

1959

International Conflict of Laws - Title to Chattels "Act of State" Doctrine

John C. Peters S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Conflict of Laws Commons](#), and the [International Law Commons](#)

Recommended Citation

John C. Peters S.Ed., *International Conflict of Laws - Title to Chattels "Act of State" Doctrine*, 58 MICH. L. REV. 100 (1959).

Available at: <https://repository.law.umich.edu/mlr/vol58/iss1/35>

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

INTERNATIONAL CONFLICT OF LAWS—TITLE TO CHATTELS—
“ACT OF STATE” DOCTRINE—Although in conflict of laws rules the
title to chattels derived from transactions occurring in a foreign
state is generally determined with reference to the law of the situs
of the chattels at the time of the transaction,¹ an exception is recog-
nized when the laws affecting the foreign transaction are contrary

¹ CONFLICT OF LAWS RESTATEMENT §260 (1934).

to the forum state's public policy.² This exception, however, is often not recognized where the transaction was an act of expropriation without compensation by the foreign state. American courts refuse to invalidate the transfer by invoking public policy or international law, relying on what is known as the "act of state" doctrine.³ This doctrine states that the municipal courts of the forum state will not question the validity of the actions of a foreign sovereign within its own territory, even when such actions affect aliens to that foreign sovereign.⁴ The doctrine has been applied though the foreign government is not recognized by our government,⁵ though the acts of the foreign government are illegal by the laws of that country,⁶ and even though it is the property of an American citizen which has been confiscated.⁷

An expropriation without compensation by the United States is, of course, a violation of the United States Constitution,⁸ even when the property belongs to an alien. Such confiscation by other countries, however, may not violate their internal law, and is generally conceded not to be a violation of international law if the property is owned by nationals of that country.⁹ The question of whether confiscation by other countries of the property of aliens to those countries is a violation of international law, however, has been argued for decades. Today an increasing number of authorities recognize that such acts do violate international law.¹⁰ For the

² CONFLICT OF LAWS RESTATEMENT §612 (1934); *Ciampittiello v. Campitello*, 134 Conn. 51, 54 A. (2d) 669 (1947).

³ *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918).

⁴ *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

⁵ *Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933).

⁶ *Banco de Espana v. Federal Reserve Bank*, (2d Cir. 1940) 114 F. (2d) 438.

⁷ *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918).

⁸ U. S. CONST., Amend. V.

⁹ This arises from the nature of international law, in which only "states" are proper parties to enforce international rights. Therefore, the national of a confiscating state has no other state which can present his claim.

¹⁰ This comment will not consider the question of whether or not such a rule is a one of international law. While the existence of such a rule is denied by FRIEDMAN, *EXPROPRIATION IN INTERNATIONAL LAW* (1953), the existence of such a rule is maintained by Seidl-Hohenveldern, "Extra-territorial Effects of Confiscations and Expropriations," 13 MOD. L. REV. 69 at 69 (1950); Cheng, "Expropriation in International Law," 21 SOLICITOR 98 at 99 (1954); Fawcett, "Some Foreign Effects of Nationalization of Property," 27 BRIT. Y. B. INT. L. 355 at 368 (1950); Herz, "Expropriation of Foreign Property," 35 AM. J. INT. L. 243 at 254 (1941); Rubin, "Nationalization and Compensation—A Comparative Approach," 17 UNIV. CHI. L. REV. 458 at 460 (1950); Re, "The Nationalization of Foreign-Owned Property," 36 MINN. L. REV. 323 at 328-329 (1952); Wortley, "Expropriation in International Law," 33 TRANS. GROT. SOC. 25 at 31 (1947); Mann, "International Delinquencies Before National Courts," 70 L. Q. REV. 181 at 188 (1954); ADRIAANSE, *CONFISCATION IN PRIVATE INTERNATIONAL LAW* (1956). It is interesting to follow the argument in its inception through the opposing papers of Fachiri and Williams in 6 BRIT. Y.B. INT. L. 159 (1925), 9 BRIT. Y.B. INT. L. 1 (1928), and 10 BRIT. Y.B. INT. L. 32 (1929).

purposes of this comment, it will be assumed that confiscation of the property of aliens without compensation is a violation of international law. It is the purpose of this comment to investigate the source of the "act of state" doctrine in the relevant court decisions and to discuss the doctrine in light of pertinent policy considerations. The inquiry here is whether municipal courts, particularly American courts, should apply the international law standard to the confiscatory actions of a state against an alien in all types of cases, or whether the wronged individual should be left solely to his international law remedies, which in these cases are often unavailable or grossly inadequate. International law has been repeatedly applied in other civil cases by our courts. The refusal to so apply the international law rule against confiscations is the essence of the "act of state" doctrine as it will be discussed in the comment.¹¹

An example of the application of the "act of state" doctrine would be the situation where jewelry in Spain owned by a French national was confiscated by the Spanish Government, later sold to an Italian national and then brought into the United States where the French owner sues to recover possession of the jewelry as his property. If the "act of state" doctrine is applied the Italian national would retain the jewelry, on the ground the Spanish confiscation passed title to the Spanish Government, the court not judging the validity of the confiscation by the standards of international law.

The "act of state" doctrine must not be confused with the doctrine of sovereign immunity. It has long been held that a sovereign cannot be sued in the courts of another country without his consent.¹² As a corollary it has been held that the property of a sovereign is not subject to judicial process in another state,¹³ and that a sovereign or his agents cannot be sued in the courts of another state for acts done within the state of the sovereign.¹⁴ None of these situations arises in the application of the true "act of state" doctrine, for the property in question has been transferred by the

¹¹ The "act of state" doctrine, as discussed in this comment, is used in a very narrow and restricted sense. There is a much broader concept often called the "act of state" doctrine. This broader concept will be alluded to only incidentally. It can be found discussed in 2 MOORE, *DIGEST OF INTERNATIONAL LAW* 23-30 (1906); MOORE, *ACT OF STATE IN ENGLISH LAW* (1906); Wade, "Act of State in English Law: Its Relations with International Law," 15 *BRIT. Y.B. INT. L.* 98 (1934).

¹² 2 HACKWORTH, *INTERNATIONAL LAW* §§169-176 (1941).

¹³ *Ibid.*

¹⁴ *Id.*, §§169, 175.

sovereign to a third party, and the original owner is suing the third party in an action to try title. Thus the French national in the hypothetical case would not be able to sue for recovery of his property if it were still owned by the Spanish Government, whether or not the "act of state" doctrine were accepted. The question here, however, is whether the acts of the sovereign validly affect the rights of the parties when the property is transferred to a third party and taken to another state.

