TO: Jenner Legal [illegible]

1. Fen's memo on forced labor — be sure it covers PW-s

war crimes 2. Hemming's 4/10 p. memo.

3 (a) Right to remove plants & equipment after surrender. Duke

(b) Right to remove U.N. property — Minskoff Duke

4. How to get countries to disgorge German assets. See Golding's memo. Talk to Duke about Golding's memo &

L. C. Aarons

5. Heffelfinger [illegible] of [illegible] practical [illegible]

6. Gen. German memo.

TO:

Mr. Brenner

E. D. GOLDING

April 5, 1945

MEMORANDUM FOR THE FILES

Re: Memorandum with respect to Authority of the Military Government of Germany to Vest Property Outside Germany with or without Provision for Compensating Credit in Reichsmarks

The memorandum which I prepared on the foregoing topic represents an advocate's position rather than an impartial analysis of authorities. It is true, as Dr. Frankel and Dr. Schoch of Foreign Economic Administration point out, that in virtually all cases which have been found where extraterritorial effect has been claimed for acts of a temporary occupant have resulted in a decision that the acts should not be recognized. This does not mean that the acts of the military occupant could not be recognized, but merely that neutral countries have considered it contrary to their public policy to recognize such acts. The probable reason is suggested by a decision of the Reichsgericht several years ago, which held that assets of a Danish bank within Germany should be liable to the claims of a partnership which had maintained a deposit with the bank, notwithstanding the fact that the balance had previously been paid to a sequestrator acting under the debt collection provisions of the Treaty of Versailles. The decision in question was somewhat startling for several reasons, including the fact that it repudiated the Versailles Treaty, and the rights of the sequestrator as derived from French law which on normal conflicts principles might have been applied. The case is, however, suggestive of the fact that neutral countries may feel greater hesitancy in recognizing acts of any temporary peaceful occupant than they would in recognizing acts of any permanent de jure or de facto government.

The carrying through of an effective program for permanent demilitarization of Germany and military control in Germany of indefinite duration is therefore the strongest assurance that an external asset vesting decree will be recognized within neutral countries.

Copies to Messrs. Aarons, Friedman, Minskoff, Brenner, and Lancione.

EDG:blw

March 31, 1945

MEMORANDUM

Re: Authority of the Military Government of Germany to Vest Property Outside Germany with or without Provision for Compensation in Reichsmarks.

I. The military occupying authorities and the United Nations are committed to war aims which could not be fulfilled without the issuance of a decree vesting German assets outside Germany.

It has been proposed that the Allied military authorities issue a decree vesting title to all property situated outside Germany which is owned by Germans. The purposes of such a decree would include those set forth in the various United Nations and Tripartite Declarations pertaining to postwar settlements, as well as specific objects incident to consummation of the tripartite program within Germany and the accomplishment of war and peace aims.

Inquiry has been made concerning the general legal authority for the issuance of such a decree and the specific types of provisions which it would be necessary or desirable to include therein.

The practical answer to this question appears already to have been given in part by joint declarations of the occupying powers. In the Yalta Declaration of February 11, 1945, Prime Minister Churchill, President Roosevelt and Marshall Stalin agreed that the damage caused by Germany to the Allied Nations in this war was such that it should be "recognised . . . as just that Germany be obligated to make compensations for this damage in kind to the greatest extent possible." In addition, it was stated to be the joint "inflexible purpose to destroy German militarism and Nazism and assure that Germany will never again be able to disturb the peace of the world." To accomplish these purposes it was provided that there would be eliminated or controlled all German industry that could be used for German military production and that in harmony such other measures would be taken in Germany as may be necessary to the future peace and safety of the world. 1/

In addition, in the United Nations Declaration of January 5, 1943, the United Nations issued a formal warning to all concerned, and particularly to persons within neutral countries, that they intended to do their utmost to defeat the methods of dispossession practiced by the enemy

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1/ See text of Yalta Declaration as published in the Washington Evening Star for February 13, 1945.

governments against the countries and people who have been so wantonly assaulted and despoiled; and to this end reserved their rights to overturn transfers or deliveries of "properties, rights, and interests which are or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged to persons, including juridical persons, resident in such territories."2/

The foregoing documents in their entirety constituted a set of understandings under which occupying powers express the moral intent to use their joint facilities to preclude Germany from ever again constituting a threat to the peace of the world, and to require Germany to make reparations payments which may doubtless be much in excess of the capacity to pay resulting from the resources available in bomb-torn Germany at the time of surrender.

