Book Review: Review of The Right of Conquest: The Acquisition of Territory by Force in International Law Practice, by Sharon Korman

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This is a very well done book in a familiar, if puzzling, genre. Originally written as a doctoral dissertation at Oxford, Korman's book well illustrates the strengths and weaknesses of much contemporary international law research in what seems, at least to these American eyes, the dominant British style. Korman reviews the history of the "right of conquest" in international law from the mid-seventeenth to the late twentieth century. The book is full of fascinating historical tidbits from which Korman pulls an often-tentative conclusion about the state of the law regarding title acquired through military conquest in various periods. Her overall story is one of progress: International society used to have a clear rule authorizing title to territory through conquest. In this century, under the combined assault of self-determination doctrine and the prohibition on the use of force, we have moved away from the traditional rule.

Korman's book is particularly good of its type. Unusual among works mapping the movement of twentieth-century international law away from a "traditional" doctrinal order, Korman's historical story is complex, particularly for the period before 1900. She is attentive to counter-tendencies and surveys a rather wide selection of brief case studies. In particular, Korman is careful to differentiate the treatment of conquest in the colonial encounter from that of conquest within Europe. Unlike many international law historians who look back beyond the First World War, she is interested in the attitudes of statesmen as well as scholars. As a result, her history of the rights of conquest in the eighteenth and nineteenth centuries has a refreshingly contemporary feeling, perhaps reflecting her immersion in the literature of international relations and diplomatic history as well as international law.

Perhaps most intriguing, Korman organizes her history around an ambivalence about precisely the progress she narrates. Although it is common in other fields to structure historical work that maps a move into modernity against a counternarrative of fall from virtue, this is a much less familiar attitude among conventional international legal scholars who are usually more committed to the utopian possibilities of a fully modernized international order. For Korman, the traditional law of conquest was certainly morally troubling—how can law be law, states be equal, et cetera, if might makes right? But she also feels there was a certain honesty and functional clarity in acknowledging the fruits of victory. Like other classical doctrines of formal positivism, the rule that conquest grants title settles claims and may promote international order, an insight with which Korman credits Grotius. At the same time, although the move to self-determination and a norm of peaceful dispute resolution or collective enforcement certainly seems to herald a more mature international order, Korman worries about the effects of hypocrisy in the application of these contemporary standards. Korman leaves this ambivalence unresolved, giving the book a somewhat nostalgic tone, which is also common in much contemporary British international law scholarship. In work such as this, the moment of critique most often fires as a vague sense that, in departing from the classic system, we may have thrown the baby out with the bath, coupled with a sympathy for efforts to renew the clarities of more formal rules and defined actors against the dissolution of international law into a soup of interpretation and process. To the extent Korman shares this critical nostalgia, she sets the stage for accomplishing in the law of conquest what the revival of uti possidetis achieved in the law relating to territory.

Within the terms of Korman's inquiry, I had only a few minor quibbles. I suspect that for most American ears, brought up on the legacies of realism and pragmatism, it will seem odd to reach the question of the impact of normative change on state behavior only on page 304, particularly when there has been so much attention to the diplomatic and international political sources for norms in the earlier chapters. One might question the selection of cases—for example, including nothing from Asia (particu-
larly in the nineteenth century) seems odd—and each reader is bound to feel that one or
another case with which he or she is familiar is handled less than objectively. Korman’s treat-
ment of the Falklands war reads very British to me, just as her treatment of the Persian Gulf war
reads very Security Council/State Department. I am less sure I can tell how her treatment of the
Polish partitions would read to a German or Russian reader, but I suspect they might detect a bias. Although Korman devotes a chapter to the particularities of conquest in colonial set-
tings, the result is far less nuanced and differen-
tiated than her treatment of conquest in Eu-

trope. I wished for a treatment of the Near East,
for example, that was as comprehensive across
time as her treatment of German boundary
problems. Colonialism remains somehow a side-
show—an arena for the deployment of doc-
trine, rather than for doctrinal generation.

From a doctrinal point of view, Korman’s work
would have been stronger had she situated
rights of conquest not only in the law of war (a
periodic and well-handled theme in the book),
but also in the law of territory and the law of
sovereignty. How did conquest relate to other
methods of acquiring or consolidating territory
at different moments? What did it mean for
what kind of entity to have title to land at various
moments? Should we think of the East India
Company, the Hohenzollern family and the Can-
adian nation similarly? In 1750 and 1950?
Were extraterritorial rights conferred by the
“unequal” treaties of the nineteenth century
analogous to the Berlin settlements for colonial
claims in Africa? Korman is at her doctrinal best
when she is exploring the conditions necessary
at various moments to make good title from
conquest—but what is good title? Does it vary
with the mode of its acquisition? My suspicion
is that the range of colonial experiences would
seem much broader if these questions were ex-