In order to clarify the use of terms, a "confiscation" when used in this comment will mean an expropriation by a foreign state without compensation. This writer will not go into the question of what is considered fair compensation in international law. Nor will the present comment consider confiscations made in time of war or the question of extraterritorial expropriations.

I. *American Precedent*

The American doctrine on the subject arose from an oft-quoted statement by Chief Justice Fuller in *Underhill v. Hernandez*:¹⁵ "The courts of one country will not sit in judgment on the acts of the government of another done within its own territory." In reality, the case did not involve the "act of state" doctrine as herein defined. No property was involved in the suit. Underhill was suing in tort for the actions of Hernandez, who at the time of the alleged tort was in command of the revolutionary army in Venezuela. A more correct statement of the basis of decision in the case is also given by Chief Justice Fuller: "If actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability."¹⁶

The *Underhill* case was relied upon by Justice Clarke, however, in two cases which formulated the "act of state" doctrine. The first of these, *Oetjen v. Central Leather Co.*,¹⁷ involved a suit by Mexican citizens to recover hides which had been seized by Villa during the Mexican revolution. Judge Clarke stated:

"It is also the result of interpretation by this court of the principles of international law that when a government . . . is recognized by the political department of our government as the *de jure* government of the country in which it is estab-

¹⁵ 168 U.S. 250 at 252 (1897).

¹⁶ *Id.* at 253.

¹⁷ 246 U.S. 297 (1918).

lished, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. . . ."¹⁸

Whether he attributed the doctrine to the fact of recognition or to a rule of international law is not clear. The possibility that the *Oetjen* case could be limited to situations involving nationals of the confiscating state was repudiated by a companion case. In *Ricaud v. American Metal Co.*,¹⁹ the plaintiff was an American citizen suing for lead bullion, seized in Mexico during the revolution, which had been sold to a third party and which was in the United States at the time of suit. Justice Clarke stated, "The fact that the title to the property in controversy may have been in an American citizen . . . does not affect the rule of law. . . ."²⁰

These decisions laid down the "act of state" doctrine, which has since been followed in American courts without any real examination of the policies involved. They could as well have been founded on a theory previously recognized by the Supreme Court that, in time of civil war, property in enemy territory is subject to seizure or destruction by a belligerent.²¹

The doctrine was again enunciated by the Second Circuit in *Hewitt v. Speyer*.²² In this case the plaintiff had a mortgage on the customs receipts of Ecuador. The defendant obtained treasury certificates "subject to" plaintiff's mortgage. Ecuador paid the defendant out of the customs receipts first, and plaintiff sued to obtain the money paid by the government. Both parties were American citizens. The court held that there was no cause of action, citing the *Underhill* decision. The plaintiff in this case never had title to the money. Moreover, the act complained of was one taken by a government to preserve its own credit. It is generally conceded that measures such as currency exchange control and monetary devaluation are not a violation of international law,²³ and the situation in this case seems comparable.²⁴

¹⁸ Id. at 302 and 303.

¹⁹ 246 U.S. 304 (1918).

²⁰ Id. at 310.

²¹ See *Young v. United States*, 97 U.S. 39 (1877), refusing damages for a seizure of cotton by Federal forces, and *Ford v. Surget*, 97 U.S. 594 (1878), refusing damages for a destruction of cotton under the orders of Confederate forces.

²² (2d Cir. 1918) 250 F. 367.

²³ Foighel, "Nationalization," 26 NORDISK TIDSSKRIFT FOR INT. RET. 89 at 100; Lauterpacht, "Re Helbert Wagg: A Further Comment," 5 INT. & COMP. L. Q. 301 at 303 (1956).

²⁴ A similar situation was involved in *Frazier v. Foreign Bondholders Protective Council*, 283 App. Div. 44, 125 N.Y.S. (2d) 900 (1953).

The next case involving the doctrine arose out of the Spanish Civil War.²⁵ The Loyalist government confiscated silver in Spain from a Spanish bank by secret decree. The silver was then sold to the United States. After the Franco regime came into power, the bank sued the United States to recover the silver. The Franco government asked the court to review the legality of the act of confiscation under Spanish law, it being claimed that the confiscation was illegal. Nevertheless, recovery was denied under the "act of state" principle. The decision could have been based upon the fact that the property confiscated was the property of a national of the confiscating state.

In *United States v. Belmont*²⁶ and *United States v. Pink*,²⁷ the Supreme Court held that confiscatory decrees issued by the Russian Government were valid to pass title to property which was in the United States at the time of the decrees. The decision was rested on the effect of recognition by the executive, the federal policy taking precedence over the public policy of New York, and not specifically on the "act of state" doctrine, which is generally conceded not to apply to extraterritorial confiscations.²⁸ The decisions have been severely criticized,²⁹ and it seems certain that they will not be extended.

In *Bernstein v. Van Heyghen Freres Societe Anonyme*³⁰ and *Bernstein v. N. V. Nederlandsche-Amerikaansche*,³¹ title to property acquired by Nazi confiscation of property of the Jews was upheld by the Second Circuit through application of the "act of state" doctrine. Judge Learned Hand intimated, however, that the rule would not be applied if there were a declaration by the Executive that the principle should not be applied.³² These decisions were severely criticized.³³ Subsequently, the acting legal

²⁵ *Banco de Espana v. Federal Reserve Bank*, (2d Cir. 1940) 114 F. (2d) 438.

²⁶ 301 U.S. 324 (1937).

²⁷ 315 U.S. 203 (1942).

²⁸ *Zwack v. Kraus Bros. & Co.*, (2d Cir. 1956) 237 F. (2d) 255; Seidl-Hohenveldern, "Confiscation and Expropriation Problems in International Law," 83 JOURNAL DU DROIT INTERNATIONAL 381 at 389, 390 (1956).

²⁹ Jessup, "The Litvinov Assignment and the Pink Case," 36 AM. J. INT. L. 282 (1942); Borchard, "Extraterritorial Confiscations," 36 AM. J. INT. L. 275 (1942). But see note, 48 COL. L. REV. 890 (1948).

³⁰ (2d Cir. 1947) 163 F. (2d) 246, cert. den. 332 U.S. 772 (1947).

³¹ (2d Cir. 1949) 173 F. (2d) 71.

³² "[T]he only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary." *Bernstein v. Van Heyghen Freres Societe Anonyme*, (2d Cir. 1947) 163 F. (2d) 246 at 251.

³³ See comments, 57 YALE L.J. 108 (1947); 47 COL. L. REV. 1061 (1947).

adviser of the State Department stated that the policy of the Executive was opposed to the recognition of Nazi "acts of state."³⁴ Following this expression of policy, the court by per curiam opinion struck out "all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question."³⁵ Unfortunately, the case was not appealed.