To carry out the foregoing commitments, the occupying powers will doubtless be required to vest German external assets. The central significance of such a step is apparent from reports already obtained indicating that an "underground" movement of large proportions is planned within and without Germany, to be composed not only of leaders and members of the Nazi party, but also of influential economic and financial interests, such as Krupp, Messerschmidt, and Rheinmetall, as well as members of military and patriotic organizations. The evidence indicates that members of the "underground" will endeavor by all means to aggrandize and to conceal ownership and centralized control of, German financial and economic interests wherever situated, in order to preserve a position which will enable Germany again to emerge as a major threat to world peace. It seems elementary that if German industrial, economic and military influence is to be permanently prevented from constituting a threat to the peace of the world, holdings outside Germany constituting a solid corpus of such influence must be removed from all possibility of control by Germany.

It is even more obvious that Nazi acts of loot and dispossession could not be frustrated nor could the Nazi obligation to repair the damages to humanity which resulted from the war be satisfied, if title to German assets outside Germany were not taken by the central authorities. The logical step to accomplish this purpose would be the issuance and effective administration of a decree vesting German external assets.

II. <u>Principal acts in connection with the administration of a decree vesting German assets outside Germany will be effected wholly within Germany and will not be subject to re-examination outside Germany.</u>

Questions of legal authority for the issuance of the decree vesting

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2/ See United Nations Declaration on Acts of Dispossession, Schnapper, United Nations Agreements 14 (1944).

German assets as well as questions of practical administration of such a decree are somewhat simplified by virtue of the fact that many of the problems which may arise can be handled by acts of the Allied military authorities which occur within Germany.

For example, the investigation of ownership of German external assets and the securing of transfers by the owners of German external assets will involve principally acts within Germany. So too, the ultimate value of any compensation paid in Germany for the vested assets will depend upon purely internal acts within Germany, such as the steps taken to fix or alter the rate of exchange, to impose war profits' taxes, etc. Likewise, the uses to which the vested assets are placed, and, specifically, the determination of what uses of such assets are public uses, are matters involving principally internal administration within Germany after centralization has been effected.

It seems unnecessary to dwell at great length upon the authority for measures of the foregoing types. It has already been pointed out that the Allied Military Government will have full authority to carry out its war aims within Germany with or without agreement for surrender or peace treaty. 3/ Upon the cessation of hostilities, the Allied Military Government will succeed to the right to carry out institutions existing in Germany. 4/ The existence of such a right implies broad authority inasmuch as present German law confers wide powers to

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3/ See Memorandum from Mr. O'Connell, General Counsel of the Treasury Department, to the Secretary of the Treasury, dated January 30, 1945.

4/ This principle is illustrated by several cases decided by the Netherlands courts sustaining the extraterritorial effect of moratorium measures enacted by German occupying authorities in Belgium during the first World War. The Netherlands courts pointed out that the action taken was pursuant to pre-existing Belgian legislation. See 1917 Nederlandsche Jurisprudentie 594, 1079; see also Ann. Dig. 1919-22, Case No. 36.

centralise German foreign holdings.5/

While including the authority derived from pre-existing German law, the authority of the Allied Military Government is by no means limited to such authority. It shall have full power to establish a de facto government6/ pursuant to the accomplishment of a complete

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5/ See especially Article 153 of the Constitution of the German Reich of August 11, 1919, which states in part: "Expropriation can only take place for the public benefit and on a legal basis. Adequate compensation shall be granted, unless a Reich law orders otherwise"; and Sections 5(1) and 6(1)(2) of paragraph 3 of Title I of the Devisen Control Law of December 12, 1938, and Section 46 of Title III of the same law which include extensive requirements of tender to the Reichsbank of assets outside Germany owned by Germans. It is particularly interesting that the sole provision of compensation for assets so tendered is in Section 51(4) of the Devisen Control Law which provides that "A claim of a person to receive payment of the equivalent in Reichsmarks shall be determined by the general business terms of the Reichsbank." Of further interest is the law against sabotage of the economy (1936 RgbI I 999) which states, in part, that "A German national who for his selfish advantage or other purposes, wittingly or unwittingly shifts or retains assets in foreign countries contrary to legal provisions and thereby causes grave damage to the German economy shall be punishable by death. His property shall be confiscated. Such person is also punishable notwithstanding that the act was committed in a foreign country."

