14 The Case of Franz Joseph and Lajos Kossuth before the English Court of Chancery

Legal Battle over the Ruins of a Repressed Revolution with Its Still Topical International Law Consequences

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On the 160th anniversary of the tragic repression of the Hungarian national revolution of 1848/49 and in recognition of the great politician and lawyer Lajos Kossuth, it is only proper to commemorate the case between Kossuth and the Austrian Emperor Franz Joseph which took place in England in the latter half of the 19th century. The case, which has come to be known as the *Emperor of Austria v. Day and Kossuth*[1] case, has occupied the interest of international lawyers for one and a half centuries and, even today, opinions vary as to whether or not the court delivered the right judgment.

14.1 Historical Antecedents

The case itself was extraordinarily well known in its time not only in Britain but also in the United States of America. When John Westlake (the renowned Cambridge professor of law) died, the *American Journal of International Law* published an obituary stressing that nothing evidenced more the prominence of the late professor than the fact that he had been retained in this momentous case.[2] The Permanent Court of International Justice referred to it in the *Lotus* case.[3] When the *Emperor of Austria* case was omitted from an American textbook published in 1937 and compiled for a semester course in international

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1 1861, De Gex, F. & J. 217, EngR 688.

2 7 *American Journal of International Law*, 1913, p. 583, indeed, even half a century later Johnson mentions the role Westlake played in the *Emperor of Austria case* in his article on the English traditions in international law. D.H.N. Johnson, 'The English Tradition in International Law', 11 *The International and Comparative Law Quarterly* 2, 1962, pp. 416-445, at p. 441.

3 The case of the S. S. "Lotus", France *v.* Turkey, *in: Publications of the Permanent Court of International Justice*, Series A – No. 10 Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927, p. 65.

law, the *American Journal of International Law* found it necessary to reprimand the author in an editorial note. In 1965, more than a century after the judgment of the court was passed, the most important British cases concerning international law were collected in the composite volume entitled *British International Law Cases,* and it imputed a distinguished relevance to the case in question.[4] It is also referenced by the public international law textbooks of the 21st century, for example John O'Brien's monograph, *International Law*, published in 2001.[5]

Before exploring the international law implications of the case, it is necessary to examine the causes and outcomes of the proceedings that took place before the Court of Chancery. At the end of the 1850s, Kossuth was aggrieved to acknowledge that the revolutionary mindset in Hungary had been replaced by apathy. He may have found that public opinion could only be stirred by paying more attention to the 'human condition'. Thus he secretly made preparations for the printing of Kossuth banknotes to the total value of one hundred million Forints at the English printing house, Day and Sons. He was probably driven by the assumption that the hope of cashing the Kossuth notes, tucked away in the family chest, would spur on revolutionary action in the midst of lethargic Hungarian public opinion. The funds necessary for the printing were secured by Cavour, the Prime Minister of Piedmont-Sardinia, through clandestine channels[6] and the banknotes were mainly printed in 1 and 2 Forint denominations. By February 1860, the bulk of the printing tasks had been completed and – according to Francis Amasa Walker – a total of about 23 tons of bills had been printed.[7] The money was waiting shipment as the Austrian government became aware of the operation.

14.2 The Case and the Judgment

The Austrian government initially attempted to confiscate the banknotes by diplomatic means: however British government circles evaded the request. Finally, Emperor Franz Joseph was convinced by Count Rudolf Apponyi, the Austrian ambassador in London, to take the judicial route to seize and destroy the banknotes. The emperor's lawyers commenced their action in the Court of Chancery because they trusted that – as a court sitting without a jury and standing closest to the reigning powers – it would be the most likely to enforce their claim. The two-instance Court under the Lord Chancellor rendered its judgments in equity, *i.e.* not on the basis of positive law provisions. At first instance, Stuart, V.-C. ruled as a single judge, an appeal being lodged from him to the Court of Appeal in

4 *British International Law Cases*, Vol. I, Steven and Sons, London, 1964, pp. 22-60.
5 O'Brien, *International Law*, London, Cavendish, 2001, p. 20.
6 B. Ambrus, 'Kossuth Lajos londoni bankópere 1861-1862', 28 *Levéltári szemle* 3, 1978, pp. 635-656.
7 F. A. Walker, *Money*, New York, Henry Holt and Company, 1878, p. 368.

Chancery, where the Lord Chancellor sat with the two lords justices of appeal, Turner and Knight Bruce, LL.J., and delivered the judgment.

The claim of the Austrian Emperor was based on the exclusive power of the sovereign to issue and to permit the issuing of Hungarian banknotes: it was the Austrian National Bank which he had also authorised to issue money with respect to Hungary. The plaintiff further challenged the use of the Hungarian royal coat of arms on the banknote which – according to the Emperor – could only be depicted on an official document in possession of the relevant royal permit. According to the statement of claim, by issuing the money Kossuth had intended to promote revolution in Hungary; further, the introduction of the false banknotes would have caused significant injury to Hungary and thus to the subjects of the plaintiff. Pursuant to the statement of claim, the Court of Chancery was to order the seizure of the false banknotes and their surrender to the plaintiff.