On review of these decisions, it is seen that the "act of state" doctrine grew like Topsy, through an inadequate examination of the real issues involved. On their facts, the results reached could have been reached on other and more secure grounds. In none of them was a confiscation in time of peace of the property of a non-national of the confiscating state involved. Yet the purport of the decisions, at least up to the time of the *Bernstein* decisions, has led scholars to conclude that the principle is "firmly entrenched"³⁶ in American law. The *Bernstein* decisions propounded a new basis for the "act of state" doctrine, a basis which may eventually lead to its discard.

It is not clear what the doctrine was initially based upon. Perhaps it was based upon a misinterpretation of the sovereign immunity doctrine already discussed. Many commentators as well as the judges in the *Bernstein* case feel that it was based upon the constitutional doctrine of "political" questions,³⁷ the judiciary accepting the executive act of recognition of the foreign government as an approval and validation of that government's previous acts beyond which the courts could not inquire without invading the delicate field of foreign policy.³⁸ In this view of the doctrine, recognition becomes vitally important.³⁹ Yet state courts have

³⁴ Letter of Jack B. Tate, Acting Legal Adviser, Department of State, April 13, 1949, 20 DEPT. OF STATE BUL. 592 (1949).

³⁵ *Bernstein v. N.V. Nederlandsche-Amerikaansche*, (2d Cir. 1954) 210 F. (2d) 375 at 376.

³⁶ RE, FOREIGN CONFISCATIONS IN ANGLO-AMERICAN LAW 169 (1951). See also Stevenson, "Effect of Recognition on the Application of Private International Law Norms," 51 COL. L. REV. 710 at 713 (1951).

³⁷ This undoubtedly arises from language such as that previously quoted from the Underhill and Oetjen opinions.

³⁸ "[T]he conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision. . . ." *United States v. Belmont*, 301 U.S. 324 at 328 (1937).

³⁹ It is interesting to note that the writers disagree on the effect to be given the act of recognition. Seidl-Hohenveldern, "Extraterritorial Effects of Confiscations and Expropriations," 49 MICH. L. REV. 851 (1951), feels that the "act of state" doctrine should be applied only to recognized governments, whereas Borchard, "The Unrecognized Government in American Courts," 26 AM. J. INT. L. 261 (1932), feels that recognition should not be required.

applied the "act of state" doctrine to non-recognized governments,⁴⁰ and a dictum in the *Underhill* case states that it does not matter whether the government is recognized or not.⁴¹ Furthermore, this rationale does not fit all the cases. Even if recognition were an approval of acts done by the recognized state before recognition were granted, it certainly cannot be contended that it is also a blanket approval of everything the recognized state does after the date of recognition. To say it were would be to attribute powers of prophecy to the executive. Yet the doctrine is applied without question to "acts of state" done both before and after recognition.⁴² Similarly, if the real basis of the doctrine is executive approval of the confiscatory acts, expressed in the fact of recognition, the courts are being hypocritical in their frequent statements that the frustrated litigant may have a remedy through proper diplomatic channels;⁴³ the courts would then be in the position of urging the litigant to try a remedy they should know the executive would not give, since the executive certainly would not assert a diplomatic claim against acts of which it approved.

The doctrine may not be based on the "political question" theory, but rather on an erroneous conception of international law rules.⁴⁴ The Court in the *Oetjen* and *Ricaud* cases evidently felt that the international law doctrine of sovereign immunity for acts of a state's agents done within its territory⁴⁵ also applied in this type of case to validate title. In the *Oetjen* case the Court states, "It is also the result of interpretation by this court of the principles of international law."⁴⁶ Looked at in this light, the "rule of de-

⁴⁰ *Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933). This also involved citizens of the confiscating state, however.

⁴¹ "Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels." *Underhill v. Hernandez*, 168 U.S. 250 at 252 (1897).

⁴² *Banco de Espana v. Federal Reserve Bank*, (2d Cir. 1940) 114 F. (2d) 438, and *Bernstein v. Van Heyghen Freres Societe Anonyme*, (2d Cir. 1947) 163 F. (2d) 246, cert. den. 332 U.S. 772 (1947), both involved acts of governments which were recognized before the confiscations were effected.

⁴³ *Underhill v. Hernandez*, 168 U.S. 250 at 252 (1897); *Oetjen v. Central Leather Co.*, 246 U.S. 297 at 304 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 at 310 (1918); *Hewitt v. Speyer*, (2d Cir. 1918) 250 F. 367 at 371-372.

⁴⁴ Of four early law review commentaries on the *Oetjen* and *Ricaud* cases, three notes treat the question as one of international, rather than constitutional, law. 18 COL. L. REV. 611 (1918); 31 HARV. L. REV. 1167 (1918); 86 CENT. L. J. 259 (1918). The fourth propounds the "political" question theory and applies the "act of state" label. Comment, 27 YALE L. J. 812 (1918).

⁴⁵ See note 14 supra.

⁴⁶ *Oetjen v. Central Leather Co.*, 246 U.S. 297 at 302 (1918).

cision" the Court speaks of in the *Ricaud* case⁴⁷ would be a rule of international law, not a rule propounded by the executive. Therefore, it was not necessary for the state court to determine the validity of the confiscation,⁴⁸ since the Court felt that international law prevented municipal courts from looking into such questions.

Even if the Supreme Court was not applying international law in these cases, it is evident that the Court felt it was applying a rule of law—not merely acceding to the wishes of the executive. Why, then, was recognition so important? The answer must be that it showed conclusively that the confiscation was not a lawless one perpetrated by a "group of bandits," but by a group which succeeded to the government.⁴⁹ In short, it showed that the confiscation was not a mere theft, but an "act of state." Once the government was recognized by the executive, the judiciary could not question the fact that it was a government. Attaching this significance to the fact of recognition makes immaterial the question whether the foreign state was recognized before or after the confiscation.

The *Bernstein* decisions were the result of an extension of the view attaching prime importance to the act of recognition as an approval of the foreign state's acts. The result of the latter *Bernstein* decision is not criticized, but the way in which that result was reached may be, on the ground that with such an approach determination of title to property is made, in actuality, by the executive and not the judicial branch of the government.⁵⁰ While admitting that the question is basically one of public policy, it seems strange to require the courts to look to the executive for the determination of that policy in each instance. The determination of whether or not a foreign government is recognized by our government is admittedly a question to be decided solely by the executive, but the legal effects arising from the status determined by the executive would seem better decided by the courts than by

⁴⁷ *Ricaud v. American Metal Co.*, 246 U.S. 304 at 309-310 (1918).

⁴⁸ See *Oetjen v. Central Leather Co.*, 246 U.S. 297 at 304 (1918).

