KLEPTOCRACY BUYOUTS?:
A RESPONSE TO PROFESSORS BLOCHER AND GULATI

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Joseph Blocher and Mitu Gulati’s article, *Transferable Sovereignty: Lessons from the History of the Congo Free State*, is a highly enjoyable read on many levels. For one, it is lucidly written and extremely well researched. The authors present the purchase and sale of the Congo Free State by Leopold II in a compelling, highly contextualized and intriguing way—as fascinating as a great novel. One cannot overestimate this quality of the text, as the understanding of Sub-Saharan Africa in the Western world has hinged to an important extent on storytelling. The principal example for this is the Congo Free State itself under Leopold’s rule, whose terror was immortalized by Joseph Conrad’s *Heart of Darkness*. Other examples include Uwe Timm’s *Morenga*; another extremely well-researched novel about German Southwest Africa. Published in 1978, *Morenga* popularized the postcolonial turn in thinking about the colonial past. Moreover, no historical book suggests the brutality of Rwanda’s genocide as much as Gil Courtemanche’s *A Sunday at the Pool in Kigali*. Cinematographic works like *Nowhere in Africa*, *The Constant Gardener*, and, for better or worse, *The White Masai*, have also framed the Western view of the Cradle of Mankind.

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5. See NOWHERE IN AFRICA (Constantin Film 2001).
6. See THE CONSTANT GARDENER (Focus Features 2005).
7. See THE WHITE MASAI (Constantin Film 2005).
But the principal strength of the article lies in its highly innovative yet provocative thesis: sovereignty is for sale, and that might not be a bad thing. Depending on the circumstances—and the authors carefully draft their argument in this way, paying ample respect to the right to self-determination—the sale of territory might ease international tensions and provide solutions to conflict stalemates and endless, unproductive confrontation. This idea deserves serious consideration rather than unreflected moral outrage. Indeed, the authors have good reasons to emphasize the close proximity of sovereignty and property in colonial contexts. This phenomenon was by no means limited to the Congo Free State. The British and Dutch colonies resulted, to an important extent, from the trade posts of the British and Dutch East India Companies. The Germans tried to copy this model, although with significantly less success. One cannot overlook the economic interests supporting colonialism, especially of the imperialist period, without idealizing European global expansion. As the international legal concept of sovereignty essentially took its contemporary shape during that period, one should not overly romanticize it or overlook its business aspects.

Nevertheless, I have a number of concerns about the viability of operationalizing the economic underpinnings of sovereignty and exchanging territory—understood as an economic factor—for peace, whether it be voluntary or compulsory. Principally, Mitu Gulati and Joseph Blocher’s chosen example resembles a state-funded bailout, not a market transaction. Also, one should be careful when equating territory with property in colonial contexts.

Rather than swapping debt for territory, I believe that the authors’ proposed framework may be used to buy out countries from their everlasting kleptocrats. Such transactions would effectively de commodify territory.

I. A Market for Territorial Sovereignty?

A first set of concerns relates to the alleged market for property. Blocher and Gulati observe two market operations: the purchase and

8. See Blocher & Gulati, supra note 1, at 1220.
9. See id. at 1253-58.
10. See, e.g., Erin Blakemore, How the East India Company Became the World’s Most Powerful Business, NATL GEOGRAPHIC (Sept. 6, 2019), https://www.nationalgeographic.com/culture/topics/reference/british-east-india-tradingcompany-most-powerful-business [https://perma.cc/79KC-EMGE] (discussing how the British East India Company had an army twice the size of Britain’s standing army and was responsible for almost half of all British trade).
the subsequent sale of the Congo Free State by Leopold II.\textsuperscript{11} They conclude that there was a market for sovereign territory at the time, quite in the economic sense of the word, given that colonizers like Leopold were, first and foremost, interested in the economic exploitation of their possessions.\textsuperscript{12}

My doubts about the existence of a market for territorial sovereignty derive from the observation that the Congo Free State resembles a different, all too familiar pattern in colonial history: a public bailout of unsustainable private business risks. Although private entrepreneurs were often the avant-garde of colonial conquest, they did not shy back from asking for public support once the cost of establishing an effective territorial administration (and protecting it against native resistance) grew too high. When Belgium purchased the Congo Free State in 1908, the price of rubber was moving downwards precipitously. After a temporary reversal and a last peak in 1911, it collapsed in the years before the First World War.\textsuperscript{13} New competitors in Latin America and Southeast Asia, mostly under the control of British firms, increased the production to an extent that made it impossible for Leopold II to sustain his operations. Belgium ended up repaying the Congo Free State’s whopping debt of 215.5 million francs.\textsuperscript{14}

Thus, though one should not romanticize the noneconomic motives of colonial conquest, one should equally not overestimate the economic motives of states pressed into public bailout. They were often yielding to international pressure or simply seeking to avoid national embarrassment. In this respect, one could describe the sale of the Congo Free State as a deaccommodation of territory. Although it was once held in the King’s private capacity, the 1908 sale effectively brought the Congo under the control of a sovereign state like almost all territories of the time. One should therefore avoid reading too much into the sovereign character of the Congo under Leopold II.