6/ See e.g. 2 Oppenheim, International Law (6th Lauterpacht ed. 1940) 336-50; 2 Hyde, International Law (1922) 336-68; 1 Moore, International Law Digest (1906) 45-51; 7 id. 257-315; Hall, International Law (8th Higgins ed. 1924) 553-76; Lawrence, International Law (7th Winfield ed. 1923) 408-30; Spaight, War Rights on Land (1911) 320-418; Colby, Occupation under the Laws of War (1926) 26 Col. L. Rev. 116.

victory to which the laws of precarious occupation are no longer applicable.7/ The situation parallels that which has frequently arisen upon successful termination of hostilities. Thus in Societe des Quais de Smyrne v. Government Hellenique the mixed French Greek Tribunal said (See 37 Revue de Droit Int'l Public 335 (1930)):

> "During the occupation of Smyrna, the Greek government exercised there the political and military power and assumed the supreme administration of the town and its surroundings. In these circumstances it must be admitted that the occupation created for the Greek government a situation which was essentially similar to that of the legitimate government of the country."

In the case of the Bank of Ethiopia v. National Bank of Egypt and Ligouri [1937] 1 Ch. 513, the question arose as to the validity of a liquidation of an Ethiopian bank by act of the Italian authorities, shortly after the conquest by Italy of most of Ethiopia including its capital. The British court refused to apply standards as to precarious occupation and stated:

> "Thus the de facto government must necessarily make such provisions as may be proper for regulating the concerns of the inhabitants and it cannot confine itself to the protection of its military forces. It must necessarily, in such circumstances, assume the full responsibility of government and its acts, I should have thought, must necessarily have the status of a fully recognised government."

In Banque Internationale de Commerce de Petrograde v. Hausner, 50 Entscheidungen des Schweizerischen Bundesgerichtes, part II (1924); Arrets du Tribunal Federal Suisse (1924) Recueil Officiel Part II, p. 507, the court stated, in rejecting the Banque Internationale's claim for service charges against one Hausner,

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7/ See Textor, 2 Synopsis of the Law of Nations 305 (1680). (Translation in Carnegie Classics of International Law); 2 Grotius, De Jure Belli ac Pacis Libri Tres (1625) 825-826; Feichenfeld, International Law of Belligerent Occupation (1942) p. 11.

that the bank was no longer in existence. "That the Banque Internationale de Commerce de Petrograde has ceased to exist in Russia is undeniable." The court replied for this conclusion upon nationalization laws passed by the "political regime" subsequent to the Russian revolution.

The Russian regime was a de facto regime which had not been recognised by the Swiss Government.

It should be pointed out further that so far as international law is concerned, whether or not a government is a de facto government is a question of fact which is dependent upon the general nature of the authority exercised by the government; and that in resolving the question whether or not the government is a de facto government, the question of the manner in which the government obtained power is immaterial. This point was discussed in detail in the arbitration between Great Britain and Costa Rica, reported in 18 American Journal of International Law 147 (1923). That case involved the status of measures of the Tinoco Government, a usurper which replaced, and was in turn replaced by, the legitimate government. The Arbitral Tribunal stated that the Tinoco Government was a de facto government and the subsequent de jure government was bound by its acts. In support of this conclusion it was pointed out that, "the legality or constitutional legitimacy of the de facto government is without importance internationally so far as representing a state is concerned."8/ The Tribunal went on to point out that non-recognition of a government by other governments has nothing to do as a matter of international law with its de facto status. It stated, "such non-recognition for any reason, cannot outweigh the evidence disclosed by the record before me as to the de facto character of [Tinoco's] Government according to the standard set by international law." The arbitrator also stated that a government may be a de facto government notwithstanding the fact that its acts do not conform to the previous constitution of the state in question.

