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## INTERNATIONAL LAW-POWER OF GOVERNMENT-IN-EXILE TO ENACT VALID LEGISLATION

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INTERNATIONAL LAW—POWER OF GOVERNMENT-IN-EXILE TO ENACT VALID LEGISLATION—After occupying the Netherlands, Germany confiscated bonds of Netherlands nationals and sold them in the black market. Archimedes, an American national, purchased such bonds from a Swiss firm in violation of the Trading with the Enemy Act<sup>1</sup> and executive freezing order.<sup>2</sup> The bonds were placed in a blocked account in the Federal Reserve Bank. A suit by the Netherlands was removed to the New York federal district court and Archimedes was

<sup>1</sup> 40 Stat. L. 411 (1917), as amended, 12 U.S.C. (1946) §95(a), 50 U.S.C. App. (1946) §5(b).

<sup>2</sup> Executive Order No. 8389, §9(E), 5 Fed. Reg. 1400 (1940); Executive Order No. 8405, §9(E)(F), 5 Fed. Reg. 1677 (1940).

interpleaded. The Netherlands claimed title under a decree made in exile vesting protective title in the Netherlands government.<sup>3</sup> While holding that the complaint stated a cause of action,<sup>4</sup> the court ruled that the Netherlands decree was invalid and that Archimedes, due to willful ignorance of the facts and his violation of the freezing order, had no claim.<sup>5</sup> On appeal, *held*, affirmed as to Archimedes on both grounds, but reversed as to the Netherlands, the decree of the government-in-exile being valid and no American claims existing. *State of the Netherlands v. Federal Reserve Bank of New York*, (2d Cir. 1953) 201 F. (2d) 455.

This case indicates another step away from the old view that a belligerent's occupation of enemy territory gives him full authority and dispossesses the enemy government entirely.<sup>6</sup> The Hague Convention on Land Warfare<sup>7</sup> limited the occupant to that control necessary to ensure public order and security and to promote legitimate prosecution of the war, leaving the dispossessed government full sovereignty. Legislation by the government-in-exile raises two questions: effect in occupied territory and extraterritorial effect.<sup>8</sup> If the constitution of the exiled government forbids legislative action outside the national territory,<sup>9</sup> recognition of the government-in-exile by other nations is required.<sup>10</sup> Such recognition was extended by the Allied powers. The limits imposed on the occupant

<sup>3</sup> Decree A-1, May 24, 1940, CCH WAR LAW SERV., Foreign Supp., ¶191,251 (1945).

<sup>4</sup> *State of the Netherlands v. Federal Reserve Bank of New York*, (D.C. N.Y. 1948) 79 F. Supp. 966.

<sup>5</sup> *State of the Netherlands v. Federal Reserve Bank of New York*, (D.C. N.Y. 1951) 99 F. Supp. 655.

<sup>6</sup> *Occupation of Cavalla Case*, Greece, Court of Thrace (1930), ANN. DIG. PUB. INT. L. CASES 496 (1929-1930); *Fleming & Marshall v. Page*, 9 How. (50 U.S.) 602 (1850); *United States v. Rice*, 4 Wheat. (17 U.S.) 246 (1819); HALL, INTERNATIONAL LAW, 8th ed., Higgins, 553 (1924).

<sup>7</sup> 36 Stat. L. 2277 esp. at 2306, art. 43 (1910). The old view had been that as there was no protection there could be no obedience to laws. *United States v. Rice*, note 6 supra. On the changing view, see *Fleming & Marshall v. Page*, note 6 supra (occupation not conquest but gives title as far as third states are concerned); *Auditeur Militaire v. Van Dieren*, Belgium, Council of War of Brabant (1919), ANN. DIG. PUB. INT. L. CASES 445 (1919-1922); *The Fama*, 5 C. Rob. 106, 165 Eng. Rep. 714 (1804); *Coleman v. Tennessee*, 97 U.S. 509 (1878) (courts of occupied territory remain open unless occupier closes them). But cf. *In re Lo Dolce*, (D.C. N.Y. 1952) 106 F. Supp. 455 (Italy had no jurisdiction in criminal matters in territory occupied by U.N. after armistice, but did have sovereignty).

