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CONFISCATION IN ENGLISH PRIVATE INTERNATIONAL LAW†

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It is an unfortunate fact of this 20th century of ours that situations involving the unilateral confiscation of the property of foreign nationals by the government in whose territory the property is situated are of increasing frequency, as recent events in Egypt, Iran, and Indonesia only too clearly show. When such confiscation is followed or accompanied by adequate compensation to the expropriated owners, no problems arise. When compensation is refused, or is inadequate, the owner is forced to seek redress elsewhere. He may turn to his government for diplomatic intervention, but in the absence of the voluntary submission of the dispute by the confiscating state to the jurisdiction of the International Court of Justice or some other international tribunal, its protests are likely to meet with as little response as those of its aggrieved national. The owner, in those circumstances, may feel himself engaged in a losing battle, if not a hopeless one; but sometimes and as a last resort he may decide to enlist the aid of his own municipal courts in an effort to vindicate his rights and to uphold the rule of law. This possibility arises when confiscated goods — let us assume that they are of a moveable nature — have been sold by the foreign government and have now been brought by the buyer into the expropriated owner's country. How far, if at all, will the courts assist him?

It is the concern of this paper to endeavour to answer this question. But since an English court has never, so far as we can discover, been confronted with a clear case involving the assumed set of facts, it may be convenient to use a recent colonial decision, *The Anglo-Iranian Oil Co. Ltd. v. Jaffrate (The Rose Mary)*,[1] as a handy peg on which to hang the tale.

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[1][1953] 1 W.L.R. 246.

The facts in this case were that after its confiscation of the property of The Anglo-Iranian Oil Company at Abadan, the Iranian government sold some of the oil stored at Abadan to an Italian company. The ship "The Rose Mary" was carrying a cargo of this oil when, as the learned judge of the Supreme Court of Aden found, it put in of its own volition to the harbour of Aden. The Anglo-Iranian Oil Company thereupon issued a writ in *detinue* claiming delivery up to them of the oil, or alternatively a declaration that it was their property.

The plaintiffs claimed the property in, or the immediate right to possession of, the oil by virtue of an agreement between them and the government of Iran concluded on April 29, 1933, by the terms of which they were granted an exclusive right, within the territory of a specified concession, to search for and extract petroleum for a period ending in 1993. Article 21 of the agreement provided that it should not be altered by any legislation of the Iranian government, and article 22 stipulated that any disputes concerning the agreement were to be referred to arbitration.

The charterers admitted that the oil carried in their ship came from the plaintiffs' plant at Abadan, but they relied, by way of their principal defence, on the Iranian laws of March and May, 1951, which purported to nationalize and expropriate the property vested in the plaintiffs by the concession of 1933.

The learned judge of the Supreme Court of Aden found in favour of The Anglo-Iranian Oil Company. He based his decision, in so far as this paper is concerned, on the syllogism propounded to him by counsel for the Company, Sir Hartley Shawcross, which was to the following effect: (I) international law is part of the law of England; (II) confiscation of the property of an alien subject without "adequate, prompt and effective" compensation is contrary to public international law; hence follows the conclusion (III) that since no compensation had been paid to the Company, a British court will not recognize the act of expropriation by the Iranian government. The learned judge also distinguished the leading case of *Luther v. Sagor*,[2] followed in *Princess Paley Olga v. Weisz*,[3] on the ground that the property there involved belonged to a subject of the confiscating government's own country. He also apparently adopted the plaintiffs' contention (IV) that, apart from any question of its validity under international law, a British court will not "give effect" to the Iranian expropriation laws on the ground that they were "contrary to (the court's) own public policy or essential principles of morality." Each of these four points raises difficult questions of law and will now have to be more fully examined.

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[2][1921] 3 K.B. 532. The full style of cause is very much longer, but the abbreviated form used above is in common use and will therefore be followed throughout in this paper.

[3][1929] 1 K.B. 718.

I

The learned judge quoted[4] from the judgment of the Privy Council in *Chung Chi Cheung v. Rex*,[5] in which Lord Atkin stated:

> "The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."[6]

The principle that public international law is part of the law of England is, of course, of much greater antiquity. Its first enunciation is usually attributed to Lord Talbot speaking in *Barbuit's Case*[7] in 1737, and adopted by Lord Mansfield in *Triquet v. Bath*[8] in 1764. Granted that the English courts have applied principles of the law of nations in many subsequent decisions, can it be said, however, that they will apply international law to its full extent and on every possible occasion? The early judgments apparently held so. Lord Talbot is reported as saying in *Barbuit's Case* that "the law of nations, to its full extent, was part of the law of England."[9] In a similar vein Blackstone wrote that "the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land."[10] At the beginning of this century Westlake, in a celebrated essay,[11] sought to sum up the position as follows:

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[4][1953] 1 W.L.R. 246, at p. 253.

[5][1939] A.C. 160.

[6]*Ibid.*, at p. 168.

[7]Cases. T. Talbot 281; 25 E.R. 777. Lord Mansfield in *Triquet v. Bath* (see next footnote) refers to this case *sub. nom. Buvot v. Barbut*, but as *Barbuit's Case* in *Heathfield v. Chilton*, 4 Burr. 2015. It is reported as *Barbuit's Case* in Cases. T. Talbot.

[8]3 Burr. 1478; 97 E.R. 936.

[9]3 Burr. 1478, at pp. 1480-81.

[10]Commentaries, Bk. IV, ch. V. para. 67.

[11](1906), 22 Law. Quar. Rev. 14: Is International Law a Part of the Law of England? Westlake also considers the question (at p. 16) why problems of international law should ever be relevant before an English court, since international law is primarily the law between nations and municipal courts are not competent to resolve disputes between states, and he shows that many questions could not be solved satisfactorily without recourse to the law of nations, e.g., duties and obligations of neutrals, prize jurisdiction, jurisdiction over territorial waters, etc. But his explanation is not entirely satisfactory. If State *A* fails to observe the minimum standards of international law and expropriates the property of a subject of State *B*, the wrong (if any) is committed against State *B*. Only *B* has the right to complain about it, since individuals have no status in customary international law: they are regarded as mere objects. Therefore, a municipal court which allows the aggrieved individual to set up the breach of international law by State *A* is, strictly speaking, doing more than merely applying international law. (Cf. Article 34(1) of the Statute of the International Court of Justice).

"The English courts," he wrote, "must enforce rights given by international law as well as those given by the law of the land in its narrower sense, so far as they fall within their jurisdiction in respect of parties or places, subject to the rules that the king cannot divest or modify private rights by treaty (with the possible exception of treaties of peace or treaties equivalent to those of peace), and that the courts cannot question acts of state (or, in the present state of the authorities, draw consequences from them against the Crown)".[12] Professor (now judge) Lauterpacht, in a more recent article,[13] agrees with Westlake's views.

Nevertheless, notwithstanding the long line of authorities which support the proposition that international law is part of the law of England, there are substantial reasons for doubting whether the doctrine is really as all-embracing as would at first sight appear. Even its most ardent proponents admit of some limitations to its application by the courts. The courts will not, thus, enforce a rule of international law which is inconsistent with rules "enacted by Statutes or finally declared by their tribunals",[14] or enforce a treaty or

Suppose in the instant case the British government had acquiesced in the Iranian confiscation. Would the Aden Court in such circumstances still have been willing to entertain the Company's claim? Surely not. Must it be said then that the individual is impliedly presenting his claim with his government's consent, or, *quaere*, even as its agent? Counsel for the plaintiff in *Carr v. Fracis Times & Co.* [1902] A.C. 176 seems to have taken the position, however, that international law confers a personal right on the injured subject of which even his own government cannot divest him. Per Lord Lindley, *ibid.*, at page 186: "Mr. Walton contended that the Sultan (of Muscat) had no jurisdiction to give any one leave to search and take arms out of a British ship passing through his territorial waters in time of peace, and that the seizure, *although sanctioned by the governments of Muscat, Russia and the United Kingdom,* was unlawful by the law of nations, and ought to be so treated by an English court of law." (Italics added). His Lordship appears to have dismissed the argument on the wider ground that no such rule of international law as was alleged existed. Even Professor Lauterpacht who argues that because, under the doctrine of adoption, municipal courts allow individuals to sue in their own name that therefore "the individual as the ultimate unit of international law . . . is recognized to a subtantial degree" admits that "such independence (of the right to sue) is conceded by the State and is revocable at its instance": (1939), XXV Trans. Grotius Soc. 51, at p. 64. And see also (1947), 63 Law Quar. Rev. 438, at pp. 440-1.

[12] *Ibid.*, at p. 26. The cases discussed by Westlake make it clear that he was only considering English acts of state.

[13] (1939), XXV Trans. Grotius Soc. 51.