So too in the Arantzazu Mendi, (1938) P. 233, the English court held that a letter from the English foreign secretary pointing out that the Spanish Nationalist government exercised effective powers of administration was final and conclusive as to its de facto status. The Court said:

8/ See Moore 1, Digest of International Law, p. 249; Borchard, The Diplomatic Protection of American Citizens Abroad; Kent, Commentaries 14th ed., p. 25; Wheaton, International Law (Philippsons, 1st Eng. ed., p. 37); Hall, International Law, 6th ed., 1909, p. 20-21; Woolsey, Introduction and Study of International Law (1873) pp. 32, 52, 53, 171 and 172.

"My Lords, this letter appears to me to dispose of the controversy. By exercising de facto administrative control or exercising effective administrative control, I understand exercising all the functions of a sovereign government in maintaining law and order, instituting and maintaining Courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control of property, whether for military or civil purposes, including vessels, whether warships or merchant vessels. In those circumstances, it seems to me that the recognition of a government as possessing all those attributes in a territory while not subordinate to any other government in that territory is to recognize it as sovereign, and for the purpose of international law as a foreign sovereign state."

The court thereupon sustained the authority of the Nationalist government of Spain to take title of ships in British waters, although the Spanish Civil War was still in progress.

In view of the foregoing, it appears that neither international nor national tribunals will in general re-examine the validity of action taken within its territorial jurisdiction by a de facto government, notwithstanding the fact that the government was established by war or revolution. It has been specifically so held with reference to acts of a de facto government within its jurisdiction to take property under its jurisdiction or to compel the transfer of property by persons under its jurisdiction.2/

Nor is there any rule of international law which requires national or international tribunals to make such a re-examination. The right to take property for a public use is well accepted in international law.2a/ National jurisdiction exists to determine whether the taking of property is for a public use, and to determine, on a basis which treats foreign

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2/ In addition to the cases above cited, see Salimoff and Co. v. Standard Oil Co. of New York, 262 N.Y. 220, 186 N. E. 679 (1933); Luther v. Sagor (1921) 1 K.B. 456, rev'd. (1921) 3 K. B. 532; Cheshire, Private International Law (2d ed. 1938) 151; cf., the leading case of Underhill v. Hernandez, 168 U. S. 250 (1897); Princess Paley Olga v. Weisz (1929) 1 K.B. 718; Ricaud v. American Metal Co. Ltd., (1917) 246 U. S. 304; Banco de Bilbao v. Sanchez; Same v. Rey (1938) 2 K. B. 176; (1938) 2 All E. R. 253; cf. U. S. v. Rice, 4 Wheat. 246 (U. S. 1819); McLeod v. U. S., 229 U. S. 416 (1913).

2a/ See memorandum of Smith dated

nationals as favorably as local nationals, whether compensation should be paid for property expropriated. There are no accepted rules of international law precluding the exercise of such jurisdiction.10/

III. The fact that assets outside Germany, non-German nationals, or contracts entered into outside Germany are affected by confiscatory action is immaterial.

The exercise of extraterritorial jurisdiction with respect to persons and properties is an ancient practice. Some familiar instances are the broad extraterritorial jurisdiction exercised by various of the nations from time to time in areas such as China, Japan, Morocco or Egypt. The jurisdiction exercised after wars by reparations and other commissions is an equally familiar example. The foregoing instances are of cases where the rights of extraterritoriality exercised were so broad as to amount virtually to permanent government. A degree of extraterritorial authority selective as to particular categories of persons

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10/ In this connection, see the authorities collected in Herz, Expropriation of Foreign Property, 35 Am. J. Int'l. Law, 243, 253, 258-262 (1941).

or particular categories of property affected has, however, also been frequently exercised. Familiar examples are the extraterritorial rights of diplomatic officials and the exercise of criminal jurisdiction with respect to armed forces abroad.