It was not unprecedented for a foreign head of state to institute legal proceedings as a private individual before an English court[8] – typically seeking the enforcement of a claim in property – which somewhat alleviated the concerns of the emperor's circle with respect to the political risks inherent in the proceedings. Kossuth immediately saw the potential of the court proceedings as a means of arousing sympathy for Hungary's cause. In his memoirs, Kossuth wrote that the Emperor of Austria "in his nature as head of state bestirred himself to bring a case before a court against a poor Hungarian outcast".[9] This was also understood by Kossuth's supporters for which reason Cavour, the Prime Minister of Piedmont-Sardinia, and the French Emperor, Napoleon III, immediately made available and secretly provided Kossuth with the – not insubstantial – funds necessary for conducting the proceedings.[10]

Kossuth personally instructed the 12 lawyers representing him. According to the main line of defence, Franz Joseph was not entitled to submit the statement of claim for he was neither *de jure* nor *de facto* the king of Hungary. The legal order of succession to the throne was determined by the Crown Succession Act of 1723 passed by the Hungarian National Assembly on the basis of Pragmatic Sanction. In the framework of the 1748 Aix-la-Chapelle (Aachen) Peace Treaty ending the War of the Austrian Succession, Britain had also acknowledged the order of succession to the throne. Based on the 1723 Act, the last legally-elected Hungarian king was Ferdinand V, still alive at that time. According to the above sources of law, even a possible death of Ferdinand V could not have led to Franz Joseph's entitlement to the throne. At the time of the trial, Franz Joseph could not *de facto* be deemed the King of Hungary, its precondition being that he be crowned king on the

8 *Eg.*, in Case 3 Bro. C.C. 292 *The Nabob of Arcot v. The East India Company* [1791] and in Case 1 Dow and C. 169, *Hullett v. The King of Spain* it was the nabob of the Indian state of Arcot and the King of Spain who submitted their claims in property.

9 L. Kossuth, *Irataim az emigrációból III,* Budapest 1882, p. 391.

10 Ambrus 1978, p. 644.

territory of Hungary. During the trial, the English judges had no choice but to familiarize themselves with the Holy Crown theory, pursuant to which each Hungarian noble – and in consequence, also Kossuth – was a member of the Holy Crown and thus entitled to use the Hungarian royal coat of arms.[11]

The case was decided by Stuart, V.-C. at first instance. The vice-chancellor was not a peer, neither was he a member of the House of Lords, and his lowly ancestry was particularly insulting to Franz Joseph, as the judge was in effect also ruling on the legality of the Austrian monarch's rule in Hungary. Stuart, V.-C., also referred to as a 'die-hard Tory' by Kossuth,[12] delivered his judgment on 4 May 1861. In his judgment examining the legitimacy of Franz Joseph's rule in Hungary, Stuart, V.-C. found that because Queen Victoria had established diplomatic relations with Franz Joseph, thereby *de facto* recognizing him as the monarch of Hungary, the lawfulness of his rule might not be questioned before the court.

Moving on to the issue of printing money, the vice-chancellor stressed that the Kossuth banknotes did not resemble any existing paper money, thus the issue of counterfeiting money was not an issue. However he also determined that, according to international law, each state had *ius cudendae monetae*, in other words the right to issue money, including both minting coins and printing banknotes.[13] Stuart, V.-C. stated that Kossuth and his accomplices' actions clearly breached this right. The vice-chancellor declared that "the law of the nations is part of the common law of England"[14] and, for this reason in particular, the Court had to uphold the claim founded on this right. Thus Stuart, V.-C. did not afford judicial protection to the sovereign prerogatives of Franz Joseph but merely upheld a public international claim related to the monetary sovereignty of Hungary. This is the reason why public international lawyers subsequently referred to Stuart, V.-C.'s reasoning while they remained silent about the standpoint of the judges proceeding at second instance. In his ruling, Stuart, V.-C. ordered the seizure of the Kossuth banknotes and the respective printing plates.

Kossuth and Day lodged an appeal against Stuart, V.-C.'s ruling and the case came before the Court of Appeal in Chancery. A trial chamber of three judges proceeded at second instance, the senior judge being the Lord Chancellor. Each judge rejected the appeal in a separate statement and thus the second instance decision was rendered. However, the three judges gave different grounds for upholding the ruling, ordering the seizure of the Kossuth banknotes providing posterity with different interpretations as to the grounds upon which the Court had based its decision.

