>. The present contribution does not concern the question of the *violation* of Belgian (and a presumed Congolese) neutrality by Germany and leaves issues as the German ultimatum or the alleged necessity-principle outside the scope. Instead, it enquires whether the legal and conceptual foundations of permanent neutrality were as solid as a genealogic approach to international law as a vector of peace would suggest. Furthermore, an objective understanding of the discussion – if possible at all – has to discard 19<sup>th</sup> century Belgian nationalism<sup>11</sup>.

Historiography on Belgian colonialism has witnessed a new blossoming<sup>12</sup>, whereas legal history, except for some interest for the judiciary, lagged behind<sup>13</sup>. Traditionally, the relationship between indigenous customary law and colonial law attracts the interest of legal theorists and anthropologists<sup>14</sup>. Little is known about the relation between the discursive construction of Belgian and Congolese neutrality in both the domestic and the European, ‘civilised’ community of lawyers. Belgian lawyers played a predominant role as forerunners in the development of contemporary international law<sup>15</sup>, which functioned as a brake on the so-called ‘positivist’ 19<sup>th</sup> century law of nations. Yet, their writings had not only a descriptive, but also a normative, *de lege ferenda* design (which implies that their writings tended to alter the existing state of the law, rather than to merely describe it). Our analysis could not remain limited to the scholarly publications of the generation of the International Law Institute and the *Revue de droit international et de législation comparée*<sup>16</sup>, since both have an international focal point. Their views need to be juxtaposed against what lawyers ‘at home’ thought about the neutrality question of the Congo and Belgium. An original approach to tackle this issue is the study of legal periodicals publishing on the neutrality question. More than other sources, legal periodicals are vectors of law, since they both reflect and shape the mentality of its authors, editors and readers<sup>17</sup>. In his research on the *reprise du Congo* (the take-over of the Congo),

<sup>10</sup> ERIC SCHNAKENBOURG, *Entre la guerre et la paix : neutralité et relations internationales, XVII<sup>e</sup>-XVIII<sup>e</sup> siècles*, Rennes, 2013, p. 21-73. See also : KENTARO WANI, *Neutrality in International Law : From the Sixteenth Century to 1945* (Routledge Advances in International Relations and Global Politics, 131), London, 2017 ; ANTONELLA ALIMENTO (ed.), *War, Trade and Neutrality : Europe and the Mediterranean in the Seventeenth and Eighteenth Centuries*, Milano, 2011.

<sup>11</sup> E.g. Charles Faider (1811-1893), discours de rentrée at the Court of Cassation, 15 October 1885, as reported in the *Revue de droit international et de législation comparée*, 1886, p. 89 : “La constitution internationale de la Belgique peut s’exprimer par le mot NEUTRALITÉ. Cette neutralité [...] fut assurée à la Belgique dès le IX<sup>e</sup> siècle, parfois violée, jamais détruite”. (“The international constitution of Belgium can be summarized with the word ‘neutrality’. This neutrality [...] has been guaranteed to Belgium since the 9<sup>th</sup> century. At times violated, it has never been destroyed.”). JEAN STENGERS and ELIANE GUBIN, *Le Grand Siècle de la nationalité belge* (vol 1.), Bruxelles, 2002, p. 121-125.

<sup>12</sup> GUY VANHEMSCHE, “The Historiography of Belgian Colonialism in the Congo”, in Csaba Léval (ed.), *Europe and the World in European Historiography* (Thematic Work Group Europe and the World, 1), Pisa, 2006, p. 106.

<sup>13</sup> BERENGERE PIRET, *La justice coloniale en procès : organisation et pratique judiciaire, le tribunal de district de Stanleyville (1935-1955)*, unpublished doctoral thesis, University SaintLouis, Bruxelles, 2016 ; *Rechtskultur : Zeitschrift für Europäische Rechtsgeschichte*, 2016, n° 5, (theme issue on colonial legal history).

<sup>14</sup> JACQUES VANDERLINDEN, *Les systèmes juridiques africains*, Paris, 1983.

<sup>15</sup> GENIN, *Un “laboratoire belge” du droit*.

<sup>16</sup> MARTTI KOSKENNIEMI, *The Gentle Civilizer of Nations : the Rise and Fall of International Law 1870-1960*, Cambridge, 2001.

<sup>17</sup> MICHAEL STOLLEIS (ed.), *Juristische Zeitschriften: Die neuen Medien des 18.-20. Jahrhunderts* (Studien zur europäischen Rechtsgeschichte, 128), Frankfurt am Main, 1999 ; MICHAEL STOLLEIS and THOMAS SIMON (eds.), *Juristische Zeitschriften in Europa* (Studien zur europäischen Rechtsgeschichte, 214), Frankfurt am Main,

Vincent Viaene mentions the undeniable role of Brussels attorneys-at-law, especially the renowned Edmond Picard (1834-1926)<sup>18</sup> and the *Conférence du Jeune Barreau de Bruxelles* (Brussels Young Bar Association), as a breeding ground for Belgium's colonial party<sup>19</sup>. Remarkably, he left the *Journal des Tribunaux* (*JT*), founded by Picard in 1881, which wanted to 'bring law to the people', aside<sup>20</sup>. Despite its promise to be a-political, this leading legal periodical soon took positions in several national and international issues, such as the Congo question. Indeed, even though the renowned *Revue de droit international et de législation comparée* (published between 1869 and 1939) discussed both the neutrality and the Congo question, it remained relatively silent during the peak years of the Congo controversy<sup>21</sup>. The *JT* did not, which makes it a perfect medium to reconstruct the mentality of Belgium's lawyers at that time.

From the start, Picard's journal was a resounding success and soon thousands of readers turned its pages twice a week<sup>22</sup>. The goal was clear : bringing law to the people<sup>23</sup>. Therefore, it was conceived as a tabloid and printed as a newspaper, while it deliberately avoided tedious articles, enabling readers to be quickly informed about legal news whilst having breakfast. Considering the impressive list of Belgian politicians who offered contributions at that time, the *JT* was probably the most influential Belgian legal periodical. The contrast with the International Law Institute and its *Revue* could not have been clearer. In the latter's view, only a small circle of international lawyers could influence decision-makers. Vulgarization of the law was not a primary objective. Moreover, its social base was narrow, while the French-German tensions at the turn of the century impeded the functioning of both the Institute and the

2006 ; MARJU LUTS-SOOTAK and MERIKE RISTIKIWI, "Dear reader", in *Juridica International*, 2010, n°17; p. 1. On the introduction of human rights in legal practice, see : SEBASTIAAN VANDENBOGAERDE, "They Entered Without any Rumor : Human Rights in the Belgian Legal Periodicals", in *Göttingen Journal of International Law*, 2012, n° 1, p. 271-291. On the evolution of Belgian private law, see: DIRK HEIRBAUT, "Vijftig jaar privaatrecht in het Tijdschrift voor Privaatrecht : Er is in die tijd veel veranderd", in *Tijdschrift voor Privaatrecht (gelieve de hoofdletter van Privaatrecht te behouden. Zo gebruiken juristen die ook, bovendien is de afkorting TPR)*, 2014, n° 41, p. 1-71. On the evolution of social law, see: BRUNO DEBAENST, "Belgian Social Law and its Journals : a Reflected History", in *Cahiers du Centre de Recherches en Histoire du Droit et des Institutions*, 2015, n° 37 (toevoegen: permalink: <https://popups.ulg.ac.be/1370-2262/index.php?id=183>), , s.p. ; SEBASTIAAN VANDENBOGAERDE, *Vectoren van het recht : geschiedenis van de juridische tijdschriften in België*, Brugge, Die Keure, 2018 ; SEBASTIAAN VANDENBOGAERDE, "From Mirror to Vector: an Impossible Step?", *Cahiers du Centre de Recherches en Histoire du Droit et des Institutions* 2015, n° 37 (zie eerder, permalink: <https://popups.ulg.ac.be/1370-2262/index.php?id=229>).

<sup>18</sup> BART COPPEIN, *Dromen van een nieuwe samenleving : intellectuele biografie van Edmond Picard*, Larcier, Brussel, 2011 ; PAUL ARON and CECILE VANDERPELEN-DIAGRE, *Edmond Picard : un bourgeois socialiste belge à la fin du dix-neuvième siècle*, Bruxelles, 2013; WILLY VAN EEKHOUTTE and BRUNO MAES (eds.), *Genius, grandeur & gêne : het Fin de Siècle rond het Justitiapaleis te Brussel en de controversiële figuur van Edmond Picard / La Fin de Siècle autour du Palais de Justice de Bruxelles et le personnage d'Edmond Picard*, Gent, 2014.

<sup>19</sup> VINCENT VIAENE, "Reprise-remise : de Congolese identiteitscrisis van België rond 1908", in Vincent Viaene, David Van Reybroeck and Bambi Ceuppens (eds.), *Congo in België : koloniale cultuur in de metropool*, Leuven, 2009, p. 42-62.

<sup>20</sup> SEBASTIAAN VANDENBOGAERDE, "Une telle apathie est presque coupable" : How in Belgium's *Journal des Tribunaux* the Interest for the Congo Free State Sparked Off (1885-1908)", *Clio@Themis*, 2017, n° 12, p. 1-15.

<sup>21</sup> KOSKENNIEMI, *The Gentle Civilizer of Nations*, p. 163-164.

<sup>22</sup> VANDENBOGAERDE, *Vectoren van het recht*, p. 110-136.

<sup>23</sup> BART COPPEIN, "Bringing Law to the People : the "Journal des Tribunaux" and its First Editor-in-Chief (1881-1900)", *Cahiers du Centre de Recherches en Histoire du Droit et des Institutions*, 2015, n° 37, permalink <https://popups.ulg.ac.be/1370-2262/index.php?id=198>.

*Revue*<sup>24</sup>. Thus, despite its grandeur, the effective impact of the *Revue* on the Belgian legal world was smaller than that of the *JT*.

This contribution juxtaposes the scholarly writings of Belgian international lawyers and domestic ones. By confronting doctrine, state practice and periodicals on international law, it provides an insight in the perception among legal practitioners (i.e. attorneys-at-law, notaries, etc) of the Congo problem and its impact on the neutrality of both Belgium and the Congo. We adopt methods from legal history and periodical studies which considers the periodical press an object of study<sup>25</sup>. Since we only scrutinize legal periodicals as vectors of law, archival sources are left out.

At first sight, Belgium and the Congo Free State (CFS) lived under an imposed neutrality in 1885, which would have explained a swift take-over in 1909. This article will distinguish both situations, and point to the fragilities of clear-cut labelling. The status of the CFS in 1885 can hardly be likened to that of Belgium in 1839. Conversely, the takeover as a colony did raise serious questions on the extent of the guarantee given by the great powers and Belgium's respect of the obligation to remain neutral in any case, including situations where conflicts could be engendered in an indirect way. Over time, the neutrality issue has been discussed by international and domestic lawyers alike.

The dialogue between published and handwritten diplomatic correspondence, treaty texts and doctrinal treatises reaffirms the importance of the ‘classical’ law of nations doctrine in determining the role of the Congo, as soon as the armed conflict had started by the German invasion of Belgium (August 1914). The operation of practical legal reasoning in diplomacy on the one hand, and the opinions of domestic lawyers in the *Journal des Tribunaux* on the other

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<sup>24</sup> KOSKENIEMI, *The Gentle Civilizer of Nations...*, p. 18-19.

<sup>25</sup> SEAN LATHAM and ROBERT SCHOLES, "The Rise of Periodical Studies" in *PMLA (volledige titel???)*, 2006, n° 2, p. 517-531; HANS BOTS and SOPHIE LEVIE (eds.), *Periodieken en hun kringen : een verkenning van tijdschriften en netwerken in de laatste drie eeuwen*, Nijmegen, 2006; CHRISTOPHE VERBRUGGEN, *Schrijverschap in de Belgische belle époque : een social-culturele geschiedenis*, Gent, 2009 ; MARIANNE VAN REMOORTEL, KRISTIN EWINS, MAAIKE KOFFEMAN and MATTHEW PHILPOTTS, "Joining Forces : European Periodical Studies as a New Research Field", in *Journal of European Periodical Studies*, 2016, n° 1, p. 1-3.

hand, are essential complements to the patriotic ‘classics’ of the *Belle Époque*<sup>26</sup>, the renowned international lawyers Ernest Nys (1851-1920)<sup>27</sup> and Edouard Descamps (1847-1933)<sup>28</sup>.

In the ensuing paragraphs, we will first develop the treatment of the concept of neutrality within the community of Belgian international law experts and in the *Journal des Tribunaux* (II), to pass on to the concept’s legal articulation (III), split out in subsections on Belgian and Congolese neutrality, both in international and national literature.

## II. The concept of neutrality in communities of lawyers and legal experts

### Who were the fathers of Belgian neutrality?

The neutrality of Belgium was imposed by the conferences of London, held during the first months of the Belgian revolution<sup>29</sup>. The decision to isolate the former Southern Netherlands from high politics, and to use it as a buffer, had a long prehistory<sup>30</sup>. The United Kingdom of the Netherlands, created in 1814-1815, had originally been designed as a buffer against France. The Belgian Revolution (September-October 1830) perturbed the conservative international system<sup>31</sup>. The only way for the young state to gain acceptance was the imposition of a status of permanent neutrality.

<sup>26</sup> As a term, the "Belle Époque" find its roots during the Interwar Period and melancholically holds a sentiment to a time at the turn of the 19<sup>th</sup> to 20<sup>th</sup> centuries, during which technology, discoveries, inventions and economic growth promised unlimited prosperity for mankind. No one seems to know exactly when this period started but there is a consensus it ended in the Summer of 1914 when of the First World War began. In this contribution, the term Belle Époque refers roughly to the time frame 1880-1914. See : MICHEL WINOCK, *La Belle époque : la France de 1900 à 1914* (Collection Tempus, 44), Paris, 2009.