During the first World War, England adopted the practice in numerous cases of seizing and condemning in its prize courts vessels owned by persons of enemy nationality which were sailing under the claimed protection of neutral flags. A few years ago England adopted measures to centralize the foreign exchange assets of its nationals abroad. Similar steps were taken by Germany. So, too, in connection with the present war, the centralization of foreign assets has been a measure adopted by the Netherlands and Norway.

Whether or not extraterritorial rights will be permitted to be exercised has rightly been considered to involve political rather than legal considerations.

As Chief Justice Marshall stated in the case of the Schooner Exchange v. McFadden, 7 Cranch (U.S.) 116:

> "The mutual equality and independence of sovereigns and their common interest had given rise to a class of cases in which every sovereign was understood to waive the exercise of a part of an exclusive territorial jurisdiction."

Or as Strisower has put it:

> "Extraterritoriality . . . is the exemption of certain persons and of certain things from the regular action of [the territorial] state, whatever the result in principle with respect to the position of the latter, in the interest of its independence and all that attaches thereto."11/

Whether or not any particular state will give extraterritorial effect to the decree of a foreign state which purports to have extraterritorial effect is a matter upon which there is no certainty of principle. "Extraterritoriality is not necessarily the same in all cases . . . We do not have general principles applicable to all cases." 12/ The question is in all cases whether the grant of redognition would be in accord with the public policy of the territorial

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11/ Strisower, L'Extraterritorialite et ses Principales Applications, 1 Recueil des Cours (1923) 233 et seq.

12/ Ibid.

jurisdiction where it is sought to be enforced.13/

As the Permanent Court of International Justice stated, public policy is a notion "a definition of which in any particular country is largely dependent on the opinion prevailing at any given time in the country itself."14/

As the Belgian Court of Appeals said:

> "What could hurt the public order yesterday need not necessarily hurt it today."15/

As an English court said:

> ". . . You cannot lay down any definition of the term 'public policy', or say it comprises such and such a proposition, and does not comprise such and such another."16/

It is assumed that any measures taken to vest German assets outside Germany may involve the taking of steps to provide compensation. Nevertheless, it is interesting to note that the courts have sustained expropriatory action affecting property outside the jurisdiction of the country taking such action, or nationals of countries other than such country, or claims arising under the laws of other countries.

13/ A large number of authorities are collected in Rashba, Foreign Exchange Restrictions and Public Policy in the Conflict of Laws 41 Mich. L. Rev. 777, 782-83 (1943). (Footnotes 13 and 15).

14/ Judgments Nos. 14, 15, July 12, 1929 (P.C.I.J. Ser. A. Nos. 20/21), 2 Hudson, World Court Reports 344, at 375, 404 (1935).

15/ Ville Anvers v. La Belgique industrielle (Cour d'App. Brussels, Feb. 4, 1936), 3 Nov. Rev. 158, 166 (1936).

16/ Besant v. Wood, 12 ch. Div. 605, 620 (1879).

In United States v. Pink, 315 U. S. 203 (1942), the United States Supreme Court sustained the applicability of a decree nationalizing Russian insurance companies and taking over their assets within New York. The Court stated:

> "The powers of the President in the conduct of foreign relations included the power without the consent of the Senate to determine the public policy of the United States with respect to the Russian nationalization decree."
>
> The Russian decrees were sustained notwithstanding that assets within the United States were thereby expropriated and rights of certain United States creditors adversely affected.

In Anderson v. N. V. Transandine Handelmaatschappij, 289 N. Y. 9 (1942) the New York Court of Appeals sustained the applicability of the Netherlands Royal Decree of May 24, 1940, vesting assets of persons domiciled in the Netherlands to assets situated within New York. The decree involved in the case provided for a return of property to the former owner upon the termination of the emergency, but subsequently supplemented by steps to centralize all foreign exchange assets. The Decree did not provide compensation for use of the assets vested; and the right to return which it granted was conditioned upon the discretionary decision of the Dutch Government as to termination of emergency. In Lorentzen v. Lydden, 58 T. L. R. 178, 111 L. J. K. B. 329 (1942) the authority of a plaintiff to sue as assignee of the Norwegian government-in-exile was sustained where the Norwegian government's title was obtained by virtue of a Norwegian Order in Council of May 18, 1940, vesting title to property outside Norway from persons domiciled in Norway. The Court relied on the fact that compensation for the requisition was provided and stated that "public policy certainly demands that effect should be given to this decree." The absentee owner was in enemy occupied territory and most certainly had received no compensation at the date of the decision.