⁴⁹ "It is idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti or mere mobs." *Underhill v. Hernandez*, 168 U. S. 250 at 253 (1897).

⁵⁰ "While justice 'better late than never' is better than none at all, it is regrettable that the executive must lead the courts by the hand to a decision upholding basic notions of public policy and due process of law." Olmstead, "International Law," 30 N.Y. UNIV. L. REV. 1 at 12-13 (1955).

the executive.⁵¹ Instead of allowing the executive to determine not only the status of the foreign government, but whether or not its acts are in accord with public policy, it would seem wiser to discard the "act of state" doctrine entirely, and let the executive handle only those questions of foreign relations within its own sphere of competence. Thus, if the executive felt it was necessary to our foreign policy, the executive could conclude a treaty and validate the title thus acquired,⁵² or could indemnify the foreign country for the injuries it suffered through the denial of validity of its title.

The *Bernstein* decision suggests one manner by which the effects of the "act of state" doctrine may be limited. Another method of reaching the same end is suggested by the new United States policy limiting sovereign immunity from suit in cases where the foreign state is engaged in primarily commercial enterprises.⁵³ Re says:

"Thought should be given to the possibility of treating the foreign country as a trader when a question concerning such nationalized property is presented in American courts. . . . Once it is proposed that a foreign nation should no longer enjoy sovereign immunity from suit with respect to its 'private' acts, it follows naturally that the act itself should no longer enjoy immunity from judicial scrutiny."⁵⁴

This argument is not strong, however, for the act of nationalization is distinct from acts taken later when engaged in trading with the nationalized property. The act of nationalization would still be an exercise of a governmental function. However, the new policy does indicate a tendency to restrict the broad immunities previously granted foreign sovereigns.

⁵¹ "In cases involving sovereign immunity it used to be assumed that the only question which the political branch of the government was called upon to decide was the status of the government or its agents. The trend of United States decisions, culminating in the *Hoffman* case, would now make it appear that the State Department must also determine the basic legal principle governing the immunity." Jessup, "Has the Supreme Court Abdicated One of its Functions?" 40 AM. J. INT. L. 168 at 169 (1946).

⁵² Cf. *United States v. Pink*, 315 U.S. 203 (1942).

⁵³ Letter of Jack B. Tate, Acting Legal Adviser, Department of State, 26 DEPT. OF STATE BUL. 984 (1952). See Bishop, "New United States Policy Limiting Sovereign Immunity," 47 AM. J. INT. L. 93 (1953).

⁵⁴ Re, "Nationalization and the Investment of Capital Abroad," 42 GEO. L. J. 44 at 62-64 (1953).

II. *Foreign Precedent*

The English courts initially seemed inclined toward the idea that title to property acquired through a violation of international law would not be upheld in their municipal courts, but then reverted to a position very close to that of American courts. The modern position is not yet clear.

In *Wolff v. Oxholm*⁵⁵ the defendant Oxholm attempted to defend an action for the recovery of a debt on the grounds that he had paid the debt⁵⁶ to the Danish Government in compliance with a confiscatory law of Denmark. The ordinance was passed as a wartime measure, but absolved the debt for all purposes in Denmark. After a review of international law authorities, Chief Justice Ellenborough held that payment under the Danish act was no defense: "The parties . . . are not bound by the quashing of their suit, in consequence of a subsequent ordinance, not conformable to the usage of nations, and which, therefore, they could not expect, nor are they or we bound to regard."⁵⁷

Wolff v. Oxholm was followed in Chancery in 1917 in *In re Fried Krupp Actien-Gesellschaft*.⁵⁸ The case involved a German law which abrogated the obligation to pay interest to enemies during the World War I. The law was held inapplicable to a contract interpreted according to German law partly on the ground that the law was one "which is not conformable to the usage of nations."⁵⁹

Neither of the above cases is strong precedent for the proposition that title derived from foreign acts of confiscation, in time of peace, will not be given effect against non-nationals of the confiscating state. In both cases the measures were laws passed by the enemy in time of war, the laws were penal, and neither case involved title to property. The first involved a chose in action and the second a contract.

This trend was reversed in 1921 by the decision of King's Bench in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*⁶⁰

⁵⁵ 6 M. & S. 92, 105 Eng. Rep. 1177 (1817).

⁵⁶ The rate of payment was actually about one-eighth the rate of exchange existing at the time of payment.

⁵⁷ 6 M. & S. 92, 105 Eng. Rep. 1177 at 1182 (1817).

⁵⁸ [1917] 2 Ch. 188.

⁵⁹ Id. at 194.

⁶⁰ [1921] 1 K.B. 456, revd. [1921] 3 K.B. 532.

This was a suit by a Russian company⁶¹ to recover lumber confiscated by the Russian Communist Government. The first decision by Justice Roche refused to give effect to the Soviet decrees, solely on the ground that the British Government had not recognized the Soviet Government. He stated, however, that if the Soviet Government were recognized, the court would have to recognize the validity of its acts. He did not discuss the doctrine of *Wolff v. Oxholm*, finding such discussion unnecessary. The decision in the court of appeal was given after the British Government had recognized the Soviet Government as the de facto government of Russia. Although the Lord Justices stated that the previous opinion of Justice Roche was correct in the absence of recognition, the court unanimously held that title acquired by the Soviet confiscatory decrees was valid in British courts after recognition. They stated that it made no difference whether the recognition was de facto or de jure, or whether the acts were contrary to moral principles. The possibility that the confiscation was a violation of international law was not discussed, and none of the Lord Justices considered the principle of *Wolff v. Oxholm*, though it was cited by counsel in their argument.⁶² The Lord Justices relied heavily upon American precedent, citing particularly *Oetjen v. Central Leather Co.*⁶³ and *Underhill v. Hernandez*.⁶⁴ The case is strong precedent in British law, though not binding on the House of Lords. Some factors in the case, however, are worthy of note. First, the case involved nationals of the confiscating state, and therefore the confiscation was not contrary to international law. Second, the court did not discuss the international law aspects of the case. This is probably because the applicable doctrine of international law has been recognized only in recent years, and was in dispute at the time the case was decided. Third, none of the Lord Justices mentioned *Ricaud v. American Metal Co.*, which held that the fact that property was confiscated from a citizen of the forum would not change the rule. Evidently they did not want to commit themselves on this point.

Luther v. Sagor was followed in *Princess Paley Olga v. Weisz*.⁶⁵ The facts were similar. Plaintiff, a Russian national, was suing

⁶¹ It was contended that the company was an Estonian company, but this was rejected by the court. [1921] 1 K.B. 456 at 478; [1921] 3 K.B. 532 at 546, 552, 553.