<sup>27</sup> Nys, a pupil of François Laurent, studied law at the universities of Ghent, Heidelberg, Leipzig and Berlin. After a brief stint as a lawyer, Nys became a judge, a function he always combined with courses on diplomatic history, history of private law and – after Alphonse Rivier’s decease – international law. A tireless erudite, Nys spent his summers at the manuscripts section of the British Museum. He received honorary doctorates in Edinburgh, Glasgow and Oxford. He was a prolific contributor to the *Revue de droit international et de législation comparée* ; most of his articles dealt with historical (rather than contemporary) issues of international law. See : JEAN SALMON, "Nys, Ernest", in *Nouvelle Biographie Nationale* 9, Bruxelles, Académie Royale des Sciences, des Lettres et des Beaux-Arts de Belgique, 2007, p. 283-285 ; FREDERIK DHONDT, "L’histoire, parole vivante du droit?" François Laurent en Ernest Nys als historiografen van het volkenrecht", in Bruno Debaest (eds.), *De 'Belle Époque' van het Belgisch recht (1870-1914)*, Brugge, 2016, p. 91-115.

<sup>28</sup> ÉDOUARD DESCAMPS, *La neutralité de la Belgique au point de vue historique, diplomatique, juridique et politique : étude sur la Constitution des États pacifiques à titre permanent*, Bruxelles, 1902 ; Romain Yakemtchouk, "Descamps (Edouard-François-Eugène, baron)", in *Biographie Nationale* 41, Bruxelles, Bruylants, 1979, col. 198-246.

<sup>29</sup> Protocol of 20 December 1830. See : EMILE BANNING, *Les origines et les phases de la neutralité belge* (ed. Alfred De Ridder), Bruxelles, 1927, p. 40.

<sup>30</sup> RENE DOLLLOT, *Les origines de la neutralité de la Belgique et le système de la Barrière (1609-1830)*, Paris, 1902.

<sup>31</sup> Talleyrand to Sebastiani, London, 5 November 1830, published in : CHARLES-MAURICE DE TALLEYRAND-PERIGORD, *Mémoires ou Opinion sur les affaires de mon temps* (vol. 6) (ed. Bruno Ciotti), Clermont-Ferrand, 2007, p. 793. See also : THIERRY LENTZ, *Le congrès de Vienne : une refondation de l’Europe 1814-1815* (Collection Tempus, 602), Paris, 2015 ; MARK JARRETT, *The Congress of Vienna and its Legacy : War and Great Power Diplomacy after Napoleon*, London, 2014 ; MATTHIAS SCHULZ, *Normen und Praxis: das europäische Konzert der Grossmächte als Sicherheitsrat, 1815-1860* (Studien zur internationalen Geschichte, 21), München, 2009.

The Treaty of London (19 April 1839)<sup>32</sup> concluded between Belgium and the Great Powers (France, Britain, Russia, Austria, Prussia) determined the final phrasing. Article VII imposed on Belgium the obligation to remain perpetually neutral, and to observe this attitude towards all other nations<sup>33</sup>. The Great Powers' guarantee was made conditional on this attitude<sup>34</sup>.

#### ***Guillaume (Wilhelm) Arendt, sherpa for Leopold I***

Although the treaty's articles would govern the country's international status until the First World War, a lot was left to interpretation. The treaty did not clearly determine the list or extent of obligations Belgium would be under. Within the diplomatic context of the first decades of its sovereign existence, Belgium's position was constantly under threat<sup>35</sup>. The danger came mainly from France, which was feared under the July Monarchy, the Second Empire as well as under the 'leftist' Third Republic<sup>36</sup>. In one of these episodes, in 1840, the Orient Crisis threatened to trigger an all-out general war<sup>37</sup>. Adolphe Thiers (1797-1877), President of the French King's Council of Ministers, menaced to invade Belgium and the Rhineland. Although the danger disappeared with Thiers's dismissal, Leopold I (1790-1865), the King of the Belgians, did request the drafting of a thorough legal work that could serve as an official manifesto against invasion<sup>38</sup>. As a result, the German-born Wilhelm Arendt (1808-1865), professor of political history, oriental literature and classical antiquity at the University of Louvain, produced a copious *Essai sur la neutralité de la Belgique* (1845)<sup>39</sup>. Arendt had had

<sup>32</sup> Treaty of London between Austria, France, Great Britain, Prussia, Russia and the Netherlands, 19 April 1839, in 88 CTS, p. 411-; Treaty of London between Austria, France, Great Britain, Prussia, Russia and Belgium, 19 April 1839, in 88 CTS, p. 421.

<sup>33</sup> "La Belgique dans les limites indiquées aux articles I, II et IV formera un État indépendant et perpétuellement neutre. Elle sera tenue d'observer cette même neutralité envers tous les autres États." See : Art. VII, Treaty of London between Austria, France, Great Britain, Prussia, Russia and the Netherlands, 19 April 1839, 88 CTS 411 and NA (National Archives), FO (Foreign Office), 94-. See also : FLEURY DE LANNOY, *Histoire diplomatique de l'indépendance Belge*, Bruxelles, 1930.

<sup>34</sup> DOMINIQUE GAURIER, *Histoire du droit international*, Rennes, 2014, p. 853. See also : CARLOS CALVO, *Le droit international théorique et pratique*, Paris, 1870, p. 386.

<sup>35</sup> JAN ANCKAER, "Dangerous Opportunities ? Reassessing Belgian Neutrality during the Crimean War (1853-1856)", in *Journal of Belgian History*, 2014, n° 4, p. 68-111 ; MICHAEL AUWERS, "Expansion vs. Neutrality : How Belgian Diplomats Dealt with the 'Military Question', 1895-1914", in *Journal of Belgian History*, 2016, n° 2, p. 100-127 ; ALFRED DE RIDDER, "La crise de la neutralité belge de 1887", in *Revue catholique des idées et des faits*, 1927, n° ???, p. 14-18 ; DANIEL H. THOMAS, *The Guarantee of Belgian Independence and Neutrality in European Diplomacy : 1830s-1930s*, Kingston, 1983.

<sup>36</sup> EUGEN GOTTSCHALK, *Frankreich und das neutralisierte Belgien*, Stuttgart, 1926 ; CHARLES WOESTE, *La neutralité belge: la Belgique et la France*, Bruxelles and Paris 1891. Already in 1839, Soult (1769-1851), President of the French King's Council of Ministers, proposed a throttling customs union to Belgium : the Court of Cassation in Paris and the French customs administration would simply take over the competences of their Belgian counterparts.

<sup>37</sup> HORST LADEMACHER, *Die belgische Neutralität als Problem der europäischen Politik 1830-1914*, Bonn, 1971, p. 115-116 ; BANNING, *Les origines et les phases*, p. 69-79.

<sup>38</sup> LADEMACHER, *Die belgische Neutralität*, p. 222. See also : GITA DENECKERE, *Leopold I : de 'eerste koning van Europa'*, Antwerpen, 2011, p. 319-321 ; MARIO HOSTE, *Leopold I, Sylvain Van de Weyer en het ministerie van Buitenlandse Zaken : een bijdrage tot de politieke en diplomatische geschiedenis van België (1831-1845)*, unpublished MA thesis, Ghent University, 1991, p. 190-207.

<sup>39</sup> GUILLAUME (WILHELM) ARENDT, *Essai sur la neutralité de la Belgique*, Bruxelles and Leipzig, 1845 ; JOSEPH RUWET, "Arendt (Guillaume-Amédée-Auguste)", in *Biographie Nationale de Belgique* (volume 30, suppl. II, fasc. I), Bruxelles, 1958, col. 40-48 ; HERMANN VON DER DUNK, *Der deutsche Vormärz und Belgien*

studied Lutheran theology in Berlin, and was thus no trained lawyer. Yet, the state of public international law in the 19<sup>th</sup> century allowed a well-versed intellectual with a rigorous philological method to draw up a nuanced image of ‘permanent’ neutrality.

Arendt used the available customary law, general principles of the law of nations, and doctrine<sup>40</sup> to conclude that no similar situation had ever been created<sup>41</sup>. The sovereignty of the country itself was dependent on the permanent observance of obligations that were normally only temporarily applicable, on a voluntary basis<sup>42</sup>. Concluding offensive alliances, guaranteeing the territorial integrity of another state<sup>43</sup>, or, less obvious, contracting obligations with third parties that implicitly brought the Belgian state to favour a belligerent, would result in the end of the Great Powers’ guarantee, and would terminate *ipso facto* the Treaty of London<sup>44</sup>. Arendt advised the government to stretch the commercial possibilities of neutrality to the utmost, drawing profit from Belgium’s geographical position as intermediary between the Great Powers. The conclusion of numerous treaties of trade and navigation was imperative<sup>45</sup>.

Furthermore, the main difficulty of the international status resided in the epitheton ‘permanent’. In essence, neutrality could never be permanent, since it always depended on the existence of an armed conflict between two states. In the early modern period, voluntary neutrality equalled the deliberate choice of a non-belligerent – ‘*non hostis*’ (Bynkershoek) or ‘*medius in bello*’ (Grotius)<sup>46</sup> to remain aloof from a quarrel fought over a cause he could not judge. This implied the right to engage in trade, save for items of contraband (arms, goods capable to serve during a war) and an obligation to act impartially. Such an attitude would have been incompatible in the medieval, theological law of nations, built on ideas of justice. If one belligerent acted with a just cause (‘*causa iusta*’), assistance to the opponent was not tolerable. The disintegration of European moral unity, by contrast, made neutrality acceptable<sup>47</sup>.

‘Permanent’ neutrality should have perpetuated this exceptional situation. Yet, neutrality in no ways precluded a state from taking up arms to exercise its legitimate right of self-defence, intimately tied to every state’s fundamental right to self-preservation<sup>48</sup>/ Permanent

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<sup>40</sup> 1830-48, Wiesbaden, 1966, p. 166-167 and 179-180. Arendt was recruited by De Ram, the first rector of the newly established Catholic University of Louvain, which replaced the State University created by William I in 1817.

<sup>41</sup> JOHANN LUDWIG KLÜBER, *Droit des gens moderne de l'Europe*, Stuttgart, 1819 ; GEORG FRIEDRICH VON MARTENS, *Précis du droit des gens moderne de l'Europe*, Göttingen, 1821 ; EMER DE VATTEL, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, Paris, 1835-1835 (first edition 1758).

<sup>42</sup> The examples of Genoa (which failed to defend itself against France) of the Helvetian Confederation (which failed to oppose the transit of both French imperial and allied coalition troops) could not be equalled to the *sui generis* Belgian case. See: ARENDT, *Essai sur la neutralité*, p. 107.

<sup>43</sup> ARENDT, *Essai sur la neutralité*, p. 89. On the concept of neutrality, see also : MICHAEL BOTHE, "Neutrality, Concept and General Rules", in *Max Planck Encyclopaedia of Public International Law*, Oxford, 2015 (<http://opil.ouplaw.com>; last accessed 12 June 2017).

<sup>44</sup> ARENDT, *Essai sur la neutralité*, p. 93.

<sup>45</sup> *Idem*, p. 91.

<sup>46</sup> *Idem* p. 211.

<sup>47</sup> WILLIAM EDWARD HALL, *A Treatise on International Law*, Oxford, 1884, p. 601-606.

<sup>48</sup> STEPHEN C. NEFF, *Justice Among Nations*, Cambridge (Mass.), 2014, p. 71.

<sup>49</sup> JOHN WESTLAKE, *Études sur les principes du droit international*, Bruxelles and Paris 1895, p. 120-126.

neutrality ought to be credible<sup>49</sup>. In the contrary case, Belgium would soon be a prey for invaders. The guarantee of the Great Powers, finally, was dependent on their willingness to execute the guarantee obligations enshrined in the Treaty of London. Would an invasion automatically trigger their responsibility ? Or would the Belgian government need to notice every guarantor individually ?

Arendt's questions on the fragility of the guarantee were answered in the 1870 treaties concluded between Britain and France as well as between Britain and Prussia. In contrast with 1840, France and Prussia came to hands<sup>50</sup>. After the French declaration of war (19 July 1870), Gladstone's (1809-1898) liberal government obtained the pledge from Prussia (9 August 1870) and France (11 August 1870) that they would respect their word given in 1839. Yet, this agreement, concluded without Belgian participation, raised more questions than it answered or than the Catholic chief of government Jules d'Anethan (1803-1888) would admit of<sup>51</sup>. Why would it be necessary, in view of the *pacta sunt servanda* principle, to reiterate one's respect for treaty obligations ? If treaties were binding, how could the ensuing obligations come to disappear over time ? How could a reaffirmation have any legal sense ? Could an obligation to guarantee Belgian sovereignty extinguish in the course of time, or, more specifically, when Belgium acquired new territory<sup>52</sup> ?

#### *Ernest Nys, to the rescue of Leopold II*

The most popular narratives of Belgian neutrality were written in the *Belle Époque* by Nys and Descamps. Pursuant to the colonial appetite expressed by his late father Leopold I (who thought of acquiring parts of Portuguese Africa or Latin-America), King Leopold II (1835-1909) realized his autocratic dream by creating the Congo Free State<sup>53</sup>. No constitutional limitations such as contraseign or parliamentary sovereignty would burden the exercise of monarchical power in Africa<sup>54</sup>. As is well known, Leopold obtained comfortable parliamentary assent to create a personal union between his Belgian and African territories<sup>55</sup>. The reciprocal

<sup>49</sup> ARENDT, *Essai sur la neutralité*, p. 67. Arendt noted that the centralised system of government enacted by the 1831 constitution was in this regard superior to the 'vices of the federal system', as encountered in Switzerland or the United States of America.

<sup>50</sup> GEOFFREY WAWRO, *The Franco-Prussian War : the German Conquest of France in 1870-1871*, Cambridge, 2003.

<sup>51</sup> LADEMACHER, *Die belgische Neutralität*, p. 245.