Interestingly – his seniority notwithstanding – the Lord Chancellor was the first of the appellate judges to deliver his judgment. He held that the court might not investigate

11 *British International Law Cases* 1964, p. 32.
12 Ambrus 1978, p. 646.
13 *British International Law Cases* 1964, p. 43.
14 *Ibid.*

the lawfulness of Franz Joseph's rule in Hungary as the English monarch maintained diplomatic relations with him.[15] At the same time the Lord Chancellor intimated that he essentially found the Hungarian rule of Franz Joseph unlawful. Demonstrating the situation with an example, he said that Napoleon III would also have had the right to initiate proceedings before an English court notwithstanding the fact that he had come to power by a *coup d'état*.[16] For no apparent reason, the Lord Chancellor twice mentioned Napoleon III and it is reasonable to assume that this was a clear indication that the English knew Kossuth's trial was being financed by him. During the proceedings, the Lord Chancellor called Kossuth "a man of honour as well as a man of extraordinary talent and accomplishment".[17]

The Lord Chancellor emphasized the point that the English court could not consider foreign law – *i.e.* Austrian or Hungarian public law – to the extent that English courts might not grant foreign monarchs the right to initiate proceedings in order to enforce royal prerogative rights.[18] At the same time, the Lord Chancellor maintained that the National Bank of Austria holding the right to issue banknotes in Hungary, would have incurred a pecuniary loss were the Kossuth banknotes have come into circulation in Hungary. Such a potential pecuniary loss would have established the standing of the National Bank of Austria before the competent English court. Insofar as the Bank had a right of action for such a claim, the monarch instilling the right to issue banknotes in Hungary would also be entitled to the judicial protection of his claims in property in England.[19] In tacit endorsement of the Holy Crown theory, the Lord Chancellor further maintained that the use of the Hungarian coat of arms might not be held against Kossuth and his accomplices and that the judgment of first instance had erred in this regard.[20]

Yet another approach may be derived from the statement of Bruce, L.J., another member of the appeals chamber. According to him, the court had jurisdiction to consider the case both on the basis of English law and international law.[21] The jurisdiction based on English law was established by the fact that the place of the civil law violation was in England even if the consequential damage was not incurred in England but rather in a friendly state.[22] According to Bruce, L.J., the jurisdiction based on international law was established by the fact that Kossuth and his circle printed the banknotes with the intention of 'subverting' the Hungarian government.[23] Bruce, L.J.'s arguments are referred to by international lawyers as

15 *British International Law Cases* 1964, p. 51.
16 *Ibid.*, p. 56.
17 *Ibid.*, p. 53.
18 *Ibid.*, p. 51.
19 *Ibid.*, p. 54.
20 *Ibid.*, p. 56.
21 *Ibid.*, p. 57.
22 *Ibid.*
23 *Ibid.*, p. 58.

asserting that it is the international law obligation of every state to thwart all preparations and subversive activities on their territory directed against another state. Contradicting his colleagues Turner, L.J., the third judge, stressed that the Court of Chancery had no jurisdiction to interfere with Kossuth and his accomplices' activities on the basis of their preparing a revolution in Hungary.[24] According to Turner, L.J., the rights of coining and printing money, the *ius cudendae monetae*, was a right imposed upon states by public international law.[25] Even if international law formed part of the law of England, all claims derived from international law were customarily enforced exclusively by diplomatic means. The rejection of righteous claims in the ambit of interstate relations might even lead to lawful war. Nevertheless, claims based on public international law might not be enforced before the municipal courts.[26] According to Turner, L.J. neither the violation of the monarch's sovereign rights, nor the injury incurred by the Hungarian state as a consequence of the circulation of the counterfeit banknotes, established the jurisdiction of the court to decide the case.[27] It was merely the potential injury of the Hungarian subjects incurred by the false banknotes that permitted the court to proceed against Kossuth's actions.[28]

On the basis of the judgment of the Court of Appeal in Chancery, the Kossuth banknotes were seized by the English authorities. In a legal sense the emperor prevailed: however, he had suffered an immense loss of prestige in the moral and political arena. A simple lower noble vice-chancellor had pondered the lawfulness of Franz Joseph's Hungarian rule, and the Lord Chancellor likened the circumstances of the Emperor's coming into power with the coup of Napoleon III while glorifying Kossuth. During the trial, British public opinion learned of the suppression of Hungary and this further ignited caution towards Austria and its emperor.[29] This turn of events further cooled relations between the British government and the Danube monarchy. The *Emperor of Austria* case signified yet another nail in the coffin of Hungarian absolutism.

14.3 Critical Assessment of the Case in Academic Literature

In the court proceedings phase of the trial, the English *Law Magazine* published a lengthy scholarly analysis which supported Kossuth's case in every aspect.[30] Interestingly, this was

24 *Ibid.*
25 *Ibid.*, p. 59.
26 *Ibid.*
27 *Ibid.*
28 *Ibid.*
29 By then there was already a serious apprehension in England of the Danube monarchy, which may be illustrated by the fact that on his visit to London, general Haynau was beaten up by workers of the Perkins brewery and even today there is a plaque on Park Street to commemorate this event.
30 'The Emperor of Austria and the King of Hungary *v.* Day and Kossuth', *The Law Magazine and Law Review* 11 *or Quarterly Journal of Jurisprude*, 3d ser 142, 1861.

the only article referring to the case by the name of *'The Emperor of Austria and King of Hungary'* – which may have been the original denomination of the case – but somehow the 'King of Hungary' part of the title wore off, possibly due to the lack of ingenuity of Franz Joseph's lawyers with respect to the question of the emperor's rights over Hungary. The assessments published after the announcement of the judgment basically criticized the fact that, in the light of the contradictory statements of the four judges to the case, it was not possible to ascertain what made up the *ratio decidendi* of the case, *i.e.* it was impossible to disentangle the points on which legal argument of the decision was based. In his monograph of 1906, for example, W. Harrison Moore based his critical remarks exactly on this point.[31]

