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Ungentle Civilizer: Treaties and Colonial War in 19th Century International Law

erwachsenen Druck hatte sich der Eigentümer, der ja zugleich Marktteilnehmer war, zu fügen« (214). Auch diese Auswahl von Zitaten ist nicht vollständig, das Stichwortverzeichnis in dieser Hinsicht aber besonders erhellend, insb. auf Seite 252.

Der Verzicht auf alle Arten von Dogmen-, Institutionen- und sonstige Kontinuitätsgeschichten ist ebenso richtig wie der Abschied von der »grossen Dichotomie« (99 ff.), welcher der Rezensent noch die »kleine Dichotomie« von Germanisten und Romanisten hinterherwerfen will, über die Caroni nicht nur auf Seite 11 ff. mit leisem Spott äussert. Selbstverständlich ist sein Blick auf die Sozialgeschichte der ertragreichere und sein Postulat nach Erforschung der Wirkungsgeschichte des Gesetzes zweifellos begründet. Die Tragweite des »Marktarguments« hält der Rezensent ehrlicherweise für eher beschränkt. Entscheidend ist vielmehr das Gesamtbild, nämlich wie vielschichtig, bewegt und detailreich Caroni die Geschichte des Privatrechts darstellt. Er belegt damit abermals, dass sich auf einem kleinen Raum mit weniger als drei Millionen Einwohnern in der Schweiz im 19. Jahrhundert eine höchst spannende Rechtsgeschichte verfolgen lässt.

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Ungentle Civilizer: Treaties and Colonial War in 19th Century International Law*

Already Plato in the *Republic* had his protagonists muse about the application of the law of war – or its customary predecessor – to different groups of adversaries, notably fellow-Hellenes and outside »barbarians«. Among the former, Socrates argued, »civilized« rules should apply, particularly the protection of non-combatants and the rejection of a scorched earth policy. Towards barbarians, however, the ideal citizen should behave »like the Hellenes do among themselves today«,[1] hinting at the sorry state of warfare in reality even among Greeks at the time. Interestingly, Plato did not address the case when »barbarians« came under the rule of a Greek state, arguably because the ideal republic saw no room for such expansion.

For a long time, the states of Europe did not trouble themselves with this last problem, either because they were too weak to project their power overseas or they themselves were the objects of threat or occupation. Only with the discovery of the Americas and the beginning of European expansion in the 15th and 16th century did this become a relevant problem (coinciding with the rise of modern international law as a distinct field of knowledge); it became particularly pressing in the age of high imperialism during the 19th and early 20th century.

In the monograph under review, Harald Kleinschmidt thus addresses one of the most pressing problems in international law during this last phase of western expansion. The questions that animate his study are as follows (35): How did scholars of international law legitimize the fact that European powers and the US ignored valid treaties with non-western nations during the expansion? How did military and legal experts explain excluding colonial warfare from the concept of regular warfare? And finally, how did these conceptual and theoretical developments shape international relations at the time?

Based on a host of primary sources in the fields of military science and international law (mostly

* Harald Kleinschmidt, Diskriminierung durch Vertrag und Krieg: Zwischenstaatliche Verträge und der Begriff des Kolonialkriegs im 19. und frühen 20. Jahrhundert (Discrimination by treaty and war: international treaties and the concept of colonial war in the 19th century and early 20th century), Munich: Oldenbourg 2013, 237 p., ISBN 978-3-486-71730-3

1 Plato, *Politeia*, Book V, 471–473.

by British and German authors) and employing admirable erudition and attention to detail, Kleinschmidt sets out to answer these questions in three main parts. The first part of the study is devoted to the state of law prior to the 19th century (38–60), the second part focuses on the discriminating treaty practice and concepts of national sovereignty and equality during the era of imperialism (61–112), whereas the third part deals with the question of the consequences for warfare with colonized peoples or »protectorates« (113–169).

In summary, Kleinschmidt's argument runs as follows: Prior to the 19th century, European international public law acknowledged a whole array of different types of international actors, including such non-state actors with legal personality as the British and Dutch Trading Companies. The concept of international order was relatively static, and peace, not conflict, was the default state of their relationship. Consequently European public law was still rather indiscriminate in accepting non-western nations as legal entities and valid parties of international treaties, and extended the full benefits of the *ius in bello* (not to speak of *ius ad bellum*) to these nations.

This began to change, however, around the turn of the 18th century and the tendencies accelerated towards the end of the 19th century. The outburst of revolution and war in Europe as well as the dynamics of the industrial revolution led to a new dynamic in the international order and a deepening of hierarchy among the powers. Legal theory reflected these developments by increasingly limiting the number of entities that would qualify as sovereign subjects in law, ultimately declaring the state as the original subject in international law. What constituted a state was, of course, again a matter of definition that often enough took the great western powers as their model.

In this context European states and the US treated non-western nations in a number of discriminatory ways: by concluding so-called »unequal treaties« which lacked reciprocity and one-sidedly favoured the western parties; establishing colonies in many of these states that, technically, were declared »protectorates«, but left little of the former state sovereignty; and finally, by declaring even those states as non-existent, due to the alleged lack of ability of the people to govern themselves. All this was done with the usual imperialist justification of »civilization« or the lack thereof. Kleinschmidt clearly shows how international lawyers translated this process into legal theory and thus made themselves the handmaidens of imperialist expansion, particularly through Lassa Oppenheim's artificial differentiation of state sovereignty, which should formally remain with non-western states, and legal personality, i.e. the capacity to constitute effective legal acts, which non-western states were still too immature to do. Thus, non-western states lacked legal personality and became mere »legal objects«, although it should be mentioned that, because of the vicissitudes and diversity of European colonial policies, there was never a consolidated or consistent theory and contradiction abounds.