<sup>52</sup> National Archives (Kew), Foreign Office, 834/9, Confidential blue print: R.P. Collier, J.D. Coleridge and Travers Twiss Q.C. to Earl Grenville (1815-1891, Minister for Foreign Affairs), London (Inner Temple), 6 August 1870, p. 8.

<sup>53</sup> JAN VANDERSMISSSEN, *Koningen van de wereld : Leopold II en de aardrijkskundige bewegingen*, Leuven, 2009.

<sup>54</sup> JEAN STENGERS, *Belgique et Congo : élaboration de la Charte Coloniale*, Bruxelles, 1963, p. 13. Paul Hymans in the Chamber of Representatives, 1 March 1906 (*Parliamentary Proceedings, Chamber of Representatives, Session 1 March 1906, p. 15.*) plenum.be : [https://sites.google.com/site/bplenum/proceedings/1906/k00233248/k00233248\\_00](https://sites.google.com/site/bplenum/proceedings/1906/k00233248/k00233248_00): "Les législations étrangères offrent des types nombreux de régimes coloniaux qui, tout en laissant aux gouvernements locaux une large part d'autonomie et d'autorité, font place cependant à l'intervention de collèges consultatifs et au contrôle supérieur du parlement.[...] Mais, messieurs, l'absolutisme, fut-ce en Afrique, fut-il exercé par un esprit génial, n'est pas un régime durable. Le provisoire ne peut pas toujours durer."

<sup>55</sup> DESCAMPS, *La neutralité*, p. 473.

relationship between the King and Belgian international lawyers led to the creation of chairs of international law, and to the personal advancement of the royal sycophant's careers<sup>56</sup>.

To what extent could the personal acquisition of territory overseas by the monarch constitute a violation of Belgian's obligation to remain aloof from the vicissitudes of international politics ? In the 1860s, the liberal government of Frère-Orban<sup>57</sup> and Rogier tried to delimit the validity of Belgian neutrality to the perimeter of civilised European nations. Belgian commercial involvement in the American Civil War (1861-1865) or in the attempt to install Maximilian of Austria as Emperor of Mexico (1865) were justified on this basis<sup>58</sup>.

Yet, at the conclusion of 1870 guarantee treaties, Gladstone's government made it perfectly clear that the 1839 guarantee could only concern the European borders of Belgium. The colonial appetite of the Saxe-Coburgs was known in London for decades<sup>59</sup>. Britain, whose colonial possessions and dominions stretched the entire globe, had a paramount interest in keeping oversight over the distribution of territory. Even if the Congo was situated in Africa, Britain was still to be considered a civilised nation.

Edouard Descamps and Ernest Nys, who were both closely involved in Belgian colonial expansion, felt the need to tie the national narrative to the great endeavour of Leopold II's reign. This implied a first conceptual step : qualifying the Provisional Government's Declaration of Independence on 4 October 1830 as a decisive constitutional moment. If Belgian sovereignty had depended on international recognition, the mandatory and congenital character of neutrality would have represented too much of a burden for the acquisition of the Congo Free State<sup>60</sup>. Nys argued that, through the Italian and German unifications, or even at the American Revolt (1776-1787) against Britain, sovereignty had been established on the basis of the "nationality principle".<sup>61</sup>

The intervention of Great Powers could only recognize *ex post*, in a declaratory manner, what had already existed before. A state was primarily a society of men, established on a given territory, controlled by an autonomous government. Leaning heavily on the writings of Paul Laband<sup>62</sup>, Nys argued that the *ius dominandi* or capacity to dominate a territory and population determined statehood. International recognition was merely a contingent and political affair<sup>63</sup>. Nys used the German Confederation, created as a confederation of states by the Vienna Final

<sup>56</sup> Un "laboratoire belge", p. 140-145, 148, 150-151 and 225-226.

<sup>57</sup> JULES GARSOU, *Frère-Orban de 1857 à 1896*, Bruxelles, 1946.

<sup>58</sup> FRANCIS BALACE (ed.), *La guerre de sécession et la Belgique : documents d'archives américaines 1861-1865*, Louvain, 1969, p. xxi-xxvii ; Banning, *Les origines et les phases*, p. 119-124 and 147-174.

<sup>59</sup> DENECKERE, *Leopold I*, p. 608.

<sup>60</sup> ERNEST NYS, *L'état indépendant du Congo et le droit international*, Bruxelles, 1903, p. 67.

<sup>61</sup> NYS, *État indépendant du Congo*, p. 66.

<sup>62</sup> PAUL LABAND, *Le droit public de l'empire allemand (vol. 1)* (transl. Camille Gandilhon), Paris, 1901, p. 116.

<sup>63</sup> The same point of view on the Berlin Act ("une légende") can be found in : ROBERT SENELLE and ÉMILE CLÉMENT, *Léopold II et la Charte coloniale (1885-1908)*, Bruxelles, 2009, p. 11.

Act (1815-1820) as a counterexample. External recognition alone could never be constitutive, only declaratory.<sup>64</sup>

This line of argumentation made it possible to downplay the legal effect of the Act of Berlin (26 February 1885). For Nys, the Congo Free State – like Belgium in 1830 – had already developed international relations prior to the conference, and could thus not be called into question again. Establishing sovereignty over the newly acquired territories could be rooted in the distinction between civilised, barbarian and savage entities<sup>65</sup>.

#### ***Edouard Descamps, the apostle of peace?***

Descamps, from his side, tried to immunize Belgium from foreign (e.g. British) intervention by conceiving neutrality as the imposition of a codified standard of law.<sup>66</sup> Belgian neutrality would have served as the example for the neutralization of Luxembourg (1867)<sup>67</sup> and, of course, the Congo basin<sup>68</sup>. The institution of perpetual neutrality can be seen as a forerunner of ‘peace organized by law’.<sup>69</sup> In four documented and learned parts, Descamps argued that the regime of neutrality had been absorbed by the conception of *‘le paciférat positif’*, based on the principle of common and equal sovereignty<sup>70</sup>. Descamps’s ideas represented the upswing mood of pacifist international lawyers as James Lorimer (1818-1890) or politicians as de Parieu (1815-1893) who pleaded for establishing a yearly or permanent congress of all nations in either permanently neutral Switzerland or Belgium<sup>71</sup>.

In this peaceful and international law-constructed world, the ‘old’ conception of neutrality, based on “*la compression et l’effacement des États pacifiques*” would have

<sup>64</sup> NYS, *État indépendant du Congo...*, p. 62. See also :GENIN, *Un “laboratoire belge” du droit*, p. 146-148 ; Nys’s contributions in *Revue de droit international et de législation comparée*, 1903, containing the same arguments. On Nys’s publication practices, see : DHONDT, “L’histoire, parole vivante”, p. 113-114.

<sup>65</sup> STEPHEN C. NEFF, “Through a Glass, Darkly: Reflections on James Lorimer’s International Law”, in *European Journal of International Law*, 2016), n° 2, p. 409-413.

<sup>66</sup> JEAN STENGERS, “Léopold II et la rivalité franco-anglaise en Afrique, 1882-1884”, in *Revue Belge de Philologie et d’Histoire/Belgisch Tijdschrift voor Filologie en Geschiedenis*, 1969, n° 2, pp. 425-479 ; GENIN, *Un “laboratoire belge”*, p. 138 and 151-152. See also : EDOUARD DESCAMPS, “Le différend anglo-congolais”, in *Revue de droit international et de législation comparée*, 1904, p. 233-259 : “les efforts colonisateurs des autres États sont peu appréciés en Angleterre, et les aptitudes colonisatrices y sont même généralement regardées comme l’apanage de quelques rares - très rares - peuples privilégiés” (p. 235).

<sup>67</sup> See : ROBERT DEMOULIN, “Léopold II et le grand-duché de Luxembourg au printemps de 1867”, in *Mélanges offerts à G. Jacquemyns*, Bruxelles 1968, p. 163-189 ; MARIA DE WAELE, *Naar een groter België ? De Belgische territoriale eisen tijdens en na de Eerste Wereldoorlog : een onderzoek naar de hoofddoeleinden, de besluitvorming, de realisatiemiddelen en de propagandavoering van de buitenlandse politiek* (vol. 1), unpublished doctoral thesis, Ghent University, 1989, p. 36-80.

<sup>68</sup> This view was shared by Albert de La Pradel. See : ALBERT DE LA PRADELLE, “The Neutrality of Belgium”, in *The North American Review*, 1914, n° 709, p. 847.

<sup>69</sup> DESCAMPS, *La neutralité*, p. 618.

<sup>70</sup> *Ib.*, p. 597.

<sup>71</sup> JOHANN CASPAR BLUNTSCHLI, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, Nordlingen, 1872 (first edition 1868), p. 110. For the controversy between Lorimer and Bluntschli, see : BRUNO ARCIDIACONO, “La paix par le droit international, dans la vision de deux juristes du XIX<sup>e</sup> siècle: le débat Lorimer-Bluntschli”, *Relations internationales*, 2012, n° 149, p. 13-26. Descamps’s point of view was shared at the Interparliamentary Union for Peace in 1900 and 1902. See : GAURIER, *Histoire du droit international*, p. 849). See also : CECELIA LYNCH, “Peace movements, civil society, and the development of international law”, in BARDO FASSBENDER and ANNE PETERS (eds.), *Oxford Handbook of the History of International Law*, Oxford 2012, p. 194-204.

disappeared. Belgian sovereignty preceded international recognition ; neutrality could not exclude an autonomous foreign policy<sup>72</sup>. Descamps translated confidence and patriotism. Belgian domestic lawyers, whose social world is at the heart of the ensuing section, would follow this élan.

#### ***Descamps and Nys inspiring young lawyers in Brussels***

The importance of Nys and Descamps for younger generations of Belgian lawyers cannot be denied. Two examples can be retraced in the *Journal des Tribunaux*, which had taken a firm position against the Red Rubber Campaign. It published two articles, in fact lectures held before the Brussels Young Bar Association, which discussed the impact of the take-over of the CFS by Belgium.

In his opening speech for the new judicial year 1904-1905, published in the *Journal des Tribunaux* and *Revue de droit international et de législation comparée*<sup>73</sup>, attorney-at-law (*avocat/advocaat*) Pierre Graux, son of the liberal politician, attorney-at-law and professor Charles Graux (1837-1910)<sup>74</sup>, discussed for the first time the possible consequences of the CFS take-over by Belgium. The lecture did not find its origins in the British CFS propaganda war, but in the contestation of Belgium's neutrality. Since the 1890s, foreign scholars had argued that Belgium jeopardized both its neutrality and existence when it continued to pursue its colonial aspirations. Already in 1894, the Bordeaux professor Frantz Despagne (1857-1906)<sup>75</sup> had written : "The Belgians want the Congo. But France does not have to agree on this annexation, because it compromises Belgium's neutrality". A year later, Paul Fauchille (1858-1926)<sup>76</sup>, a seminal figure of French international law doctrine and a specialist of neutrality law, declared the annexation of Congo to Belgium not compatible with the country's perpetual neutrality<sup>77</sup>.

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<sup>72</sup> DESCAMPS, *La neutralité...*, p. 202.

<sup>73</sup> PIERRE GRAUX, "La neutralité de la Belgique et l'annexion du Congo", in *JT* 1904, col. 1211-1221 ; PIERRE GRAUX, "La neutralité de la Belgique et l'annexion du Congo", in *Revue de droit international et de législation comparée*, 1905, p. 33-52.

<sup>74</sup> Charles Graux was born in a liberal family and studied law at the Free University of Brussels. In 1862 he became a member of the Brussels Bar. He defended a progressive line in the liberal party. In 1878 Graux was elected as senator and he became eventually Minister of Finance. From 1875 onward, he taught penal law at the Free University of Brussels). See : NADINE LUBELSKI-BERNARD, "Graux, Charles", in *Nouvelle Biographie Nationale 1, Bruxelles, Académie Royale des Sciences, des Lettres et des Beaux-Arts de Belgique*, 1988, col. 112-118.

<sup>75</sup> BERNADETTE SUAU (ed.), *Mémoire des Landes : dictionnaire biographique*, Mont-de-Marsan, Comité d'études sur l'histoire et l'art de la Gascogne, 1991, , p. 108.

<sup>76</sup> CLAUDINE MOUTARDIER, "Paul Fauchille", *Société française pour le droit international* (accessed online on October 25, 2016 ; <http://www.sfdi.org/internationalistes/fauchille/>) ; HENRY BONFILS and PAUL FAUCHILLE, *Manuel de droit international public*, Paris, 1909, (first edition 1894).

<sup>77</sup> Fauchille was even doubtful if the personal union in itself respected the spirit of the Treaty of London. See : PAUL FAUCHILLE, "Les frontières de l'État du Congo", in *Revue générale de droit international public*, 1894, p. 422 ("La situation est plus délicate encore en ce qui concerne l'union personnelle de la Belgique et du Congo : car cet Etat n'a d'autres sujets que des noirs ; ces fonctionnaires, ses officiers sont [...] des Belges ; si l'Etat était engagé dans une guerre [...] serait-ce de la part de ce Royaume garder une neutralité stricte que de laisser de nombreux sujets belges commander des troupes congolaises ? La situation actuelle ne présente-t-elle pas, dans une large mesure, les inconvénients qu'aurait une annexion de l'État du Congo par la Belgique [...] qui comporterait [...] des obligations militaires incompatibles avec cette neutralité ?").

The French reluctance was rooted in a fear that Belgium had begun to colonize the CFS against all international agreements. To claim the Congolese territories, King Leopold II lobbied and received international support from all Western powers. The Belgian King needed to dismantle the threat of a potential invasion, specifically a French one, since France had colonized the territory of Congo-Brazzaville. A solution presented itself in a convention signed in 1884 between the *Association Internationale Africaine* – the official predecessor of the CFS – and France. France recognized the Congolese sovereignty rights, but in case the sovereignty should lapse, it could claim the CFS territory. In other words, if King Leopold and the CFS were not able to fulfil their international engagements such as freedom of trade in the Congo Basin and perpetual neutrality, France could take over the territory. According to the French, the neutrality promise had lapsed in 1890, when Belgium lent 25 million francs to the CFS. The metropole, in turn, received a right to annex the overseas territories when the loan would not be repaid after ten years. Especially when it became clear in 1895 that more Belgian money was needed to develop the colonial infrastructure, the parliament drafted a first proposal to annex the CFS. Since a lot of money had already been lost, public opinion and political parties proved very hostile<sup>78</sup>. The cession project was almost immediately subordinated<sup>79</sup>. Parliament only allowed an extra loan of 6,850,000 francs under the conditions of the 1890 act. In 1901, the Belgian government thus had the free choice whether it would engage in an annexation project.