In this respect, the “Lockean proviso” that the authors cite needs to be corrected for the case at hand.\textsuperscript{15} Here, territorial acquisition (“original appropriation,” as Marxists would put it) does not consist of

\begin{itemize}
\item \textsuperscript{11} Id. at 1226-47.
\item \textsuperscript{12} See id. at 1228.
\item \textsuperscript{14} Adam Hochschild, \textit{King Leopold’s Ghost: A Story of Greed, Terror and Heroism in Colonial Africa} 259 (1998).
\item \textsuperscript{15} See Blocher & Gulati, supra note 1, at 1230-31.
\end{itemize}
putting labor into land. Instead, it consists of rallying government support behind one’s entrepreneurial activities to reap its benefits while the government covers the losses. All this had at times very little to do with market transactions but instead concerned prestige, geopolitical strategy, cronyism, and illegitimate favors. The Congo sale is no exception. The same holds true for other “trades” in territorial sovereignty, even some that lack a shift from private to public risk bearing. For instance, Germany and Britain’s 1890 territorial swap of Heligoland and Zanzibar followed geostrategic and security rationales, but not the economic interests of Germany.\(^\text{16}\) Of course, one can always reinterpret such motives as economic, but only at the price of collapsing property and sovereignty even at the conceptual level.

**II. The Complexity of Territorial Relationships**

Another concern is of a more methodological kind. I wonder to what extent one can infer general assumptions about territorial transactions from the history of the Congo Free State. As the authors concede, it represents an exceptional case in that it showed a unique concentration of private and public power in one single person.\(^\text{17}\)

In other colonial settings, we find much more complex patterns of individual and collective interests and property relations. For lack of a better overview of colonial history, I shall refer to the case of Southwest Africa as an example. Uwe Timm’s novel, *Morenga*, is highly enlightening in this respect.\(^\text{18}\) The *dramatis personae*, partly historical figures, feature vastly different relationships to other persons, groups, animals, and land. Gottschalk, the main character, is a military veterinarian from rural Germany. His focus on animals allows the author to overcome anthropocentrism and reveals transformations in the relationships between humans, animals, and landscape resulting from colonial invasion. The German leadership, by contrast, does its best to ignore the natural conditions and mostly engages in static warfare—an insane idea in a landscape where water is a rare resource. German troops come from all echelons of society and are driven by diverse motives including boredom, the desire to escape poverty and suppression, and career advancement. Traders selling huge quantities of booze compete with missionaries for spiritual

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\(^{17}\) Blocher & Gulati, *supra* note 1, at 1259.

control over native villages. Jacobus Morenga, in contrast, has consigned himself to a deterritorialized, guerilla existence.

One should not confuse a novel, even a well-researched one, with historical reality, but Morenga serves as a highly illustrative reminder that the relationship between land and people is infinitely more complex than questions of property ownership (or ownership of sovereignty, which the authors for good reason appear to treat synonymously). That complexity can be felt in contemporary debates about land reform, in Namibia as much as in any other country in Southern Africa. An important root cause of these quarrels often seems to reside in the imposition of a Western concept of absolute sovereignty/property on precolonial societies.\textsuperscript{19} For this precise reason, basing a peace plan on the sovereignty/property issue alone seems ambitious, especially in a postcolonial context.

III. LIMITS TO FORCED SALES

Although the right to self-determination gives a right to independence and secessions only in limited circumstances, the authors observe that the reverse is not true. In other words, there is no right to remain part of a country.\textsuperscript{20}

I have some doubts. These doubts relate to the internal, rather than the external, dimension of the right to self-determination. Though the latter originated as a colonial idea, providing a pretext for colonial conquest and the validity of protection agreements\textsuperscript{21} and has since remained of limited value, the internal dimension of the right to self-determination took a different turn, reflected in constitutions around the world rather than in international law.

Whereas the American and French revolutions championed the idea of popular sovereignty, by the middle of the twentieth century, it had become clear that mere status equality would not suffice to generate social integration. For this reason, constitutions of the period became instruments of social integration. Parliaments were charged with the task of organizing class compromise, while constitutional adjudication would protect the rules of the game and, increasingly, the


\textsuperscript{20} Blocher & Gulati, supra note 1, at 1259-60.

\textsuperscript{21} See generally Joseph Massad, Against Self-Determination, 9 HUMANITY 161 (2018) (describing how colonists have used self-determination as a “right to conquest”).
rights of minorities. The principal examples for this type of integrative constitution include the 1917 Mexican Constitution (still reflecting an elite rather than a class compromise), the 1919 Weimar Constitution, the 1948 Italian Constitution, many of the interwar constitutions in Central and Eastern Europe, and, arguably, President Franklin Delano Roosevelt’s Four Freedoms. Such integrative constitutions promote a strong sense of solidarity. To cede territory for money is inimical to this idea. In fact, this notion of solidarity is premised on the idea of the whole country sticking together in good and bad times. According to this logic, a country could cede part of its territory only when circumstances prevail that would give a state the right to secede.

