Florida Journal of International Law

Volume 24 | Issue 3 Article 1

December 2012

Prologue

Pavdon Broeder

Matthew Nellans

PROLOGUE

Paydon Broeder[*] *& Matthew Nellans*[**]

Issue 24.3 of the *Florida Journal of International law* explores a wide range of legal topics including the occupation of Iraq, property rights under European human rights law, the validity of the doctrine of *forum non conveniens*, the American secession from England during the 1700s, and the competitiveness of American copyright law in the international arena. The authors, both foreign and domestic, provide a unique perspective on these legal issues that make up the varied and ever-developing field of international law.

Jordan E. Toone's[1] article, *Occupation Law During and After Iraq: The Expedience of Conservationism Evidenced in the Minutes and Resolutions of the Iraqi Governing Council*, germinated in 2010 as Toone worked as a research assistant for Stefan Talmon, then a Professor of International Law at Oxford University. Assisting Professor Talmon, Toone translated the minutes and resolutions adopted by the Iraqi Governing Council (IGC) and later concluded that the United States did not take its obligations under international occupation law seriously.

Toone commences an examination of the history of the law of occupation and its status at the start of the Iraq invasion in 2003. He observes that, from the eighteenth to the nineteenth century, conquest receded as a tool of statecraft, giving rise to the view that the occupying force should maintain the status quo. This transformation in occupation law led to the Fourth Geneva Convention and finally to the conservationist principle, which Toone defends and which stands for the premise that the occupying power should maintain order in the occupied state but not enact fundamental changes.

As he examines the Iraqi sources, Toone assesses U.S. compliance with the international law of occupation, which seeks to protect the occupied from the occupier. Toone suggests that the IGC minutes reveal that the IGC was in many ways a puppet of the Coalition Provisional Authority (CPA). For instance, the IGC minutes demonstrate that the CPA pressured the IGC to enact banking laws favored by the United States. They also reveal instances of micromanaging, as evidenced by

---

* Articles Editor, Florida Journal of International Law, J.D. 2013, University of Florida Levin College of Law.

** Articles Editor, Florida Journal of International Law, J.D. 2013, University of Florida Levin College of Law.

1. Associate at White & Case, LLP in New York.

the CPA's appointments of police force authorities.[2] Toone asserts that, despite being motivated by good intentions, the actions of the CPA clearly violate the law of occupation.

Some argue that the conservationist principle is outdated because the purpose of occupation has changed from obtaining geopolitical advantage to transforming a tyrannical society into one that respects human rights. Toone responds remarking that an overarching principle of international law is that sovereignty lies in the people and not with a political elite. Therefore, the building blocks of international law favor the conservationist principle because the conservationist principle recognizes self-determination. In the context of Iraq, Toone argues that, in its communications to the United Nations, the United States recognized the significance of the conservationist principle leading up to the war and subsequent occupation of Iraq.

To reduce the likelihood of human rights violations in occupied states where the former government should be stripped of its powers, like Iraq, Toone offers a three-part solution. For starters, the military command of the occupying state should separate itself from a multinational civilian command.[3] Second, citizen representatives from the occupied state should comprise an executive council that heads the multinational civilian command. Finally, the multinational civilian command should be cautious about enacting reforms until all major hostilities have ceased.

Sebastián López Escarcena's[4] *Interferences with Property Under European Human Rights Law* offers an analysis of the European Commission[5] and the Court of Human Rights case law construing the protection of property rights pursuant to Article 1 of the First Optional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Escarcena synthesizes the opinions, reducing the holdings to three categories of state intrusions on property rights: peaceful enjoyment, deprivation of property, and control on the use of property. Generally, Escarcena concludes that the opinions suggest that

2. The CPA also attempted to appoint judges. *See* Carolyn A. Dubay, *Beyond Critical Mass: A Comparative Perspective on Judicial Design and Gender Equality in Iraq and Afghanistan*, 24 FLA. J. INT'L L. 163, 205 (2012).