[14] *Chung Chi Cheung v. Rex* [1939] A.C. 160, at p. 168. What had Lord Atkin in mind in referring to 'rules finally declared by their tribunals'? Was he merely thinking of the conventional exceptions enumerated above or was he also predicating the possibility of the courts adding to those exceptions in the future? Cf. his observations in *Commercial & Estates Co. v. The Board of Trade* [1925] 1 K.B. 271, at 295: "International law as such can confer no rights cognizable in the municipal Courts. It is only in so far as the rules of international law are recognized as included

international agreement which has not been ratified by Parliament and which divests or modifies private rights.[15] They will not also question acts of state.[16] Of these exceptions Dr. Lauterpacht states that "they do not affect the nature and the significance of the doctrine of adoption in other spheres."[17] With respect, it may be doubted whether this is so. Once it is conceded that the English courts enforce rules of international law not because of their adherence to any natural law theory of the supremacy of international law over municipal law, or because an act of Parliament requires them to do so, but only because they are prompted by a desire to promote comity between nations or because there is no other applicable law, then it would always be open to them to refuse to follow an otherwise applicable rule of international law where for good and sufficient reason they deem it inexpedient to do so.

In fact, this appears to be the rationale behind the rule of what an eminent legal scholar has aptly termed "the sacrosanctity of foreign acts of state."[18] That rule in its most extreme form says that whenever the acts of another sovereign or his officials are material to the solution of a particular problem the validity of those acts, whether under international law or even the law of the sovereign's own country, may not be put in issue before an Anglo-American court. This doctrine of immunity *ratione materiae* seems to have received its genesis in the well known nineteenth century decision of the House of Lords in the *Duke of Brunswick v. The King of Hanover.*[19] There the Duke of Brunswick sought to impugn certain acts of his uncle who was a trustee over his property, and who, in addition to being King of Hanover, was also a peer in his own right of the United Kingdom. The Lord Chancellor, in rejecting the right of the court to question the acts of the King, said:

> "The whole question seems to me to turn upon this, . . . that a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgement upon an act of a Sovereign, effected by virtue

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in the rules of municipal law that they are allowed in the municipal Courts to give rise to rights or obligations", as to which Dr. Lauterpacht comments that "if he (Lord Atkin) had meant that every rule of International Law, in order to be applied by Courts, must have previously, in some other case, have received the judicial imprimatur — then it may be difficult to assent to the proposition." (XXV Trans. Grotius Soc., at p. 83).

[15]Westlake, 22 Law Quar. Rev. 1, at p. 15. For a recent application of this exception, see *Republic of Italy v Hambros Bank* [1950] 1 All E.R. 430.

[16]E.g., *Johnstone v Pedlar* [1921] 2 A.C. 262; Halsbury (2nd ed'n), Vol. 26, p. 252. The exception referred to by Westlake is as to English acts of state. The position with respect to foreign acts of state is discussed below.

[17] XXV Trans. Grotius Soc. 51, at p. 77.

[18]F. A. Mann, The Sacrosanctity of the Foreign Act of State, 59 Law Quar. Rev. 42 & 155.

[19](1848), 2 H.L.C. 1; 9 E.R. 993.

> of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign."[20]

In *Johnstone v. Pedlar*,[21] an act of state case, Lord Sumner said, in what was admittedly only a dictum, that "municipal courts do not take it upon themselves to review the dealings of State with State or of Sovereign with Sovereign. They do not control the acts of a foreign State done within its own territory, in the execution of sovereign powers, so as to criticize their legality or to require their justification."[22] But the most striking application of the doctrine has been given in the United States, where on more than one occasion the courts have recognized a foreign act of state notwithstanding that the act in question might have been in violation of the rules of international law. In the oft cited case of *Oetjen v. Central Leather Co.*,[23] for example, the Supreme Court of the United States said, "To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of

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[20] 9 E.R. at pp. 998-9. Dr. Mann is no doubt right is maintaining (59 Law Quar. Rev. at p. 48) that this case does not incontrovertably establish the doctrine of immunity *ratione materiae*, since the primary question with which both the Master of the Rolls and the House of Lords was concerned was the personal immunity of the King of Hanover. In so far as the latter considered the wrongful acts with which the King was being charged it was only to show that they were done in his sovereign capacity and not as a private individual. On the other hand, defendant's counsel, in their argument, did clearly distinguish between the King's personal immunity and his immunity *ratione materiae*. Their fourth objection to the court's jurisdiction was based on the ground that "it appears by the bill that the matters therein complained of are not the subject of municipal jurisdiction, being either matters of state or political transactions, which cannot be dealt with in the Courts of this country." (9 E.R. 996, at p. 998). See also pleadings before Langdale M.R. in 49 E.R. 724, at p. 730. And in the Circuit Court of Appeals in the American case of *Underhill v Hernandez* (1895), 65 Fed. 577. Judge Wallace contended for the wider interpretation of the House of Lords' decision. He said: "The decision was put, not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign effected by virtue of his sovereign authority abroad." (*Ibid.*, at p. 580).

[21] [1921] 2 A.C. 262.

[22] *Ibid.*, at p. 290. Cf. Halsbury (2nd ed'n), Vol. 26, pp. 248-9: "The transactions of independent states with each other are governed by other laws than those which municipal Courts administer; such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make. Hence, the Courts of this country, whether of law or equity, have no jurisdiction to adjudge upon acts committed by one sovereign state towards another in the exercise of its sovereign power . . . "; Dicey, *Conflict of Laws*, (6th ed'n), p. 158: "As regards acts of state authorized by foreign Governments, the courts in England would doubtless apply the same principle (as are applied to English acts of state)", Pollock on Torts (15th ed'n), p. 82: "If we may generalize from the doctrine of our own courts, the result would seem to be that an act done by the authority, previous or subsequent, of the government of a sovereign state in the exercise of *de facto* sovereignty is not examinable at all in the courts of justice of any other state."

[23] (1918), 246 U.S. 297.

another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.' "[24] The facts of this case and other American cases are more fully considered below.[25]

As to the scope of this rule of the immunity of foreign sovereign acts there is a great deal of uncertainty, and the rule itself has been subjected to some very trenchant criticism,[26] but that it is now well-established and has been repeatedly applied in American jurisprudence to facts similar to those that were in issue in *The Rose Mary* there can be little doubt. The views of Dr. Lauterpacht in this connection have undergone a marked change. In the 5th edition of Oppenheim on *International Law* (1937), it is stated, apparently as a principle of international law, that:

> "the courts of one State must not be allowed to question the validity or legality of the official acts of another sovereign state or the officially avowed acts of its agents, at any rate so far as those acts purport to take effect within the sphere of the latter State's own jurisdiction. If the need to question any such act should arise, it should be done through the diplomatic channel."[27]

But in the 7th edition of this authoritative work, the carlier view has been modified appreciably, and the position is now stated in the following terms:

> "A fourth consequence of equality — or independence — of States is that the courts of one State do not, as a rule, question the validity or legality of the official acts of another sovereign State or the official or officially avowed acts of its agents, at any rate in so far as those acts purport to take effect within the sphere of the latter State's own jurisdiction. It is not clear whether the rule in question can properly be regarded as a rule of Public International Law or whether it belongs to the province of Private International Law. . . . *There is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by International Law.*"[28]

If, as is now suggested, the recognition of foreign sovereign acts is not affirmatively prescribed by public international law, how can the prevailing practice be reconciled with the rule that international law is part of the law of the land, at any rate in those cases where the foreign act is repugnant to a rule of the law of nations? It must surely be, then, that a further exception, beyond those generally conceded, must be added to the incorporation theory of international law — an exception which is so far reaching that to an individual aggrieved by a foreign act of state it must almost seem to nullify the major premise. Looking at the matter from another point of view, with the possible exception of the cases that are discussed below,[29] there does not

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[24]*Ibid.*, at p. 304.

[25]See *post*, p. 14.

[26]See note (18) above; also Dr. K. Lipstein in (1949), XXXV Trans. Grotius Soc. 157 et seq.

[27]Vol. I, p. 224.

[28]Vol. I, p. 241. (Italics added). The footnote cites, *inter alia*, *Underhill v Hernandez* (1897), 168 U.S. 250 and *Luther v Sagor* [1921] 3 K. B. 532.

[29]*Wolff v Oxholm* (1817), 6 M. & S. 92; *In re Fried Krupp. A. G.* [1917] 2 Ch. 188; *Republic of Peru v Dreyfus Bros.*, 78 Ch. D. 348.

appear to be any reported decision[30] in which an English court has refused to recognize a foreign official act on the ground that it was illegal by international law. Indeed, a perusal of the leading cases on questions of public international law will tend to show that the overwhelming majority of them were personal immunity cases[31] in which a foreign state stood *to benefit* by the application of the rules of international customary law, so that there was no ostensible reason why the courts should refuse to adopt and apply them as part of the law of the land.[32]

II.