⁶² [1921] 3 K.B. 532 at 538.

⁶³ 246 U.S. 297 (1918).

⁶⁴ 168 U.S. 250 at 252 (1897).

⁶⁵ [1929] 1 K.B. 718.

for property, confiscated in Russia by the Soviet Government, which had been sold to a third party and was then in England. Lord Justice Scrutton cited the *Ricaud* case and noted that the confiscation was upheld "with respect to the property of a citizen of the United States."⁶⁶ It seems evident from the tenor of his opinion that he would have extended the rule to a case involving a British citizen. Lord Justice Sankey did not cite the *Ricaud* case and gives no intimation whether or not he would extend the principle to a case involving a British national. Lord Justice Russell did not cite any cases, but seems to limit the doctrine when he states: "This Court will 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."⁶⁷

The next major British decision in the "act of state" area arose out of the nationalization of the oil industry by Iran. In *Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)*,⁶⁸ the oil company, a British corporation, contended that the Iranian nationalization law was invalid to pass title to oil to Iran on the grounds that the nationalization was confiscatory and thus a violation of international law. The company sued in a court in Aden to gain possession of oil sold by Iran to a third party, and subsequently bought to Aden. The Supreme Court of Aden held that the Iranian nationalization was confiscatory, that such a confiscation was a violation of international law, and that it was invalid to pass title to third parties because the international law was incorporated into the domestic law of Aden. *Luther v. Sagor* and *Princess Paley Olga v. Weisz* were distinguished on the ground that they involved nationals of the confiscating state. This decision has been criticized on the ground that while international law can make the confiscating state liable to pay damages for its illegal action, it cannot invalidate the confiscation; it is said that while international law gives a right *in personam* it gives none *in rem*.⁶⁹ Whether this is a valid statement of the international law on the point may be questioned.⁷⁰ However, even if this view of international law is

⁶⁶ Id. at 724-725.

⁶⁷ Id. at 736. Emphasis supplied.

⁶⁸ [1953] 1 W.L.R. 246.

⁶⁹ O'Connell, "A Critique of the Iranian Oil Litigation," 4 INT. AND COMP. L. Q. 267 at 277 (1955).

⁷⁰ Commenting on Secretary of State Hull's statement that compensation must be "adequate and effective" in his note to the Ambassador of Mexico of Nov. 9, 1938, Dept. of State Press Release, Nov. 12, 1938, No. 541, Hyde states: "It suffices to note . . . that if Secretary Hull's theory be duly respected, a territorial sovereign may find its very

accepted, the decision may still be defended. The only controversy is over the remedy; the right is admitted. Since municipal courts cannot give an *in personam* remedy,⁷¹ they should be allowed to give the best remedy of which they are capable. The only one available is restitution of the confiscated property. Moreover, even if the decision cannot be considered purely the result of a direct application of international law, it could be upheld as an application of public policy.⁷² Although the public policy doctrine has been criticized in recent years,⁷³ this use of the doctrine should be acceptable, for the court is not relying on its own vague notions of justice, but on a rule of international law. Since the act of the confiscating state violated international law, it violates the public policy of the forum, and will not be given effect.⁷⁴

The reasoning of the *Rose Mary* case⁷⁵ was criticized in the Chancery case of *In re Claim by Helbert Wagg & Co.*⁷⁶ involving a liquidated contract debt owed by a German company to a British company. The law governing the contract was German, and the place specified for payment was London. A German law passed in 1933 altered the place of payment of the debt to Berlin, allowed the payment to be made in marks instead of sterling, and forced the German debtor to pay the debt into a German Konversionkasse. The amounts paid into the Konversionkasse were credited to the accounts of the foreign creditors, but no amounts were shown to have been paid from the Konversionkasse. The Court assumed that the law was confiscatory. Nevertheless, the defense of payment into the Konversionkasse was upheld on the ground that

right to expropriate conditioned upon its power to pay, and if it be sought to exercise that right when evidence of the possession of such power and the disposition to use it are not evident, there is reason to demand that there be restored to the owners what may have been taken from them." Hyde, "Compensation for Expropriations," 33 AM. J. INT. L. 108 at 112 (1939).

⁷¹ This would be a judgment against a foreign sovereign, and a foreign sovereign cannot be sued without his consent. See note 12 *supra*.

⁷² See note 2 *supra*.

⁷³ "[W]e do know enough to say with considerable confidence that an investigation to determine when the courts will apply the doctrine of public policy to deny the recognition of a foreign right would result in the conclusion, 'you never can tell.'" Nutting, "Suggested Limitations of the Public Policy Doctrine," 19 MINN. L. REV. 196 at 200 (1935). Most of the critics of the public policy doctrine would probably accept its use in this manner.

⁷⁴ The results would be predictable and similar to the application of a statute, Nutting, "Suggested Limitations of the Public Policy Doctrine," 19 MINN. L. REV. 196 (1935); and would involve the adjudication of a question of public importance, Paulsen and Sovern, "Public Policy" in the Conflict of Laws," 56 COL. L. REV. 969 (1956).

⁷⁵ [1953] 1 W.L.R. 246.

⁷⁶ [1956] Ch. 323.

"these courts must recognize the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency."⁷⁷ This holding is in accord with the international law on the subject, for such measures are not recognized as giving a right of compensation.⁷⁸ Nevertheless, Justice Upjohn evidently felt that it was a violation of international law. Therefore, he considered the *Rose Mary* case at length in the course of his opinion. He agreed with the holding on its facts, because he felt that the law was passed "to nationalize the plaintiff company only"⁷⁹ and was thus invalid because it was discriminatory. But he disagreed with the principle that confiscations of the property of a non-national would not be recognized in British courts. He felt that *Luther v. Sagor* and *Princess Paley Olga v. Weisz* were applicable whether or not the property confiscated was owned by a national or non-national of the confiscating state.

The result of the *Rose Mary* and *Helbert Wagg* cases is to leave the "act of state" doctrine unsettled in British law. The *Rose Mary* is the only British case which involved the "act of state" doctrine on its facts. The *Helbert Wagg* case can be distinguished on the ground that the action in question was not a violation of international law. Yet the court did not consider the question in this light, and the dictum in *Luther v. Sagor* and *Princess Paley Olga v. Weisz* is still formidable. None of the cases, of course, is binding on the House of Lords, and therefore the question remains open.

Italian⁸⁰ and Japanese⁸¹ courts were called upon to adjudicate the title to oil after the Iranian nationalization on facts similar to those in the *Rose Mary* case, and both held that the Iranian law must be recognized as passing title. It is interesting to note, however, that both courts after invoking the "act of state" principle did consider the question of whether or not the decrees were confiscatory and decided that they were not. If the decrees were not confiscatory there would, of course, be no violation of international law. The Japanese court also rejected the contention that the oil

⁷⁷ Id. at 351.

