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Book Reviews: FOREIGN SEIZURES: SABBATINO AND THE ACT OF STATE DOCTRINE. By Eugene F. Mooney and TREATISE ON JUSTICE. By Edgar Bodenheimer.

Cornelius F. Murphy Jr.

Harry M. Montgomery

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BOOK REVIEWS

FOREIGN SEIZURES: SABBATINO AND THE ACT OF STATE DOCTRINE. By Eugene F. Mooney.† Lexington: University of Kentucky Press, 1967. Pp. 186. \$5.00.

I

In 1964 the Supreme Court held that United States courts were precluded from exercising jurisdiction over controversies involving the validity of the act of a recognized foreign state within its own territory, even where the act allegedly violates international law, unless the controversy in question can be adjudicated by the use of international standards established by treaty or other unambiguous agreement. The decision was made in the now celebrated case of *Banco Nacional de Cuba v. Sabbatino*:¹ litigation arising out of the efforts of an American owned Cuban sugar company to recover the proceeds of a sale of its property by the Cuban Government after the Castro regime had expropriated its assets in retaliation for the reduction of the Cuban sugar import quota by the United States.

The *Sabbatino* decision was not happily received by either the legal profession or the business community. Substantial pressure was exerted upon the Congress to reverse the result, and the Hickenlooper Amendment to the Foreign Assistance Act of 1964 was the result. In the Amendment, Congress provided that:

... [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable . . . (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States. . . .²

The principles of international law referred to include the duty “. . . to discharge its obligations under international law . . . including speedy

† Professor of Law, University of Kentucky.

1. 376 U.S. 398 (1964).

2. 22 U.S.C. § 2370(e)(2) (Supp. II, 1967).

compensation for such property in convertible foreign exchange, equivalent to the full value thereof as required by international law. . . .³ On remand, the district court judge before whom the *Sabbatino* litigation had commenced, found the Amendment Constitutional and entered Summary Judgment in favor of the American interests.⁴

Thus was created the extraordinary situation of the Congress of the United States purporting to overrule the Supreme Court opinion concerning the function of the judiciary within our over-all scheme of government. The entire process, from initial litigation through the application of the Hickenlooper Amendment, has raised important questions as to the role which domestic courts should play in contributing to the development of international order.

This book, by a Professor of Law at the University of Kentucky, is a brief in favor of the Amendment. It expresses the belief of its author that international trade and development will be best served by allowing American courts to examine the compatibility of seizures of American property with the requirements of international law. Unfortunately, the book fails to make a contribution to constructive discussion of the role of courts in this sensitive area.

II

The book is inadequate for several reasons, of which the following inter-related factors should be specifically mentioned: the author's inability to sufficiently respond to the praise of the *Sabbatino* opinion by competent legal scholars; his failure to critically evaluate the standard of compensation adopted by Congress as a rule of international law; and a significant absence of any genuine awareness of the standards adopted by the international community as a whole with respect to the power of states to nationalize the property of aliens.

In *Sabbatino* the Supreme Court held that wider interests of national policy required judicial abstention in the expropriation cases. It reasoned that:

Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or

3. 22 U.S.C. § 2370(e)(1) (1964).

4. *Sub. nom.*, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (1965). Entry of final judgment was suspended for sixty days in order to allow the President to file a suggestion that application of the act of state doctrine was required by the foreign policy interests of the United States. The executive branch informed the Court that "no such determination is contemplated." Final judgment was then entered on November 15, 1965. See E. MOONEY, *FOREIGN SEIZURES: SABBATINO AND THE ACT OF STATE DOCTRINE* 123 (1967) [hereinafter cited as MOONEY].

multilateral talks, by submission of the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country. Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries who have engaged in similar expropriations would not be immune from effect.

The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law. If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.⁵

Able commentators have given their assent to that reasoning as being most conducive to our own interest. Professor S. D. Metzger, for example, has supported the court's rationale with the following illustration:

Suppose Ethiopia, for example, while not engaging in exchange restrictions, nationalized cotton-ginning facilities, some of which were American-owned, pursuant to a law and decree providing for compensation in non-negotiable interest-bearing bonds payable in local currency in seven years. The Treaty of Amity and Economic Relations with Ethiopia, whose legal standards in the expropriation field parallel those that the United States has with other similarly situated countries, provides:

Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party. Such property

5. 376 U.S. at 431-432.

shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just and effective compensation.