In support of the proposition that confiscation of the property of an alien without "prompt, adequate and effective compensation" is in violation of the

[30]Yet there must frequently have been cases where a breach of international law was involved, but counsel seem generally to prefer to rest their case on other grounds. So, for example, in *Bank of Ethiopia v National Bank of Egypt* [1937] Ch. 513, which was a case where the Court refused to allow the claim of the Bank acting on behalf of the exiled Emperor of Ethiopia on the grounds that H.M. government had recognized the Italian invaders as the *de facto* government of Ethiopia, it could have been argued that since Italy had committed an act of aggression contrary to the Covenant of the League of Nations she could not validly be recognized as the new sovereign of Ethiopia. It is safe to predict, however, that had such a plea been raised it would have been rejected, because (a) the court would not look behind H.M. recognition of the Italian regime as being an act of state; (b) that if there was a breach of international law the United Kingdom had condoned it by recognizing the new government; and (c) that, in any event, the invasion was a foreign act of state into the legality of which the courts will not inquire.

[31]All states recognize the personal immunity of a sovereign and his accredited representatives, though even here, in view of the far flung activities of the modern state, there is considerable agitation to restrict the immunity to certain well recognized types. On the other hand, the doctrine that foreign official acts may not be inquired into, even though no personal submission of the sovereign or his property to the jurisdiction of the local court is involved, is not nearly as widely accepted: see Mann, *supra,* footnote (18).

[32]Cf. the submission of the Attorney-General in *West Rand Central Gold Mining Co. v The King* [1905] 2 K. B. 391, at p. 398:. "The cases cited for the Crown establish beyond all doubt that international law is not part of the common law of England, and that the claims of the suppliants cannot be enforced by petition of right. Decisions as to ambassadors and territorial waters are beside the question; they are *ex necessitate* cases, for neither ambassadors' privileges nor territorial waters could be said to exist if they were not recognized and enforced in Courts of law." The argument is of interest because it shows to what extent the first law officer of the realm thought the rules of international law had been adopted as part of the common law, although the first part of his proposition must be deemed to have been rejected by Lord Alverstone. It matters perhaps little, as a question of practical effect, whether one says that international law is part of the law of England but subject to exceptions, or whether it is said that international law is not part of the law of England but that the courts will, in suitable circumstances, adopt certain rules of the law of nations. It would, however, probably affect the burden of proof.

rules of international law, Campbell J. relied[33] on a number of well known international arbitrations,[34] several foreign municipal decisions of doubtful value, and, in so far as English precedents were available, on Lord Ellenborough's decision in *Wolff v. Oxholm*,[35] which was followed by Younger J. (as he then was) in *In re Fried Krupp, A. G.*[36] In addition, counsel for The Anglo-Iranian Oil Company also referred to the dicta of the Permanent Court of International Justice in the *Chorzow Factory* case.[37] The English decisions, since they were relied upon by the learned judge as proving the exception to the rule in *Luther v. Sagor*,[38] will be more conveniently dealt with when we come to discuss that case. Suffice it to say at this stage that on this particular point *Wolff v. Oxholm* and *In re Fried Krupp, A. G.* can no longer be regarded as good law in the light of the Court of Appeal decision in *In re Ferdinand, Ex Tsar of Bulgaria*.[39] There is the further consideration that the method adopted by Lord Ellenborough in *Wolff v. Oxholm* for ascertaining the relevant rules of international law, namely by consulting the writings of jurists, without reference to state practice, is now obsolete and discredited. It was, in fact, his ignoring the English state practice with regard to the confiscation of enemy property in time of war that led the Court of Appeal, in effect, to overrule his decision in *In Re Ferdinand*.[40]

Reverting, however, to the more authoritative expositions of the rules of international law on the confiscation of foreign property, let it be admitted at once that it is still a widely held view that such confiscations are illegal

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[33][1953] 1 W.L.R. 254-8. It is perhaps unfortunate that in this part of his discussion the learned judge fails to distinguish between foreign laws that were held to be contrary to English public policy (e.g., *Kaufman v Gerson* [1904] 1 K.B. 591) and foreign laws that were not recognized because they were said to be in violation of international law, e.g., *Wolff v Oxholm* (1817), 6 M. & S. 92. The two problems are of course quite distinct. A foreign law may be contrary to international law but not necessarily repugnant to English public policy, and vice versa.

[34]*The Norwegian Claims Case* (1922), Hague Court Reports (2nd Series), p. 39; *The De Sabla Claim* (1933), Annual Digest of Int. Law, 1933-34, p. 241.

[35](1817), 6 M. & S. 92; 105 E.R. 1177.

[36][1917] 2 Ch. 188.

[37]P.C.I.J., Series A, No. 17 (1928).

[38][1921] 3 K.B. 532.

[39][1921] 1 Ch. 107.

[40]See Article 38 of the Statute of the International Court of Justice for the hierarchy of the sources of international law there set forth. *Quaere*, is an English judge bound by the previous decision of a higher English court on a question of international law? If questions of international law in an English court are questions of fact, (as is asserted by some), then the answer should be 'no', but if they are questions of law (as is asserted by Dr. Lauterpacht in XXV Trans. Grotius Soc. at p. 59), then presumeably the usual doctrine of *stare decisis* applies. The cases seem to show that English courts do recognize the binding character of previous decisions, although it has never been expressly decided whether international law must be specifically pleaded or not. See also Brierly's observations in 51 Law Quar. Rev. at pp. 33-4.

if not accompanied by compensation, although there is no direct decision on the point by the highest international tribunal, apart from the few dicta of the Permanent Court of International Justice already referred to. Where it is difficult to agree with Campbell J., however, is in the impression he creates that the rules of international law on the subject are settled beyond all reasonable doubt.[41] It would be beyond the scope of this paper to do more than to touch lightly the surface of a topic that has been so frequently discussed,[42] but it may perhaps be permissible to draw attention to two factors which, it is believed, throw doubt on the continuing validity of the rule prohibiting confiscation, at least in the wider form in which the rule is generally stated. The first of these factors is, as Sir John Fischer-William pointed out in a notable article in 1925,[43] that all the disputes concerning the confiscation of alien property that have been submitted to international arbitration involved cases in which it was only foreign property that was being expropriated, and where, in effect, there was discrimination against such property in favour of nationally-owned property. In the opinion of this learned writer, therefore, apart from any questions of international policy — and these are weighty in themselves and have, so far as we know, never been refuted — state practice warrants the conclusion that confiscation of foreign-owned property without compensation is illegal only where nationally owned property is exempt from the confiscatory measures. The position is otherwise, however, where the confiscating state has granted a concession to the foreign national and has expressly bound itself not to revoke it.

The second factor is that the economic doctrines of *laissez-faire* on which the rules of international law relating to the inviolability of alien property were evolved in the 19th century no longer obtain today, and both in the inter-war period and especially since the end of World War II there has developed a general tendency, by no means confined to countries now behind the Iron Curtain, to nationalize foreign property without paying its owners adequate compensation.[44] It has been estimated that, in the case of British

[41]His Lordship concludes his judgment with the observation that "Dicey, Oppenheim, Cheshire, Fachiri and Hackworth endorse the view that expropriation without compensation is contrary to international law," and he continues "I can find no opinion to the contrary, though the defendants have referred me to Martin Wolff." [1953] 1 W.L.R. 246, at p. 259. With respect, Dicey, Cheshire and Wolff are writers on private and not public international law, and, so far from endorsing the view which the learned judge attributes to them, with the possible exception of Dicey, they adopt the opposite position.

[42]For some of the voluminous literature on the subject, see G. Schwarzenberger, *Manual of International Law,* (1st ed'n), Study Outlines to ch. III, pp. 179-180, and to ch. VI, pp. 266-8.

[43]9 B.Y.I.L. p. 1.

[44]G. Schwarzenberger, *Current Legal Problems 1952,* p. 295; N.R. Doman, Post-war Nationalisation of Foreign Property in Europe, (1948), 48 Col. Law Rev. 1125; A. Drucker, The Nationalisation of U. N. Property in Europe, XXXVI Trans. Grotius Soc. 75.

overseas investments that have been confiscated, compensation ranged from one to two-thirds of their true value.[45] This post-war phenomenon does, therefore, seriously raise the question whether the old rules in this branch of international law have not now been materially modified, if they are not altogether obsolete. The creation in international law of a custom of binding force between nations does not require the unanimous consent of every state; it suffices that there is a general consensus of opinion among states in its favour. Conversely, an international custom may fall into desuetude if it is consistently disregarded by at least a representative number of nations.[46] It is happily not our task here to decide whether that stage has yet been reached in the international customary law relating to the confiscation of alien property, nor to conjecture how an international court would reconcile the conflicting interests at stake. Neither, it is respectfully submitted, was it necessary for the learned judge of the Supreme Court of Aden to answer the question. For the purpose of resolving the issue raised before him, it is believed, it would have been sufficient for Campbell J. to have refused to recognize the Iranian confiscatory law on the narrow ground that by the terms of its agreement with The Anglo-Iranian Oil Company of 1933 the Iranian government had specifically promised not to revoke the Company's concession before 1993, and had also failed to submit its dispute with the Company to arbitration as the agreement required it to do. In both respects, therefore, the Iranian government was guilty of a serious breach of good faith.

III.