According to the then prevailing opinion, a foreign state or head of state could only submit a private law claim (*e.g.* damages claim) to another state's municipal court (*e.g.* in case of the injury of a painting owned by the state or the monarch in the other state): claims deriving from the public law of that state could not however be enforced. The majority of the authors criticizing the judgment objected to the fact that the action of Franz Joseph before the English court was inseparable from his public law prerogatives deriving from his nature as monarch. Moore asserted that should Franz Joseph be entitled to represent his Hungarian subjects with no explicit authorization from their side, this right could only be based on public law.[32] Referring to the judgment in his book *Money in the Law, National and International*, Nussbaum bases his critical remarks on the same point.[33]

At the 1945 session of the Grotius Society, F.A. Mann illustrated the incorrectness of the judgment passed in the *Emperor of Austria* with an illustrative example. If the richest Andorran citizen declines to pay taxes in his country, it may well be that he not only affects the sovereign rights of Andorra but also the 'pockets of its subjects'. At the same time, a public law claim based on the tax rules of Andorra may not be enforced before the municipal courts of another state.[34] According to Mann, printing money in violation of the state's prerogative to issue money may have caused pecuniary injury to the monarch, his state or his subjects, nevertheless no proceedings should have been initiated before an English court as the *Emperor of Austria* case was related to the enforcement of the public law of another state.[35]

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31 H. Moore, *Act of State in English Law*, John Murray, London, 1906, p. 155.

32 *Ibid.*, p. 154.

33 Nussbaum, *Money in the Law, National and International*, The Foundation Press, New York, 1951, pp. 35-36.

34 F.A. Mann, 'Prerogative Rights of Foreign States and the Conflict of Laws', *in*: *Problems of Public and Private International Law*, Transactions for the Year 1954, Vol. 40, London, The Grotius Society, 1955.

35 It is noteworthy that there were not only critics but also supporters of the judgment passed by the Court of Chancery. On the very same session of the Grotius Society Roman Kuratowski also expressed his views and defended the decision emphasizing that "no courts are *bound* to enforce foreign prerogative rights but I submit there is no rule preventing them *from enforcing indirectly* such foreign rights when relief is claimed against injury to property, and, in particular, to private property and there is a possibility of pecuniary redress".

14.4 Impact of the Case on English Civil Law Development

The *Emperor of Austria* also influenced the development of English civil law. The English judges were gripped by the aspect of the case that Kossuth's money-printing activities were not illegal because printing 'fantasy money' did not amount to printing money; however, on the basis of equity, he might be barred from the said activity due to the injury he had caused to the plaintiff. There have been numerous endeavours in the course of the evolution of English company law where different plaintiffs – referring to the *Emperor of Austria* case – tried to achieve the issuing of a prohibitive injunction against a prospering business, an imaginative venture on the basis that the activity in question caused them injury.[36] The *Emperor of Austria* case was a precedent for the situation where the court deemed an act – that according to the general view was illegal though not sanctioned by positive law – to be trespass and to order its termination by way of a prohibitive injunction or judgment.[37]

14.5 Private International Law Repercussions of the Case before the English Court

As already mentioned, the *Emperor of Austria* case reinforced the English legal principle that foreign states and heads of state may bring a private law action for a claim in property before English municipal courts.[38] What is more, after the *Emperor of Austria* case, the English courts tacitly acknowledged that such claims might be more or less related to the constitutional arrangements of the plaintiff states. This view has had an influence on the legal practice of English courts ever since.

In the 1986 case *Kingdom of Spain v. Christie, Manson and Woods Ltd and Another*[39] – as the judge himself proclaimed in the judgment[40] – it was a veritable turning point when

36 Information provided by professor Bill Cornish.

37 The English scholarly literature of the early 20th century referred to the *Emperor of Austria* case as a precedent for equity jurisdiction only to be available in cases where there is an act jeopardizing rights in property. (Frank B. Fox quotes the case in this respect in the October issue of the *Michigan Law Review* of 1906 – F.B. Fox, 'Note and Comment', *Michigan Law Review*, October 1906, p. 493. Lord Denning spelled out the principle in the *Acrow (Automation) Ltd. v. Rex Chainbelt Inc. Case* [1971] 1 WLR 1676, 1683, pursuant to which any person interfering with another person's trade or business without an explicit right or justification to do so is in violation of law. According to the lord justice this right is a right in the nature of property and as an example of the protection of such rights based on the general principles of civil law he referred to the *Emperor of Austria Case* (quoted by L.C. James, *The Tort of Intentional Interference with Economic Relations Is There Property in Economic Relationships? Moving Targets, Bows, Arrows and Booby Traps*, p. 41.)

38 However Edward Whitney stresses that is only true for cases where the violation is completely analogous to the private law claim of the private individuals. E. B. Whitney, 'The Northern Securities Company', 11 *The Yale Law Journal* 8, June 1902, pp. 387-398 at p. 396.

