

Harald Kleinschmidt. *Diskriminierung durch Vertrag und Krieg: Zwischenstaatliche Verträge und der Begriff des Kolonialkriegs im 19. und frühen 20. Jahrhundert.* München: Oldenbourg Verlag, 2013. 236 S. ISBN 978-3-486-71730-3.



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H. Kleinschmidt: Diskriminierung durch Vertrag und Krieg

This interesting book tries to join two separate developments of the late nineteenth century: the tendency in international law to differentiate between full states which were both subjects and objects of the law, on the one hand, and protectorates or other quasi-states, which were mere objects, on the other; and the invention of the concept of colonial warfare as something distinct from regular warfare between states. Kleinschmidt's thesis is that in their scramble to expand territorially, European states and the United States perverted international law so as to use unequal treaties both to gain title to land and to deny indigenous peoples the legal right to use armed resistance against imperialism. Anti-colonial struggles then became defined as "small wars" which Kleinschmidt says were "total wars", meaning no limitations of the laws of war applied to them.

This study has many strengths. It is useful to problematize the concept of colonial warfare ("Kleiner Krieg") and to trace its late emergence in the literature on military theory. Kleinschmidt also provides a valuable close reading of many, sometimes obscure treaties establishing protectorates or other odd relations between West-

ern states and local leaders, beginning in 1817. He uncovers the contradiction between the substance of these treaties, which were unequal insofar as the obligations of local leaders far outweighed those of the Western states, and their form, whose preambles postulated equality between the signatories. He provides a nice précis of the Western assumptions silently embedded in these treaties: that written contracts carried more legal weight than oral ones; that treaties were binding in perpetuity or at least beyond the lifetimes of the signers; that treaties were meant to be binding (*pacta sunt servanda*); and that a specific theory of the state, and especially of state government, inhered in them. In a lovely reading of the British dispute with Ashanti leaders over the meaning of their mutual treaties, Kleinschmidt also gives a fascinating analysis of the misunderstandings to which such assumptions could give rise (pp. 153-68).

The book's argument is not entirely convincing, however. Kleinschmidt's sources are exclusively "theoreticians" of law and of the military, rather than actual state colonial practices or government policies. That evidentiary focus makes the argument idealistic; that is,

ideas or concepts are frequently taken to be causes of state behavior (pp. 34, 35, 62â3, 116, 144). Idealism of this kind is particularly problematic for international law before 1945 when state practice was taken by statesmen, military leaders, and jurists alike to be the main determinant of customary international law. The writings of âtheoreticiansâ were considered to be of relatively minor importance, and historians acquainted with state decision making will have noticed the often wide cleft between the acts and motives of statesmen and other officials, and the musings of legal writers of the time. A close eye on the publication dates of many of Kleinschmidtâs most important sources (for example, Callwellâs book on small wars, or the mostly British legal writings postulating a hierarchy of state forms based on governmentality, or the works recognizing the concept of state succession) will note that these mostly come after the Scramble for Africa had concluded. This chronology suggests that theoreticians were describing or trying to pour into legal forms actions already taken by states, rather than actually causing state policy.

It is certainly true that Western states used their own governmental systems to judge whether they would recognize other polities as states. Non-recognition then meant that European states denied ânon-statesâ the ability to wage legitimate war and therefore to enjoy the protection of law for their warriors. But there were other reasons besides greed and the desire to disadvantage non-European polities for this insistence on a certain degree of governmentality. Some functioning organization is required to ensure compliance with the laws of war. Even after newly independent colonial states were significantly involved in revising international law, they agreed on that prerequisite (Addition Protocol to the Geneva Conventions I, Art. 43, 1977). Moreover, in the nineteenth century, reciprocity was widely taken to be the foundation of international law. How were contemporaries to judge or apply reciprocity in the colonial encounter? Kleinschmidtâs account needed to address and analyze the principle of reciprocity in the confusing context of cross-cultural contact.

Kleinschmidtâs use of âtotal warâ is also problematic. He writes that colonial war simply became total war (p. 118). Yet none of the contemporary writers used that term (p. 137). Moreover, historiansâ use of âtotal warâ differs from Kleinschmidtâs. They mean total mobilization of economy and society, not no-holds-barred war-

fare (though the first might encourage the second). In fact, actual colonial conflicts in the nineteenth and early twentieth century rarely degenerated into total wars â the genocide of the Herero and Nama in German Southwest Africa was unusual. How far colonial armies (or expeditions) went depended largely on circumstance. And even that odious imperial institution, the concentration camp, was designed to separate civilians from ârebelsâ, not just to make fighting easier, but also partly to protect non-combatants from what is now called âcollateral damage.â Colonial wars were more complicated than Kleinschmidt allows. We need to know much more about how colonial conflicts were fought, before we can assess the spectrum of violence actually used or thought proper by military men and by metropolitan governments.

Most of all, it is striking how many contradictions and exceptions crop up in the course of Kleinschmidtâs account. Western states extended state recognition to such different polities as Japan, Siam, Liberia, and Ethiopia (pp. 91â2). Britainâs empire produced many different statuses of subordination besides the protectorate (pp. 95â6). Most remarkable of all are the enormous contradictions in which states became entangled by their use of legal instruments to fashion their intercourse with colonials. Kleinschmidt notes that the imperialist states never outright annulled these treaties, nor did they simply cover their expansion as military conquest (pp. 88â90). Why not? Why were they so intent on clinging to legal fictions?

For in the end, despite his criticism of Lassa Oppenheim, Kleinschmidt actually agrees with Oppenheimâs position that these unequal treaties were figleaves, mere âpreparations and precursors of future occupationsâ (Lassa Oppenheim, *International Law: A Treatise*, London 1905, Vol. 1, para. 226, p. 281. (p. 104). Kleinschmidt concludes convincingly: âDas VÃ¶llkerrecht erwies sich, trotz komplizierter TheoriegebÃ¶ude, ungeeignet als praktisches Instrument zur Legitimierung der Ãnderung des Rechtsstatus der Kolonialherrschaft unterworfenen Staaten. Denn es war konstruiert mit dem Ziel, den Fortbestand von Staaten zu gewÃ¶hrleisten. Die im Zusammenhang mit der Errichtung und Verteidigung von Kolonialherrschaft vorgenommenen Ãnderungen des Rechtsstatus der der Kolonialherrschaft unterstellten Staaten folgten daher nicht aus der Anwendung von Rechtsnormen, sondern aus den Geboten der Machtpolitik.â (p. 151)

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