As the next step in his reasoning, Campbell, J. had to overcome the formidable hurdle presented by the well known decision of the English Court of Appeal in *Luther v. Sagor*.[47] In that case the government of the Soviet

[45]Schwarzenberger, *ibid.*, at p. 306. The United Kingdom, for example, signed compensation agreements with the Argentine, Mexico ,and Uruguay during the period 1947/48; with Poland in 1948; with Czechoslovakia and Yugoslavia in 1949; and with France in 1951.

[46]Dr. Schwarzenberger maintains (*ibid*, p. 309) that nothing that has happened in the inter-war period or since has abrogated the sanctity of foreign property under international customary law. But that view, with respect, is difficult to reconcile with his own recital of the frequent violations of the rule and the changed political thinking about the status of private property in modern society, and ignores the fact that international law, as much as any municipal system of law, is in a constant state of flux and must adapt itself to new social values. Cf. Sir Samuel Evans in *"The Odessa"* [1915] P. 52, at pp. 61-2: "In the domain of international law, in particular, there is room for the extension of old doctrines or the development of new principles, where there is, or is even likely to be, a general acceptance of such by civilized nations. Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted or cast aside."

[47][1921] 3 K.B. 532.

Union had confiscated the plaintiff's mill in Russia and certain manufactured wood in it. The plaintiff was a company incorporated in Russia under Russian law.[48] Some of the wood was subsequently sold by the Soviet government to the defendants, a firm doing business in England, who imported it into the United Kingdom. The plaintiffs challenged the exterritorial validity of the Soviet decree and claimed that they were the true owners of the wood. Two main points were at issue, but only the second concerns us here. The plaintiffs argued that the Soviet confiscatory decree should not be recognized in England because it was immoral and repugnant to British principles of justice. The argument was rejected by all three members of the Court. The reasoning of the Lord Justices was not identical, but basically they all appeared to agree on the proposition that the Soviet decree must be accepted as conclusive and binding in an English Court.

Bankes, L. J. said:

> "The question before the Court is not one in which the assistance of the Court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in *Hope v. Hope*[48a] and *Kaufman v. Gerson.*[48b] The question before the Court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold under an f.o.b. contract for export to this country. The Court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think that any authority can be produced to support the contention."[49]

He added that:

> "Even if it was open to the Courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the Courts could treat this particular decree otherwise than as the expression by the de facto government of a civilized country of a policy which it considered to be in the best interests of that country."[50]

The first part of the learned judge's reasoning really begs the question because the plaintiffs did not deny the general principle of private international law that the *lex situs* governs the transfer of title in goods. What they were contending was that on grounds of public policy the *lex situs* should be ignored in the circumstances prevailing here. Bankes, L. J.'s assertion, therefore, of the finality of the *lex situs* may have been based either on the "immunity

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[48]The Report states (*ibid.*, at p. 532) that the plaintiffs were a company incorporated in 1898 in the Empire of Russia, but Roche J. in the court below points out ([1921] 1 K.B. at p. 456) that Venesta, Ltd., a British import company, were by far the largest shareholders in A.M. Luther & Co. There is a conflict of opinion, reflected in a varying state practice, as to the nationality of a company, the majority of whose shareholders are not nationals of the country of incorporation. See J. Merwyn Jones, Claims on Behalf of Nationals Who are Shareholders in Foreign Companies, (1949), 26 B.Y.I.L. 225.

[48a](1857), 8 D.M. & G. 731.

[48b][1904] 1 K.B. 591.

[49]*Ibid.*, at p. 545.

[50]*Ibid.*, at p. 546.

rule", or on the inconvenience and the uncertainty in international trade which would flow from a *bona fide* purchaser not being able to rely on the *lex situs*. It is impossible to tell which of these two grounds he had in mind. Warrington, L. J. stated:

> "It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country: "Every sovereign state is bound to respect the independence of every other sovereign state, and the Courts of one country will not sit in judgment on the acts of the Government of another done within its own territory": per Clarke J. delivering the judgment of the Supreme Court of the United States of America in *Oetjen v. Central Leather Co.*[51] The existence of this principle of law is implicit in the speeches of both Lord Macnaghten and Lord Shaw in *Lecouturier v. Rey*,[52] and is not disputed by counsel for the respondents in the present case."[53]

The third member of the court, Lord Justice Scrutton, referred to the principle of the immunity of foreign states from local jurisdiction as enunciated in *The Parlement Belge*[54] and other cases, and then continued in language that is strikingly similar to that employed by Lord Denning in the recent House of Lords decision in *Rahimtoola v. Nizam of Hyderabad*:[55]

> "What the Court cannot do directly it cannot in my view do indirectly. If it could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from that Government by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign state. Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the Courts could investigate the title without infringing the comity of nations. But it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will."[56]

Then, somewhat illogically, the learned judge goes on to consider the plaintiff's argument that the English courts should refuse to recognize the Soviet legislation and titles derived under it as confiscatory and unjust, and he expresses the opinion that:

> "Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax and a large proportion of their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right."[57]

Scutton L. J.'s judgment is puzzling. Once he decided that the immunity principle applied, was not that the end of the matter? Why did it "remain(s)" to consider the argument that the Soviet decree was repugnant to English

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[51]246 U.S. 297, at p. 303.

[52][1910] A.C. 262

[53][1921] 3 K.B. 532, at pp. 548-9.

[54](1880), 5 P.D. 197.

[55][1957] 3 All E.R. 441, at pp. 463-4.

[56][1921] 3 K.B. 532, at pp. 555-6.

[57]*Ibid.*, at p. 559.

public policy? Did not the immunity principle preclude this very enquiry, or was the Lord Justice suggesting that there might be circumstances when such an enquiry might be possible and legitimate? The answer possibly is that he was merely endeavouring to reconcile the general principle with the reported cases cited by him at page 558. If so, he overlooked the fact that they were decisions in which it was sought to *enforce* in England, a right acquired under foreign law, as distinct from merely recognizing it.

It is quite true, as Campbell J. argued in the instant case, that in *Luther v. Sagor* the English Court of Appeal was confronted with a situation where the Soviet revolutionary government had confiscated the property of one of its own nationals, but it is by no means clear that the judges there would have arrived at a different conclusion if the aggrieved party had not owed allegiance to the Soviet Union. All the available evidence supports the contrary view. Counsel for the defendants in *Luther v. Sagor,* relied upon two well known American authorities in support of his contention that the courts of one country will not sit in judgement on the acts of another done within its own territory: *Underhill v. Hernandez*[58] and *Oetjen v. Central Leather Co.*[59]

In the first of these cases the plaintiff brought an action in the United States against the defendant, a Mexican insurrectionist military commander, who had ordered the plaintiff's detention while he was resident in Mexico in the course of one of the perennial revolutions in that country. The plaintiff was an American national. The insurrectionist government was subsequently recognized by the United States, and according to the *lex loci commissi,* i.e. Mexican law, the defendant's action was justified. Although the report itself never mentions the word "international law", it must, however, have been Underhill's contention that he was still entitled to damages because Mexican law could not excuse a violation of the minimum standards of international law. The Supreme Court of the United States, however, rejected his claim, and Fuller C. J. in a short judgement that has since been often relied upon in many subsequent American decisions said:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by the sovereign powers as between themselves."[60]

In the second case, *Oetjen v. Central Leather Co.,* goods belonging to an American national were seized in Mexico by a revolutionary force, which was subsequently recognized by the United States as the *de jure* government of Mexico. The assignees from the former owner claimed title in the goods against the defendants, who had purchased them from the revolutionary government. The plaintiff contended that the seizure was illegal because it

[58](1897), 168 U.S. 250.
[59](1918), 246 U.S. 297.
[60]168 U.S. 250, at p. 252.

violated the Fourth Hague Convention Respecting Laws and Customs of War on Land. The question therefore arose, did the fact that the Mexican law violated an international convention exclude the application of what was otherwise admitted to be the *lex rei sitae* governing the transmission of the goods, viz. Mexican law? The Supreme Court held that the Hague Convention IV did not apply to civil wars, but preferred in any case to rest its decision on the wider ground already explained in *Underhill's* case. The court said:

> "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of the court . . . . as . . . to the cases . . . . in which claims for damages were based upon acts done in a foreign country; for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.' "[61]

These decisions have been repeatedly followed in subsequent American cases.[62] In a third Supreme Court decision, *Ricaud v. American Metal Co. Ltd.*,[63] also decided in 1918, the illegality of the seizure of the plaintiff's property under international law was directly in issue. The facts in that case were very similar to those in *Oetjen's* case, except that the property had been assigned to an American national before its confiscation by the Mexican authorities. The Court, however, was unimpressed by this difference in the nationality of the owners at the crucial date and rejected the plaintiff's contention in the following words:

> "The fact that the title to the property in controversy may have been in an American citizen who was not in or a resident of Mexico at the time it was seized for military purposes by the legitimate government of Mexico does not affect the rule of law that the act within its own boundaries of one sovereign state cannot become the subject of re-examination and modification in the courts of another. Such action, when shown to have been taken, becomes, as we have said, a rule of decision for the courts of this country."[64]

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[61] 246 U.S. 297, at pp. 303-4.