According to foreign scholars, an annexation project acted directly against Belgium's and the CFS's perpetual neutrality. Neutrality not only meant keeping aloof from international conflicts, it also included an active duty to avoid possible conflicts. A colonial empire jeopardized this neutrality, since the odds for conflict in Africa increased. It could force the recognizing powers to annul the London Treaty and make Belgium disappear. Graux remarked that other colonial powers intentionally tried to confine Belgium in its colonial adventure by "imposing a new international law"<sup>80</sup>. Graux referred to Ernest Nys and stated that a declaration of independence and sovereignty is a fact and other nation states can do nothing more but acknowledge the existence of the new state. The only thing other nations could do to recognize a new country, was to impose certain conditions. Hence, Belgium's perpetual neutrality was a mere condition for the country's recognition in the "concert of nations". Belgium had the right to develop and expand overseas, just like other European powers. It is remarkable that Graux only discussed Belgium's neutrality duties and did not consider the Congolese point of view. Both neutralities were juxtaposed only four years later by the young and promising attorney-at-law Eugène Soudan (1880-1960)<sup>81</sup>.

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<sup>78</sup> Major Albert Thys had to answer to Belgian investors what happened with the money invested in the Matadi-Stanley Pool (today Pool Malebo) railway. As the Congo river between Matadi and Kinshasa was not navigable, a railroad could bring relief. Major Albert Thys took the lead of the building project which was twice as expensive as initially anticipated. See : ALBERT THYS, *L'annexion du Congo*, Bruxelles, 1895, p. 6-10.

<sup>79</sup> EUGÈNE SOUDAN, *La reprise du Congo et le droit international*, Bruxelles, 1908, p. 5.

<sup>80</sup> PIERRE GRAUX, "La neutralité", p. 35.

<sup>81</sup> Soudan studied law at Ghent University and became an attorney at the Brussels Bar. After the First World War, he was appointed professor at the Free University of Brussels, where he would become dean of the law faculty, a position he combined with a career in parliament and local politics for the Belgian Workers Party. See: MARC-ANTOINE PIERSON, "Soudan, Eugène", *Biographie Nationale* (vol. 37), **plaats en jaar ???**, col. 740-744.

In 1908, when the take-over of the CFS was imminent, the *Journal des Tribunaux* and the *Comité de propagande coloniale* (Committee of Colonial Propaganda) published a report presented by Eugène Soudan before the *Section de droit colonial* (Section of Colonial Law), a subdivision of the Brussels Young Bar Association (see *infra*)<sup>82</sup>. Soudan largely used the arguments brought forward by Graux. On Belgium's neutrality he concluded : "Belgium is a sovereign state, existing by its own will and not by grace of the Powers. Those could only recognize the country and to that end impose its neutrality". Moreover, the neutrality clause of the London Treaty could only be imposed on the borders of continental Belgium, since no one in 1839 could have foreseen that the new state would become a colonial power. Since the treaty had internationally recognized Belgium as a sovereign state, it had the same rights as any other state, including the right to colonize.

On the CFS's sovereignty, Soudan interpreted in analogy with Nys that the Berlin Act had recognized the CFS as a full-fledged state. The Congo Free State was already a state before 1885, since the Leopoldian project had started in the 1870s and King Leopold II had claimed the territory before the Berlin Conference. As an example, the attorney referred to the United States which was internationally recognized in the 1780s, although no one contested that it had been independent and sovereign since 1776, an argument taken over literally from Nys. Soudan drew parallels with the establishment of the CFS. To tackle the criticism that Belgium occupied the Congo territories, Soudan stated that the indigenous people voluntary subjected themselves to the CFS by signing treaties. Hence, the rights of the indigenous had never been violated. Moreover, he stated that all humans, irrespectively the colour of their skin, had the same rights. Indeed, power could lead to abuses, but according to Soudan, the local people had made serious progress, both on a material and a moral level. In other words, the colonial project of King Leopold II had brought nothing but prosperity. In many ways, Soudan's exposé was representative for the opinion propagated by a (fairly) large part of the Brussels attorneys. At that time, they found a forum in one of Belgium's leading legal periodicals : the *Journal des Tribunaux*.

### The *Journal des Tribunaux* and the colonies

Between 1881 and 1914, the *Journal des Tribunaux* gained a leading position amongst Belgium's legal periodical press.<sup>83</sup> Driving forces were founder Edmond Picard, who was in charge from 1881 until 1900, and his assistant Léon Hennebicq (1871-1940)<sup>84</sup>, who took over the journal until 1940. Both eras coincide with a change in the debate about the CFS. At first, Belgian lawyers seemed to move in overlapping worlds with industrialists, politicians and military leaders. One of the leading figures in this debate was Edmond Picard, who used his

<sup>82</sup> EUGENE SOUDAN, "La reprise du Congo et le droit international", in *JT* 1908, col. 585-596, 641-652, 657-668, 673-684, 689-698 and 705-714 ; Eugène Soudan, *La reprise du Congo et le droit international*, Bruxelles, 1908.

<sup>83</sup> VANDENBOGAERDE, *Vectoren van het recht...*, p. 110-112.

<sup>84</sup> Léon Hennebicq studied law at the Free University of Brussels and became an intern at the office of Edmond Picard. He was elected president of the *Conférence du Jeune Barreau*, member of the Bar Council, secretary and later president of *Fédération des avocats belges* and in 1925 he became batonniere at the Brussels Bar Association. He was also responsible for the publication of *La Vérité sur le Congo*, a periodical published between 1903 and 1907. See: GEORGES ARONSTEIN, "Hennebicq, Léon", *Biographie nationale* (vol. 30), Bruxelles, Bruylants, 1958, p. 451-458 ; DE WAELE, *Naar een groter België*, p. 95-97.

*Journal des Tribunaux* as a forum for those networks. After the turn of the century, Léon Hennebicq changed the course of the legal periodical and engaged in a crusade against the Red Rubber campaign.

#### **Picard's *Journal des Tribunaux*: legally securing the Congo Free State (1885-1900)**

During the *Belle Époque*, national feelings in Belgium soared, not the least because of King Leopold II. To celebrate fifty years of independence, he commissioned the *Parc du Cinquantenaire*, which also symbolised the economic and industrial performance of Belgium. Almost simultaneously, the Brussels Palace of Justice was inaugurated (1883). Its grandeur – it was at that time the largest building in the world – filled the public with awe and it became the centre of Belgium's legal world. In its court rooms, leading attorneys-at-law pleaded their cases before prominent magistrates. The central figure seemed to be Edmond Picard, who believed that a good lawyer should not only take interest in legal issues, but should also be open-minded towards social, cultural and political issues. He personified these values since he was both attorney-at-law before the Supreme Court (*Court de Cassation/Hof van Cassatie*) and senator for the Belgian Socialist Party (POB, *Parti Ouvrier Belge/Belgische Werkliedenpartij, BWP*). Moreover, he patronized artists and moved in artistic circles. For his (semi-)weekly *Journal des Tribunaux*<sup>85</sup>, he assembled a like-minded team as editorial board whose members showed large interests in law, the arts and politics which was illustrated in the journal itself.

The *Journal des Tribunaux* embodied Picard's philosophy to 'bring law to the people'. The editor-in-chief adhered to the ideas that law is a cultural phenomenon, and that the public has to be acquainted with all aspects of the national legal system. In its form, the *JT* was conceived as a 'journal', a daily newspaper, meant to be bought and read by all citizens. Spreading legal knowledge was expected to strengthen Belgium as a nation<sup>86</sup>.

Edmond Picard promoted the Belgian nation and shared his enthusiasm through his publications, of which *L'Âme belge* (The Belgian Spirit), published in an edition of the *Revue Encyclopédique* in 1897, is the most renowned<sup>87</sup>. *L'Âme belge* was written in the aftermath of Picard's voyage to the Congo Free State between August and October 1896. As the 'first tourist ever', he wanted to assess the situation in the country himself. He embarked on the steamer *Léopoldville* to visit the royal domain in Africa, and not long after his return, he published his diary *En Congolie*<sup>88</sup>. Picard's voyage in Africa fulfilled him with the idea that Belgian presence in the Congo Free State was much needed and just. In his opinion, the Congo Free State was exemplary to other colonial empires, while it proved the primordial role of the Belgians in the 'concert of nations'. Belgium deserved its place between its much larger neighbouring countries Germany, England and France. Even though Picard was not too fond about the monarchy, he admired King Leopold's colonial adventure. The bond between Picard and the Royal Palace

<sup>85</sup> Initially, the *Journal des Tribunaux* was a weekly, but due to its immediate success the editors decided to publish it twice a week, which enabled it to follow the events in Belgium's legal world closely.

<sup>86</sup> BART COPPEIN, "Bringing Law to the People : The "Journal des Tribunaux" and its First Editor-in-Chief (1881-1900)", *Cahiers du Centre de Recherches en Histoire du Droit et des Institutions*, 2015, n° 37.

<sup>87</sup> Edmond Picard is generally seen as the inventor of the *Âme belge* concept, which was later endorsed by the leading historians Henri Pirenne and Godefroid Kurth. See: SARAH KEYMEULEN, *Het fenomeen Pirenne : de geschiedenis van een reputatie*, unpublished doctoral thesis, Ghent University, 2017.

<sup>88</sup> *En Congolie* has been reprinted several times. For this article we have used the third print, published in 1909 and updated with *Notre Congo*. See : EDMOND PICARD, *En Congolie 1896 suivi de Notre Congo en 1909*, Bruxelles, 1909.

intensified on the Congo debate. Edmond van Eetvelde (1852-1925)<sup>89</sup>, Secretary of State at the Domestic Affairs Department of the Congo Free State, gave Picard and his intern, the young and promising Félicien Cattier (1869-1946)<sup>90</sup>, ten questions to advise King Leopold II on the rights of the Private Domain. The work of the attorneys was published in 1892<sup>91</sup>. They stipulated that sovereignty of a State not automatically led to the property of unoccupied territories (*terres vacantes*). However, they continued, each State had the right to regulate property rights. Remarkably, the *Journal des Tribunaux* reported on this questionnaire only ten years later when the annexation of the Congo Free State became imminent<sup>92</sup>.

Only when in 1893 the first article of Belgium's Constitution was amended with a colonial clause<sup>93</sup>, some interest for the Congo question arose in the *Journal des Tribunaux*. The young Brussels attorney-at-law Victor Pourbaix (1867-1906)<sup>94</sup> urged to establish the *Société étant favorable à la Politique d'Expansion Coloniale* (Society in favour of a Colonial Expansion Policy)<sup>95</sup>, abbreviated as *Société d'Études Coloniales*.<sup>96</sup> Pourbaix became the secretary of this association<sup>97</sup>, whereas Auguste Couvreur (1827-1894), well-known for his advocacy of the Leopoldian Congo, became the association's first president<sup>98</sup>. All members of the *Société*, most of whom were attorneys-at-law, supported King Leopold II and his colonial policy<sup>99</sup>. The Society was divided in a scientific, an economic, and a legal section. A few weeks

<sup>89</sup> JEAN STENGERS, "Eetvelde, van Edmond", in *Biographie Coloniale belge* (vol. 2), Bruxelles, Institut Royal Colonial belge/Koninklijk Belgisch Koloniaal Instituut, 1951, p. 327-335.

<sup>90</sup> Cattier studied law at the Free University of Brussels and became attorney-at-law at the Brussels bar. His supervisor was Edmond Picard. Together, they published a report on the *terres vacantes* in the Congo. With Louis Wodon (1868-1946), he inquired on indigenous customary law (1894). In 1896, Cattier went to Siam to work for the King who tried to reform the country's administration and judiciary. During this mission, Cattier professed himself more on moral and humanitarian issues in the 'civilising colonisation'. A year, later he became professor Congolese law. Soon afterwards, he published *Droit et administration de l'État Indépendant du Congo*. See : PIERRE KAUCH, "Cattier, Félicien", *Biographie nationale* (vol. 32), Bruxelles, Bruylants, 1964, col. 90-94.

<sup>91</sup> EDMOND PICARD and FELICIEN CATTIER, *État indépendant du Congo : consultation délibérée par M<sup>e</sup> Edmond Picard avec la collaboration de M<sup>e</sup> F. Cattier du Barreau de Bruxelles, novembre 1892*, Bruxelles, 1892.

<sup>92</sup> EDMOND PICARD, "Les concessions congolaises et la conférence de Berlin", in *JT* 1903, col. 737-748, col. 753-763, col. 769-777, col. 785-792, col. 801-812 and col. 817-828.

<sup>93</sup> The article was completed with the sentence: "Les colonies, possessions d'outre-mer ou protectorats que la Belgique peut acquérir sont régis par des lois particulières. Les troupes belges destinées à leur défense ne peuvent être recrutées que par des engagements volontaires."

<sup>94</sup> Before Pourbaix became public prosecutor in Charleroi he was attorney-at-law in Brussels. As a young legal practitioner, he founded Belgium's first colonial periodical *Le Congo belge* and organised conferences to answer critics against Leopold's colonial policy. See : MARIE-LOUISE COMELIAU, "Pourbaix, Victor", in *Biographie Coloniale belge* (vol. 4), Bruxelles, Institut Royal Colonial belge/Koninklijk Belgisch Koloniaal Instituut, 1955, p. 722.