<sup>8</sup> A side issue, whether the nation which receives the exile must enact enabling legislation to make any decree of the exile effective for any purpose, is suggested by Lourie and Meyer, "Governments-in-Exile and the Effect of Their Expropriatory Decrees," 11 UNIV. CHI. L. REV. 26 (1943); Oppenheimer, "Governments and Authorities in Exile," 36 AM. J. INT. L. 568 (1942). But such legislation was passed: Diplomatic Privileges (Extension) Act, 4-5 Geo. VI, c. 7 (1941). Oppenheimer, supra, suggests full recognition of exiled government by receiving state may be sufficient. But cf. *In re Savini*, Italy, Court of Appeal of Rome (1927), ANN. DIG. PUB. INT. L. CASES 166 (1927-1928) (both recognition and permission must be granted).

<sup>9</sup> Wolff, "The International Position of Dispossessed Governments at Present in England," 6 MOD. L. REV. 208 (1943), argues that international law requires suspension of such provisions.

<sup>10</sup> *Ibid*; *Bank of Ethiopia v. National Bank of Egypt and Liguori*, [1937] Ch. 513.

could result in gaps in the ordinary law of the occupied nation which only the sovereign could fill.<sup>11</sup> As sovereignty retained by the occupied state must vest in its dispossessed government and legislative power is indispensable to a government,<sup>12</sup> courts of that state have enforced in the occupied territory decrees which do not impair the occupant's authority, although enacted after occupation.<sup>13</sup> Decrees to hamper the occupant in dealing with the territory are void.<sup>14</sup> The suggestion that the occupant should recognize proper absentee legislation is met with practical difficulty in view of the more pressing problems faced by the occupant.<sup>15</sup> Legislation designed to have an effect abroad presents a greater problem. Foreign courts, though refusing to judge the effectiveness of decrees directed to the occupied territory,<sup>16</sup> have determined their extraterritorial effect.<sup>17</sup> Peacetime confiscatory decrees have generally been denied extraterritorial effect.<sup>18</sup> United States courts have suggested determination may be a matter for the political branches of the government.<sup>19</sup> The *Transandine* case<sup>20</sup> reserved decision on this question, but the principal case suggests it may be political in nature. English courts, while agreeing that recognition by the political branch of their government relieves the courts of the necessity for determining the internal effect of the recognized government's decrees, have themselves determined the extraterritorial effect of such decrees.<sup>21</sup> Other factors in ascertaining the effect have been the situs of the object of the decree<sup>22</sup> and the forum's public policy.<sup>23</sup> Unless determination by the political branch is now controlling, no single factor is determinative and the courts use a combination in each case.<sup>24</sup> Both England

<sup>11</sup> 50 MICH. L. REV. 1066 (1952), cited in principal case; *Thorington v. Smith*, 8 Wall. (75 U.S.) 1 (1868); *Aboitz & Co. v. Price*, (D.C. Utah 1951) 99 F. Supp. 602 (but acts to aid war effort invalid); *De Brabant & Gosselin v. T. & A. Florent*, Belgium, Court of Appeal of Brussels (1920), ANN. DIG. PUB. INT. L. CASES 463 (1919-1922) (order voiding contracts void).

<sup>12</sup> Oppenheimer, "Governments and Authorities in Exile," 36 AM. J. INT. L. 568 (1942).

<sup>13</sup> *Public Prosecutor v. Reidar Haaland*, Norway, Supreme Court, Appellate Division (1945), ANN. DIG. PUB. INT. L. CASES 444 (1943-1945) (reimposing death penalty); *De Nimal v. De Nimal*, Belgium, Court of Appeals of Brussels (1919), ANN. DIG. PUB. INT. L. CASES 447 (1919-1922) (changing statute of limitations).