In the case of Rigmor, decided March 17, 1942, Sweden sustained the validity of a requisition by the Norwegian Government of Norwegian vessels in Swedis waters. The case was decided on the broad ground of sovereign immunity of the British Government and without regard to whether or not compensation had been paid for the vested assets.

The Hausner case, adverted to previously, is of particular interest inasmuch as it involved the effect of the Russian expropriation law and dissolution order upon a contract entered into in Switzerland by a Swiss branch of a Russian company. Inasmuch as the court deemed that the Swiss branch lost all capacity by virtue of the Russian Law, the effect of the decision was to effectively terminate property rights entered into under Swiss law between persons within Switzerland.

The principle of giving extraterritorial operation and effect to acts of a de facto government established pursuant to war or insurgency is well established in many cases other than the Hausner case.17/

In general, as Moore says:

> "The theory that the courts cannot consider as having external validity the acts of a government which has not been recognized as a government de jure may be said to lack support either in principle or authority."17a/

It appears clear from the above that any extraterritorial effect given to a decree vesting German external assets would be in accordance with the public policy of, that is to say with the concurrence of, the country where such decree has operation. In view of this fact, it seems rather clear that the legal authority for vesting property outside Germany in return for payment of compensation can scarcely be differentiated from that for condemnation of property within the territorial jurisdiction of Germany which is wholly lawful.18/ In both cases property within the territorial jurisdiction of a country is taken with the consent of that country; and compensation provided.

* * *

It may be noted further that to give effect to the decree will be in accord with the public policy of neutral governments. The German external assets vesting decree is part of the broad program for Germany to give to the peoples of the world permanent security and permanent peace. It is true that through the program Germany will undoubtedly be required to take just measures to recompense people everywhere for damages suffered through the war. These measures will benefit particularly the countries which have suffered material damages as a consequence of war. But the broader aims of

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17/ See Part I supra.

17a/ Moore, The New Isolation, 27 Am. J. Int'l. Law 607, 612 (1933).

18/ See Smith's memorandum of

the program to eliminate and control German productive facilities and financial resources available will accord with the public policy of all peace-loving peoples.

The issuance of a decree vesting German external assets will require countries and persons everywhere to disclose their public policy with regard to its implementation. The mere issuance of the decree will place persons holding German external assets under the necessity of determining the persons whose instructions they will honor. Any determination that a person or authority other than the German control authority can be treated as the lawful owner of assets will be at the peril of the person making the determination. The stakeholder will scarcely make such a determination without order of court or without most serious cause. The Allied authorities will be enabled to use all appropriate means to obtain voluntary transfers by stakeholders; and if this measure fails, to establish their interest by court proceedings or to raise questions on a diplomatic level.

Issuance of the vesting decree may also give neutral governments additional grounds to surrender assets to the Allied control authorities inasmuch as they will be enabled to take the position that they acted primarily to preserve the interests of their nationals. In this connection reliance may be placed on the view that intangibles have situs wherever the debtor has assets which may be used in payment of the claim.19/ This means that when a neutral depository of German external assets also has assets within a United Nations country or within Germany the claim of the Allied control authorities may be collected in territory controlled by or allied with the authorities occupying Germany; any refusal of the neutral country of which the debtor is a national to give extraterritorial effect to the decree vesting German assets could therefore have the effect of subjecting the neutral national to liability, both at the instance of the German owner in the neutral country, and at the instance of the Allied Control authorities.20/

Governments giving extraterritorial effect to the external assets vesting decree may receive protection for their nationals in international tribunals which may be established even though another German government is ultimately reinstated. This point is made in the arbitration between Great Britain and Costa Rica, 18 American Journal of International Law 147 (1923), where it was held that as a matter of international law a subsequent constitutional government

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19/ For references as to the pertinence of this concept in private international law see Lourie, Governments-in-Exile, and the Effect of Their Expropriatory Decrees, 11 U. Chi. L. Rev. 26, 32 (1943).