[62] *Terrazas v Holmes* (1925), 115 Tex. 32; 275 S.W. 392; Annual Digest 1925-6, Case No. 43; *Terrazas v Donahue* (1925), 115 Tex. 46; 275 S.W. 396; *Monte Blanco Real Estate Corp. v Wolvin Line* (1920), 147 La. 563; 85 So. 242; *O'Neill v Central Leather Co.* (1915), 94 Atl. 789; aff'd (1918), 246 U.S. 297; *Wulfsohn v Russian Socialist Fed. Soviet Rep.* (1923), 234 N.Y. 372; 138 N.E. 24; *Salimoff v Standard Oil Co.* (1933), 262 N.Y. 220; *Dougherty v Equitable Life Assce Socy* (1933), 266 N.Y. 71; Annual Digest 1933/34, Case No. 28; *Holzer v Deutsche Reichsbahn-Gesellschaft* (1938), 277 N.Y. 474; 14 N.E. (2nd) 798; Cheatham et al., *Casebook on the Conflict of Laws,* (3rd ed'n), p. 355. For the facts of these cases, see Edward D. Re, *Foreign Confiscations* (1951), ch. VII.

[63] (1918), 246 U.S. 304.

[64] *Ibid.*, at p. 310. Cf. Prof. Re's conclusion as to the effect of the American decisions (*op. cit.*, at p. 169): "The 'rule of decision' principle prevents a review of the foreign act of seizure regardless of the nationality of the owner. The principle does not bow or bend in relation to the nationality of its potential victim."

In *Luther v. Sagor,* Bankes and Scrutton, LJJ. referred to *Underhill's* and *Oetjen's* cases with approval in so far as they were concerned with the past acts of a *de facto* government, whereas Lord Justice Warrington went further and adopted the judgment of Clarke J. in *Oetjen's* case in its entirety, prefacing his judgement with the observation that "it is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country."[65] In *Princess Paley Olga v. Weisz,*[66] in which similar acts of confiscation by the Soviet regime were in question, and in which the Court of Appeal followed its previous decision in *Luther v. Sagor,* both Scrutton and Sankey LJJ. quoted extensively from *Oetjen's* case. It would have been sufficient, it may be thought, for the purposes of the issue before the Court if their Lordships had confined themselves to reading only those extracts from the Supreme Court decision which related to the effect of recognition on the past acts of a revolutionary government before its recognition, but they went further, and in each case their quotations include a reference to the general principle re-stated in *Oetjen's* case that "every sovereign State is bound to respect the independance of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of another done within its own territory."[67] It would seem, therefore, that they regarded the retroactive effect given to the acts of a foreign revolutionary government as but an application of the general principle that foreign acts of state must not be questioned. Lord Justice Sankey, in effect, says as much in the concluding words of his judgment: "In these circumstances, in my view, the Princess was dispossessed of this property by an act of state behind which our Courts will not go."[68] On the other hand, it is only proper to add that the third member of the Court in *Paley Olga's* case read the act-of-state rule more restrictively. In Russell J.'s opinion the court would not inquire "into the legality of acts done by a foreign Government against *its own subjects* in respect of property situate in its own territory."[69]

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[65][1921] 3 K.B. 532, at p. 548.

[66][1929] 1 K.B. 718.

[67][1929] 1 K.B. 718 at p. 725 (Scrutton L. J.) & p. 729 (Warrington L.J.). Scrutton L. J. observes at p. 725: "This Court acted on the principles laid down in the above cases in *A.M. Luther Co. v James Sagor & Co.,*" the "above cases" being *Underhill, Oetjen,* and *Ricaud.* He also states on p. 728: "The American case of *Oetjen v Central Leather Co.* which was mentioned with approval in the Court of Appeal in *A.M. Luther Co. v James Sagor & Co.* states the American, which in my view is the same as the English, law in such circumstances."

[68]*Ibid.,* at p. 730.

[69]*Ibid.,* at p. 736 (Italics added). Unfortunately Russell J. does not elaborate on his opinion, and so it is impossible to tell whether he was consciously drawing a distinction between nationals of the confiscating state and non-nationals, or whether he was simply adverting to the particular facts at bar.

Writers on the conflict of laws have placed the widest interpretation on the scope of the decision in *Luther v. Sagor*. Dr. Cheshire states that:

> "The English courts recognize without hesitation that the ownership of property is conclusively and finally determined by the terms of the foreign decree of expropriation, if the property is situated within the jurisdiction of the sovereign at the time of the decree, notwithstanding that it is later brought to England and is still there at the time of action. . . . . "

And he adds that:

> "It is immaterial that the property previously belonged to a British subject."[70]

Martin Wolff is of the same opinion. He writes that:

> "In so far as the confiscation decree affects property situate within the territory of the confiscating state its effect is the transfer of the title to the state, and this has to be respected everywhere, even if the confiscated things did not belong to a national of that state."[71]

Unfortunately, however, neither of these learned authors gives any reasons for his opinion and neither quotes any authority apart from *Luther v. Sagor*. Only Dr. Lipstein considers the American cases, and he maintains that the rule in *Luther v. Sagor* reproduces in general terms the specific principles which were developed by the Supreme Court of the United States, the third of which is that:

> "If the domestic rules of conflict of laws refer to the law of a foreign country, the Court cannot examine whether the law of the foreign country conflicts with international law."[72]

Dicey, on the other hand, is unhappy with the decision and comments that:

> "It may well be that the House of Lords will at some future date reconsider the decision in *Princess Paley Olga v. Weisz*, in the light of international law and foreign practice in the matter of confiscations."[73]

Dr. Mann recognizes the existence of some kind of "rule of decision" principle but is critical of it, and in particular he favours the non-recognition of foreign acts of confiscation on the grounds of public policy.[74] It is perhaps surprising

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[70] *Private International Law* (4th ed'n), p. 135.

[71] *Private International Law* (1st ed'n), pp. 535-6.

[72] (1949), XXXV Trans. Grotius Soc. 157, at p. 187.

[73] *Conflict of Laws* (6th ed'n), p. 157, and see also p. 563. It is difficult to reconcile the learned specialist editor's disapproval of the rule in *Luther v Sagor* with his subsequent comment that "as regards acts of State authorized by foreign Governments, the courts in England would doubtless apply the same principle", i.e., of immunity from judicial review as they apply to English acts of state (*op. cit.* p. 158), unless "acts of State" is given a very restrictive meaning here. In so far as the practice of continental countries in matters of foreign confiscations is concerned, although far from unanimous, it seems on the whole to coincide with the Anglo-American practice. See G.A. van Hecke, (1951), 4 Int. Law Quar. 345, at p. 356; Beitzke, *Enteignung im Internazionalen Privat-Recht, in Festschrift fur Raape* (1948), p. 93 et seq.

[74] 59 Law Quar. Rev. 155, at pp. 168-171. Surely Dr. Mann is mistaken in thinking that the New York court refused to recognize the Russian legislation in *Dougherty v Equitable Life Assce Socy* (266 N.Y. 71)? That was the decision of the trial judge, but he was overruled on appeal.

that none of these writers considers the rule that international law is part of the law of England, and, indeed, the views of Cheshire, Lipstein and Martin Wolff would be irreconcilable with that rule unless it were true to say that there is an exception to it in the case of foreign acts of state.

Having satisfied himself, as he thought, that *Luther v. Sagor* could be distinguished from the facts before him, Campbell J. then relied on Lord Ellenborough's decision in *Wolff v. Oxholm,*[75] which was followed a hundred years later by Younger, J. in *In Re Fried Krupp,*[76] to prove his proposition that a British court will not recognize the confiscation of the property of a British national situated abroad. The facts in *Wolff v. Oxholm,* as stated in the head-note to the Report, were as follows:

> "An ordinance made by the Government of Denmark pending hostilities with Great Britain, whereby all ships, goods, money, ... belonging to English subjects were declared to be sequestrated and detained . . .; in consequence of which, a suit then depending in the Danish Court for recovering a debt due from a Danish to a British subject was not further prosecuted, and the debt was afterwards paid by the Danish subject, at the rate specified by the ordinance, to commissioners appointed in virtue of the ordinance to receive payment . . . . was held to be no answer to an action against the Danish subject . . . in this country . . . ."[77]

The head-note also states that the decision was arrived at because the ordinance "not being conformable to the usage of nations, was held to be void," but it may be questioned whether that was the true *ratio decidendi.* What the Chief Justice actually said was this:

> "If this ordinance is to be considered merely as a penal law, it is clear that the Courts of this country ought not to take notice of it, because no country regards the penal laws of another: *Folliott v. Ogden,* I. H. Black 135. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and what can be seized by virtue of their authority: Lord Loughborough's judgment in *Folliott v. Ogden.*"[78]

From this passage it is practically impossible to tell what Lord Ellenborough thought was the situs of the debt, a most important question, as we shall see. Neither do his references to the old case of *Folliott v. Ogden*[79] afford any assistance, because it is even more difficult to deduce any single principle from that decision than it is from *Oxholm's* case. In *Folliott v. Ogden* the plaintiff sued in England on a bond executed by the defendant in New York and apparently payable there; then came the American revolution and while the plaintiff was still living in New York all his property was declared to be

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[75](1817), 6 M. & S. 92; 105 E.R. 1177.