3. This separation would be different than the current practice under international law where the military government is both the executive and the legislator. *See* Adam Shinar, *Constitutions in Crisis: A Comparative Approach to Judicial Reasoning and Separation of Powers*, 20 FLA. J. INT'L L. 115, 166 (2008).

4. Sebastián López Escarcena is an Assistant Professor at Pontifical Catholic University of Chile.

5. *See generally* Charles W. Smitherman III, *Growing Pains: European Union Enlargement and the Restructuring of the European Commission Under the Treaty of Nice*, 15 FLA. J. INT'L L. 243 (2002) (discussing the background and purposes of the European Commission).

while the state must detail a public interest in order to interfere with property rights, the state has broad leeway to describe the particular public interest that provokes an interference with a property interest. The court tests the validity of the interference with property by balancing the interests of the property owner with those of the community. The amount of compensation paid to the property owner is an important metric used in the balancing test. Escarcena continues by describing the case law granting local authorities a wide berth to calculate the amount of compensation to the property owner. Escarcena reviews several nebulous standards, including the case law that allows taxes on property so long as the amount of taxation is not excessive, as well as a requirement of good governance to minimize legal uncertainty.

In the third article, the doctrine of *forum non conveniens* is critiqued. Unlike other critiques which commonly focus on the actual application of the doctrine in practice, however, this article explores the doctrine's validity and need as a judicial tool. In his work titled *A Critique of the Doctrine of Forum Non Conveniens*, the author, Markus Petsche,[6] who has taught worldwide on the subject of international law, comes to the conclusion that the doctrine fails to achieve its desired objectives.

Professor Petsche starts his analysis by arguing that the legitimate objectives of *forum non conveniens* consist of efficiency and fairness, but later shows that even an ideal doctrine of *forum non conveniens* ultimately fails to achieve these objectives. Professor Petsche specifically criticizes how the doctrine is "applied in an incoherent, arbitrary, and discriminatory manner." To exemplify how courts apply the doctrine in this way, particularly in favor of domestic plaintiffs rather than foreign plaintiffs, Professor Petsche points to several high profile cases where he finds that the courts' application of the doctrine leads to illogical holdings. In lieu of *forum non conveniens*, Professor Petsche argues that jurisdictional rules, rather than the doctrine itself, are better equipped to achieve the goal of locating the appropriate forum.[7] In support of his argument, Professor Petsche contends that abstract rules of jurisdiction are able to ensure efficiency and fairness in the vast majority of cases. Additionally, Professor Petsche suggests that if rules of exorbitant jurisdiction were abolished, such as those in

6. Markus Petsche is currently an adjunct professor of law at Sorbonne Assas International Law School in Singapore.

7. For an additional critique of the doctrine, see Donna Solen, Forum Non Conveniens *and the International Plaintiff*, 9 FLA. J. INT'L L. 343 (1994); *see generally* Christine Russell, *Should Florida be a "Courthouse for the World?: The Florida Doctrine of* Forum Non Conveniens *and Foreign Plaintiffs*, 10 FLA. J. INT'L L. 353 (1995) (discussing how the doctrine applies in Florida).

Article 14 and 15 of the French Civil Code, there would be no "need for a *forum non conveniens* doctrine as a tool to avoid the detrimental effects of those rules." In coming to the conclusion that *forum non conveniens* is not a useful legal rule, Professor Petsche provides a novel and interesting critique to the common law doctrine.

If the current norms in international law would not justify the secession of the American colonies from Britain, should Americans reconsider those norms? This is the question Patrick A. Woods[8] seeks to answer in his essay *Inevident Truths: Why Current International Norms and Policies May Not Have Supported the American Revolution.* Woods seeks to provoke a critical examination by Americans of the international norms by which current secession movements are judged. Now is a good time to examine these norms, for the economic situation in Europe has recently spawned several secession movements, including movements to create a Venetian Republic, a Catalonia separate from Spain, and an independent Bavaria.