20/ This line of reasoning has given rise to extraterritorial recognition of expropriatory actions. See e.g. Banque de France v. Equitable Trust Co. (1929) 33 F (2d) 202; Russian Reinsurance Co. v. Stoddard and Bankers Trust Co. (1925) 240 N. Y. 149, 147, N.E. 703.

was bound by the acts of a de facto government established through force notwithstanding that the de facto government had acted in violation of provisions of the pre-existing constitution.

IV. As a practical matter possession may be taken pursuant to a German external assets vesting decree in many classes of cases; once such possession has been taken, it shall be final and conclusive.

In many instances, the vesting of title to assets outside Germany can be implemented by obtaining a payment order from the owner of the assets or possession from the depositary or stakeholder. Defenses of duress are personal to the owner of the assets, and if such defenses are not raised by him, might not be interposed by a stakeholder in defense to a claim based upon a payment order valid on its face. War aims can moreover be accomplished as a matter of international law through measures of duress.21/ Moreover, if possession of assets is once acquired pursuant to a decree having extraterritorial operation and effect, it seems to have been the law in numerous cases that such possession is final and conclusive and that the courts will not inquire into the manner by which it was acquired.

This principle is illustrated in certain cases arising in connection with the Spanish Civil War. Thus in the Cristina, the facts were that the Loyalist government of Spain took possession of a vessel in British waters pursuant to requisition after the outbreak of war. In all courts writs of attachment against the vessels were dismissed.22/ In dismissing the appeal, their lordships were agreed in basing their decision upon two indisputable propositions of international law which, Lord Atkin said, are "engrafted into our domestic law":

> "The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

21/ See Opinion of the General Counsel of the Treasury Department, supra.

22/ See 59 Ll. L. Rep. 47, 50 (1938) A. C. 485; (1938) 1 All E. R. 719; 32 Am. J. Int'l. L. 824 (1938); 54 Law Quarterly Rev. (1938) 339-44; Mann, Immunity of Sovereign States, 2 Mod. L. Rev. (1938) 57-62; Jennings, Recognition and Sovereign Immunities, id. at 287-291; Keith, The Jurisdiction of British Courts over Foreign Sovereigns, 50 Jurid. Rev. 179-85 (1938); Juenicke, Die Frage der Immunitat in der Rechtsprechung zum Spanischen Burger Krieg, Zeitschrift fuer Auslaendisches Oeffentliches Recht und Volkesrecht, IX (1939) 354-63.

" The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property of which he is in possession or control."

In the Cristina, the House of Lords and the courts below had not judicial knowledge of the division of Spanish territory between the contending forces, and the case proceeded throughout on the footing that the Republican Government was the sole recognized government in and for Spain. In the striking case of the Arantzazu Mendi23/, however, there was squarely posed the question whether, while the legitimate government is still recognised as the de jure government of the state, an insurgent government recognized as the de facto authority within a part of the national territory is to be considered as the government of a sovereign state for purposes of asserting sovereign immunity with respect to assets which it has obtained through the voluntary consent of the person in possession. In this case, the de facto government was permitted to have priority where its decree was prior in time and its notice of requisition served on the same day as the decree of the de jure government. The court considered that, notwithstanding that assets within England were affected, it was bound by decisions holding that foreign acts of state may not be reexamined.

V. While the authority to vest property of citizens of Germany who are within Germany, and corporations organized under the laws of Germany is most clear, no legal necessity for such a limitation exists.

For practical reasons, a decree which may be issued vesting German assets outside of Germany may be somewhat restricted so far as the nationality of the persons whose assets are subjected to vesting action is concerned. The legal authority for any decree which may be issued is not, however, so restricted. In issuing a decree vesting German assets outside Germany the Allied control authorities shall be enabled to exercise such authority as may exist with respect to persons who are German nationals upon the date of the issuance of the vesting decree, and such authority

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23/ (1938) P. 233 (1938) 3 All E. R. 333; (1939) P. 37 (1938) 4 All E. R. 269; (1939) A. C. 256 (1939) 1 All E. R. 719; see Lauterpacht, Recognition of Insurgents as a de facto Government, 3 Modern L. Rev. (1939) 1; Briggs, De Facto and De Jure Recognition; The Arantzazu Mendi, 33 Am. J. Int'l. L. 639 (1939).