39 'Kingdom of Spain *v.* Christie, Manson and Woods Ltd. and Another', *International Law Reports*, Vol. 118, pp. 579-592.

40 *Ibid.,* p. 589.

the lawyers of the plaintiff Kingdom of Spain referred to the *Emperor of Austria v. Day and Kossuth* case as a precedent. Analysing the case, Julian Agnew and Matthew Farrer found that "Kossuth and his forged notes and the judgment against him had prevented the Spanish government's claim being struck out".[41] The laws of Spain prohibited works of art of outstanding artistic and cultural value from leaving the territory of Spain without government consent. Somehow Goya's famous painting, the *Marquesa*, was smuggled from Spain and, after lengthy detours, it finally appeared in Christie's auction house, in London, as a work of art waiting to be auctioned off. The Spanish state attempted to repurchase the painting at a reduced price; however the bid price was rejected by the owner. Thereupon the Kingdom of Spain brought an action before the English court to establish that the painting had been taken illegally from Spain to another country. As the statement of claim pursued not enforceable, but declaratory relief, the English judges would have been obliged to decide on the basis of Spanish law in order to solve the case.[42]

At first, the court appeared reluctant to rule in favour of the plaintiff's claim, because it seemed as if it were to enforce Spanish public law on British territory on official request of the Spanish state, which would have contravened the territorial limitation of state sovereignty. The plaintiff's lawyers however called the court's attention to the *Emperor of Austria* case. The judge passing the judgment underlined the fact that the continued use of forged documents of the Spanish state, purporting to show the lawful export of works of art from Spain, is directly comparable to the false currency which was under consideration in the Emperor of Austria case. "[…] The question in this case will be whether such debasement would cause damage to the property of the Kingdom of Spain or the property of its subjects".[43]

The lawyers of the Spanish state emphasized the fact that the value of Spanish paintings might decrease in cases where the state licence related to their export could be circumvented and further losses would be incurred if the Spanish government were to be forced to repurchase the paintings with taxpayers' money.

The injury incurred by Spain due to the loss of the painting served as a legal basis for the English court to establish its jurisdiction and pass a judgment declaring that the painting was unlawfully taken from Spain. The judgment obviously reduced the chances of selling the painting at Christie's and definitely reduced its value, making it possible for the Spanish state and the owner of the painting to find an extrajudicial resolution to their dispute.[44]

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41 J. Agnew & M. Farrer, 'Goya's 'The Marquesa De Santa Cruz', 2 *International Journal of Cultural Property*, 1992, pp. 137-141 at p. 141.

42 F.A. Mann, 'Prerogative Rights of Foreign States and the Conflict of Laws', *Problems of Public and Private International Law, Transactions for the Year 1954*, Vol. 40, London, The Grotius Society, 1955, p. 34.

43 E. Lauterpacht & C.J. Greenwood (Eds.), *International Law Reports*, Vol. 118, Cambridge, Cambridge University Press, 2001, p. 590.

44 Agnew &Farre, 1992, pp. 137-142, at p. 141.

In line with the general opinion expressed in legal literature, municipal courts are obliged to enforce *jure gestionis*, *i.e.* purely civil law claims, while claims construed *jure imperii*, *i.e.* based on the public authority of the foreign state, must be rejected. Interestingly, the *Marquesa* case had already emerged, hypothetically, namely in Mann's presentation at the Grotius Society decades before the facts of the actual case occurred. The speaker categorically stated: It is also free from doubt that if works of art cannot be exported from Italy without a special licence, the State of Italy cannot come to the English Courts to recover a painting wrongfully exported from Italy.[45]

The concerns articulated in scholarly literature notwithstanding, based on the judicial practice derived from the *Emperor of Austria* case the English court hearing the case found it only equitable to rule in favour of the Spanish claim.[46]

In the light of the English case law evolving on the basis on the *Emperor of Austria* case it is worth comparing the decision of the French *Cour de Cassation* in the *Duvalier*[47] case with the judgment of the English appeals court in the *Marcos* case.[48] In essence the two heads of state in both cases – Duvalier in Haiti and Marcos on the Philippines – misused their official position as a head of state to appropriate state assets and flee the country. The governments succeeding the two heads of state attempted to recover the stolen assets. The French *Cour de Cassation* rejected restoring the treasures stolen by the Duvalier family to Haiti on the basis that its courts might not enforce another state's public law. On the contrary the English court provided for the confiscation and restitution of former President Marcos' assets to the Philippine people.