Woods begins by stating his personal view that the American Revolution was legitimate, and then proceeds to analyze the international law that determines the legitimacy of a secession movement. First, Woods removes slavery and suffrage from the analysis, conceding that, if those factors were considered, the American Revolution would certainly be deemed illegitimate. Woods reasons that slavery is so far out of the bounds of acceptability in the modern world that any secession movement supportive of slavery would be viewed as "laughably hypocritical." Therefore, slavery has little utility for comparative purposes. The same goes for suffrage.

The author moves on to discuss the principles of self-determination and territorial integrity, describing the tension between the two concepts. To provide evidence for his conclusion that the interest in self-determination is strongest, and the interest in territorial integrity is weakest, in the decolonization arena, Woods employs two examples. The cases of Bangladesh—where self-determination trumped territorial integrity—and Quebec—where territorial integrity remained paramount—illustrate the contours of self-determination. Woods concludes that, at most, a remedial right exists to cure an injustice against the seceding party. Moving on to the case of the South Ossetian[9] secession movement in Georgia, Woods concludes that modern international law would hold territorial integrity paramount in all

8. Law Clerk to the Honorable Richard K. Eaton, U.S. Court of International Trade. The author graduated from Albany Law School summa cum laude in 2012.

9. *See generally* Robert P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, 23 FLA. J. INT'L L. 75 (2011) (discussing the conflict in South Ossetia).

instances not involving colonization or foreign occupation. A mere desire to use the democratic process to separate is not enough to obtain international legitimacy.

Continuing the analysis of international norms, Woods describes the requirement that a seceding party be a "people," suggesting that the seceding party must be unified and have an ethnic or cultural make-up distinct from the nation from which it wishes to secede. Woods describes the American colonists as nearly indistinguishable from the British with respect to the ethnic and cultural make-up of the population. Therefore, Woods suggests the American colonists should be viewed as an oppressed people, again seeking the path most favorable to establish the legitimacy of the American Revolution measured by modern international norms.

He then reasons, however, that the American colonists' grievances were not sufficient to entitle them to secede. He explains that the violence attributed to the British, while more extreme than the non-existent violence between Quebec and Canada, was far less extreme than the acts of violence suffered by the Bangladesh citizens. Finding that the American colonists would not qualify as an oppressed people, Woods concludes that the American Revolution would not be considered legitimate if measured by modern standards. Consequently, Woods suggests that Americans reconsider the norms applied by modern international law to determine the legitimacy of secession movements.

Lastly, we are pleased to publish Arletys Rodriguez,[10] the winner of the *Florida Journal of International Law*'s Best Case Comment in the fall of 2012, who writes a thorough analysis on copyright material that has fallen into the public domain in the United States. Using the case *Golan v. Holder* as the backdrop, Rodriguez's work, entitled *Copyright Law: Balancing Foreign and Domestic Interests in the International Arena*, explores the history of American copyright law,[11] and comes to the conclusion that American copyright law needs to adapt "to stay competitive in the international arena."

The *Golan* case involves a challenge to the constitutionality of section 514 of the Uruguay Round Agreement Act (URAA). Rodriguez points to several factors in the case law that weaken the policy objectives of section 514, including the extension of copyright

10. Arlety Rodriguez is a 2014 J.D. candidate at the University of Florida Levin College of Law and is expecting an M.A. in International Business in 2014 from the University of Florida Hough Graduate School of Business.

11. For a more complete history of copyright law, see Sharon E. Foster, *Invitation to a Discourse Regarding the History, Philosophy and Social Psychology of a Property Right in Copyright*, 21 FLA. J. INT'L L. 171 (2009).

protection to existing works, the uncertainty of reciprocity from foreign nations, and the potential negative effects that section 514 creates. Rodriguez concludes that *Golan v. Holder* "demonstrates the importance of reciprocity and diplomacy" in copyright law, and that America needs to adapt its copyright laws to stay competitive on an international level. She leaves the reader with the intriguing question of whether section 514 will lead to increased or decreased piracy.[12]

12. *See generally* Julie Siefkas, *Copyright Piracy in Vietnam: the Impediments of Weak Enforcement Policies on the Country's Economic Reform*, 14 FLA. J. INT'L L. 475 (2002) (explaining the policies to combat copyright piracy).