Depriving non-western states of their legal personality and, in more extreme cases, of their quality as states per se had critical consequences in cases of military conflict between colonial governments and non-western nations. In the same way as non-western nations were declared unfit to govern themselves, they were also seen as incapable of fighting a »civilized« war with the military techniques of western states, of which the guerrilla-style warfare that non-western nations often utilised against their oppressors seemed proof. Being a non-state, they therefore lacked a *ius ad bellum* against »their« government, and due to fighting an unlawful »small war« – as colonial wars came to be known because of the asymmetry of power in these conflicts – they were not extended the benefits of the *ius in bello*. Thus, with the limitation of legal personality to »regular« states came the exclusion of non-western nations from the protection of the laws of war. Instead, western troops resorted to the tactics of so-called »razzias« – arguably the colonial equivalent to guerrilla warfare – or »expeditions« against the colonial population, the most notorious characteristic of which was that they did not distinguish between combatants and non-combatants and thus victimised whole populations. This culminates in Kleinschmidt's verdict that »with its inherent limitation of the concept of war to conflicts between states, international law committed so-called ›savage‹, ›half-savage‹ or ›uncivilized‹ peoples to lawless massacres« (33) and that »even unpardonable acts of violence and genocide could became unproblematic measures under international law, even if, as in the case of the war against the Herero and Nama, these violated municipal, in this case German, law« (172).

Although the insight that international law and military science, as much as any other field of knowledge, was not free of politics but, on the contrary, directly or indirectly lent itself to the imperialist project, is not new and has arguably even become the default expectation in historiography in the past decades, Kleinschmidt's study is nonetheless fresh and important in that it focuses on the critical doctrinal link between sovereignty, state personality and the application of the law of war, particularly towards non-western nations. It is also valuable in that it directs our attention to further fields of inquiry that need much more work. Thus, it could be argued that the term »unequal treaty« is a subjective one and would have to be confirmed by a corresponding feeling of iniquity on the part of the non-western nation. So for example, it seems somewhat formalistic to declare the treaty between Britain and the King of Bonny as »unequal« (78), just because it did not grant the same rights to the King if the latter felt no need for them (which we do not know). Likewise, Kleinschmidt's case studies of the Kingdom of Buganda and the Ashanti (145–168) do not always bear his own analysis, but hint at even further diversity in the details: when Britain considered merging Buganda into a bigger union, the *kabaka* of Buganda *could* insist on the treaty of 1900 which prohibited any changes in the status of the kingdom (151), demonstrating that treaties *could* benefit non-western states, provided the political situation was right. Also, Kleinschmidt argues that the implicit assumption of the principle *pacta sunt servanda*, which came with the conclusion of the treaties, and the requirement of its written form constituted an imposition of European public law on the non-western side (84–87). Apart from the fact that any other form than the written seems impractical for international treaties, the problem here seems less the imposition than the misunderstandings that the implied principles created, as the case of the Ashanti demonstrates. Here, the successive ruler did not seem to have felt bound by a treaty that was not concluded by him but by his predecessor as *representative* of the state as a legal person (165). Again, this example illustrates the necessity to know much more about the interpretation of international law on the *non-western* side.

However, the most important vista is opened up by Kleinschmidt's verdict on the notorious complicity of international law with state-perpetrated crimes, as it points towards the problem of doctrine, historical context and the standards we apply. Thus the verdict ignores that traditional international law at the time did not concern itself with domestic atrocities, and seems to apply a somewhat anachronistic standard. If we take the legal doctrine of the time seriously, then it is on the surface consistent to argue that protectorates are part of the extended interior of the sovereign state. As such, it would be nonsensical from a publicist's point of view to postulate a *ius ad bellum* for the local population, and again consistent to treat its uprising as rebellion. However, traditional international law does not concern itself with such ›internal affairs‹, but leaves dealing with this to the municipal law of the sovereign state. Thus, in principle, international law does not ›outlaw‹ colonial people, but simply declares itself not competent and pushes the responsibility into another legal sphere. As Kleinschmidt concedes, the Herero and Namaqua genocide violated municipal, in this case German law. Thus, on the surface neither international nor municipal law condoned the atrocities as such, and we need to know much more about the legal status of protectorates and colonial people in municipal law, and its unholy conjunction with ideology, to understand the dynamics that led to such atrocities.

One could argue that pushing away the responsibility was already a tacit complicity which left entire populations defenceless and at the mercy of possibly murderous governments. But it was only the postwar period that saw the rise of instruments that addressed this problem, notably the concept of »crimes against humanity« and the human rights regime. It would be anachronistic to demand the same standards from 19th century legal scholarship. Moreover, the ambiguous status of »crimes against humanity« and legal issues in the »war on terror«, which eerily recall the »small wars« in Kleinschmidt's study, show that these problems persist. Conversely, when considering the debates over the »responsibility to protect« in our time, we should not judge too harshly about such muddled interactions as Kleinschmidt describes in the case of the Ashanti. Nevertheless, one of the many merits of this thoughtful study is to make the reader aware of how deeply these problems of sovereignty and war are ingrained in the history of the international legal order.

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