The *Emperor of Austria* case raised a question of interpretation which even the lawyers of the 21st century could not entirely solve. There may be cases where the claims of a foreign state are in part associated with its public law – nevertheless equity demands that the foreign municipal court uphold the claim. This correct approach however is a characteristic

45 Mann 1955.

46 In the mid-20th century the English courts passed two unfortunate judgments. The first related to Russian princess Olga Paley who successfully escaped from the Soviet Union taking her jewels with her, which however, according to an earlier soviet legal act, were to be confiscated. The jewels were thus soviet state property and the Soviet Union initiated a trial in England. Surprisingly and unfortunately the English court ruled in favour of the Soviet state and against the Russian princess. The parties subsequently closed the case in an out-of-court settlement. Another unfortunate case was the *Kahler v. Midland Bank* case associated with the socialist change of the Czechoslovakian political system. The case regards shares that were issued in Czechoslovakia and which their owner wanted to convert in England. The owner assigned Midland Bank with converting the shares the Bank however contacted its Czechoslovakian partner, which in turn did not receive the necessary permit from the Czechoslovakian state. The denial of the permit in itself sufficed for the English court to reject the owner's claim against Midland Bank, thereby effectively enforcing Czechoslovakian public law in England. Mann bitterly noted that the judgment puts the burden on the next generation to find a way to come to a lesser wrong in a similar case (Mann 1955, pp. 36-39).

47 Aix, 25.4.1988, 1988 Clunet 799; Cass. Ci*v.* I, 29.5.1991.

48 *Republic of Philippines v. Marcos*, 806 F. 2nd 344 (2nd Cir. 1986); 818 F. 2nd 1473 (9th Cir. 1987), 826 F. 2nd 1355 (9th Cir).

one developed due to the *Emperor of Austria* case and completely restricted to English law: it is not typical even of the other common law countries.[49]

The English appeals court recently had to interpret the principles[50] laid down in the *Emperor of Austria* case, when hearing a case similar from a legal point of view: *Equatorial Guinea v. Bank of Scotland International* and *Ors (Guernsey)*. The facts of the case go back as far as 2004 when the Zimbabwean authorities arrested Simon Mann and his associates accusing him with the intention of overthrowing the rule of President Obiang of Equatorial Guinea.

Obiang's regime is one of the most autocratic and corrupt systems in the world, and back then, the head of state himself came to power by a coup. The head of state is infamous for the personality cult he introduced, and similar to the Ugandan dictator, Idi Amin, his opposition even accused him of cannibalism. Following the arrest of Simon Mann and his associates, Obiang and the government of Equatorial Guinea submitted a claim to the Royal Court of Guernsey pleading for it to order the Guernsey branch office of the Bank of Scotland International to provide information on the bank transactions carried out by Simon Mann on his bank account. The plaintiff stated that they only wished to use the information thus obtained in civil lawsuits, and not in criminal trials. The plaintiffs' lawyers formulated the statement of claim not as one directed at enforcing the public law of Equatorial Guinea, but as a private law claim. According to the plaintiff, it was the anxiety over the life and safety of Obiang himself and his relatives, the costs of investigating the conspiracy, the expenses associated with the detention and the different proceedings, as well as the costs of enhanced security measures that established the civil law claim on the basis of which he wished to obtain (with the help of the English courts) information related to Simon Mann's English bank account. The first instance court was convinced by the plaintiff's arguments and ordered the Bank of Scotland to disclose the requested information. However, in the appeal the case came before the Privy Council.

Analysing the decision brought in the *Emperor of Austria* case, the Privy Council came to the conclusion that a foreign head of state might only formulate a legal claim before an English court with regard to actions not carried out in the exercise of his/her sovereign rights, *i.e.* with regard to actions that might also be performed by private individuals. As a consequence, any head of state or state might also make a civil law claim to restore

49 For example, the British government suffered a serious legal defeat when attempting to enforce the English legal approach in Australia. Peter Wright, a retired agent of the British secret service, wrote a book about the organization and tried to publish it in Australia under the title *Spycatcher*. The British government did everything possible to prevent the dissemination of the books. For this purpose it initiated proceedings in Australia mindful of the fact that the court would be unwilling to act as a tool for enforcing British public law in Australia, thus the claim was completely based on civil law. The plaintiff made reference to the fact that confidentiality formed part of the employment conditions of Peter Wright and the infringement thereof violates his civil law obligations stemming from such a trust relationship. However, the Supreme Court of Australia found that Great Britain's claim was centred on government interests to the enforcement of which Australian courts may not assist.

50 The case was heard by the Privy Council.

property from anyone in unlawful possession of it. In addition, any state might enforce its contract-based monetary claims, furthermore it might even lodge a damages claim in relation to the damaging of a state-owned ship: however fines, customs and taxes levied outside of Great Britain might not be claimed before an English court, their financial nature notwithstanding. In the light of the above, the Privy Council declared that the plaintiff's claim could not be enforced before an English court.

In the *Emperor of Austria* case, the Court of Appeal in Chancery rendered the principles of the rights of action of foreign states/heads of state more precise and considerably narrowed down their scope of application. Based on the determinations made in the *Obiang* case, it seems highly unlikely that the argumentation of the Lord Chancellor in the *Emperor of Austria* case could be maintained in the future. Namely, according to the Lord Chancellor, since Franz Joseph bore the right to regulate the issuing of money, he also had the right to lodge a complaint against Kossuth's printing activities with reference to potential damages to the monarch. However the decision of the Privy Council in *Obiang* made clear that the right of action only adheres to activities that the head of state may carry out in a private capacity and giving permission to issue money is obviously not of such nature. Nevertheless the decision of the Privy Council did not entirely reject the principles laid down in the *Emperor of Austria* case. This makes it possible that, in compliance with the view put forward by Turner, L.J., the leaders of a foreign state may initiate proceedings to protect the interests of their citizens, requesting the termination of the infringing act potentially causing pecuniary damage and the aversion of the risk of damage.