Moreover, states selling parts of their territories (or those forcing them to do so) would hardly escape the international human rights obligations toward the population on that territory. In fact, case law from the European Court of Human Rights (“ECHR”) on the extraterritorial application of human rights confirms that states might be liable for human rights violations even if they lack executive control over territory. For example, the court held Moldova responsible for human rights violations that occurred in the Russia-backed separatist region of Transnistria. Also, if the ECHR prohibits extraditing people to a state where their human rights are at risk, it would surely prohibit the sale of territory producing the same effect.

Human rights also set limits to sales of property (not sovereignty). This is of immense relevance for the so-called land grab: the purchase of vast amounts of agricultural land by foreign investors in developing states. Due to the inexistence of land registries or the ignorance of traditional land use and land rights, such transactions might seriously infringe the rights of the population affected, specifically of indigenous groups.

IV. RISKS INHERENT IN DEBT-TERRITORY SWAPS

Arguably, Blocher and Gulati’s most controversial example is the proposed debt-territory swap of Crimea. Of course, in reality, the

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conflict is certainly not about human rights abuses committed by Ukraine on Crimea but is instead the site of a larger geopolitical dispute between European and Russian spheres of influence. And it is unthinkable that transferring territory from a struggling democracy to a fully-fledged, belligerent autocracy would advance human rights in any way. However, for the sake of argument, I will accept the authors’ proposition that human rights abuses justify a forced sale and the netting out of the purchasing price with Ukraine’s preexisting debt.26

There are a number of risks associated with this position. First, this would discourage more ambitious efforts to restructure sovereign debt. In fact, instead of striving for a restructuring, creditor states might find it more beneficial to force the country to sell its territory. The Eurozone crisis might serve as a warning. The suggestion that Greece could sell some of its islands in order to cover up for a crisis caused by the flawed architecture of the Eurozone and its structural economic imbalances infuriated many Greeks.27 As a result, creditors would avoid responsibility for taking excessive risks.

This raises a second issue. Debt–territory swaps might endanger international peace. Russia’s invasion recalls gunboat diplomacy from over one hundred years ago; a kind of economic warfare that was outlawed for good reasons. Countries might find it more convenient to invade debtor states, following Russia’s example, rather than seek debt repayment. Worse still, it might encourage predatory lending—lending with the sole purpose of overtaking part of the debtor state’s territory. Sovereign debt would again become a facilitator of war. While Immanuel Kant saw debtor states as aggressors,28 this proposal risks causing creditor states to consider waging war.

The third risk is that debt–territory swaps might encourage other deals of a similar type, unrelated to debt, which might discourage more sustainable efforts to create peace. The example of Palestine springs to mind. Jared Kushner’s proposal for Middle Eastern peace appears to consist of paying Palestinians (or at least their leadership) hush money...

27. See Simon Shuster, Greece May Have to Sell Islands and Ruins Under Its Bailout Deal, TIME (July 13, 2015), https://time.com/3956017/greece-bailout-selloff [https://perma.cc/NTQ3-GZEW] (“It’s basically saying sell the memory of your ancestors, sell your history just so we can get something commercial for it.”).
for losing their territory, identity, and hopes. It recalls dangerous attempts to justify colonialism through economic arrangements.

V. KLEPTOCRACY BUYOUTS?

But what would be a viable proposal for thinking soberly and openly about territorial transactions? I see one particular situation where the “economic solution” might come as an actual relief to the population. It does not necessarily require large-scale human rights violations, although that might often be the case. I am thinking of long-time dictators whose regime could best be characterized as a kleptocracy. Typically, they rule countries where the economy and politics are indistinct. These rulers cling to power for decades for fear of losing access to crucial economic resources for themselves and for their cronies or clans.

In such a situation, bailing out a country from the fangs of dictatorship might constitute the most efficient and effective solution. It would definitely be more peaceful than the endless cycle of election fraud, protests, international inaction, civil conflict, and ensuing escalation of violence and economic decline. The United Nations, or for that matter, the International Criminal Court, might be useful for preventing outbursts of violence or cleaning up the legal mess afterwards, but its record on actually removing recalcitrant dictator-entrepreneurs from office after the expiry of their terms remains unimpressive.

Such a proposal surely raises many questions. What is the price of peace? Who should pay for the bailout? Who should distribute the funds and supervise the implementation of the bailout plan? Where should the cronies be allowed to settle? Nevertheless, there are precedents for many of these aspects. The 2008 Kenyan coalition government allegedly cost bilateral donors in the range of $300 million. Yet, looking at the current situation in Venezuela, such a price tag might not be too high considering available alternatives.


In conclusion, I believe that there is indeed scope for trading sovereign control for money, although in cases that are fundamentally different from those Joseph Blocher and Mitu Gulati envisage. They would decommodify the respective territory, but money should buy freedom, not the reverse.