⁷⁸ See note 23 *supra*.

⁷⁹ In re Claim by Helbert Wagg & Co., [1956] Ch. 323 at 346.

⁸⁰ The *Miriella*: Anglo-Iranian Oil Co. v. S. U. P. O. R., (Venice Law Court, 1953), 2 INT. AND COMP. L. Q. 628 (1953), as digested and translated by Bresch. Also reported in 1955 I.L.R. 19.

⁸¹ The Anglo-Iranian Oil Co. v. The Idemitsu Kosan Co., (Dist. Court of Tokyo, 1953), 1 JAPANESE ANN. INT. L. 55 (1957), also reported in 1953 I.L.R. 305.

had been refined prior to the nationalization, and hence held that "the applicant . . . had never gained title to the oil in question."⁸² They then held that the Anglo-Iranian Oil Co. had only a private contract right, and that this could be "subjected to control"⁸³ by the domestic law of Iran. Therefore, this part of the Japanese court's decision may be rested on the familiar conflict of laws doctrine that a contract is to be governed by the laws of the state where it is made,⁸⁴ or is to be performed,⁸⁵ which in this instance was Iran. The decision was affirmed on appeal to the Higher Court of Tokyo.⁸⁶ The court stated that the nationalization law "is not a completely confiscatory law" but was "subject to payment of compensation." While recognizing the rule of international law against confiscation, the court held that it could not examine the adequacy of the compensation if some compensation were given. The concession agreement was held to be a mere contract subject to the municipal law of Iran.⁸⁷

In a later decision involving the Iranian nationalization, a three-judge Italian court held that Iran gave a right to compensation, and thus that the nationalization was not contrary to international law.⁸⁸ They held further that the Anglo-Iranian company did not allege or prove that they had extracted the oil, and that this was necessary to acquire title under Iranian law.⁸⁹ It is interesting to note, however, that they did examine the legality of the Iranian acts according to Iranian law.⁹⁰ Further, they stated that "Italian courts must refuse to apply in Italy such foreign Laws as may, even for non-political and non-persecutory motives, decree expropriation of the property of any foreign national without compensation."⁹¹

In France, the confiscation of a potash company by Catalonia was held to be "contrary to French public order" and thus invalid to pass title to potash subsequently sold to a third party and sent

⁸² *Id.* at 65.

⁸³ *Id.* at 62

⁸⁴ 2 BEALE, *CONFLICT OF LAWS* §§332.1, 332.4 (1935).

⁸⁵ *Ibid.*

⁸⁶ *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabuski Kaisha*, (High Court of Tokyo) 1953 I.L.R. 305 at 312.

⁸⁷ *Id.* at 313-314.

⁸⁸ *Anglo-Iranian Oil Co. v. S. U. P. O. R.*, (Italy, Civil Court of Rome, 1954), 1955 I.L.R. 23.

⁸⁹ *Id.* at 42, 43, 45.

⁹⁰ *Id.* at 33, 42.

⁹¹ *Id.* at 42.

to France.⁹² This result was reached even though the company was registered in Spain. The majority of its stockholders, however, were Swiss or French. A similar result was reached on substantially the same facts in *Société Potasas Ibericas v. Nathan Bloch*,⁹³ the court stating that "French courts may not recognize any divestment of a right of ownership, except with the consent of the owner, without just and previous indemnity."⁹⁴ Whether these cases now represent French law on the subject is open to doubt. In the *Hardmuth* case⁹⁵ a French court held that industrial property rights owned by a Czechoslovakian firm were situated in Czechoslovakia at the time of the nationalization and thus were later entitled to protection in France. Some commentators, while recognizing that this case had "not been finally decided, for the matter came only before a judge of the Référés," feel that the case is evidence of a shift in the French attitude toward confiscations.⁹⁶ It is interesting to note, however, that the decision was rested in part on an international agreement. That the French attitude is at present uncertain is further shown by *De Keller v. Maison de la Pensée Française*.⁹⁷ This was an application for sequestration of paintings confiscated during the Russian revolution and later brought to France for an art show. The application, made to a judge in chambers, was denied. The judge pointed out that the granting of the sequestration was essentially optional, that the case involved third parties not before the court, and that one party might be the Russian Government which could plead sovereign immunity. It is apparent, however, that he considered the question of the validity of the title acquired through the confiscation an open question.

In the *Confiscation of Property of Sudeten Germans Case*,⁹⁸ a German court held a Czech confiscation of "enemy" property invalid to pass title to a third party. Both plaintiff and defendant

⁹² *Moulin v. Volatron*, (France, Comm. Trib. Marseilles, 1937), 1935-1937 ANN. DIG. 191 (No. 68), *affd.* on appeal (France, Court of Appeal of Aix, 1939), 1938-1940 ANN. DIG. 24 (No. 10).

⁹³ France, Court of Cassation (Chambre Civile, 1939), 1938-1940 ANN. DIG. 150 (No. 54).

⁹⁴ *Id.* at 151.

⁹⁵ France, Cour de Appel de Paris, (14^e Chambre, 1950), 79 JOURNAL DU DROIT INTERNATIONAL 1201 (1952).

⁹⁶ Sarraute and Tager, "Yesterday and Today. The Effects Produced in France by Foreign Nationalisations," 79 JOURNAL DU DROIT INTERNATIONAL 497, 1139 (1952).

⁹⁷ France, Tribunal Civil de la Seine (Référés, 1954) 82 JOURNAL DU DROIT INTERNATIONAL 119 (1955).

⁹⁸ Germany, Amtsgericht of Dingolfing (1948), 1948 ANN. DIG. 24 (No. 12).

were interned in Czechoslovakia. Both owned sewing machines, and both machines were confiscated. When they were released, the defendant was given the plaintiff's machine. The plaintiff sued to recover her machine, and the relief requested was granted, on the ground that the confiscatory decree was contrary to international law. In a later case involving a confiscation taking place in the Soviet Zone of Germany a similar result was reached.⁹⁹ A German court has even upheld a criminal charge of conversion against the defendant's assertion that title to the goods was not in the former owner, but in the confiscating government.¹⁰⁰

From the foregoing review of the practices of other countries, it is obvious that there is no unanimity in treatment of the problem. However, the modern decisions examine the question of compensation, and some will not uphold an expropriation unless some compensation is given.

III. *Policy Considerations*

The essential issue involved in the "act of state" doctrine is whether or not municipal courts of one country will pass judgment on the legality of the confiscatory actions of another country, when the title to property is in question before such municipal court. In passing on the legality of the confiscation the municipal court could have reference to one or more of three standards: (1) the public policy of its own country (the forum state), (2) the law of the confiscating state, and (3) principles of international law. The "act of state" doctrine prevents the municipal court from in any way questioning the confiscatory actions of another state. Should the municipal court so restrain itself?