24/ See note 9, supra.

as may exist with reference to persons who are "enemies" of at least one of the occupying powers. It cannot be said that there is any clear international law, either with respect to the definition of the term "national" or with respect to the definition of the term "enemy." The customary international practice has been for each state to reserve for its own determination the question whether particular persons are its nationals for general or limited purposes,25/ although in case of conflict between law of origin and law of domicile the latter has generally prevailed.26/ In Perkins v. Elg, 307 U. S. 325, 329 (1939), the United States Supreme Court said that "municipal law determines how citizenship may be acquired" and "it follows that persons may have dual nationality." It would not be unprecedented for Germany to punish as criminal, acts outside its borders by aliens which were in violation of the vesting decree. See Ford v. United States, (1927) 273 U. S. 593; Jurisdiction with regard to crime, Harvard Research in International Law (Supplement) 544, 545 (July 1935). Consequently, while the term "national" of a country no doubt includes its citizens resident within its borders and corporations incorporated and doing business under its laws, the additional categories of persons included within the term remain ill-defined, and for the purpose of a German external assets vesting decree can be defined inclusively.

The same observation is true, perhaps to even a greater extent, with respect to the definition of the term "enemy." As Oppenheim stated (see Oppenheim's International Law (Lauterpacht ed.) section 87):

> "Now, it is generally speaking correct to say that, whereas the subjects of a state and their property bear enemy character, the subjects of an enemy state and their property do not bear enemy character. This rule has, however, important exceptions. For under certain circumstances and conditions enemy persons and the property of enemy subjects may not bear, and on the other hand, subjects of a neutral state and their property may bear enemy character. And it is even possible for a subject of a belligerent to bear for certain purposes enemy character as between himself and his home state.

25/ See Sauser-Hall, Les Traite's de Paix et les Droits des Neutres (1924); Hackworth, Digest of International Law, section 255.

26/ See Hyde, International Law (3d ed.) sec. 348. Hyde also points out that "neutral arbitrators have generally been agreed in requiring the sovereign which claimed an individual as a national to adhere to a position consistent with its own municipal laws or constitution."

"The question of enemy character is, however, to a great extent unsettled, since on many points connected with it no universally recognized rules of International Law are in existence. . ."

It has long been agreed that all persons within a particular country may be treated as enemies notwithstanding their citizenship in other countries. (Ibid.) The question of the enemy status of corporations has, however, provoked considerable discussion. Corporations incorporated under the laws of a country may clearly be treated as enemies. It is now clear, moreover, that a corporation may be deemed to be an enemy because of enemy ownership or control, notwithstanding that it is incorporated under the laws of the neutral or even of an Allied country. (See e.g. Daimler Co. Ltd. v. Continental Tire and Rubber Co. Ltd. (1916) 2 A. C. 307.) Both the British and United States Trading with the Enemy Acts provide that persons acting for the benefit or on behalf of enemies may be treated as enemies and, under this test, citizenship, domicile or residence is, of course, not conclusive.

Enemy status, once acquired, of course cannot be divested through voluntary act of the enemy. The United Nations Declaration on War Criminals is specifically predicated on the position that war criminals of any nationality may be pursued for punishment by the Allied authorities to all countries of the world.27/

Conclusion

Whether and to what extent a decree vesting German Assets outside Germany will be recognised in courts of a third country raises questions of the policy of particular countries and not of international law. Clearly the duty of recognition by all countries will be supported by the Allied countries, at least insofar as the duty relates to property outside their respective territorial jurisdictions. The attitude of the neutral countries may be expected to turn upon their view of their interest. For practical reasons, including their self interest in cooperation with the Allies and the interest of their nationals in not being subjected to double liability, it appears that the neutral countries will cooperate in enforcement of the decree.28/

27/ See Declaration on War Crimes of January 13, 1942, in Schnapper, United Nations Agreements 11 (1944). On this point compare 6 Hackworth, Digest of International Law, sec. 203.

28/ In this connection, it may be pointed out that Switzerland has already blocked German assets.