<sup>95</sup> MAARTEN COUTTENIER, *Congo tentoongesteld : een geschiedenis van de Belgische antropologie en het museum van Tervuren (1882-1925)*, Leuven, 2005, p. 121-124.

<sup>96</sup> "Société d'Études Coloniales", in *JT* 1893, col. 347-348 ; "Société d'Études Coloniales", in *JT* 1894, col. 79.

<sup>97</sup> OSCAR LANDRIEN, "Allocution", in *JT* 1895, col. 1078 ; MARIE-LOUISE COMELIAU, "Pourbaix", p. 722 ; JOSEPH-MARIE JADOT, "Iseghem, André van", *Biographie coloniale belge* (vol. 5), 1958, p. 464-468.

<sup>98</sup> Auguste Couvreur was a publisher and a politician. He participated at the 1876 Geographic Conference organized by King Leopold II. Couvreur negotiated with France concerning the borders between Gabon and the Congo. He died unexpectedly in 1894 and was succeeded as president of the Society of Colonial Studies by Auguste Beernaert (1829-1912) who had just resigned as government leader. See : MARTHE COOSEMANS, "Couvreur, Auguste", *Biographie coloniale belge* (vol. 4), Bruxelles, Institut Royal Colonial belge/Koninklijk Belgisch Koloniaal Instituut, 1955, p. 163.

<sup>99</sup> Out of 700 Brussels attorneys-at-law, 129 became member of the *Société des Études Coloniales*. During its first year, this society had 350 members. See : MAARTEN COUTTENIER, *Congo tentoongesteld*, p. 122 ; BART

later, a section devoted to political and moral sciences was added. The sections were not strictly divided, and members of one section could participate in reunions of another. Alphonse Rivier (1835-1898)<sup>100</sup>, professor of international law at the Free University of Brussels (*Université Libre de Bruxelles*) and one of Belgium's most renowned scholars on international public law, headed the legal component<sup>101</sup> which wanted to transplant “the best principles of our legislation” in the indigenous law. Characteristics such as race, psychology, climate and civilisation were taken into account<sup>102</sup>. The study group’s goals and programme were published in the *Bulletin de la Société d’Études Coloniales*<sup>103</sup>. Even though the *Société d’Études Coloniales* had its own periodical, the *Journal des Tribunaux* reported on the legal meetings.

It may seem remarkable that *Journal des Tribunaux* did not report on the important works for the colony, and neither did it review the books of its editor-in-chief. In fact, between 1885 and 1900, the periodical devoted little attention to the Congo question, as if it were unimportant. In this sense, it confirmed the “large disinterest” Belgian politicians had for the CFS. However, Picard intended to keep his *Journal des Tribunaux* a-political and therefore he might have avoided the subject<sup>104</sup>. The absence of the debate on the Congo Free State might be explained through his political career as a socialist senator (1894-1908). In 1895, the POB openly opposed the colonization project of King Leopold II and gave priority to the social question. In this sense, Emile Vandervelde’s (1866-1938)<sup>105</sup> 1895 intervention was symptomatic when he stated: “Let us wait to treat negroes as white men until in our country white men are no longer treated as negroes”<sup>106</sup>. Edmond Picard illustrated the division amongst politicians. Not all politicians, not even in the socialist party, were against the cession of the CFS. Some believed the take-over of the CFS would benefit both the colony and the metropole<sup>107</sup>. Edmond Picard was one of those ferocious supporters of the Leopoldian project

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COPPEIN and JÉRÔME DE BROUWER, *Histoire du Barreau de Bruxelles/Geschiedenis van de Balie van Brussel*, Bruxelles, 2011, p. 232.

<sup>100</sup> Rivier was born in Lausanne and had studied law in Geneva, Berlin and Paris. From 1867 onwards, he was professor at the ULB. He became a member of the leading *Institut de Droit International*. See : RENE DEKKERS, “Rivier, Alphonse”, *Biographie Nationale* (vol. 35), Bruxelles, Bruylant, 1969, p. 627-630.

<sup>101</sup> The legal section had four subdivisions : 1° International Law, 2° Public Law and relations with the metropole, 3° Internal Colonial Law, 4° Comparative Colonial Law. See : "Société d’Études Coloniales", in *JT* 1893, col. 347-348 ; "Société d’études coloniales", in *JT* 1894, col. 79.

<sup>102</sup> “La législation coloniale”, in *JT* 1893, 173-174. See also : EMMANUELLE TOURME-JOUANNET, “Des origines coloniales du droit international : à propos du droit des gens moderne au XVIIIe siècle”, in PIERRE-MARIE DUPUY and VINCENT CHETAIL (eds.), *The Roots of International Law/Les fondements du droit international : Liber Amicorum Peter Hagemmacher* (Legal History Library, 11/Studies in the History of International Law, 5), Leiden/Boston 2014, p. 649-647 ; ANDREW FITZMAURICE, *Sovereignty, Property and Empire, 1500-2000* (Ideas in Context, 107), Cambridge, 2014, p. 271-300 ; GENIN, *Un “laboratoire belge”*, p. 133-136. For a more profound reflection on the doctrinal consequences of colonisation, see : MIEKE VAN DER LINDEN, *The Acquisition of Africa (1870-1914) : the Nature of Nineteenth-Century International Law* (Legal History Library, 20/Studies in the History of International Law, 8), Leiden/Boston, 2016, p. 34-94.

<sup>103</sup> “Société d’études coloniales”, in *JT* 1893, p. 347-348.

<sup>104</sup> BART COPPEIN, *Dromen van een nieuwe samenleving*, p. 74-81.

<sup>105</sup> JANET POLASKY, “Vandervelde, Emile”, in *Nouvelle Biographie Nationale* (vol. 1), **plaats/jaar ???**, col. 344-354.

<sup>106</sup> “Nous voulons, en un mot, avant de traiter les nègres comme des blancs, que l’on ait cessé de traiter les blancs comme des nègres!” in *Parliamentary Proceedings, Chamber of Representatives*, Belgian Session 27 June 1895, p. 14. [https://sites.google.com/site/bplenum/proceedings/1895/k00182053/k00182053\\_04](https://sites.google.com/site/bplenum/proceedings/1895/k00182053/k00182053_04). Last accessed 2 January 2018.

<sup>107</sup> GUY VANTHEMSCHE, “De Belgische socialisten en Congo 1895-1960”, in *Brood en rozen: tijdschrift voor de geschiedenis van de sociale beweging*, 1999, n°???, p. 31-65.

in Africa, but he was also a true socialist party member, following the line drafted by the party. Therefore, he did not promote the colonization of the CFS in his *Journal des Tribunaux*. Léon Hennebicq, who succeeded Picard as editor-in-chief, drew a much harder line.

#### ***Journal des Tribunaux at the centre of the colonial legal world: Léon Hennebicq (1900-1940)***

In 1900, Hennebicq took over the position of editor-in-chief from Picard. The young attorney-at-law resembled his predecessor in several ways. He believed that Belgium, based on its history, industrial power and intellectual influence, deserved a prominent place in the ‘concert of nations’. As president of the *Ligue Maritime belge* and the *Institut International de Commerce*, Hennebicq advocated a large penetration of Belgium on the world markets, which could only be reached through a colonial empire. Further, he was involved in colonial periodicals such as *Le Mouvement Maritime* (1901-1904), which merged in 1905 with *La Belgique Coloniale* (1895-1904)<sup>108</sup> into *La Belgique Maritime et Coloniale* (1905-1921). He worked also for *Le Matin*, a paper defending Leopold’s policy in Africa, and the *Mouvement Géographique* (1884-1922). All journals participated in the polemical discussion concerning Belgian colonialism. The connections between these journals are revealed in articles copied and published in the *Journal des Tribunaux*<sup>109</sup>.

Léon Hennebicq cherished some political ambitions, but in contrast to Edmond Picard, he could not submit himself to a political line. This might explain the harsher opinions the *Journal des Tribunaux* uttered about the Congolese question. Despite his conviction that Belgium had to take over the CFS without further ado, Hennebicq remained loyal to the programme of his legal periodical. He allowed publications of influential collaborators such as the later Minister of Colonies Henri Jaspar (1870-1939)<sup>110</sup> and colonial experts such as Félicien Cattier, Maurice Duvivier<sup>111</sup> and the “champion of the colonial cause” René Vauthier (1864-1921)<sup>112</sup>. These young attorneys sparked the discussion on the take-over and an eventual

<sup>108</sup> *La Belgique Coloniale* was headed by René Vauthier, who worked closely together with Edmond Picard and Léon Hennebicq. Several of his articles on the Congo Free State were published in the *Journal des Tribunaux*. See : KATRIEN ROTSAERT, *La Belgique Coloniale: analyse van een koloniaal tijdschrift toegespist op de onafhankelijke Kongostaat 1895-1909*, unpublished MA thesis, Ghent University, 2001.

<sup>109</sup> E.g. : PAUL ERRERA, "La constitution belge et le Congo", in *JT* 1901, col. 705-716.

<sup>110</sup> Jaspar studied law at the *Université Libre de Bruxelles* and afterwards enrolled at the Brussels Bar, where he was an intern of Victor Bonnevie, who was member of the *Journal des Tribunaux*’s editorial board. Together with Hennebicq, he founded the *Cercle universitaire de criminologie*. Despite his liberal convictions he was a Catholic. See : JOSEPH-MARIE JADOT, "Jaspar, Henri", in *Biographie belge d'Outre-Mer* (vol. 4), **Bruxelles, Académie Royale des Sciences d'Outre-Mer** 1968, p. 593-547 ; P. WITMEUR, "Henri Jaspar", in *JT* 1949, col. 601 ; PIERRE HENRI, *Grands avocats de Belgique*, Bruxelles, 1984, p. 115-120 ; LOUIS DE LICHTERVELDE, "Jaspar, Henri", in *Biographie Nationale* (vol. 31), **Bruxelles, Bruylants**, 1961, col. 480-491.

<sup>111</sup> Not much is known about Maurice Duvivier. Archival sources indicate he was attorney-at-law in Brussels from 1892 to 1933. Amongst his friends were Paul Spaak and Léon Hennebicq; Archives of the City of Brussels, [http://www.pallas.be/pls/opac/plsp.getplsd?lan=N&htdoc=general/opac\\_avb\\_n.htm](http://www.pallas.be/pls/opac/plsp.getplsd?lan=N&htdoc=general/opac_avb_n.htm) (consulted on 26 February 2017).

<sup>112</sup> René Vauthier was attorney and publisher. In his capacity as editor-in-chief of *La Belgique Coloniale*, one of Belgium’s most important periodicals on the CFS, he was invited to the inauguration of the Matadi-Leopoldville railroad in 1898 and afterwards explored Congo for three months. He defended strongly in King Leopold’s endeavour (*zinsbouw*), and in 1905, he became the vice president of the Congo Superior Court. See : M.-L. COMELIAU, "Vauthier, René", in *Biographie coloniale belge* (vol. 4), **Bruxelles, Académie Royale des Sciences d'Outre-Mer**, 1955, p. 906-907 ; "Conférence de M<sup>e</sup> René Vauthier au Jeune Barreau de Bruxelles", in *JT* 1898, col. 1352.

annexation of Belgium and positioned the Brussels Bar Association at the centre of colonial legal thinking.

After the turn of the century, international protest against the policy of the CFS increased significantly. Hennebicq profiled the Brussels *Conférence du Jeune Barreau* as the best forum to discuss the annexation problem of the Congo. In his opinion, Belgium's parliament was a "tohu-bohu d'ignorances" : a bunch of misconceptions about the Congo lived amongst MP's since they, according to Hennebicq, only cared about electoral gaining<sup>113</sup>. Since the establishment of the *Société d'Études Coloniales*, plenty of Brussels attorneys-at-law had expertise in the colonial matter. Their membership of the Young Bar Association, made it the perfect environment to discuss the Congo question. It was Hennebicq who continued to develop commissions and sub-commissions at the Brussels Bar Association.

At the end of February 1906, ten members of the *Conférence du Jeune Barreau* summoned the General Assembly around the central topic "Le problème de l'annexion du Congo"<sup>114</sup>. Throughout the year, the Assembly convened several times to discuss one particular question : did the annexation of Congo need to go as fast as possible and did another regime need to be installed? The Assembly tackled four legal problems : taxes, freedom of commerce, revenues for Belgium and not for Congo, and land regime<sup>115</sup>. In relation to the humanitarian crisis, only forced labour was briefly mentioned.

At that same time, the Brussels Young Bar Association established a subdivision working on the colonial question: *Section de Droit Maritime et de Droit Colonial* (Section of Maritime and Colonial Law). A year later, in 1907, that Section established a study group of seven Brussels attorneys-at-law : the *Commission d'Études Coloniales* (Commission of Colonial Studies)<sup>116</sup> with Léon Hennebicq as president<sup>117</sup>. The secretary of this sub-commission was Eugène Soudan. Systematically, this commission answered within a comparative framework<sup>118</sup> questions raised by public opinion and the Colonial Commission of the Belgian parliament which prepared the cession of the CFS to Belgium.<sup>119</sup> Hennebicq cleverly used his *JT* and connections within the *Conférence du Jeune Barreau de Bruxelles* to bring himself at

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<sup>113</sup> "L'Angleterre et le Congo", in *JT* 1904, col. 788 ; LEON HENNEBICQ, "Insuffisance Parlementaire", in *JT* 1906, col. 324.

<sup>114</sup> The association's statutes stipulated that in case more than ten members asked to convene, an extraordinary general assembly needed to be installed. See : "Conférence du Jeune Barreau de Bruxelles", in *JT* 1906, col. 254.

<sup>115</sup> "Conférence du Jeune Barreau de Bruxelles", in *JT* 1906, col. 269.

<sup>116</sup> "La loi coloniale", in *JT* 1907, col. 334.

<sup>117</sup> Other members were de Formanoir, Marcel Despret, Panis, Renault, Eugène Soudan and J. Van Ackere.