<sup>14</sup> *State of the Netherlands v. Federal Reserve Bank of New York*, note 5 supra.

<sup>15</sup> Stein, "Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation: The Schio Massacre," 46 MICH. L. REV. 341 (1948).

<sup>16</sup> *Oetjen v. Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309 (1918).

<sup>17</sup> *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 348 Pa. 335, 35 A. (2d) 346 (1944).

<sup>18</sup> *Moscow Fire Insurance Co. v. Bank of New York and Trust Co.*, 280 N.Y. 286, 20 N.E. (2d) 758 (1939), affd. 309 U.S. 624, 60 S.Ct. 725 (1940).

<sup>19</sup> *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552 (1942).

<sup>20</sup> *Anderson v. Transandine Handelsmaatschappij*, 289 N.Y. 9, 43 N.E. (2d) 502 (1942).

<sup>21</sup> *Luther v. Sagor & Co.*, [1921] 3 K.B. 532.

<sup>22</sup> *Lourie and Meyer*, "Governments in Exile and the Effects of Their Decrees," 11 UNIV. CHI. L. REV. 26 (1943); *Cities Service Co. v. McGrath*, 342 U.S. 330, 72 S.Ct. 334 (1952).

<sup>23</sup> Principal case; *Lorentzen v. Lydden & Co.*, [1942] 2 K.B. 202; 5 MOD. L. REV. 262 (1942). But cf. *Bank Voor Handel En Scheepvaart v. Slatford*, [1951] 2 All E.R. 779.

<sup>24</sup> 65 HARV. L. REV. 1463 (1952).

and the United States have enforced such decrees when they accord with the forum's public policy.<sup>25</sup> The district court distinguished the principal case from the *Transandine* case on the ground that public policy in the latter required that property situated in this country be kept out of enemy hands, while in the present case the property was in the Netherlands when the decree was made.<sup>26</sup> The circuit court, rejecting this argument, said the freezing program was to protect property of persons in occupied territory and to assist in the recovery of looted securities.<sup>27</sup> The requirements for the enforcement of a decree of an exiled government are (1) the property affected must be in the United States when action is brought; (2) the property must belong to the exiled government or a resident of the occupied territory; and (3) there must be no legitimate American claims.<sup>28</sup> English courts with one exception<sup>29</sup> have given such decrees extraterritorial effect.<sup>30</sup> Application of public policy considerations to give extraterritorial effect is somewhat unusual,<sup>31</sup> but since the occupying nation has no valid claim to the property affected, it would appear that comity<sup>32</sup> and justice<sup>33</sup> are better served by implementing such protective expropriation decrees.

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<sup>25</sup> Note 23 *supra*.

<sup>26</sup> *State of the Netherlands v. Federal Reserve Bank of New York*, note 5 *supra*.

<sup>27</sup> Principal case at 459; *Zittman v. McGrath*, 341 U.S. 446 at 453, 71 S.Ct. 832 (1951).

<sup>28</sup> Principal case; *Anderson v. N.V. Transandine Handelmaatschappij*, note 20 *supra*.

<sup>29</sup> *Bank Voor Handel En Scheepvaar v. Slatford*, note 23 *supra*.

<sup>30</sup> 65 HARV. L. REV. 1463 (1952); 100 UNIV. PA. L. REV. 764 (1952); note 24 *supra*.

<sup>31</sup> 5 MOD. L. REV. 262 (1942).

<sup>32</sup> *Anderson v. N.V. Transandine Handelmaatschappij*, note 20 *supra*.

<sup>33</sup> There is some concern over the possible double liability of the obligor. *Matter of Breitung*, 109 N.Y. L.J. 1029:3 (1943); cf. *Cities Service Co. v. McGrath*, note 22 *supra*.