Many reasons in addition to those discussed above have been given by the courts and by writers for upholding the "act of state" doctrine. For instance it may be argued that the doctrine is based on comity. But it is stronger than this, for it is applied to unrecognized governments,¹⁰¹ and there is no indication that it would not be applied in favor of the acts of countries which would not apply the doctrine in their courts.

The doctrine is sometimes said to be merely an application of

⁹⁹ Expropriation (Soviet Zone of Germany) case, Germany (American Zone), (Court of Appeal of Nuremberg, 1949), 1949 ANN. DIG. 19 (No. 10).

¹⁰⁰ Czechoslovakia Confiscatory Decree case, (American Zone Court of Appeal of Nuremberg, 1949) 1949 ANN. DIG. 19 (No. 14).

¹⁰¹ *Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933).

the conflict of laws rule that passage of title will be determined by the law of the situs of the property at the time. This is not the case, however, for the doctrine is applied by American courts even when the acts are illegal by the law of the confiscating state.¹⁰² Further, an application of a conflict of laws doctrine would normally be tempered by grounds of public policy.¹⁰³ This doctrine is not.¹⁰⁴

One writer has suggested that a rejection of the rule would make questions of title to confiscated goods doubtful, and dependent upon the law of the country to which they were ultimately brought.¹⁰⁵ That situation now exists, however, as not all countries follow the rule, and the countries which do follow it may deny its application on political grounds.¹⁰⁶

Lipstein suggests that restricting the rule to confiscations of the property of nationals of the foreign state would result in discrimination against aliens in the courts of the forum.¹⁰⁷ This is not true. All aliens would be treated in accord with the rules of international law. Nationals of all states other than the confiscating state would receive the same treatment. Nationals of the confiscating state would be denied protection only because international law cannot protect them.¹⁰⁸

Seidl-Hohenveldern states that restoring the confiscated goods to their former owners "would soon bring trade with some confiscating countries to a virtual standstill."¹⁰⁹ But similarly it can be argued that such a policy would bring *confiscations* "to a virtual standstill," since a country would normally not derive any benefit from confiscation if it could not market the fruits of its confiscation. Also, the effects of a court's action on world trade should not lead it to a denial of justice. If those effects are felt detrimental by the forum state's executive, the executive can take action to mitigate or abolish those effects within his recognized sphere of authority. This also resolves the objection raised by some authorities that the question is a political one, and so should be left to the executive. The executive has ample means to fore-

¹⁰² *Banco de Espana v. Federal Reserve Bank*, (2d Cir. 1940) 114 F. (2d) 438.

¹⁰³ See note 2 *supra*.

¹⁰⁴ Cf. *Bernstein v. N.V. Nederlandsche-Amerikaansche*, (2d Cir. 1949) 173 F. (2d) 71.

¹⁰⁵ Comment 57 *YALE L. J.* 108 (1947).

¹⁰⁶ *Bernstein v. N. V. Nederlandsche Amerikaansche*, (2d Cir. 1954) 210 F. (2d) 375.

¹⁰⁷ Lipstein, note, 1956 *CAMB. L. J.* 138.

¹⁰⁸ See note 9 *supra*.

¹⁰⁹ Seidl-Hohenveldern, "Extraterritorial Effects of Confiscations and Expropriations," 49 *MICH. L. REV.* 851 at 860 (1951).

still any court action which it might consider harmful, and thus can resolve political questions through political channels, instead of allowing them to be resolved by default, often in an unsatisfactory manner, by the courts. Although it might be contended that this would force the executive to a positive declaration of policy, and thus embarrass the executive, that is also the result of the present policy, as an aftermath of the *Bernstein* litigation.

Perhaps the most important arguments for the doctrine, however, are those which say that for one state to examine the validity of another state's acts in accordance with the standards of international law would "vex the peace of nations," and would be an interference with the sovereignty of the state whose acts are examined. Sometimes the question raised is whether such an examination of itself would be a violation of international law.¹¹⁰

In support of the "act of state" doctrine, it is thought that it would be an insult to a state for a second state to declare its acts a violation of international law. This insult would create tension between the two states.¹¹¹ This argument seems weak on two grounds. First, it should not be an insult to a state for a second state to enforce a rule of international law, since the first state should expect its actions to be upheld internationally only when those actions do not exceed its rights under international law. Second, the initial act of confiscation, and not the attempt by a national court to apply international law to mitigate the effects of the illegal act, is the act which "vexes the peace of nations." It would also seem to strain international relations for state *A* to deny the rights of nationals of state *B* because of state *A*'s refusal to review the illegal acts of state *C*.¹¹² It has been suggested that such a refusal would make the forum state "a party to the delinquency."¹¹³

¹¹⁰ This question is raised by Lauterpacht, "Public International Law—Foreign Legislation Enacted in Violation of International Law—Effect in England," 1954 CAMB. L. J. 20 at 21, who holds that it would not be a violation of international law. Wortley, "Observations on the Public and Private International Law Relating to Expropriation," 5 AM. J. COMP. L. 577 at 592 (1956); Mann, "International Delinquencies Before Municipal Courts," 70 L.Q. REV. 181 at 198 (1954); and Rheinstein, "Correspondence: Observations on Expropriation," 7 AM. J. COMP. L. 86 at 88 (1958), concur in this view.

¹¹¹ *Oetjen v. Central Leather Co.*, 246 U.S. 297 at 304 (1918).

¹¹² "[I]t may be said that friendly relations are likely to suffer if the courts of a country are constrained to lend their assistance to perpetrating a legal wrong committed either against its nationals or the nationals of another state (other than the confiscating State itself)." Lauterpacht, "Public International Law—Foreign Legislation Enacted in Violation of International Law—Effect in England," 1954 CAMB. L. J. 20 at 21.

¹¹³ Mann, "International Delinquencies Before Municipal Courts," 70 L. Q. REV. 181 at 198 (1954).

Similarly, it has been said that for one state to review the acts of another state committed within its own territory is an interference with the sovereignty of the second state.¹¹⁴ This argument undoubtedly arises from the concept of absolute or territorial sovereignty in vogue in the eighteenth and nineteenth centuries,¹¹⁵ which has been progressively limited in the modern era.¹¹⁶ It would seem to be as great a denial of the sovereignty of the forum state to hold that they could not again affect the title to the property through an application of their own law. When it is realized that there is no attempt to declare the law of the foreign state invalid within its own territory,¹¹⁷ but only to deny extraterritorial effects to that act,¹¹⁸ it will be recognized that there is no denial of sovereignty.