<sup>118</sup> From a comparative point of view and with eleven questions, the policies in French, British, Dutch and German colonies were discussed. See : "Etudes préparatoires à la loi coloniale belge", in *JT* 1907, col. 490-491.

<sup>119</sup> VICTOR RENAULD, "Rapport préliminaire sur la législation coloniale allemande", in *JT* 1907, col. 491-494 ; JOSEPH VAN ACKERE, "Rapport préliminaire sur la législation coloniale allemande", in *JT* 1907, col. 616-620 ; EUGENE SOUDAN, "Notes sur la loi coloniale néerlandaise", in *JT* 1907, col. 817-824 ; LEON HENNEBICQ, MARCEL DESPRET and FRANCIS WIENER, "Rapport sur les colonies anglaises", in *JT* 1907, col. 781-782 ; RENE MARCQ, "Notes sur les principes généraux de la législation coloniale française", in *JT* 1907, col. 882-887.

the front of the Congo debate. It was his strategy to respond vividly against critiques uttered by national and international voices.

#### **Hennebicq heads for a polemical approach**

From 1903 onwards, the *Journal des Tribunaux* opposed the British red rubber campaign. In these humanitarian debates, Léon Hennebicq saw a hidden agenda, aimed at “dismembering Congo and dividing it amongst Germany, England and France”<sup>120</sup>. Therefore, he openly criticised international humanitarian campaigns as “a screen to hide latent ambitions”. In his opinion, Belgium had become a competitor for the other European powers which needed to be restrained. Léon Hennebicq continued that the Congolese take-over was necessary for Belgium if it wanted to establish a large commercial fleet.

The 1904 Casement Report, named after its drafter Roger Casement (1864-1916), set off a discussion in the British House of Commons, and public opinion favoured stopping the atrocities. Almost unanimously, the House of Commons accused the government of the CFS of infringements against humanity and freedom of commerce. On June 19, 1904 *Journal des Tribunaux* reported on these debates, but according to the author it was clear that this campaign was motivated by commercial ambitions :

“The campaign conducted by Liverpool merchants and embraced by the government did not address this issue. A policy of strong images and alleged spectacular atrocities gave the denouncing missionary reports an authentic character and gained public opinion for the cause. Therefore the different meetings, the Casement report and the voting in the House of Commons”<sup>121</sup>.

The *Journal des Tribunaux* assumed, like many Belgians, that the British outrage was inspired by “commercial appetites by a nation hungry for conquest”<sup>122</sup>. The CFS’s resourceful vastness made it a profitable region, and under the cloak of humanity and justice, Great Britain tried to regain the position it lost to Antwerp in the trade on ivory and rubber. Prior to the Casement Report, Edmund Morel had already sought to damage the CFS and he sought support in the Chambers of Commerce in Liverpool, Manchester and London. The merchants, however, had not been harmed directly, and their president Alfred Lewis Jones (1845-1909) did not support the allegations. Later on, the British showed little interest to trade in this region.<sup>123</sup>

The editors of *Journal des Tribunaux* sought and found flaws in Casement’s report, particularly in the Epondo case<sup>124</sup>. According to them, the British diplomat seemed to have

<sup>120</sup> LEON HENNEBICQ, "L'annexion du Congo", in *JT* 1903, col. 667.

<sup>121</sup> "La campagne menée par les commerçants de Liverpool et accueillie par le gouvernement ne parlait de cette dernière question. Il leur paraissait plus opportune de frapper l'imagination populaire et l'opinion publique par le spectacle d'atrocités prétextées auxquelles la fonction des missionnaires dénonciateurs donnait un caractère d'authenticité apparente. De là la campagne de meetings, le rapport Casement, les votes de la Chambre de Communes". See : "La commission d'enquête au Congo", in *JT* 1904, col. 1036. See also : STENGERS, *Charte Coloniale*, p. 63-64 and 67-68.

<sup>122</sup> "L'Angleterre et le Congo", in *JT* 1904, col. 789.

<sup>123</sup> DEAN PAVLAKIS, *British humanitarism and the Congo Reform Movement 1896-1913*, Farnham, 2015, p. 153-154.

<sup>124</sup> The Epondo Case was the only atrocity that Casement had the opportunity to investigate personally. Epondo was a Congolese boy whose hand was cut off because of failure to fulfil the rubber harvest quota. When

forgotten about “the natural propensity of the negro to lie and the change of the truth by the missionaries”<sup>125</sup>. This “misinformation” has led to the diplomatic problems for Belgium. Under international pressure, King Leopold II appointed a *Commission d’Enquête* (Inquiry Commission) in July 1904, which was fully supported by the *Journal des Tribunaux*.

Hennebicq hailed the King’s choice of “absolute impartial members”<sup>126</sup> and expected a lot from their research. Attorney-General at the Belgian Court of Cassation Edmond Janssens (1852-1919)<sup>127</sup> presided this international Commission. The JT held him high in esteem as he “would not be guided by his emotions”. The Swiss chief justice of the Luzern canton Edmond de Schumacher (1859-1908)<sup>128</sup> and the Italian president *ad interim* of the Boma Court of Appeal baron Giacomo Nisco (1860-1942)<sup>129</sup> assisted as vice-president. Together with their assistants, the Commission travelled four and a half months through the Congo, held hearings and took testimonies in different localities. It took months before the report was published. Its findings did not meet the expectations of Léon Hennebicq at all. The Commission condemned unanimously the Congo Free State for committing atrocities against its citizens.

Generally, the *Journal des Tribunaux* kept silent about the Commission’s results and ignored the opportunity to rethink its position in the Congo debate. It was Henri Jaspar, at that time member of the editorial board<sup>130</sup>, who put his finger on the most sensitive problem “They were numerous, those in denial and persuaded that the Commission would bring a certificate of good conduct and morality for the young [Congo Free] State”<sup>131</sup>.

Amongst those numerous people was the editor-in-chief of the JT who must have felt betrayed by the Commission. In a way, Hennebicq and his fellows ignored the report as much as possible and diverted their focus on the question whether the annexation of the CFS could annul Belgium perpetual neutrality and even it existence as a state.

#### ***The Journal des Tribunaux on collision course***

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the authorities of the CFS replied to this accusation, they produced evidence certified by an American missionary that Epondo’s hand had been bitten off by a wild boar. This news made many English doubt the validity of other parts of the report. See : LOUIS, *Ends of British Imperialism*, p. 155.

<sup>125</sup> “*la propension naturelle du nègre au mensonge, et le travestissement de la vérité par les missionnaires; La commission d’enquête*”, in JT 1904, col. 1037.

<sup>126</sup> FELICIEN CATTIER, *Etude sur la situation de l’État Indépendant du Congo*, Bruxelles, 1906, p. 10.

<sup>127</sup> JEAN STENGERS, “Janssens, Edmond”, in *Biographie Nationale* (vol. 31),, J/P ?, col. 474-480.

<sup>128</sup> VICTOR DEVAUX, “Schumacher (de), Edmond”, in *Biographie Coloniale belge* (vol. 3), J/P ? col. 793-796.

<sup>129</sup> Nisco was an Italian attorney-at-law who had a brilliant career. At the end of the nineteenth century he left Italy and he became involved with the Congo Free State. He was the first Italian citizen to enter the Congolese judiciary at the Boma Court of Appeal. He left the judiciary because he could never obtain presidency of this Court. In 1904, he became member of the International Inquiry Commission. At the end of 1905 he returned to Italy. See : FERNAND DELLICOUR, “Nisco, Giacomo”, in *Biographie Coloniale belge* (vol. 4), Bruxelles, Académie Royale des Sciences Coloniales, 1955, col. 660-661.

<sup>130</sup> VANDENBOGAERDE, *Vectoren van het recht*, p. 129.

<sup>131</sup> “*NOMBREUX étaient ceux qui, confiants en d’audacieux démentis, étaient persuadés que la Commission rapporterait de son voyage en terre nègre un certificat de bonne conduite et de moralité pour le jeune Etat*”. See : HENRI JASPAR, “Dignité nationale”, in JT 1906, col. 306-308.

In 1906, Félicien Cattier<sup>132</sup>, a former trainee of Edmond Picard and thus a colleague of Léon Hennebicq, published *Étude sur la situation de l'État Indépendant du Congo*<sup>133</sup>, an update of his book published about ten years earlier. In his new work, the attorney did not longer advocate the King's colonial operations. However, he targeted less the humanitarian aspects of the Leopoldian reign than the fact that he had moved millions of Belgian francs (borrowed from the Belgian government) to personal accounts. Cattier's book brought a shock and divided the Brussels attorneys in two large camps using the *Journal des Tribunaux* and the Bar Association as their arena<sup>134</sup>. Some attorneys, such as Paul Emile Janson (1872-1944)<sup>135</sup> and Henri Jaspar<sup>136</sup>, hailed the work of their colleague and called out for an open, moral and public debate on the Congo question<sup>137</sup>. They denounced the theory that violence and abuses were necessary in the Leopoldian colonial expansion and argued that, if Belgium was to inherit the Congo from its King, all must be done to wash away the humanitarian crisis. They hailed the parliamentary debate on the Congo annexation.

Others, such as Hennebicq and René Vauthier<sup>138</sup>, opposed these ideas strongly. They loathed Cattier as an anticolonialist and antinationalist who played with fire. Hennebicq considered the book as inappropriate in a time when the Congo was threatened "by foreign ambitions" and Belgium found itself "on the brink of war with England, which wants to take our property in accordance with its traditional policy"<sup>139</sup>. England was the most important enemy, ready to invade the CFS and violating its independence for its own economic welfare<sup>140</sup>. According to Hennebicq, Belgium and King Leopold II had undeniably done a great job overseas. Yet, individual mistakes, such as torture or killings, were considered unavoidable in a colonial adventure. In addition, the editor-in-chief accused Cattier of taking the easy route by mentioning the scandals in the CFS. Moreover, and still according to Hennebicq, Cattier had made terrible mistakes in his study, while had ignored the fact that other colonial powers had adopted similar policies<sup>141</sup>. By doing so, Cattier had exposed himself as a "representative of the commercial societies" and as an "anglophile". Even if Cattier urged for an annexation to

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<sup>132</sup> See footnote 90.

<sup>133</sup> FELICIEN CATTIER, *Étude sur la situation de l'État Indépendant du Congo*, Bruxelles, , 1906.

<sup>134</sup> PAUL SPAAK, "La fiente", in *JT* 1906, col. 338-341.

<sup>135</sup> Paul-Emile Janson belonged to a prominent political family : his sister, Marie Janson, was the first woman to be elected in the Senate and his nephew Paul-Henri Spaak took a leading role in multiple governments. Janson studied law at the *Université Libre de Bruxelles* where he met Henri Jaspar. They became good friends, even though they belonged to different political parties. Janson was Prime Minister of Belgium from November 1937 to May 1938. He eventually died in Buchenwald during the Second World War. See : GINETTE KURGAN-VAN HENTENRYCK, "Janson, Paul-Emile", in *Nouvelle Biographie Nationale* (vol. 11), Bruxelles, Académie Royale des Sciences, des Lettres et des Beaux-Arts, 2012, col. 203-205.

<sup>136</sup> For a biography, see : footnote 110.

<sup>137</sup> PAUL-EMILE JANSON, "Œuvre de moralité", in *JT* 1906, col. 194-197.

<sup>138</sup> As an answer to Cattier, he wrote the book *Un méchant livre: les théories de Mr. Cattier*. See : M.-L. COMELIAU, "Vauthier, René", *Biographie coloniale belge* (vol. 4), Bruxelles, Académie Royale des Sciences Coloniales, 1955, col. 906.

<sup>139</sup> CATTIER, *Étude sur la situation* ; LEON HENNEBICQ, "Un pamphlet anti-colonial", in *JT* 1906, col. 210-214.

<sup>140</sup> "Conférence du Jeune Barreau de Bruxelles", in *JT* 1906, col. 1305.

<sup>141</sup> For instance, Cattier compared Belgium's colonial policy to the French, British and German. For Germany's legislation, he discussed the legislation until 1896, henceforth omitting the evolutions afterwards, which were inspired by other colonial powers. For English law he discussed the British East Africa protectorate, which could not be compared to Congo.

Belgium, Hennebicq could not consider him a Belgian patriot, since his propositions would lead to a *de facto* annexation to England. For the editor-in-chief, it was essential that CFS first received a clear legal status to guarantee the colonial occupation. The CFS was a legal entity with all rights to position itself amongst other states and in the relation with the indigenous people<sup>142</sup>. From then on, the discussion in the *Journal des Tribunaux* escalated.

Leading figures such as Alphonse-Jules Wauters (1845-1916)<sup>143</sup> defended Cattier, who also responded in an open letter to Hennebicq's accusations<sup>144</sup>. It resulted in a bitter discussion in which Hennebicq took the last word: "As for M. Cattier, I have only one obvious thing to say, I do not agree with him, and no one, not even him, has a monopoly on Justice and humanitarian ideas"<sup>145</sup>. Another article, symptomatically entitled *La fiente* (bird droppings), illustrated the harsh debate amongst Brussels attorneys-at-law. Two fictive attorneys, Jaspic and Hennebar, were overheard by their colleague in a discussion on the CFS. For the one, King Leopold II had allowed terrible policies, whereas the other stated that the colonial endeavour had been a success. The author of the text suggested a middle way and argued that nothing is perfect. A colony could not be established without crimes against humanity, but the annexation was very needed to clean the mess the colonials had made<sup>146</sup>. This discussion was between Hennebicq and Jaspar, wherein the former acknowledged that a few bad apples had given the Congo Free State a terrible reputation. Jaspar adhered to the idea that abuses and torture were systematically applied in the overseas territory. This article clearly illustrated the different opinions about the Congo debate at the Brussels Bar, although no one rejected the take-over.