Leaders of a foreign state may bring such an action, notwithstanding the fact that academic literature has rightly indicated that, in the absence of a mandate, such representation might only be based on the public law of the state in question. In this case, English courts may continue to bring fair and equitable judgments in cases such as the *Marquesa* or the *Marcos* case.

14.6 Effect of the Case on the Development of International Law and Its Application in English Law

As it shall be clear from the following, the *Emperor of Austria* case contributed to the development of public international law in more than one crucial aspect.

14.6.1 Ius cudendae monetae

Already in Antiquity, the right to coin money was deemed a royal prerogative; in the Roman Empire the right of minting coins and issuing money adhered to the emperor.[51]

51 A. Nussbaum, 'Basic Monetary Conceptions in Law', 35 *Michigan Law Review* 6, 1937, pp. 865-907, at p. 883.

In his piece on sovereignty, Jean Bodin (1530-96) highlighted the right of coining money as a substantial element of state sovereignty.[52] As Ethan Avram Nadelmann pointed out, the states' right of minting money (*ius cudendae monetae*) – which also encompasses the printing of banknotes – was first stated as a sovereign right in international case law in the *Emperor of Austria* case.[53] And with this, the modern concept of the monetary sovereignty of states was conceived.[54] The most important public international law implication of the *ius cudendae monetae* principle is that, based on the latter principle, states may demand that other states recognize their legal personality so that they disallow counterfeiting, *i.e.* the infringement of such right on their territory.

14.6.2 International Law is Part of English Common Law

The *Emperor of Austria* case, which served as a basis for the reception of international law into English law, was referred to by a no lesser an authority than the Permanent Court of International Justice in The Hague in the *Lotus* case.[55] But what is meant by the phrase: *international law is part of the law of England*? Lauterpacht dedicated a complete presentation[56] to this issue upon the request of the esteemed Grotius Society.[57] Lauterpacht pointed out that, based on this principle, English courts were to apply and enforce international law in the framework of national rules.[58] However, the rule did not imply that international treaties could be applied directly without their implementation at the national level, and it was not tantamount to the principle of the primacy of public international law.

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52 Bodin, *On Sovereignty* (Cambridge Texts in the History of Political Thought), p. 79.

53 P. Andreas & E.A. Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations*, Oxford University Press, Oxford, 2006, p. 89.

54 In his book on the legal aspects of money Nussbaum describes the monetary sovereignty of states as follows: "monetary sovereignty comprises the legal regulation of cash flow, the acceptance or rejection of foreign currencies and first and foremost the issuing and collection of money from the state". (A. Nussbaum, *Teoría Jurídica del Dinero,* Madrid, Librería General de Victoriano Suárez 1929, p. 4.) Charles Proctor underlined that it is derived from the official authority of the states that governments are entitled to issue banknotes. It is the obligation of each state imposed by international law to prevent and to penalize the printing of other states' money on their own territory. (Ch. Proctor, *Mann on the legal Aspect of Money*, 6th edn, Oxford University Press, p. 18, n. 1.19).

55 *S. S. "Lotus" Case*, legal dispute between France and Turkey, *PICJ*, Ser. A, No. 10, 7 September 1927, *Publications of the Permanent Court of International Justice*, Series A-No. 10; *Collection of Judgments*, Leyden, A.W. Sijthoff's Publishing Company, 1927.

56 H. Lauterpacht, 'Is International Law a Part of the Law of the England?', *Grotius Society Transactions*, Vol. 25, pp. 51-88, at p. 56.

57 In his presentation Lauterpacht briefly mentioned the *Emperor of Austria* case, pointing to the fact that in this case the decision was based directly (and according to him, exclusively) on public international law – contrary to Mann for example, who only mentioned the private law implications of the case.

58 J.L. Kunz, 'International Law by Analogy', 45 *The American Journal of International Law*, 2, 1951, pp. 329-335, at p. 329.

According to English constitutional law, international law is part of the common law: nevertheless, statutes may override common law. At the same time, however, in the case of a conflict between common law (including international law) and statute law, there is a presumption that in the absence of a separate legal act to the contrary, the legislator did not wish to override the rules of common law.[59] In principle, statutes rank higher in the constitutional hierarchy of the United Kingdom than international law.[60] However, the UK is aware of the fact that the breach of international law, by way of conflicting statutes, would entail the UK's liability under international law.