...

Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall at the request of either High Contracting Party be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

In all likelihood, the American owners of the ginning company, having exhausted without success their local legal remedies in Ethiopia, claiming that the mode of compensation was unjust, would have requested the State Department to espouse their claim under the above-quoted treaty provisions. Let us assume for the moment that the State Department had in fact decided to do so, despite its substantial misgivings as to whether the Ethiopian decree was in fact inconsistent with the treaty. In all likelihood, the Department would proceed in a friendly way, not charging "treaty violation" in shrill terms, but discussing with Ethiopia, a friendly country in whose economic development we have been much interested, ways and means whereby she might provide convertible currency as compensation at some time earlier than seven years. Perhaps this might be worked out through a governmental purchase of Ethiopian cotton fabric for further manufacture in a third country in whose development we were also interested.

Is it not reasonable to think that litigation in American courts on the question whether the mode of compensation violated the treaty would involve consequences similar to those graphically described by the Court where the litigation involved a foreign state act alleged to violate customary international law?⁶

Professor Mooney never really comes to grips with these arguments.⁷ He relies heavily upon the dissent of Mr. Justice White,⁸ a dependence which, while not without some justifications, is not the equivalent of independent scholarship. Beyond that, he is content to characterize the majority opinion in emotionally charged language.⁹

6. Metzger, *Act of State Doctrine Redefined: The Sabbatino Case*, 1964 SUP. CT. REV. 223, 237-238 (P. Kurland ed.).

7. In addition to Professor Metzger's study, see R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964).

8. 376 U.S. at 439.

9. See, e.g., MOONEY at 94.

A further weakness of the book is the author's failure to probe deeply into the issue of an appropriate legal standard which can be applied by the courts. It is true, as Professor Mooney argues, that basic standards of governing the expropriation of alien properties have yet to be developed; and it is further true, as he contends, that traditionally our common law courts have creatively developed rules of law. Conceding, *arguendo*, that domestic courts should be allowed to contribute to the formulation of compensation standards, the more important job of the legal scholar is to critically evaluate the standards which the judiciary attempts to create. This Professor Mooney neglects to do.

In the present context the task is to examine not only the norms which the courts create but, more accurately, to examine the norms which the courts are commanded to apply by the Hickenlooper Amendment. In controversies to which the Amendment is relevant, it becomes the obligation of the taking state to pay ". . . speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law. . . ." ¹⁰ It is in the suggestion that international law requires full value that the standard is subject to criticism.

This position, which is also the view of the Restatement of the Foreign Relations Law,¹¹ does not reflect a consensus adequate to justify its identification with international law. Its inadequacy lies in its assumption, implicit in the demand for *full* value, that legal ownership justly entitles a person or corporation to the total intangible value of property taken by a state. "Value" is an ambiguous term; nevertheless, the moral implications of such a suggestion are not acceptable to many states that believe that private ownership has contributed only a part of the total monetary or economic worth of a given enterprise. And these states believe they are entitled to decide the quantum of private contribution in any given situation. This does not mean that the power of states is unrestricted. The right not to be *arbitrarily* deprived of property is clearly recognized in international law. However, it is important to grasp the nuances of distinction between "full value" as a standard and a notion of "arbitrariness."¹² Professor Mooney assumes that there is substantial agreement which exists with respect to a basic norm that a taking must be compensated, and that it remains for the Courts to determine the nuances of meaning which the standard suggests. This is a defensible position but a more critical examination of basic formulation is necessary before any headway can be made in this area.

The author makes ample use of epithets such as "parochial" and "pro-

10. 22 U.S.C. § 2370(e)(1) (Supp. 1964).

11. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 187 (1965).

12. For a full development of these ideas, see Murphy, *State Responsibility for Injuries to Aliens*, 41 N.Y.U.L. REV. 125, 136-138 (1966).

vincial" in describing the Supreme Court's position as expressed in *Sabbatino*. It is tragic that he fails to consider how appropriately those terms can be applied to his own position. For the book reflects an obsession with the protection of American foreign investment, and that passion controls his evaluation of the contribution to be made to international law by the *Sabbatino* Amendment.

The insularity of his viewpoint is demonstrable in several respects. The author not only ignores the myriad forms of cooperation which have been developed by capital importing states to accommodate the expectations of private investors,¹³ he never considers whether the interference with world trade which judicial inquiry necessarily involves may outweigh the "emotional" satisfaction to be derived by disgruntled corporations from seizing goods moving in international commerce. More significant is the absence of any reference to the attempts by the United Nations to adjust the values at stake in these controversies through the declaration of guiding principles.¹⁴

Passionate reaction to the phenomena of expropriation is to be expected from those who have an immediate monetary stake in the outcome. Extreme advocacy by lawyers representing foreign investors and businesses is understandable. But at the level of legal scholarship an effort on impartial objective analysis is essential. Without this effort from the community of scholars we can never expect the evolution of a workable world order.¹⁵

This book fails to approximate these requirements.

*Cornelius F. Murphy, Jr.**

TREATISE ON JUSTICE. By *Edgar Bodenheimer*. † New York: Philosophical Library, Inc., 1967. Pp. 314. \$10.00.

Though the *Treatise on Justice* is a current work with much material to aid in setting a trustworthy course through the tortured channels of

13. *E.g.*, Bolivia: Foreign Investment Law, V INT'L LEGAL MATERIALS 208 (1966); Brazil and American & Foreign Power Co.: Contract for sale of utility properties, IV INT'L LEGAL MATERIALS 72 (1965).

14. *E.g.*, Declaration on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR Supp. 17, U.N. Doc. A/5217 (1962). The text is set forth in 57 AM. J. INT'L L. 710 (1963).

15. See Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231 (1964).

* B.S., The College of the Holy Cross; LL.B., Boston College; LL.M., University of Virginia. Professor of Law, Duquesne University.

† Professor of Law, University of California, Davis. B.A., LL.B., University of Washington, J.U.D., Heidelberg.

today's maelstrom of domestic and international law and jurisprudence, its classical references are not inappropriate since the author draws heavily on the thought and wisdom of such ancients as Aristotle and Plato, Aurelius and Aquinas, to enrich his modern presentation.

The emphasis on the deep wellsprings and origins of justice exhibited by Professor Bodenheimer is not by any means confined to the past; it extends with reinforced understanding to the most pressing of modern problems, for example, the question of racial justice, or interracial relations. In our own era, the issue of racial justice has attained an overarching importance in the domestic politics of a number of nations and has also cast its shadow into the domain of international relations. As the author correctly points out, racial disturbances are inevitable when the measuring rods used by the dominant groups in society stand in irreconcilable opposition to those of disfavored minorities.

Justice is defined as the norms of right conduct which people observe toward each other, and as a necessary ingredient to a healthy society is considered in relation to various other concepts, such as ethical values, legality, morality, utility, and as a rational ideal. Throughout the work the Golden Rule is emphasized as the author closely associates justice with equal treatment, and the infraction of that principle constitutes injustice. He also points out the curious fact that men's emotions are more keenly aroused by acts of injustice than by the most careful administration of justice. Although much of the obvious is belabored in his discussion that law and justice are not necessarily coterminous, the author nevertheless considers the more timely question of disobedience to a repugnant law. He intimates that the answer to this problem lies in the broader field of ethics and morality.

Baffled by innumerable various definitions of justice, the author takes refuge in the pious hope that as knowledge and social experience progress divergent notions of justice will converge toward a considered unity, "unless events in the international arena should plunge humanity down into a new era of barbarism and ignorance."¹

The author takes a paternalistic view of government albeit along democratic and equalitarian lines. He nevertheless inveighs against the intrinsic immorality of the "superman philosophy" with its consequent mistreatment of underlings. In this connection he admits "inequality of personal ability" but insists there is a duty of society to provide work opportunities for all and, in fact equal opportunities for all. The author speaks of the basic rights to social security as being among the postulates of justice and dispels the argument that incapacity to find work is attributable to ineptitude and sloth. Unemployment, he asserts, should be

1. E. BODENHEIMER, *TREATISE ON JUSTICE* 114 (1967).

traced to general economic conditions. Continued intervention by the government in the economic sphere is advocated on the ground that this prevents abuses arising from avarice, and contributes to the greatest good for the most people.

As to the best form of government the author favors democracy, but has a lesson for our times in pointing out that democratic freedom may degenerate into anarchy if short-term goals prevail which destroy the moral stamina of society. He quotes Emil Brunner: "There are circumstances in which democracy can be the worst of all political orders, namely when the people are not ripe for it, or when social conditions are so disorganized that only a strong central will, a 'strong hand,' is capable of curbing anarchy latent or manifest in the body social."²

Political and social justice are concepts frequently not identical, with political justice having to do with the nature and scope of the powers it needs to support itself, and the latter dealing with the range of freedom it can at the same time allow its subjects. The author finds that a power structure which ignores its subjects' claims for justice cannot in the long run maintain itself, but at the same time gives a surprisingly timely warning for our present leaders: "A state which is powerless to fight disorder, civil strife and crime, to enforce the law, and to maintain its position in the international community becomes a caricature of a state."³ He quotes Hobbes with approval to the effect that the prime duty of a state is to maintain internal peace and order.⁴

An eloquent plea for the promotion of freedom is made by Professor Bodenheimer in his analysis that in such an atmosphere is created the highest potential of the human mind to advance ideas for the betterment of mankind.

Under the section heading "The Public Interest," Professor Bodenheimer confronts such blazing and controversial issues as group or ethnic defamation versus free speech, rights of private property versus open accommodations and housing laws. His views are worthy of close study in their application to present day problems with solutions as the objective.

Taking up the universal and age-old question of crime and punishment, he first probes criminal responsibility, even bringing in the dilemma of free will versus predetermination. Suffice it to say, Professor Bodenheimer is not especially strong in the field of causality as seen by modern science. He favors free will on the ground that "people feel accountable" and therefore upholds the punishment of criminals, while warning that

2. E. BRUNNER, *JUSTICE AND THE SOCIAL ORDER* 200 (1945).

3. E. BODENHEIMER, *supra* note 1, at 117.

4. *Id.* at 118.

there must be a proper relationship between the crime and its punishment, or conversely, between a virtuous action and its reward. He ignores, or does not know about, the predeterminationists' solution to the criminal's defense that he was forced to commit this crime because he has no free will—the answer that if the crime was inevitable the punishment is too. In fact, some predestination-oriented philosophers contend that if criminals were taught this doctrine it in itself would be sufficient cause for their reformation. He does have a word for some criminologists who want to smooth the pathway of the rapist and the burglar, quoting Goodhart to the effect, "A community which is too ready to forgive the wrongdoer may end by condoning the crime."⁵

Coming finally to the question of preserving the peace among the major nations, Professor Bodenheimer correctly sums up by showing that justice everywhere is menaced by the atomic threat, and that the dream of an ideal social order may have to be postponed for centuries. As the author correctly explains, if the pursuit of peace is not followed and men are told and believe that order based on justice and reason is an illusion, irrational behavior and chaos will increase in proportion to their delusionment.

Professor Bodenheimer pleads for the adoption of the Golden Rule in international politics, and explains that avoidance of future wars must become the foremost concern of modern statecraft. He makes a final plea for conscription for the conquest of nature to take the place of military conscription, as advocated by William James,⁶ and concludes that men seeking a rational order and interested in preserving civilization from total extinction must reconcile themselves to the probability that they will have to endure "the most severe trials and tribulations before a firm foundation can be laid for the reign of peace and justice throughout the world."⁷

*Harry M. Montgomery**

5. A.L. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 92-93 (1953).

6. W. JAMES, *ESSAYS ON FAITH AND MORALS* 323 (1943).

7. E. BODENHEIMER, *supra* note 1, at 256.

* Judge of the Superior Court of Pennsylvania