[76][1917] 2 Ch. 188.

[77]105 E.R. 1177. It may be noted in passing that it is usual for treaties of peace to contain provisions dealing with the property of former enemy aliens that has been impounded by the contracting parties. For an early example of such provisions being given effect to in Chancery, see *Weymberg v Touch* (1669), 22 E.R. 724.

[78]105 E.R. 1177, at p. 1180.

[79]1 H. Bl. 123; 126 E.R. .75 (Common Pleas); 3 T.R. 726; 100 E.R. 825 (King's Bench).

forfeited by an act of attainder of the New York legislature. All the judges, however, were agreed that that did not prevent the plaintiff from bringing his action in England, although their reasons for disregarding the confiscatory decree differ greatly. In the Court of Common Pleas Lord Loughborough gave as his reason the fact that it was sought to give extra-territorial effect to the decree, and he enunciated the principle, quoted by Lord Ellenborough in the passage above, that:

> "The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized of by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be effected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend."[80]

It is not clear why the learned judge thought it was sought to give the penal law extra-territorial effect, since, as counsel pointed out, the contract was made and was to be performed in New York,[81] and the act of attainder did no more than to vest the right of action accruing under the bond in the people of New York, but it is possible that Lord Ellenborough was influenced by the fact that the plaintiff was still in actual possession of the bond itself. On appeal the King's Bench upheld the decision, but on different grounds. Lord Kenyon took the view that since the penal law was passed at a time when the colonies were in rebellion against the mother country it must be regarded, on constitutional grounds, as void *ab initio*.[82] Buller J., on the other hand, would uphold the judgment of the Court of Common Pleas on the quite different ground that "the penal laws of one country *cannot be taken notice of* in another." He continues:

> "Then apply that principle to the present case: this is an action on a bond, to which the defendant has pleaded that by the penal laws of another country the property of the plaintiff in the bond has been divested (sic) out of him: but this Court cannot take notice of that defence; and then all the pleadings are are a nullity and consequently the action remains unanswered."[83]

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[80]126 E.R. 75, at p. 82.

[81]Cf. Maugham J. *In re Russian Bank for Foreign Trade* [1933] Ch. 745, at p. 767 (followed by Romer J. in *Frankfurther v W. L. Exner, Ltd.* [1947] Ch. 629): "If the debt — (that is to say, the petitioner's debt) — was primarily recoverable in London, I am of opinon that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable." And in *Employers' Liability Assce Corp. v Sedgwick Collins & Co.* [1926] 1 K.B. 1, at p. 15 Sargant L. J. said in the Court of Appeal: "Effective as such (confiscatory) legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here." See also Martin Wolff, *op. cit.*, pp. 552-3.

[82]100 E.R. 825, at p. 829.

[83]*Ibid.*, at pp. 829-30. Italics added.

What was meant here by the phrase "cannot be taken notice of"? Was Buller J. conscious of any difference between *recognizing* a foreign penal law that has already been executed within the boundaries of the confiscating country and *enforcing* it in another jurisdiction? Did he consider the situs of the debt to be in New York or in England, or was it immaterial from his point of view, and, if so, did he intend to lay down a broader principle than Lord Loughborough attempted to do?[84]

There being this apparent difference between Lord Loughborough's and Buller J.'s view of the law it becomes equally difficult to determine how Lord Ellenborough construed it, since he appears to adopt both their judgments. If he deemed the debt to be situated at the place of the creditor's residence, that is in England, then presumably he favoured Lord Loughborough's view and what is also the accepted principle today, that foreign penal laws will not be *enforced* in England,[85] although the modern rule, generally speaking, is that a debt is situated at the place of residence of the debtor; if, on the other hand, Lord Ellenborough considered the situs of the debt to be in Denmark then he must have accepted Buller J.'s interpretation of the law. But whichever view he adopted it is at least clear that the Chief Justice thought the Danish ordinance was contrary to English public policy. Why then was it necessary for him to deal with the further point that it was also contrary to the law of nations? The reason appears from the following passage in his judgment:

> "But, it was contended, that this ordinance was a proceeding founded upon and conformable to the law of nations, and that as the defendant paid the debt to the persons appointed by the ordinance to receive the confiscated debts, he has a good discharge as to the debt itself according to the law of nations."[86]

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[84]Of the other members of the court, Ashhurst J. (at p. 829) seems to adopt Lord Kenyon's approach, while Grose J. appears to rest his judgment on both Lord Kenyon's and Buller J's views. He says (at page 830): "It has been correctly stated by my brother Buller, that the penal laws of one country *cannot affect the laws and rights of citizens of another.* Then if we were to determine that the plaintiff should not recover on this bond, we must say that the treaty of independence was retrospective, and that it had the effect of declaring that the property of the subject of America resident in this country was forfeited by an Act, which at the time it was passed . . . was an Act of Treason." The words in italics were not those used by Buller J. It must of course be borne in mind in reading both *Folliott's* and *Wolff's* case that notions about the conflict of laws were still very rudimentary at the beginning of the 19th century and no series of connected principles governing even the most elementary branches of the subject had yet been evolved. Cf. Cheshire, *op. cit.*, (4th ed'n), p. 34: "We can affirm without exaggeration that to cite a decision upon private international law of 150 years ago is little more helpful than to search for the law of landlord and tenant in the medieval reports of the Common Pleas. In fact we can go further and say that a decision no more than seventy or eighty years old is suspect."

[85]e.g., *Lecouturier v Rey* [1910] A.C. 262; *The Jupiter* (No. 3) [1927] P. 122; *Re Russian Bank for Foreign Trade* [1933] 1 Ch. 745; *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 K.B. 140; *Frankfurther v W. L. Exner, Ltd.* [1947] Ch. 629; *Novello & Co. v Hinricksen Edition* [1951] 1 All E.R. 779.

[86]105 E.R. 1177, at p. 1180.

Lord Ellenborough then examines this claim and arrives at the conclusion that international law does not permit the confiscation of enemy property in time of war. As already mentioned, the Court of Appeal in *In Re Ferdinand, Ex Tsar of Bulgaria*[87] must be taken to have overruled this aspect of his judgment. But the point that is sought to be made here is that in *Wolff v. Oxholm* the rules of international law were apparently invoked *not to invalidate,* as was done in the *The Rose Mary,* a foreign law that would otherwise be applicable, but *to validate* a foreign law that would otherwise not be applicable; not applicable, that is, because Lord Ellenborough apparently held the view that any foreign penal law was not cognizable by an English court *eo nomine.*

It must be admitted, however, that this is not the *ratio decidendi* that Younger, J. deduced from the case when he was confronted with a similar situation in *In Re Fried Krupp, A. G.*[88] Here a German ordinance of 1914 forbade the transmission of funds to creditors in Great Britain. Although Younger J. regarded German law as the proper law of the contract he refused to recognize the German decree, giving as the second of his reasons for this refusal that:

> "this ordinance, with its marked bias in favour of German nationals as against British subjects, can, in my opinion, create in this country no disability upon a person against whom its provisions are directed, and the language of Lord Ellenborough, in *Wolff v. Oxholm,* may, with the necessary modifications, justly be applied to it . . . as being one which is not conformable to the usage of nations."[89]

When, however, it was decided in *In Re Ferdinand*[90] that there was no such usage among nations as alleged, Younger L. J. (as he had meanwhile become), sought to justify his earlier decision on the wider ground that even if confiscation in such circumstances was not prohibited by international law, still, "it (His Majesty's exercise of the right of forfeiture of the property of enemy aliens) might well be regarded as a penal law of which no notice would be taken in the Courts of another country."[91] This observation, of course, ignores the vital distinction, to which we have already adverted, between recognizing a foreign penal law and giving effect to it in another country. Failure to observe this distinction is responsible for the difficulty of deducing the exact *ratio decidendi* in *Folliott v. Ogden* and *Wolff v. Oxholm,* but its relevancy can now scarcely be doubted in the light of *Luther v. Sagor* and later decisions.[92]

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[87][1921] 1 Ch. 107.
[88][1917] 2 Ch. 188.
[89]*Ibid.,* at pp. 193-4.
[90][1921] 1 Ch. 107.
[91]*Ibid.,* at p. 144.
[92]The learned specialist editors of the 6th edition of Dicey are also not agreed as to the ground of decision in *Ogden and Oxholm.* At pp. 17-18, under General Principles No. 2, and at p. 152, under Rule 22, these cases are cited by Professor

Plaintiff's counsel in *The Rose Mary* also appears to have relied on the case of *Republic of Peru v. Dreyfus Bros.*[93] The facts in this case were somewhat involved, but must be stated in order to put Kay J.'s judgment in its proper perspective. Dreyfus Bros. had agreed to purchase a quantity of guano from the government of Peru. Difficulties arose as to the state of accounts between the parties, but before they could be resolved the government was overthrown in a civil war and replaced by the dictatorship of one Pierola. Pierola and Dreyfus Bros. agreed on a sum said to be owing to the bank, and in settlement of the claim the dictator ordered certain bills of lading for cargoes of guano to be endorsed to the bank. The latter, however, had to institute legal proceedings against another company before it could obtain hold of the cargoes. The English Court found in its favour and ordered the proceeds from the sale of the guano to be paid into court. At this point, however, Pierola resigned and the original government was reconstituted. It repudiated Pierola's settlement with Dreyfus Bros., and now moved for an injunction to prevent the bank from taking the money out of court. The motion was refused by Kay, J. It will thus be seen that at the material time, that is, the repudiation by the legitimate government of Pierola's agreement with the French concern, the *res litigiosa*, the money, was not subject to the Peruvian government's territorial jurisdiction. It was situated in England, and its disposition therefore governed by English law as being the *lex situs*. It comes to this, therefore, that the Peruvian government was trying to give an exterritorial effect to this repudiatory decree and asking the English court to enforce it.

