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Case Comments

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SOVEREIGN IMMUNITY AND ACT OF STATE --- A FOREIGN SOVEREIGN INSTITUTING SUIT IN A UNITED STATES COURT WAIVES IMMUNITY TO A SET-OFF ARISING FROM AN ACT OF THAT SOVEREIGN.

First National City Bank of New York loaned a Cuban governmental corporation fifteen million dollars secured by United States government bonds and other obligations. After the ascension of the Castro government in 1959, the bank's Cuban branches were expropriated without compensation. Subsequently the bank sold the collateral, realizing 1.8 million dollars in excess of the amount of the loan. In a suit by the Cuban government corporation's successor for the excess, the bank counterclaimed for the value of its seized branches. Plaintiff contended that the counterclaim was barred by the principle of sovereign immunity or, alternatively, by the act of state doctrine. Held, plaintiff's motion for summary judgement denied. By instituting suit in a United States court, a foreign sovereign waives immunity to set-offs, and although the set-off is based on the public acts of the sovereign, the Hickenlooper Amendment[1] directs that the act of state doctrine will not preclude a determination of the merits. Banco Nacional de Cuba v. First National City Bank of New York, 270 F. Supp. 1004 (S.D.N.Y. 1967).

The court's sovereign immunity holding is consistent with established law since the executive branch had not suggested immunity and the resulting presumption against immunity governed.[2] But by allowing defendant more than set-off relief the court could have served better the "ultimate policy of fairness" on which its decision was partially based. Only a lower New York court has allowed an unlimited counterclaim against a sovereign plaintiff.[3] While, in that case, the counterclaim was compulsory, there seems to be no valid reason for maintaining the compulsory-permissive dichotomy in this situation.

The instant case was the first in which the Hickenlooper Amendment was asserted affirmatively; previously it had been used only defensively to persuade the court to determine the illegality of public acts upon which a sovereign plaintiff based its claim in a United States court.[4] In addition to directing courts to determine the merits of such cases, the Amendment states that, for expropriations to be internationally legal, they must be compensated. Thus the amendment effectively vitiates the act of state doctrine's exception to the conflict of laws principle that, unless contrary to an important forum policy, the lex locus delicti provides the model for the law to be applied. Affirmative assertion of the Hickenlooper Amendment dramatizes its effect: the application of United States law to a foreign sovereign acting within its own territory. This result

may be justified in light of the Amendment's underlying policy of encouraging and protecting American investment in underdeveloped countries; but the result creates jurisprudential problems and does not seem justified in light of the search for an international legal order based on traditional concepts of territoriality.

FOOTNOTES

1. Foreign Assistance Act of 1964 §301 (d)(4), as amended 22 U.S.C. § 2370 (e)(2) (1964).

2. National City Bank v. Republic of China, 348 U.S. 356 (1955); See Maier, Sovereign Immunity and Act of State: Correlative or Conflicting Policies?, 35 U. Cinn. L. Rev. 556 (1966).

3. Et re Balik Kurumu v. B.N.S. International Sales Corp., 25 Misc. 2d 299, 204 N.Y.S. 2d 971 (Sup. Ct. 1960), aff'd 17 App. div. 2d 927, 233 N.Y.S. 2d 1013 (1962).

4. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), Final order entered 272 F. Supp. 836, aff'd 383 F. 2d 845 (1967).

INTERNATIONAL LAW - NUREMBURG DOCTRINE INVOKED IN DOMESTIC COURT-MARTIAL

In 1967, United States Army Captain Howard Levy was court-martialed for willful disobedience of a lawful order. Levy had refused to teach methods of treating skin diseases to Vietnam-bound medical aides. At the court-martial, Levy contended that since the medical aides in Vietnam were guilty of calculated atrocities and crimes against humanity, his disobedience was exculpated under the doctrine of the Nuremburg trials. Although the presiding officer ruled that the doctrine of the Nuremburg trials could be raised as a defense for refusing to obey an order, the Nuremburg defense did not prevail and Levy was convicted because he was unable to establish that the medical aides were guilty of war crimes or crimes against humanity.[1]

