



# 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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## BOOK REVIEWS AND NOTES

EDITED BY RICHARD B. BILDER

*The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice.* By Sharon Korman. Oxford, New York: Oxford University Press/Clarendon Press, 1996. Pp. ix, 323. Index. \$72.

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 midseventeenth 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 treatment 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 settings, the result is far less nuanced and differentiated than her treatment of conquest in Europe. 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 doctrine, 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 Canadian 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 explored.

Terminologically, 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 conquest. Still, the two are not always simply conflated, 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 application. 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 writers she considers, after all, "morality" was a well-defined, if idiosyncratic category. The modern term "moral climate" simply highlights the unanswered question of the status of the legal doctrine 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 become passionate (and Korman's intense passion for her subject is clear) about producing doctrinal surveys of this sort. It is here that I began to have genre problems. Even when enriched by interdisciplinary work in international relations 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 process, 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 preoccupations 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 formalist 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 international 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 comparative insight into how norms are applied. Both inquiries compress the historical record into a list of factors and a normative conclusion.

Indeed, in Korman's work, as in much of the best international legal history, this genre demand often falls like a curtain across a fascinating tale whose telling has only begun. This struck me most powerfully in Korman's chapter on conquest in the nineteenth century—a powerful and complex set of stories reflecting a range of quite different ideas about what sovereignty was, what dominion meant, how title became legitimate. For a moment, Korman's history 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 counter-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 participants. 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 institution 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 continue to “state” while others are consigned to the limbo of having “stated.” And yet the Vattel who wrote one thing was operating in a completely different universe, in a polemic with radically different people, from the Wheaton or

the Oppenheim who wrote something else. The difference in actors over time makes the historical task of restatement much more difficult, but it is hard to see how it can be avoided. What is true 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 adherence 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 similarly across time and space, and that its restatement will clarify for some group of interested players some aspect of our current situation, some regularity in our political and legal culture we might not otherwise have noticed. But the grand progress narrative, with its anthropomorphic fantasy of an international society 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 deployment of law.

In temporal terms, the years 1648–1919, while conventionally treated as one long “traditional” period, saw a range of extremely diverse ideas about the universality of international law, the status of sovereignty, the relationships between law and rights, and between law and morality, and the status of violence. The players, whether scholars or statesmen, whose behavior and writings are now cataloged to produce either conclusions about the state of the law or predictions about state behavior, had quite different 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 science and international relations, far from operating as an American-style antidote to this sort of historical narration, simply complicates the factual base without breaking the genre demand 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 contradictions and ambiguities than is visible in current efforts to retrospectively restate what “traditional” 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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*The Concept of Treaty in International Law.* By Jan Klabbers. The Hague, London, Boston: Kluwer Law International, 1996. Pp. xx, 302. Index. Fl 165; \$110; £74.25.

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*,<sup>1</sup> 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,<sup>2</sup> 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 binding legal rights and obligations for Qatar and Bahrain; and the award of the court of arbitration in the *Heathrow Airport User Charges* arbitration,<sup>3</sup> 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).<sup>4</sup>

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

<sup>1</sup> Case C-327/91, *France v. Commission*, 1994 ECR I-3641 (1994).

<sup>2</sup> *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).

<sup>3</sup> *Heathrow Airport User Charges (U.S. v. UK)*, arbitral award of Nov. 30, 1992, Dept. of State File Nos. P94 0020-1961/2369, P94 0022-2099/2102, *reprinted in* 1994 Y.B. COM. ARB. 33.

<sup>4</sup> 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.