Wortley and Dr. Lipstein respectively, in conjunction with *Hüntingdon v Atrill* [1893] A.C. 150, at pp. 153-4; *Lecouturier v Rey* [1910] A.C. 262; and *Banco de Vizcaya v Don Alfonso* [1935] 1 K.B. 140, in support of the proposition that an English court will not *enforce* a foreign penal law. On the other hand, on p. 14, Dr. Lipstein cites *Oxholm* for the proposition that "legislative measures during war against private rights may be refused *recognition* in England;" while, on page 468, Mr. Welsh refers to *Ogden* as an example of a foreign *penal status* which will not be recognized in England. Finally, Professor Kahn-Freund suggests, at pp. 606 and 652, on the bases of the authority of both cases that "the principle of public policy . . . may . . . lead to the enforcement of a contract in an English court, although under the law which governs the contract, it is void." Thus Wortley and Welsh appear to construe *Ogden* and *Oxholm* on the basis that it was sought to enforce the penal laws ex-territorially (whence they must deem the debts to have been situated in England), whereas Kahn-Freund places the situs in the territory of the confiscating state. Lipstein, somewhat inconsistently appears to attribute both an English and a foreign situs to the debts. In *Luther v Sagor* counsel for the appellants adopted the view that the debt in *Oxholm's* case was situated in England: "It was said in the Court below that a confiscatory decree of a government . . . would not be enforced here — *Wolff v Oxholm*, but that only applies where the property is situate in *this country.*" (1921) 90 L.J.K.B. 1202, at p. 1209. Italics added. This passage does not appear in the official Law Reports.

[93]38 Ch.D. 348.

Unfortunately, however, this is not the way in which Kay J. approached the matter. He refused the motion on the wider ground that where the revolutionary government of a country has been recognized by the government of a foreign state, a subject of such foreign state may safely contract with that *de facto* government; and if, by subsequent revolution, the previously existing government of the country is restored, the restored government is bound by international law to treat any such contract as valid, and "In a litigation with the foreigner, party to the contract, they must adopt the contract, and merely take such rights as the *de facto* Government of the rebel States might have had under it."[94] It is submitted, however, with respect, that these words are too wide and are inconsistent with the doctrine by which the American and English courts treat as conclusive the executive acts of another State — whether legal by international law or not — but that Mr. Justice Kay's decision can be justified on the more limited ground already stated, namely, that the Peruvian government was seeking to give exterritorial effect to its decree.[95]

IV.

Campbell J. in *The Rose Mary* also refused to recognize the Iranian law upon a second ground, namely, that "no state can be expected to give effect within its territorial jurisdiction to a foreign law that is contrary to its own public policy or essential principles of morality."[96] The Report does not show that this submission was ever made by plaintiff's counsel, nor is it clear what meaning the learned judge meant to be given to the phrase in the passage just quoted that no state can be expected "to give effect" to a foreign penal law. If what he meant was that no state can be expected "to enforce" a foreign penal law, then, stated in the abstract, the proposition is unexceptionable and *Kaufman v. Gerson*,[97] which is the only English authority cited by Campbell J., supports it. But it is surely correct to say that that principle was not in question in the instant case, for here the court was not asked

[94] *Ibid.*, at p. 362.

[95] In *West Rand Central Gold Mining Co. v The King* [1905] 2 K.B. 391, at p. 412, plaintiff's counsel referred to the *Dreyfus Bros.* case in support of his argument that by international law a successor government was bound by the acts of its predecessor, as to which Lord Alverstone observed: "The only principle, however which can be deduced from these cases is that a Government claiming rights of property and rights under a contract cannot enforce those rights in our Courts without fulfilling the terms of the contract as a whole." Hence it would appear that the Lord Chief Justice also regarded the *Dreyfus Bros.* case as one in which the Peruvian government sought to enforce its law exterritorially.

[96] [1953] 1 W.L.R. 246, at p. 253.

[97] [1904] 1 K.B. 591.

to enforce or give effect to the Iranian confiscatory legislation, but was required merely to acknowledge what was already a *fait accompli*.[98]

If, however, the right construction to be placed upon Campbell's words is that no state can be expected "to recognize" such foreign legislation, then the learned judge may have had in mind one or the other of the following propositions. He may have meant to say that a foreign law which was contrary to international law would not be recognized by the courts of England (and *ipso facto* of Aden) on the grounds of public policy, quite apart from the question whether international law was part of the law of the land or not. This is perhaps an acceptable proposition, but it adds very little to the first ground upon which Campbell J. refused to recognize the Iranian decree. In the alternative, he may have intended to say that an English court would not recognize the Iranian confiscation on the grounds of public policy, irrespective of whether the action was sanctioned by international law or not. This is a much more objectionable proposition. In the first place it would have to be restricted to the confiscation of the property of foreign nationals (or, *quaere,* of British nationals?) only, since *Luther v. Sagor,* and the many cases which have followed the decision, show that confiscation of the property of a state's own nationals will be recognized. But if confiscation qua confiscation is so objectionable, what difference does it make whether the confiscated property belongs to an Iranian or a British subject? Secondly, by ignoring international law and practice as the guiding post the proposition would lead to confusion and uncertainty in practice and give unbridled scope to the personal or national predilections of judges. But whichever way Campbell J.'s words are interpreted they do not overcome the objection that they appear to be in conflict with the "foreign act of state" rule.

V.

Conclusions

In order to reach the conclusion in *The Rose Mary* which it did, the Court of Aden ought to have had to overcome two major obstacles. It should first have had to dispose of the objection that there is a rule, well established by several leading decisions of the United States Supreme Court referred

[98]Cf. Warrington L.J. in *Luther v Sagor* [1921] 3 K.B. 532, at p. 549: "Some reliance was placed by the respondents upon the principle enunciated in such cases as *Kaufman v Gerson,* that the Courts of this country will not enforce a contract invalid by our law as being in contravention of some essential principle of justice or morality, notwithstanding that by the law of the country where it was made no such objection could be raised to it. In my opinion the principle has no application. The appellants are not seeking to enforce such a contract. They are resisting an endeavour on the part of the respondents to induce the Court to ignore and override legislative and executive acts of the Government of Russia and its agents affecting the title to property in that country; it is that, which in my opinion, we are not at liberty to do."

to with approval in *Luther v. Sagor* and *Princess Paley Olga v. Weisz,* and referred to in other weighty English dicta, that the international validity of foreign acts of state will not be questioned in an Anglo-American court. This rule was not apparently drawn to Campbell J.'s attention, and so he did not deal with it. It remains, nevertheless, a most formidable objection. Secondly, the Aden Court had to distinguish *Luther v. Sagor* from the facts in the instant case, and this the learned judge attempted to do, but, it is respectfully submitted, quite unconvincingly. Campbell J. also relied heavily on *Folliott v. Ogden* and *Wolff v. Oxholm* as providing affirmative support for his conclusion, but these old decisions, as we have attempted to show, are contradictory, ambiguous, and vague in their reasoning and therefore constitute a most unsatisfactory guide in this unsettled branch of the law.

Since *The Rose Mary* was decided an English court has had occasion to review some of the same questions of law in *Re Claim by Helbert Wagg & Co. Ltd.*[99] The facts in the latter case were that by an agreement made in 1924 a British company loaned a substantial sum of money to a German company, repayable over a period of years. Until 1933 the German debtor met its obligations regularly. In that year Germany passed a Moratorium Law, which provided for the creation of a Konversionskasse and enacted that debts payable in foreign currency should be converted into Reichmarks and paid into the Konversionskasse, the debtor's liability to the creditor being discharged thereby. The German company duly complied with the law and made regular payments into the Konversionskasse, with the result that by 1945 the company had paid the full equivalent in Reichmarks of the outstanding portion of the loan. On September 3rd, 1939, there was outstanding under the loan agreement the sum of £174,142 and the claimant claimed, under the provisions of the Distribution of German Enemy Property Act, 1949, and the orders made thereunder, to rank as creditor in respect of that amount.