In 1946, the Nuremburg International Military Tribunal found the leaders of Nazi Germany guilty of war crimes, crimes against humanity, and crimes against peace.[2] The Tribunal rejected the accuseds' contention that persons who carry out orders for the state are not personally liable for them. The Tribunal said that individuals have international duties which transcend the national obligations of obedience imposed by the individual state and that persons who violate the laws of war cannot obtain immunity while acting pursuant to the authority of the state if the state in authorizing action moves outside its competence under international law.[3]

By allowing the Nuremburg doctrine as a defense, the presiding officer in the Levy case implicitly recognized the existence of an international standard of conduct which may supersede national law in certain instances, as where obedience to military orders would facilitate the commission of war crimes or crimes against humanity. Nevertheless, the Nuremburg definitions of war crimes and crimes against humanity show that the international standard of conduct (at least as reflected by the Nuremburg trials) proscribed only the grossest violations of human rights and dignities. At Nuremburg, war crimes were defined as violations of the laws or customs of war such as the killing of hostages, deportation to slave labor of the civilian population in occupied territory, plunder of public or private property, and wanton destruction of cities, towns or villages. Crimes against humanity were such acts as murder, extermination, enslavement, deportation, or persecutions on political, racial, or religious grounds.[4] Clearly the Nuremburg doctrine is only a recognition of the minimum require-

ments of human rights and the presiding officer in the Levy case was correct in holding that these minimum requirements had not been violated by the medical aides.[5]

Although the recognition of an international standard of conduct in the Levy case is merely a restatement of the Nuremburg doctrine, the recognition is important because it comes from a domestic court. A declaration by the Nuremburg Tribunal (which was itself of limited jurisdiction and was largely the product of politics and emotion)[6] that the sovereignty of nations is limited by superseding international laws may have less effect upon the domestic use of international law than a declaration by the court-martial tribunal to the same effect. International law is given effect in international tribunals, regardless of national law. International law is also recognized in domestic courts.[7] But, in domestic courts when international law conflicts with national law, the national law has precedence.[8] Consequently, in giving precedence to international law, the Levy case is contrary to the preponderance of authority. Nevertheless, the Levy case is not really significant for its value as legal precedent. The real significance of the Levy case is that it may be the initial step in recognizing the relevance of international law in domestic affairs, and as such it may signal a change in attitude toward the domestic use of international law.

FOOTNOTES

1. For the facts in the Levy case, see New York Times, May 19 through June 4, 1967. Levy's attempt to prove that the medical aides were guilty of war crimes or crimes against humanity failed to establish any substantial violations of human rights. Indeed, some of the witnesses who testified for Levy did not feel that the medical aides were guilty of any violations of human rights.

2. At the Nuremburg trials crimes against peace constituted planning, preparation, initiation or waging of war against agression, or a war in violation of international treaties, agreements or assurances. Probably because the criteria for these crimes had no relation to the specific offenses alleged by Levy, there was no mention of these crimes at the court-martial.

3. 22 Proceedings in the Trial of Major War Criminals 466 (1946).

4. 39 Am. J. Int. Law Supp. 257, 260 (1945). The particular acts constituting war crimes and crimes against humanity were not condemned at Nuremburg unless they were committed in execution of a common plan and conspiracy.

5. Traditionally the doctrine and practice of international law has been that only states have rights and duties. But in recent years there has been increasing recognition of the individual as an international personality possessing rights and duties. W. Bishop, International Law 265 (2d ed. 1962). The Nuremburg trials and the Levy court-martial are specific instances in which the courts have held that individuals have international duties. The Genocide Convention, U.N. Doc. No. A/1517 (1950) (reprinted in 45 Am. J. Int. L. Supp. 13 (1951), the International Declaration of Human Rights, U.N. Doc. No. A/810 (1948) (reprinted in W. Bishop, International Law at 270-73 (2d ed. 1962), the Human Rights Commission of the United Nations, and the Geneva conventions are evidence of the continuing interest in international human rights. Possibly if the Levy defense had looked to some of the resolutions and conventions since Nuremburg it would have found good arguments that the international standard now included more individual rights and duties than reflected by the Nuremburg doctrine.

6. Finch, The Nuremburg Trial and International Law, 41 Am. J. Int. Law 20 (1947).

7. The Paquette Habana, 175 U.S. 677 (1900). See also Sprout, Theories as to the Applicability of International Law in the Federal Courts of the United States, 26 Am. J. Int. Law 280 (1932).

8. See W. Bishop, International Law 69 (2d ed. 1962).