The majority of English lawyers take the view that customary international law cannot be implemented. Thus based on the rule *international law is part of the law of England*, it is also directly applicable in English law.[61] Premised on this point, the *R v. Jones*[62] case was decided by the House of Lords. The essence of the case was that a group of British citizens damaged certain military vehicles before these could be deployed in the Iraq war. In the course of the criminal proceedings against them, the appellants argued that their actions could not be deemed as crimes, but much rather as *self-relief* with the aim of impeding the commission of crimes, namely the crime of aggression. However, the English Criminal Law Act (obviously) contained no such crime as aggression and, for this reason, the British citizens causing damage to the military equipment argued that customary international law formed part of the English legal system even without parliamentary implementation of it. (The fact that the prohibition of aggression is also part of international *ius cogens* was not brought up in the case.) To substantiate their case, the appellants referred to among others the *Emperor of Austria v. Day and Kossuth* case, in which Stuart, V.-C. ruled that public law claims recognized by international law were permissible since international law was part of the law of England. The binding force of former precedents could only be circumvented by the House of Lords by severing a part of international law – the rules of international law related to crimes – from all other norms of international law. Based on this, it ruled that customary international law was generally automatically assimilated into the domestic law of England. However this was not true for the rules of criminal law, which could only be enforced after statutory incorporation in England and, for these reasons, the House of Lords rejected the British citizens' *self-relief* line of defence.[63]

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59 D.C. Vanek, 'Is International Law Part of the Law of Canada?', 8 *The University of Toronto Law Journal* 2, 1950, pp. 251-297 at p. 259.

60 *Ibid.*

61 According to McNair the *Emperor of Austria* case is proof of the fact that international law was enforced in early English law without reservation. A.D. McNair, 'The Method Whereby International Law Is Made to Prevail in Municipal Courts on an Issue of International Law', *Transactions of the Grotius Society*, Vol. 30, Problems of Peace and War, Transactions for the Year 1944, pp. 11-49, at p. 15.

62 *R v. Jones* (Appellant) [On Appeal from the Court of Appeal (Criminal Division)] [formerly *R v. J* (Appellant)] [2006] UKHL 16.

63 The case was dealt with in detail *in:* C. Villarino Villa, 'The Crime of Aggression before the House of Lords', 4 *Journal of International Criminal Justice* 4, 2006.

14.6.3 Impeding an Attack against a Third State

According to W. Harrison Moore, based on the *Emperor of Austria v. Day and Kossuth* case, making hostile preparations against a foreign state cannot be regarded as a threat to the peace of England, therefore the English court would not intervene to obstruct a planned insurgency in another country.[64] At the same time, the author suggested that in the future international law should foresee the rule that states have an obligation to impede hostile actions against other states stemming from their own territory.[65] By contrast, Tomas M. Frank and Deborah Niedermayer found that the *Emperor of Austria* case served as a precedent for states' obligations to thwart all hostile actions against other states which originate from their territory.[66] The authors published the article in 1989: however since 11 September 2001 it seems that this issue has – unfortunately – become of even greater relevance.

The initial premise of the authors is the following: citizens of state B living in emigration in state F organize an attack against the civil facilities and citizens of state B. Preparations, training and attack are to be organized and started from state F. These attacks are not only of a military nature (be directed against military targets), but may also be directed against civilians.[67] The authors contend that, in such a situation, it is an international law obligation on state F to take action in order to obstruct the planned attack. The authors could merely bring up two international law precedents to substantiate their proposition. One of which was the *Emperor of Austria*, while the other was an American case related to printing money, with the factual difference that it concerned an attempt in the United States of America to counterfeit money valid and in circulation in Bolivia.[68]

The international recognition of this alleged principle of law is further weakened by the fact that when a person was accused in the United States in 1967 that he was planning to blow up rail tracks in Rhodesia, his defence attorney attempted to achieve the discontinuance of proceedings with reference to *desuetudo*, *i.e.* a custom sinking into oblivion.[69] This does not seem to substantiate the widespread recognition of the rule of international law asserted by the authors, notwithstanding the fact that it would be of extraordinary significance in the 21st century.

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64 Moore, 1906.

65 *Ibid.* at p. 155.

66 T.M. Frank & D. Niedermeyer, 'Accommodating Terrorism: an Offence Against the Law of Nations', *Israel Yearbook on Human Rights*, 1989, pp. 75-130 at p. 111.

67 *Ibid.*, p. 75.

68 *U. S. v. Ajona*, 120. U.S. 479 (1877).

69 Frank & Niedermeyer 1989, p. 121.

14.6.4 *Providing Damages in the Absence of Other Jurisdictions in International Criminal Cases*

The depth and legal manifoldness of the *Emperor of Austria* case is evidenced by the fact that, even a century after the judgment was made, time after time the case has resurfaced with new aspects in academic literature. In his monograph of 1983, Michael Meyer asserted that it would greatly contribute to the further development of international law if – in the absence of other jurisdictions – the municipal courts of individual states were at least entitled to adjudicate victims' damages claims. According to Meyer, the *Emperor of Austria* case would be the proper precedent and historical example for the injured parties when submitting such claims.[70]

14.7 Comitas Gentium

As previously discussed, states normally do not afford the possibility to enforce the law of other states before their municipal courts. Situations may arise, however, where *comitas gentium* may be justified on the basis of international courtesy, that the municipal courts consider the law of other states. In this case it is not the parties to the case but a public international law (non-binding) rule of comity that requires courts to take into account other states' domestic laws in sufficiently significant cases. However, *comitas gentium* does not extend to considering other states' tax laws.[71]

The relief sought in the *Regazzoni v. K.C. