OIL EXPLOITATION IN OCCUPIED TERRITORY: SHARPENING THE FOCUS ON APPROPRIATE LEGAL STANDARDS

*Jordan J. Paust**

Despite the extended negotiations which culminated in the signing of the peace treaty between Egypt and Israel on March 26, 1979, far too little attention has been paid to the significant issues arising out of Israeli control of oil resources in occupied territories. Recent literature has not exhausted the debate nor, in my opinion, fully addressed the legal issues from policy and contextual orientations. Moreover, the legal ramifications of Israeli claims to these oil resources will likely be felt far beyond the Middle East, especially as future claimants seek to control resources of defeated peoples or in areas considered as "occupied." The United States Government and various oil companies have already become involved, and it is not unlikely that this pattern will be repeated as oil companies deal first with one government and then another concerning extraction and transnational sales.

This comment is intended to sharpen the present focus on these issues by addressing the writings of three legal scholars and offering further thought about appropriate international legal standards. A sharpened focus, it is hoped, will contribute to a fuller, richer exposition of relevant legal norms and an approach to a solution.

A. The Approach of Allan Gerson

In his comment on the Israeli extraction of oil in territory occupied by Israel,[1] Allan Gerson provides useful insight into a fairly complex problem concerning what might be termed the international law of property. It is somewhat surprising, however, to read the argument that "contemporary international law forbids exploitation . . . only where the practice is marked by wanton dissipation of . . . resources,"[2]

* Professor of Law, University of Houston, College of Law (Leave of Absence 1978-79, Fulbright Fellowship, University of Salzburg); A.B., J.D., California (Los Angeles); LL.M., Virginia; S.J.D. Candidate, Yale University.

1. Gerson, *Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute*, 71 AM. J. INT'L L. 725 (1977) [hereinafter cited as *Off-Shore Oil*].

2. *Id.* at 731; *Cf.* Gerson, *War, Conquered Territory, and Military Occupation in the*

especially when the author quotes a customary law originating in Hague Convention No. IV of 1907 which seems to refute such an assertion.[3] The Hague Convention language (in Article 55 of the Annex) is not in dispute; an occupying state "shall be regarded only as administrator and usufructuary . . . . It must safeguard the capital of [relevant] properties, and administer them in accordance with the rules of usufruct."[4]

Mr. Gerson's argument is apparently that a usufructuary[5] can freely utilize resources as long as there is no "wanton dissipation" of such. A better approach is to claim that the usufructuary has a right, perhaps, to the "reasonable" use of property (as might be expected, though hardly "consented to," by warring states and expected generally by the international community), but that the line to be drawn between permissible and impermissible use should relate more adequately to the recognized authority of the occupant as ("only") an administrator, usufructuary and one who safeguards. To allow a free use except in cases of "wanton dissipation" would seem to shift the legal focus on "administer," "usufruct," and "safeguard" to use for "some" purpose, use for profit, or use "as it sees fit."[6]

In view of relevant domestic property law (*i.e.*, the general principles of property law recognized by civilized states), this would seem no small extension of the freedom of a usufructuary to dissipate controlled resources.[7] According to the U.S. Department of State Memorandum of Law on this point,[8] the usufructuary's right to continue the operation

Contemporary International Legal System, 18 HARV. INT'L L.J. 525, 541 (1977) ("providing prudence is shown in preserving the corpus").

3. *Off-Shore Oil*, *supra* note 1, at 730.

4. Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539.

5. Usufructuary is defined in the civil law as "one who has the usufruct or right of enjoying anything in which he has no property." BLACK'S LAW DICTIONARY 1713 (4th ed. 1968).

6. Text writers on international law and prior state practice also stand against such a nearly unqualified use of enemy resources for domestic consumption or for profit. *See, e.g.*, GREENSPAN, THE MODERN LAW OF LAND WARFARE 288 (1959) (limited to what is usual or necessary); M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 812 (1961) (not exclusive or comprehensive competence; also mentioning "military necessities of the occupant"); II L. OPPENHEIM, INTERNATIONAL LAW 397, 400-401 (7th ed. H. Lauterpacht ed. 1952) (cannot sell or alienate; German violations in World War II); J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 697, 714 (1975)(excessive mining or waste impermissible); M. WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 576 (1968) (no right of sale or unqualified use); *see also* N.V. De Bataafsche Petroleum Maatschappli & Ors. v. The War Damage Comm'n, *reprinted in* 51 AM. J. INT'L L. 802 (1957).

7. *See, e.g.*, J. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 436-37 (2d ed. 1969); AMERICAN LAW OF PROPERTY §§ 20.1-20.6 (Casner ed. 1952); W. BURBY, REAL PROPERTY 33, 37-39 (3d ed. 1965).

8. U.S. Dep't of State, *Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez, reprinted in* 16 INT'L LEGAL MATERIALS 733 (1977) [hereinafter cited as U.S. Dep't of State *Memorandum*].

of mines and oil wells seems limited by a principle of reasonableness which might allow, for example, exploitation "at the previous rate" (*i.e.*, at a "reasonable rate").[9] Although exploitation at least technically constitutes waste, if it continues at the prior rate, such use is well within the contemplation of the relevant parties and will be recognized by the international community as a "reasonable" use under the circumstances.[10] Notwithstanding the fact that such an exploitation depletes "the corpus" or impairs "the capital of oil bearing land,"[11] a reasonable rate of extraction may still be permissible.[12]

There is an additional problem, however, concerning the purpose of the exploitation. According to the U.S. Memorandum, actual use of the resources must relate directly to the requirements of the occupying army and the needs of the local population.[13] By analogy, the removal of oil or minerals is privileged under general property norms if reasonably necessary to accomplish the purpose of the lease (*i.e.*, occupation).[14] A use merely for profit or general economic purposes, however, would be impermissible. Furthermore, to shift the standard from one allowing only a reasonable use for occupation purposes or local needs to one that permits any use short of "wanton dissipation" would seem to make the Geneva prohibition against extensive "appropriation of property, not justified by military necessity," meaningless—at least as far as the use of real property is concerned—since a military "necessity" for the use and exploitation of property would not have to be shown. The burden would effectively shift from the user's need to prove the necessity of a particular use to the sovereign's need to demonstrate the occupier's "wanton" or purposeless dissipation of the resources.

Another persistent problem concerns integrating the Geneva standard of "necessity" with the Hague standard of "reasonableness" regarding local needs and occupation requirements. If the needs of the occupying force, however, are reasonably necessary under the circumstances, both tests seem to be met (*i.e.*, the use would be reasonable with regard to necessary requirements).

These complexities in interpreting and applying international law could be dealt with authoritatively by the International Court of Jus-

9. *Id.* at 737-38, 740-41 (at normal or pre-existing levels).

10. *Id.* at 740-41 ("might be viewed as a standard established by the owner"). Acceptance by the community of a "reasonable" use, however, apparently satisfies Gerson's concern that rules "conform to reasonable expectations." *Off-Shore Oil, supra* note 1, at 730. The principle of reasonableness demonstrates what is expected.

11. U.S. Dep't of State *Memorandum, supra* note 8, at 740.

12. *Id.*

13. *Id.* at 744.

14. *See, e.g.*, W. BURBY, *supra* note 7.

tice. Egypt and Israel, as well as future claimants, could benefit from an internationally recognized legal determination of the relevant rights of an occupant. Egypt, on the one hand, could have its ownership claims heard by a court of law and might obtain a portion of the oil profits (to the extent that exploitation was beyond a reasonable rate or for a purpose not appropriately related to occupation requirements or local needs). Israel, on the other hand, could also have its claims heard by a court of law and might obtain legally recognized title to a portion of the oil extracted. In addition, Israel (unlike Iran and other states) could avoid costly, protracted litigation in numerous domestic courts over disputed title. Both Egypt and Israel would earn increased international respect as states so committed to the peaceful and legal resolution of disputes that each is willing to have the Court decide a particularly sensitive dispute, thereby substantially reinforcing the positive atmosphere created by the new peace treaty.

Indeed, peaceful litigation before the I.C.J. would seem particularly attractive considering that: (a) issues concerning the proper interpretation of a treaty and the allocation of a limited amount of money can be distinguished from the macro issues of war and peace,[15] (b) a judicial resolution of the dispute one way or another may well result in a no-loss situation overall for both, and (c) both states could reinforce their international reputations as peacemakers. It is even possible that a formal presentation of legal claims and counterclaims before the Court would contribute not to an entrenched adversarial stance but to a more cooperative exploration of the resolution of disputes outside of the courtroom. Conversely, a failure to resolve this dispute will clearly not help in the overall effort to maintain a permanent peace in the Middle East.

B. The Approach of Claggett and Johnson

After the printing of Mr. Gerson's comment, a second article on this subject, by Brice Claggett and Thomas Johnson, has been published which supports some of the arguments already proposed above.[16] For later investigation and research by litigants, practitioners and scholars, however, it may be more useful here to highlight points of

15. For example, if sovereignty over the "occupied" territory is disputed, a judgment could require the occupying country to act as a usufructuary by placing an amount of money equal to the value of any impermissible exploitation in trust for the rightful sovereign, thereby avoiding a formal determination of sovereignty. This remedy would be consistent with an occupying country's obligation as a usufructuary to safeguard the capital of properties.