Kelsen says that the "act of state" doctrine is itself a rule of international law. He cites only British and American precedents, however.¹¹⁹ If confiscations of the type under discussion are themselves violations of a rule of international law, it is strange that the enforcement of that rule should be similarly held a violation. In the case of nationality laws, the Hague Convention on the Conflict of Nationality Laws of 1930 imposes a duty of recognition only to the extent that the law of the first state is in conformance with international law,¹²⁰ and both municipal¹²¹ and international

¹¹⁴ *The Anglo-Iranian Oil Co. v. The Idemitsu Kosan Co.*, (Dist. Court of Tokyo, 1953), 1 JAPANESE ANN. INT. L. 55 at 62 (1957), also reported in 1953 I.L.R. 305.

¹¹⁵ Dunn, "International Law and Private Property Rights," 28 COL. L. REV. 166 (1928).

¹¹⁶ E.g., the international law rule against confiscations; the Nuremberg war-crimes trials; the restriction of sovereign immunity when the state engages in trading ventures. See also JESSUP, A MODERN LAW OF NATIONS 1 (1948): "Unlimited sovereignty is no longer automatically accepted as the most prized possession or even as a desirable attribute of states."

¹¹⁷ Denial of effect to the Iranian nationalization law "may prevent the application, but can never annul, set aside or destroy the Persian law, which will always remain fully effective within the Persian State." *The Miriella: Anglo-Iranian Oil Co. v. S.U.P.O.R.*, (Venice Law Court, 1953), 2 INT. AND COMP. L. Q. 628 (1953); also in 1955 I. L. R. 19.

¹¹⁸ "It is thus important to distinguish between titles acquired solely by some local law, by an act of sovereignty, and those acquired by an act of sovereignty in conformity with public international law, since only such internationally lawful acquisitions have a claim to international validity. . . . A confiscating sovereign cannot expect his title, acquired solely by his own law and in contradiction to international law, to be universally guaranteed, and indeed it is not. Once the question of sovereign immunity goes, then a mere declaration by a sovereign will not confer a title. Wortley, "Expropriation in International Law," 33 TRANS. GROT. SOC. 25 at 31, 33 (1947).

¹¹⁹ Kelsen, PRINCIPLES OF INTERNATIONAL LAW 256 (1952).

¹²⁰ 5 HUDSON, INTERNATIONAL LEGISLATION 359 (1936).

¹²¹ Mathieu Ulmann et Nathan Ulmann c. Min. pub., (France, Trib. Civ. de la Seine, 1915), 1915-1916 REVUE DE DROIT INTERNATIONAL PRIVE 67.

tribunals¹²² have refused to recognize a state's "naturalization" of an alien when it was contrary to international law, even though the alien was resident in the naturalizing country at the time of the alleged naturalization. The confiscation of private property by a belligerent has been repeatedly denied effect by other municipal courts,¹²³ including our own,¹²⁴ when it is found to be a violation of international law. On the other hand, no international tribunal has ever held a refusal to apply the "act of state" doctrine to be a violation of international law, and there has been no diplomatic protest against a judicial decision which has failed to apply it.¹²⁵ While perhaps the doctrine was at one time properly regarded as a rule of international law, the emergence of the rule of international law against the confiscation of the property of aliens may alter this fact.¹²⁶ Moreover, even as a rule of international law, if it was ever so regarded, the doctrine rested on the practices of but a few states.

In light of the increasing authority holding that acts of confiscation are violations of international law,¹²⁷ the "act of state" doctrine no longer seems advisable. By abandoning that doctrine in favor of the emerging international law rule American courts could avoid weakening that rule by in effect indirectly sanctioning its violation. The rights of persons who had been affected by the

¹²² FELLER, MEXICAN CLAIMS COMMISSIONS 98, 100 (1935); 3 MOORE, INTERNATIONAL ARBITRATIONS 2468-2483 (1898).

¹²³ *Suita v. Guzkowski*, (Poland, S. Ct., 3d Div., 1921) 1919-1922 ANN. DIG. 480 (No. 342); Hungarian S. Ct. resolution 1922, 1919-1922 ANN. DIG. 482; *M. v. Aktieselskabet K. H.* [German, Reichsgericht (in Civil Matters) 1934], 1933-1934 ANN. DIG. 501 (No. 217). In *Rosenberg v. Fischer*, [Switzerland, Fed. Trib. (Chamber for the Restitution of Assets Seized in Occupied Territory) 1948], the court said, "In fact, an object seized from its owner in a manner contrary to international law has, without doubt, the character of stolen or lost property in the meaning of Article 934, par. I, of the Civil Code. . . ." 1948 ANN. DIG. 467 at 468 (No. 150).

¹²⁴ *State of the Netherlands v. Federal Reserve Bank*, (S.D. N.Y. 1951) 99 F. Supp. 655. The court stated, however, that the "act of state" doctrine was not involved. On appeal, the question was left open, (2d Cir. 1953) 201 F. (2d) 455.

¹²⁵ Mann, "International Delinquencies before Municipal Courts," 70 L. Q. REV. 181 at 198 (1954).

¹²⁶ "A conflict of two rules of international law then arises. The rule according to which the courts of one State do not sit in judgment on acts of another state may conflict with the rule that aliens shall not be deprived of their property without compensation. It is submitted that settlement of such a conflict might be found by applying the generally accepted principle of *lex posterior derogat legi priori*." "The Legal Effects of Nationalizations Enacted by Foreign States," Report of the Netherlands Branch of the International Law Association, New York University Conference, p. 9 (1958).

¹²⁷ It can also be said that the confiscating state acted without jurisdiction in international law. See O'Connell, "A Critique of the Iranian Oil Litigation," 4 INT. & COMP. L.Q. 267 at 291 (1955); Mann, "International Delinquencies before Municipal Courts," 70 L. Q. REV. 181 at 194 (1954).

confiscation would be upheld.¹²⁸ Perhaps most important, there would be much less incentive for foreign states to expropriate without compensation. Since most expropriating countries are generally underdeveloped, they are in need of capital goods from other countries. The major suppliers of such goods are often the United States, Britain, France and Germany. If the United States and Britain were to follow the example of France and Germany and not recognize title to confiscated goods, the confiscating country would have difficulty using the goods so obtained to acquire needed capital goods and the benefits derived from the confiscation would be drastically circumscribed.

John C. Peters, S.Ed.

¹²⁸ The rights of innocent third parties who purchased goods without knowledge of the confiscatory character of their title could perhaps be protected by an adaptation of the theory that title so acquired is not void but voidable, and not voidable against third party bona fide purchasers.