Theologically, I had two minor nits to
pick. Korman makes a nice point about the
interplay of doctrines about territory and force
by demonstrating the slippery line between
the right to conquer and rights resulting from con-
quest. Still, the two are not always simply con-
flated, in law or practice, and a firmer hand on
the distinction across time might have enriched
the telling. Korman also uses the term “morality” in a variety of ways, as a catchall to reflect
considerations that she does not want to claim
for law. At various points, for example, the doc-
trine is said not to have changed, despite
changes in the “moral climate” of its applica-
tion. This makes intuitive sense, but just as the
meaning of “law” and its relation to what was
understood as “politics” changed repeatedly in
the four centuries under review, the concept of
“morality” also changed. For some of the writ-
ers she considers, after all, “morality” was a
well-defined, if idiosyncratic category. The mod-
ern term “moral climate” simply highlights the
unanswered question of the status of the legal
document at the time.

But these are all minor points. Korman has
written an excellent doctrinal history. My real
reaction, I must say, was to remain puzzled by
the numbers of scholars who continue to be-
come passionate (and Korman’s intense passion
for her subject is clear) about producing doc-
trinal surveys of this sort. It is here that I began
to have genre problems. Even when enriched
by interdisciplinary work in international rela-
tions or diplomatic history, the project remains
one of doctrinal restatement: what is the law?
Some of my genre difficulty undoubtedly results
from the somewhat different preoccupations of
the conventional American international law
discipline. In American postwar international
law, one is more accustomed to asking questions
about the machinery through which what might
(or might not) be described as norms make
themselves felt, than to asking questions about
the origins, sources, history or precise content
of those norms.

My own skepticism about Korman’s genre has
somewhat different roots. For those of us who
have been critical of the conventional American
postrealist inquiry into state behavior and pro-
cess, a lengthy attention to legal history such as
Korman’s can seem a welcome relief. Still, to
my mind, British or continental work clarifying
the source and content of rules suffers from
many of the same difficulties as American work
preoccupied with how rules influence the way
nations behave. Although American preoccupa-
tions with state behavior and process, which
embrace normative relativity, soft law and the rest,
may seem ahistorical and squishy to continental
colleagues (just as European work can seem for-
malist to American readers), to my mind, work
we might broadly term British or European and
American are two sides of a single genre. Both
present narratives of progress toward interna-
tional order that are more polemical than they
acknowledge. Both write history to generate a
holding. The reduction of one historical event
after another to an instance of norm generation
is no less forced and presentist than the effort
to draw from one case study after another com-
parative insight into how norms are applied.
Both inquiries compress the historical record
into a list of factors and a normative conclu-

Indeed, in Korman's work, as in much of the
best international legal history, this genre de-
mand often falls like a curtain across a fascinat-
ing tale whose telling has only begun. This
struck me most powerfully in Korman's chapter
on conquest in the nineteenth century—a pow-
erful and complex set of stories reflecting a
range of quite different ideas about what sover-
eignty was, what dominion meant, how title be-
came legitimate. For a moment, Korman's his-
tory slipped the collar of the genre. And then
the inevitable summary paragraphs—so what
was "the" right of conquest under traditional
law? And a series of propositions that capture
something, but unfortunately very little, of the
complex tale just told. Where are the coun-
trary principles and counterrules? What are we
to make of this urge to harmonize what clearly
seem to be entirely different historical contexts?
How can we withhold a smile when one after
another conflict ends with a statement of its
"significance" that could only startle the partici-
pants. For example, when summarizing the
mandate system, an enormously rich episode in
the history of the colonial encounter, Korman
writes: "the primary significance of the institu-
tion of the Mandates..." was... that it placed
new limitations on the right of the conqueror
to exercise its sovereign will in that territory"  
(p. 150). Significance for whom? And here may
lie the real rub. It is difficult to get a fix on
Korman's imaginary audience. In whose mind's
eye does the law look so?

Korman is slippery here—at times speaking
about the attitudes of statesmen, even particular
rulers, at other times relying on the writings of
international legal scholars. For both groups,
one gets the sense that Korman imagines them
as extensions back into history of either scholars
or statesmen she might encounter at Oxford
today, an unbroken chain of people asking the
same questions in the same terms about norms
and political life. The result is an ahistorical
mélange in which some scholars long dead con-
tinue to "state" while others are consigned to the
limbo of having "stated." And yet the Vattel
who wrote one thing was operating in a com-
pletely different universe, in a polemic with rad-
ically different people, from the Wheaton or
the Oppenheim who wrote something else. The
difference in actors over time makes the histori-
cal task of restatement much more difficult, but
it is hard to see how it can be avoided. What is
ture for scholars is even more true for political
figures, whose various rhetorical gestures and
motives are extremely hard to compare across
time as applications of a similar idea or adher-
ence to a similar principle.