On an appeal from the decision of the Administrator of German Enemy Property, who had rejected the claim, Upjohn J. held that German law was the proper law of the contract; that the Moratorium Law was a legitimate foreign exchange control measure genuinely passed for the protection of the German economy and was not aimed at confiscating the property of an individual or classes of individuals; and that it must therefore be recognized, with the result that the appeal failed. From his approach to the problem it is clear that Upjohn J. entertained the opinion that had the German law been essentially of a confiscatory nature and discriminatory in intent it would not have been entitled to recognition.

The learned judge thought that the decisions justified the following rules: (1) No state will enforce the fiscal laws, however proper, of another state, nor penal statutes, using that phrase in the strict sense of meaning statutes imposing penalties recoverable by the state for the infringement of some law.

[99][1956] 1 All E.R. 129; [1956] Ch. 323.

Lord Loughborough's judgment in *Folliott v. Ogden* was cited in support of this proposition. (2) English law will not recognize the validity of foreign legislation intended to discriminate against British nationals in time of war by legislation which purports to confiscate, wholly or in part, moveable property situated in that State. *Wolff v. Oxholm* and *In re Fried Krupp A. G.* were cited under this head. (3) English courts will not recognize the validity of foreign legislation aimed at confiscating the property of particular individuals or classes of individuals. The decisions referred to here were *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*[100] and *The Rose Mary.*

Upjohn J. did not challenge the correctness of the decision in the latter case upon the facts of that case, but he disagreed with Campbell, J.'s proposition that confiscation *per se* is contrary to international law, or that an English court would refuse to recognize *all* foreign legislation of such character. He did not concur that *Luther v. Sagor* applied only to cases where the property confiscated belonged to subjects of the confiscating country, but thought that it was intended to apply to confiscation of the property of nationals and foreigners alike. Upjohn J. concluded:

> "In my judgment the true limits of the principle that the courts of this country will afford recognition to legislation of foreign States in so far as it affects title to movables in that State at the time of the legislation or contracts governed by the law of that State rests in considerations of international law or in the scarcely less difficult considerations of public policy as understood in these courts. Ultimately I believe the latter is the governing consideration. But, whatever be the true view, the authorities I have reviewed do show that these courts have not on either ground recognized any principle that confiscation without adequate compensation is per se a ground for refusing recognition to foreign legislation."[101]

Time unfortunately does not permit a detailed examination of Upjohn J.'s interesting judgment, but reference must be made to three points arising out of it which are germane to this paper. In the first place, the learned judge makes no reference to the "foreign act of state" rule. Secondly, by citing *Folliott v. Ogden* only in support of the first of his three rules he appears to regard it as authority only for the proposition that an English court will not *enforce* foreign penal or fiscal legislation. Thirdly, and most important, Upjohn J. appears to lay down, in his third rule, the wholly novel principle that foreign confiscatory legislation which is discriminatory in its nature will not be recognized whether it applies to *nationals or non-nationals* of the confiscating country. The only authority, apart from *The Rose Mary* cited in support of this proposition is *Banco de Vizcaya v. Don Alfonso de Borbon y Austria,*[102] which, with respect, does not support it. It was a case where Russell J. refused to enforce a Spanish decree confiscating property of the exiled king which was situated in England at the time of the passing of the decree. Whatever may be the merits in principle of a policy of disregarding

[100][1935] 1 K.B. 140.
[101][1956] Ch. 323, at p. 349.
[102][1935] 1 K.B. 140.

discriminatory foreign penal legislation on the grounds of public policy, it cannot be seriously questioned that in practice the Anglo-American courts have consistently recognized such legislation where it affected the property rights of nationals of the confiscating country — as, for example, the confiscation of German Jewish property by the Nazis — and, in so far as England is concerned, only a higher court could now reverse a trend which is so well established.

From the foregoing survey of the authorities, it must be confessed that the law on confiscation in private international law is in a state of great uncertainty, and it is much to be hoped that an early opportunity will present itself to the House of Lords to lay down some definitive rules and to resolve the important conflicting interests that compete for recognition in this branch of the law.

In any such a forensic debate weighty arguments can be adduced by both sides, and it may not be out of place here to indicate very briefly what form these are likely to take. In favour of the traditional view that municipal courts should not be allowed to question the validity of foreign acts of state, reliance will be placed upon two basic doctrines of classical international law. The first is the principle of the equality of all states and their juridical independance from each other; the second, that only states (with certain limited exceptions with which we are not concerned) are subjects of the law of nations. From the former rule flows the well established consequence that municipal courts are not competent to settle disputes between sovereign nations, this privileged function being restricted to such specially designated tribunals as the parties may generally or specifically agree upon. It is true, no doubt, that in *The Rose Mary* and similar cases the state was not personally impleaded, but, it will be argued, personal immunity is of little value if the foreign act of state can be indirectly impugned, as Lord Justice Scrutton pointed out in *Luther v Sagor*. Indirect impeachment is indeed worse than a frontal assault, for in the former case the foreign state does not even have an opportunity to vindicate its action. It is judged *in absentia,* as it were.

The second rule denies the right of an individual to complain of an international wrong, since *ex hypothesi* he is not a subject of the law of nations. The wrong, if any, is committed against the state of which the aggrieved individual is a citizen, and it alone has the right to complain about it. The state alone has the right of action, and, it will be strongly contended, embarassing conflicts would arise if a concurrent right of action were to be conceded to the citizens of the state.[103] Furthermore, counsel for the state view might be expected to argue, once the floodgates of litigation are opened the foreign state would be at the mercy of every individual who disliked its policies or political orientation, and the state would be exposed to all manner of suits in the local courts. True, the assault so far has been of an

[103]See ante, footnote (11).

indirect nature and restricted, in the main, to cases of confiscation of property. But why logically should it stop there? Would it not be simply a matter of time before municipal courts assumed jurisdiction in other types of international disputes in which individuals had an interest, and would not every official in the employ of the foreign government alleged to be a *particeps criminis* to the delict be potentially exposed to an action if he happened to find himself within the jurisdiction of the local courts? The mischief, moreover, would be compounded by the fact that municipal courts do not always agree in their interpretation of the rules of international law, and the result would be confusion and uncertainty, even if national courts could be expected to eschew a natural bias in favour of their own citizens.

It will therefore be concluded that disputes between states should continue to be settled through the normal and well established channels, such as negotiations, arbitration, the United Nations and the International Court of Justice. The existing machinery may not always be adequate, but the remedy is not to sabotage it but to strengthen and improve it.

The arguments in favour of the aggrieved individual are no less persuasive. The classical doctrines of international law, he will boldly assert, are obsolete and hopelessly inadequate to meet the exigencies of the 20th century. They may have worked in the last century, but that was because all the principal powers either shared certain basic principles of justice or found it politic to observe towards foreigners and their property the minimum standards of conduct required by international law. Besides, *pax britannica* ruled the waves and the few minor states who proved recalcitrant from time to time were quickly coerced into legality by the persuasive guns of the Royal Navy. Today, the West no longer enjoys a monopoly of power — even if its use as an instrument of policy were still acceptable — and nationalism, especially among the younger peoples, is prevalent to an unprecedented degree. Violations of international rights, often of the most flagrant kind, are much more common.

To continue in the light of these facts, so the argument will run, to deprive municipal courts of the right to question the legality of foreign acts of state is to put a premium on lawlessness and to permit states to flout the rules of international law with impunity. A law that cannot be enforced is a contradiction in terms. The traditional machinery for settling international disputes is largely useless because, in most of the recent cases, the confiscating state has been unwilling to submit the dispute to arbitration and, unless it has signed the optional clause, the International Court of Justice cannot assume jurisdiction. The United Nations is only a power camp; and the use of force is a discredited and dangerous remedy in the atomic era.

If, it will be reasoned, the assumption of jurisdiction by the local courts promotes the recognition of the individual as a subject of international law (at least for this limited purpose), so much the better. The courts can be relied upon to exercise their power with discretion and good sense and to

avoid conflicts between the interests of the state and its aggrieved citizen. Even if municipal courts are not the ideal forum for resolving international disputes, the answer is not to deprive them of jurisdiction but to establish an international appellate tribunal to review their decisions.

How is this conflict to be resolved? History and doctrine favours the state view. A feeling for justice and the rule of law strongly supports the dispossessed individual's claim. But his dilemma is only one aspect of the complex problem of the settlement of international disputes of a justiciable nature. The imperative long-term solution must be the establishment of an international organ with compulsory jurisdiction, and it is questionable whether the unilateral assumption of jurisdiction by municipal courts will genuinely advance the cause of an international rule of law. One fears that the price of their intervention in the comparatively few cases of this nature that come before them is too high and that the orderly development of international law may be hindered rather than helped. It is for these reasons that I incline to the view that the refusal, in the past, by the Anglo-American courts to review foreign acts of state was soundly based and should be maintained in the future.