On 20 August 1908, the Belgian Chamber of Deputies voted to take-over the CFS as a Belgian colony. The Senate followed suit a few weeks later, and from 15 November 1908, Belgium took over the Congolese administration. The work in Belgian Congo (1908-1960) really took off. New tasks waited: valorising the colony and ameliorating the lives of the indigenous<sup>147</sup>. In a sense this can be considered as a hidden confession that Belgian colonizers had not always done the right thing in the CFS<sup>148</sup>. The neutrality question, which had risen

<sup>142</sup> "Le problème de l'annexion du Congo", in *JT* 1906, col. 362.

<sup>143</sup> Alphonse-Jules Wauters had studied geography and art criticism. Since the 1876 Geographic Conference in Brussels, he passionately defended the colonial policy of King Leopold II. In 1884 he established the *Mouvement Géographique*, a biweekly of which he was the only editor for almost 30 years. In those days, Wauters was considered to be the expert on the geography of the Congo basin. He further published several works on the Congo to vulgarize and propagate the project in Belgium. The polemic around the annexation of the Congo made Wauters a strong forfighter bestaat woord forfighter in het Engels ? – advocate ? of the immediate annexation. See : RENE CAMBIER, "Wauters, Alphonse-Jules", in *Biographie Coloniale belge* (vol. 2), p/j?, col. 969-972.

<sup>144</sup> FELICIEN CATTIER, "La question du Congo", in *JT* 1906, col. 227-228.

<sup>145</sup> "Quant à M. Cattier, je n'ai à répondre qu'une chose, qui est évidente, c'est que je ne suis pas de son avis et que personne, pas même lui, n'a le monopole de la justice et de l'humanité". See : LEON HENNEBICQ, "Correspondance", in *JT* 1906, col. 228.

<sup>146</sup> SPAAK, "La fiente", col. 338-341.

<sup>147</sup> "Conférence du Jeune Barreau de Bruxelles", in *JT*, 1908, col. 1128-1129 ; "Après l'annexion du Congo, les tâches nouvelles", *JT*, 1908, col. 1157-1158.

<sup>148</sup> On the administration of Congo, see recently : PIERRE-LUC PLASMAN, *Léopold II potentat congolais*, Bruxelles, 2017. External (British) pressure counted for many substantial changes in the original 1907 project of the Colonial Charter (the legislative act which would organise parliamentary and budgetary oversight of the Congo colony), which assumed Belgium's sovereignty over the territories of the CFS. Government leader Schollaert surrendered to reformist pressures (Hymans, Vandervelde) by granting full parliamentary control on both

during the five years prior to the annexation, moved in the *Journal des Tribunaux* to the background until the start of the First World War.

### III. Belgian and Congolese neutrality at the eve of the First World War

#### Belgian neutrality

##### *The persistence of controversy in international doctrine*

In international doctrine, Arendt's doubts and confusion could not be discarded. Heffter, whose *Europäische Völkerrecht der Gegenwart* counted as a classic of 19th century international law – and thus of the period in which Belgian neutrality originated – used the Belgian case to demonstrate that “whereas every Nation has its own right, Europe has its rights as well, granted by the mere social order [between states] itself”<sup>149</sup>. Belgian sovereignty remained subjected to its international status.

What would be the consequence of a foreign invasion? Franz von Liszt (1851-1919), Professor at the Humboldt University in Berlin, held the most traditional position before the outbreak of the First World War. In his view (1913), neutrality was still constructed on the simple opposition between two belligerent parties and the neutral state. The latter had to consider an ongoing conflict as *res inter alios acta* (a legal situation applicable only between third parties), and could maximize its profit by acting as *medius in bello* (the middleman in an armed conflict)<sup>150</sup>.

Of course, for Belgian doctrine, there could be no doubt on the nature of a German invasion of the metropolis. In 1902, Edouard Descamps had already described a potential attack as a “true crime of high international felony”.<sup>151</sup> Descamps’s conception of *pacigérat* found a partial echo in the 1907 Hague Conventions. Convention V, dated 18 October 1907, stated in its first article that “the territory of neutral powers is inviolable” and phrased self-defense as the “punishment of violations of neutrality” (art. 5, *in fine*). Mentioning that “the fact of a neutral Power resisting, even by force, attempts to violate its neutrality, cannot be regarded as a hostile act” equally created the impression that Descamps’s concept of *pacigérat* had received both ratification and extension (art. 10).<sup>152</sup> A neutral state invaded by an aggressor would thus be regarded as a neutral power defending itself, and not as a belligerent.

Yet, this contradicted in part the internal policies supported by Leopold II, namely the construction of considerable fortifications in Antwerp and along the Meuse. If defence did not

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administration and budget in order to obtain as broad a majority as possible. After the May 1908 elections, the socialist MP Royer managed to introduce an amendment stating that “no one can be compelled to work for the benefit of private individuals or companies”. See : STENGERS, *La Charte Coloniale*, p. 169-179 and 190.

<sup>149</sup> AUGUST WILHELM HEFFTER, *Le droit international public de l'Europe* (transl. Jules Bergson), Berlin, 1857 (first edition 1844), p. 521.

<sup>150</sup> FRANZ VON LISZT, *Das Völkerrecht systematisch dargestellt*, Berlin 1913, (first edition 1898), p. 335. For the genealogy of this term, see : GAURIER, *Histoire du droit international*, p. 295.

<sup>151</sup> DESCAMPS, *Neutralité*, p. 436.

<sup>152</sup> Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land, The Hague, 18 October 1907, 205 CTS 299. See also : RANDALL LESAFFER, "Peace through Law: the Hague Peace Conferences and the Rise of the *Ius Contra Bellum*", in MAARTJE ABENHUIS, CHRISTOPHER ERNEST BARBER and ANNALISE R. HIGGINS (eds.), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907*, London, 2017, p. 31-51.

serve national independence, since permanently neutral states were considered helpless victims, to what object had these efforts been made ? Notwithstanding the development of doctrinal restraints on the use of force<sup>153</sup>, arguments were not lacking to support the thesis that neutrality ended at the first gunshot. A neutral state defending itself against aggression would become a belligerent, and had to count on its guarantors' goodwill. Its fate would be dependent on the outcome of the armed conflict.

### **Neutrality of the Congo**

#### ***The significance of the 1885 Berlin Final Act***

The importance of the Berlin Act has been either “grossly exaggerated” or consistently downplayed in historiography<sup>154</sup>. The neutrality introduced by articles 10 and 11 of the Berlin Final Act was, in the words of Louis Jozon, in no ways a “rigorous neutrality”, capable of ruling out armed conflict<sup>155</sup>. The signatory parties engaged themselves to use their best offices to submit quarrels to arbitration. Yet, the ultimate recourse to armed force remained an option. We should however emphasise that this only concerned conflicts arising in the Congo itself.

The Congo Free State declared itself perpetually neutral by letter of Leopold II (1 August 1885)<sup>156</sup>, thereby fulfilling the condition posed by article 10 that the perpetual neutrality of any state along the Congo river would be voluntary (and thus not imposed)<sup>157</sup>. The role of the signatory parties was addressed in article 11, stating that they ought to provide “good offices” in order to ensure that in case one of the guaranteed territories was involved in an armed conflict, these territories could be placed under the regime of neutrality, “for the duration of the war”, and “with the common consent of this power and one or another of the belligerent powers”<sup>158</sup>. This did not imply a hard guarantee to defend the Congolese territories<sup>159</sup>. Even if a violation of the Berlin Final Act could count as a pretext for the other signatory powers to intervene, there was no explicit mechanism to enforce its validity<sup>160</sup>.

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<sup>153</sup> AGATHA VERDEBOUT, "The Contemporary Discourse on the Use of Force in the Nineteenth Century : A Diachronic and Critical Analysis", in *Journal of the Use of Force and International Law*, 2015, n° 2, p. 223-246.

<sup>154</sup> MATTHEW CRAVEN, "Between Law and History : the Berlin Conference of 1884-1885 and the logic of free trade" in *London Review of International Law*, 2015, n° 1, p. 33.

<sup>155</sup> LOUIS JOZON, *L'état indépendant du Congo : sa fondation, ses principales manifestations de sa vie extérieure, ses relations avec la Belgique*, Paris, 1900, p. 158.

<sup>156</sup> JOZON, *Congo*, p. 153. For the text of the letter, see : *American Journal of International Law*, 1909, n° 1, p. 26.

<sup>157</sup> WILLIAM ROGER LOUIS, "The Berlin Conference and the (Non-)Partition of Africa", in LOUIS, *Ends of British imperialism*, p. 113. See also : EMILE DE LAVELEYE, "La neutralité du Congo", in *Revue de droit international et de législation comparée*, 1883, p. 254-262 ; JAN VANDERSMISSSEN, "The King's Most Eloquent Campaigner : Emile de Laveleye, Leopold II and the creation of the Congo Free State", in *Journal of Belgian History*, 2011, n° 1-2, p. 7-57.

<sup>158</sup> JOZON, *Congo*, p. 151.

<sup>159</sup> Guarantee and neutrality are not necessarily linked in a congenital way, as in the Belgian 1830-1839 case. See : DESCAMPS, *Neutralité*, p. 524.

<sup>160</sup> DESCAMPS, *Neutralité*, p. 527. Concerning Van Eetvelde's reticence to cite the Berlin Act in further reforms of the Congo State, see : Note to Leopold II, 21 June 1901, quoted in JEAN STENGERS, *Elaboration de la Charte*, p. 53.

Yet, the take-over of the Congo by Belgium in 1907-1908<sup>161</sup> created a second set of potential conflicts, originating in Europe, and thus not in Africa. In this case, Congo would form part of the Belgian territory involved in a war. Article 12 of the Berlin Final Act did not exclude the transfer of armed operations to Africa : in case serious dissent would arise among the signatory parties, they obliged themselves to have recourse to mediation by one or several friendly powers. In the same vein, the voluntary recourse to arbitration was open to them. Again, these provisions did not preclude the use of force, but sought to limit it by codifying the centuries-old practice of interstate diplomacy and mediation. In Jozon's words :

"[...] this article is not awfully embarrassing for the signatory powers. It does not do anything else than compel them to try a tentative of reconciliation. If they desperately desire war, they can bypass this mediation"<sup>162</sup>.

#### ***The 1908 take-over of the Congo by Belgium: Liszt and Oppenheim***

Liszt went the furthest in his application of classical legal thinking. According to this German author, the 1907-1908 incorporation of the Congo by the Belgian state had created an unprecedented event, causing a fundamental change in the nature of the circumstances underpinning the Treaty of London of 1839. Liszt applied the contested legal figure of the *clausula rebus sic stantibus*, or the unwritten, implied clause in international treaties causing their automatic end when the underlying configuration conducive to the conclusion of the treaty ends. This legal phenomenon is only rarely accepted in civil law, e.g. in the hyperinflation under the Weimar Republic, when devaluation had wiped out the balance between payment and sold goods.

Liszt did not allow the application of this principle for all treaties, but only for those concluded "with regards to a specific factual situation, whereby its continuation is conditional on the very existence of this situation". The annexation of Congo by Belgium, in Liszt's eyes, counted as a fundamental alteration of the object guaranteed by the Great Powers in 1839. Liszt declined a general application of this principle, leading to a potential unravelling of the international legal order (*pacta sunt servanda*), but thought it applicable in the case of guarantee treaties : when a state has guaranteed another state's holdings, the guarantee treaty could be cancelled unilaterally, if an extension of the state territory of the guaranteed state, for instance through the acquisition of an extended colonial holding, significantly increased the obligations undertaken by the guarantor<sup>163</sup>.

<sup>161</sup> Treaty of Cession and Annexation between the Kingdom of Belgium and the Independent State of the Congo, 28 November 1907, *American Journal of International Law*, n° 1, p. 73-75 and 206 ; *CTS* 17 ; JEAN STENGERS, *Belgique et Congo: l'élaboration de la Charte coloniale*, Bruxelles, 1963 ; ROBERT SENELLE and ÉMILE CLÉMENT, *Léopold II et la Charte coloniale (1885-1908) : de l'État indépendant du Congo à la colonie belge*, Wavre, 2009.

<sup>162</sup> JOZON, *Congo*, p. 152.

<sup>163</sup> "[...] auf einen bestimmten tatsächlichen Zustand und unter Voraussetzung seiner Fortdauer [...] Wenn ein Staat dem andern seinen Besitzstand garantiert hat, so kann der Garantievertrag einseitig gekündigt werden, wenn durch eine Vergrößerung des Staatsgebietes des garantierten Staates, etwa durch die Erwerbung eines ausgedehnten Kolonialbesitzes, die von dem garantierenden Staaate übernommenen Verpflichtungen wesentlich erhöht würden". See : LISZT, *Das Völkerrecht*, p. 170-171. Contra ("risky theory") : E. NYS, *Le droit international : les principes, les théories, les faits* (vol. 2), Bruxelles, 1912, p. 533.

The take-over (“*reprise*”)<sup>164</sup> by the Belgian government had created a distinction between the metropolis and the administration of the colony<sup>165</sup>. This way, budgetary and political risks were kept separate, at the insistence of the political elite. In practice, financial transfers between both entities were common<sup>166</sup>. Moreover, in international law, as argued *inter alia* in Heffter’s *Le droit international de l’Europe*, the distinction between metropolis and colony was irrelevant<sup>167</sup>. Both were part of the national territory and risked being involved in an armed conflict<sup>168</sup>.

Lassa Oppenheim (1858-1919), a German-born professor of international law at Cambridge, supported Liszt’s view in his *magnum opus International Law : A Treatise* (1912) :

“[...] the region of war depends upon the belligerents [...]. Since colonies are a part of the territory of the mother country, they fall within the region of war in the case of a war between the mother country and another State, whatever their position may be within the colonial empire they belong to”<sup>169</sup>.