There is a retrospective fantasy at work in this
book—that there really is an international law,
which can be and has been comprehended simil-
larly across time and space, and that its rest-
atement will clarify for some group of inter-
ested players some aspect of our current situ-
tion, some regularity in our political and legal
culture we might not otherwise have noticed.
But the grand progress narrative, with its an-
thropomorphic fantasy of an international soci-
cy or a great power or a Britain that could
and did think and then act, misses the changing
nature of the subjects and status of law. It is
also likely to miss the role changing images of
geography play in the construction and deplo-
ment of law.

In temporal terms, the years 1648–1919,
while conventionally treated as one long "tra-
ditional" period, saw a range of extremely diverse
ideas about the universality of international law,
the status of sovereignty, the relationships be-
tween law and rights, and between law and mo-
rality, and the status of violence. The players,
whether scholars or statesmen, whose behavior
and writings are now cataloged to produce ei-
ther conclusions about the state of the law or
predictions about state behavior, had quite dif-
ferent conceptions of their own prerogatives, as
of the status of law or statecraft. In a way, the
American tendency to ignore the way nations
behaved before 1945 at least recognizes the
presentist nature of such a retrospective. It is
interesting that Korman's turn to political sci-
ence and international relations, far from op-
 erating as an American-style antidote to this sort
of historical narration, simply complicates the
factual base without breaking the genre de-
mand for a holding.

What we now call the "traditional" system of
international law emerged only as the fragile
fantasy of a few lawyers and scholars in the late
nineteenth and early twentieth centuries. And
even they were far more aware of its contradic-
tions and ambiguities than is visible in current
efforts to retrospectively restate what "tradi-
tional" law was. As Korman tells us, ideas about
the consolidation of the European nation-state and colonial expansion arose together with an idea about the legitimate status of their inhabitants. Only a strong retrospective projection of the status of colonial occupation or nineteenth-century sovereignty could consign reference to popular will to the role of precursor for twentieth-century developments.

If we consider the same point from a spatial point of view, even the most politically correct American and European writing, giving equal treatment to doctrines and developments outside the North Atlantic theater, assimilates the colonial situation to the generic project. Thus, in European-style histories, the colonial theater will serve as a more exotic origin for doctrinal holdings, or as the terrain for the evolution of doctrinal mutants. In the American version, the non-European world offers a domain of special problems on which international law can be deployed and a terrain of special attitudes that might inflect the application or interpretation of norms. In both sides of the genre, the role of international law in the ongoing production of a distinction between the West and the rest of the world, and the role of that distinction in the generation of doctrines, institutions and state behavior are underplayed.

The rights of conquest, situated in a changing discourse about sovereignty, territory and force, might have proved an excellent focal point for study that unpacked or challenged the progress narratives and internal maps of our discipline, whether European or American. It would certainly offer a promising venue for exploring international law not as a set of rules with origins and applications, but as a history of people with institutional, polemical and political projects. To write such a story would take us far from Korman’s scholarly project.

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This is the published version of a doctoral dissertation prepared by Dr. Klabbers for the University of Amsterdam. The object of the study is to explore the concept of treaty in international law by analyzing international instruments of doubtful status which may nonetheless embody undertakings binding the parties as a matter of international law.

The author begins by contrasting the detailed attention international law scholars have given to the formation of customary international law with their sparse treatment of the notion of treaty itself, whether as an instrument or a source of legal rights and obligations. Klabbers derives encouragement for his choice of topic from a number of recent instances in which particular aspects of the concept of treaty have been clarified. These include the judgment of the Court of Justice of the European Communities in 1994 in France v. Commission, dealing with the issue of whether an agreement concluded by the EC Commission on behalf of the Communities constituted a treaty; the 1994 and 1995 Judgments of the International Court of Justice in the jurisdiction and admissibility phase of the Qatar v. Bahrain case, which dealt inter alia with the question of whether the so-called Doha agreed minutes signed by the Foreign Ministers of Qatar, Bahrain and Saudi Arabia (the latter in its capacity as mediator) could be regarded as a treaty instrument embodying legal rights and obligations for Qatar and Bahrain; and the award of the court of arbitration in the Heathrow Airport User Charges arbitration, which inter alia was required to determine the legal status of a memorandum of understanding entered into by the British and United States Governments in order to resolve problems regarding the interpretation and application of the bilateral Air Services Agreement of 1977 (the so-called Bermuda II Agreement).

Klabbers professes an "eclectic" theoretical orientation toward his topic, while not disguising his sympathy for the "critical legal studies" approach, particularly as expounded by Koskenniemi; at the same time, he claims to have been inspired mainly by analytic positivism as prac-

2 Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1994 ICJ Rep. 112 (July 1); Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1995 ICJ Rep. 6 (Feb. 15).
4 At this point, the present reviewer has to declare an interest, having acted as one of the counsel for Qatar in the jurisdiction and admissibility phase of the Qatar v. Bahrain case, and as one of the counsel for the United Kingdom in the Heathrow Airport User Charges arbitration.