16. Clagett & Johnson, *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?*, 72 AM. J. INT'L L. 558 (1978).

disagreement in approach among those who otherwise seem to agree. In my opinion, future consideration of approaches to inquiry, including consideration of relevant sources of law, is just as important as future consideration of appropriate legal standards.

In considering the authors' approach to the control of resources in occupied territories, it is difficult to understand why Claggett and Johnson place such an emphasis on the statement of Justice McNair, in the *South-West Africa* case,[17] that judges are bound to use municipal law only for "policies and principles" rather than for "rules."[18] The Justice's statement, as Claggett and Johnson conclude, is hardly relevant to the present question.[19] In addition to being overly broad and nearly meaningless in application, from a jurisprudential perspective, the statement ignores the proper function of a court of law.

It is helpful to consider two alternatives to the approach suggested by McNair's statement. First, the International Court of Justice could, under Article 38 (1) (c) of the Statute of the I.C.J., apply generally recognized principles (or "rules") of domestic property law as standards for judicial decision. The international law of property, such as it is, is substantially built upon such a foundation;[20] and, as Claggett and Johnson note, the Hague Convention is not clearly "self-contained" but implicitly borrows from the above-mentioned civil law concept of "usufruct."[21] Whether domestic law is directly relevant should more appropriately depend on the actual treaty, other legal policies at stake and the many features of context.[22]

Secondly, the authors' implication that the meaning of a treaty phrase must depend upon the possible meaning to dead negotiators is wrong. Surely the meaning of law must relate to presently shared legal expectations. Historic interpretations may be useful as an evidence of trends and currently relevant patterns of authority and control, but the past is not always an adequate guide to contemporary legal expectations nor to the current *opinio juris*.[23] Even the Vienna Convention on the Law of Treaties recognizes the import of subsequent agreement

17. International Status of South-West Africa, [1950] I.C.J. 128.

18. Clagett, *supra* note 16, at 566.

19. *Id.* at 567.

20. *See* R. SCHLESINGER, COMPARATIVE LAW 25-27 (2d ed. 1959); Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734 (1957).

21. Clagett, *supra* note 16, at 566.

22. *See, e.g.*, Paust, *The Concept of Norm: A Consideration of the Jurisprudential Views of Hart, Kelsen and McDougal-Lasswell*, 52 TEMPLE L.Q. 9 (1979); Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116, 148-49 (J. Alvarez, indiv. opinion).

23. For example, the historic instances utilized by Clagett and Johnson demonstrate an 1874 approach to our problem, which might be termed "the old Brussels consensus" - a then current consensus which subsequently disintegrated.

(consensus) and subsequent practice.[24] As Thomas Paine might add, what strikes a nerve is the "assumed authority of the dead."[25]

In conclusion, the generally recognized principles of domestic property law are just as relevant as other forms of generally shared legal expectations when interpreting Article 55 of the Annex to the Hague Convention. None of these principles permit the unrestricted use of resources in occupied territories nor allow the disregard of common interests and common expectations about reasonable rates of extraction and permissible purposes.[26]

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24. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27, *reprinted in* 8 INT'L LEGAL MATERIALS 679 (1969).

25. T. Paine, *The Rights of Man*, *reprinted in* S. HOOK, THE ESSENTIAL THOMAS PAINE 129 (1969). Paine adds: "The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man . . . ." *Id.* at 128.

26. For further discussion of the need for a broader and more policy-serving approach to the general question of resource control and allocation, *see also* I. Brownlie, *Loaves and Fishes: Access to Natural Resources and International Law* (1978) (inaugural lecture, London School of Economics and Political Science); Arsanjani, *International Control Over the Pricing of Resources: A Configurative Approach*, 3 YALE STUDIES IN WORLD PUB. ORDER 251 (1977); Paust, *International Law and Economic Coercion: "Force," The Oil Weapon and Effects Upon Prices*, 3 YALE STUDIES IN WORLD PUB. ORDER 213 (1976); Paust & Blaustein, *The Arab Oil Weapon: A Reply and Reaffirmation of Illegality*, 15 COLUM. J. TRANS. L. 57 (1976), *reprinted in* ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER 205 (R. Lillich ed. 1976); and THE ARAB OIL WEAPON 134 (J. Paust & A. Blaustein eds. 1977).