The neutralization of Congo required an explicit convention between belligerents, whereby they agreed to limit the theatre of war<sup>170</sup>. This left of course the choice to belligerents to unilaterally decide not to invade part of their opponent’s territory<sup>171</sup>. But they could never be compelled to do this<sup>172</sup>. The Belgian historian Jacques Willequet (1914-1990) classified the Belgian Congo among the explicit German war objectives in 1914, rendering the latter possibility illusory : for the *Auswärtiges Amt* (German Foreign Ministry), two options were to be envisaged. First, an agreement with France and Britain provided for a general reshuffle in Africa. Second, a military conflict could bring conquests<sup>173</sup>. Although these doctrinal positions might sound harsh, they

<sup>164</sup> On the quarrel between Leopold II and the political world, see : JEAN STENGERS, *L'action du Roi*, p. 131-132.

<sup>165</sup> “Belgian Congo has a distinct legal personality from the metropolis.” See : Art. 1, law of 18 October 1908 on the government of Belgian Congo, M.B. 19-20 October 1908 ; DESCAMPS, *Neutralité*, p. 514.

<sup>166</sup> GEERT LELOUP, *Non pas un pouvoir illusoire : ontstaan, rol en (on)macht van het Belgische Rekenhof (1814-1939)* (Studies in Belgian History, 2), Brussels, 2016 and id., ““Fait accompli”, de controversiële controle van de Congolese Financiën (1885-1914)”, in : *Revue Belge de Philologie et d’Histoire/Belgisch Tijdschrift voor Filologie en Geschiedenis*, 2015, n° 2, p. 487-531.

<sup>167</sup> HEFFTER, *Le droit international*, p. 225

<sup>168</sup> LISZT, *Das Völkerrecht*, p. 157.

<sup>169</sup> LASSA OPPENHEIM, *International Law : a treatise* (vol. 2), London/New York, 1912, p. 86. On Oppenheim, see : MATTHIAS SCHMOECKEL, “Lassa Oppenheim (1815-1919)”, in JACK BEATSON and REINHARD ZIMMERMAN (eds.), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain*, Oxford/New York, 2004, p. 583-599.

<sup>170</sup> LISZT, *Völkerrecht*, p. 297-298 ; Oppenheim, *International Law* (vol. 2), p. 87.

<sup>171</sup> See : OPPENHEIM, *International Law* (vol. 2), p. 87.. Another example is the neutralisation of the Southern Netherlands in 1733, when France (belligerent in a conflict with Emperor Charles VI) promised the Dutch Republic not to invade the Austrian Netherlands lest Charles VI would invade France from there. See : BANNING, *Les origines et les phases*, p. 11-15 ; FREDERIK DHONDT, *Balance of Power and Norm Hierarchy : Franco-British Diplomacy after the Treaty of Utrecht* (Legal History Library, 17 / Studies in the History of International Law, 7), Leiden/Boston, 2015, p. 478-485.

<sup>172</sup> JONATHAN E. HELMREICH, “The End of Congo Neutrality, 1914”, *The Historian*, 1966, n° 4, p. 617.

<sup>173</sup> JACQUES WILLEQUET, *Le Congo Belge et la Weltpolitik (1894-1914)*, Bruxelles/Paris, 1962, p. 425. This in spite of Emperor Wilhelm II’s apathy towards Africa. See also : JACQUES ARMAND WULLUS-RUDIGER, *La Belgique et l'équilibre européen : documents inédits*, Paris, 1935, p. 47-48.

found support in diplomatic practice. Belgian proposals for the neutralization of Congo required the participation of the other Great Powers (under the Berlin Act), or of the belligerent in case of a conflict originating in Europe<sup>174</sup>.

Descamps did not consider the voluntary and optional nature of article 10, and eagerly assimilated the protection granted to the Congo basin to the status of Belgium itself. At the time of publication of Descamps' essay (1902), the Congo Free State had not yet been absorbed by Belgium. His work could however preventively state that "the applicability of Belgian neutrality ought to be limited to the family of the same, or a similar civilisation to ours"<sup>175</sup>.

Yet, Descamps linked aggression in Congo to a direct violation of the "*droit européen*" : since all major powers were a party to the Berlin Act, an attack on the Congo Free State or a subsequently annexed Belgian colony, would result in the same consequences as an attack on Belgian soil itself under the 1839 Treaty of London<sup>176</sup>. In both hypotheses, the Great Powers would be immediately involved. In this sense, the separate discussion of the neutrality of the Congo Free State under the Berlin Act seemed almost senseless from the Great Powers' point of view. British fears that an annexation of Congo would amount to an enlargement of its guarantee, limited to the European continent, seemed to contradict this position.

The key to resolving this question is the wording of the Berlin Act. Article VII of the Treaty of London imposes a clear obligation to guarantee Belgium's independence, as a counterpart for the observance by the guaranteed party of her duties under the laws of neutrality<sup>177</sup>. By contrast, article 13 of the Berlin Act imposes mediation by a friendly power ; article 11 good offices. This does not exclude the used of armed force *in fine*, when these options would appear as exhausted. Where does the "positive obligation"<sup>178</sup> to provide good offices end ? To this effect, Descamps counted on the impossibility for any European power to decline a mediation effort, helped by "the necessities of politics" to complement legal guarantees.<sup>179</sup>

Any researcher trying to pin down the legal status of Belgian neutrality should pierce the veil of secrecy and venture into diplomatic correspondence. Conformably to the deep structure of the sources of international law<sup>180</sup>, the "writings of the most highly qualified publicists of the various nations" only have a supplementary value. Only subsequent state behaviour explains vague treaty clauses, such as article VII of the 1839 Treaty of London. There again, interstate negotiations consider the neutrality of Belgian Congo as political and optional, never as mandatory. The late British recognition of Belgium's absorption of the Congo in 1913 was entirely tied to the limited engagement undertaken by Gladstone's government in 1870 : the British guarantee was meant to cover European territory, not overseas possessions. Hence,

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<sup>174</sup> PAGE, *Africa and the first World War*, p. 3. See also : WILLEQUET, *Le Congo Belge*, p. 412-416.

<sup>175</sup> DESCAMPS, *La neutralité*, p. 340.

<sup>176</sup> *Ib.*, p. 527.

<sup>177</sup> "un contrat synallagmatique parfait" [a perfect reciprocal contract] (*ib.*, p. 310).

<sup>178</sup> *Ib.*, p. 525.

<sup>179</sup> *Ib.*, p. 527.

<sup>180</sup> Statute of the Permanent Court of International Justice, Geneva, 13 December 1920, art. 38, (1) 6 LNTS 379.

the take-over of the Congo Free State by Belgium necessitated a new explicit consent by the British guarantor<sup>181</sup>.

#### IV. Conclusion

Permanent neutrality, as established in 1839, was never extensively defined. The growing international regulation of the status never remained at the mercy of armed conflict<sup>182</sup>. Irrespective of a country's status as belligerent or neutral power defending its status, the factual risk of aggression could never be ruled out. The Great Power guarantee attached to Belgium's national territory was strictly limited to its European borders, as the 1870 guarantee conventions rightly illustrate. The intervention of France, Britain, Russia, Austria and Germany (Prussia) could only be triggered by an attack on Belgian soil. The pacifist overtone in Descamps's writings did not liberate Belgium from the conventional obligation to render its neutrality credible and invest in defence.

As far as the Congo was concerned, the signatory parties to the Berlin Act had "engaged themselves to respect the declared neutrality on behalf of article 10, but did not engage themselves to *enforce it* on third parties" (our emphasis)<sup>183</sup>. Even if an explicit guarantee clause was lacking, the basis on which the colony could be protected resided more in 'good faith' than in the parties' actual commitment<sup>184</sup>.

From the formal abolition of permanent neutrality<sup>185</sup> to the Pact of Locarno, Belgium shook off its neutral attire, to the benefit of an entirely novel legal order set up at the Versailles Peace Conference. The League of Nations created a collective system of security<sup>186</sup>. This legal order was value-driven, just as the medieval theory of *bellum iustum*, which precluded neutrality<sup>187</sup>. Parties to the Covenant of the League of Nations vested their confidence for the settling of international disputes in the League's Council (art. 15) and in the newly created Permanent Court of International Justice (art. 13). Edouard Descamps presided over the

<sup>181</sup> MARY ELIZABETH THOMAS, "Anglo-Belgian Military Relations and the Congo Question, 1911-1913", *The Journal of Modern History*, 1953, n° 2, p. 165; Memorandum by Hurst, London, 22 January 1907, published in KENNETH BOURNE, D. CAMERON WATT and MICHAEL PARTRIDGE (eds.), *British Documents on Foreign Affairs (part I, series G, vol. 24)*, [Bethseda], 1987, p. 3-4; Hardinge to Grey, Annual Report 1908, Brussels, 22 January 1909, *ib.*(part I, series F, vol. 4-6), p. 277; Memorandum Respecting the Affairs of the Congo, s.d., *ib.* (part I, series G, vol. 24), p. 330-334. See also : FRANTZ DESPAGNET, *Cours de droit international public* (ed. Charles de Boeck), Paris, 1910, p. 180, arguing for the internationally contentious nature of Belgium's takeover of the Congo Free-State, or CHARLES DUPUIS, *Le droit des gens et les rapports des grandes puissances avec les autres états*, Paris, 1921, p. 182, who required the consent of the guarantors before a perpetually neutral state acquired a colony.

<sup>182</sup> JONATHAN E. HELMREICH, "Belgian Concern over Neutrality and British Intentions, 1906-1914", in *Journal of Modern History*, 1964, n°. 4, p. 416-427.

<sup>183</sup> JOZON, *Neutralité*, p. 154.

<sup>184</sup> DESCAMPS, *Neutralité*, p. 529.

<sup>185</sup> Art. 31 of the Peace Treaty abolished the status of permanent neutrality, "recognizing that the treaties of April 19, 1839, no longer corresponded to the requirements of the situation". See : 225 CTS 188.

<sup>186</sup> ROBERT KOLB, MARKUS G. SCHMIDT, DJACOBA TEHINDRAZANARIVOLO and ANDRY SOLOFONIRINA OLIVA (eds.), *Commentaire sur le pacte de la Société des Nations* (Organisation internationale et relations internationales, 77), Bruxelles, 2014 ; ABBENHUIS, *An Age of Neutrals*, p. 8. On the implications for maritime – classical – neutrality : ERIC SCHNAKENBOURG, "La fin d'une illusion ? Le droit de la neutralité à l'épreuve de la Première Guerre Mondiale", in *Relations internationales*, 2015, n° 160, p. 3-18.

<sup>187</sup> League of Nations Covenant, Versailles, 28 June 1919, 25 CTS 188. On Belgium's role in the League, see : HENRI ROLIN, *La politique de la Belgique dans la Société des Nations*, Genève, 1931.

prestigious committee of international lawyers that drew up the Court's statute, including the famous article 38 (1), listing the sources of international law according to which the Court ought to examine pending cases<sup>188</sup>. Moreover, the adoption of the Briand-Kellogg Pact seemed to consecrate pacifist theories<sup>189</sup>.

Nevertheless, during the conflict, the King of the Belgians and his government opted for the use of 'neutrality' as a rhetorical and political advantage, allowing for an even-handed position in negotiations with both belligerent camps. Albert I (1875-1934) saw himself as the defender of Belgian integrity and independence<sup>190</sup>. His son, Leopold III (1901-1983), used the failure of the League of Nations system to opt for a policy of 'independence' (*zelfstandigheid*), which could be assimilated to classical, pre-19<sup>th</sup>-century, voluntary neutrality.<sup>191</sup>

The *Journal des Tribunaux* of the *Belle Époque* offers a unique glance on how an intellectual elite was divided on the Congolese question. As founder of an apolitical periodical, Edmond Picard kept aloof of political discussions, although he referred to the Congo debate when the *Journal de Tribunaux* reported on the Society in favour of colonial expansion. Only when Hennebicq took over as editor-in-chief, a clear rise in the attention for the Congo debate is noticeable. Contrarily to his predecessor, Hennebicq did not have a political career and his publications were mostly limited to what he wrote for the *Journal des Tribunaux*. He did use the journal and his connections at the Brussels Bar Association to take a lead in the discussion. He intended by his polemical approach to influence the parliamentary work and to profile the *JT* as a vector of law. Taking the number of lawyers who were members of Parliament at that time, one can assume the influence of Hennebicq and the *Journal des Tribunaux* was significant. Despite its editor-in-chief's convictions, the journal's pages revealed not a single, but multiple visions on the role of the Congo Free State and the Congo as a colony. The journal nourished itself with the general and established discourse of 19<sup>th</sup>-century international law. Not necessarily in conformity with the 'Great Civilizer of Nations"', but always with the national interest at heart.

#### List of abbreviations

<i>CTS</i>	Clive Parry (ed.), <i>The Consolidated Treaty Series</i> , Dobbs Ferry, Oceana, 1969-1981
<i>JT</i>	<i>Journal des Tribunaux</i>
<i>LNTS</i>	<i>League of Nations Treaty Series (Treaty series and international engagements registered with the Secretariat of the League of Nations)</i> ; Geneva, League of Nations, 1920-1946

<sup>188</sup> Statute of the Permanent Court of International Justice, Geneva, 16 December 1920, 6 *LNTS* 379.

<sup>189</sup> General Treaty for Renunciation of War as an Instrument of National Policy, Paris, 27 August 1928, 94 *LNTS* 57. BERNHARD ROSCHER, *Der Briand-Kellogg-Pakt von 1928. Der "Verzicht auf den Krieg als Mittel nationaler Politik" im völkerrechtlichen Denken des Zwischenkriegszeit*, Baden-Baden, 2004.

<sup>190</sup> MARIA DE WAELE, *Naar een groter België* (vol. I), p. 151-200 ; JAN VELAERS, *Albert I : koning in tijden van oorlog en crisis, 1909-1934*, Tielt, 2009, p. 250-379.

<sup>191</sup> JAN VELAERS and HERMAN VAN GOETHEM, *Leopold III : de koning, het land, de oorlog*, Tielt, 1994, p. 54-63 ; CHARLES HENRY HYDE, "Editorial Comment: Belgium and Neutrality", in *American Journal of International Law*, 1937, n° 1, p. 81-85.

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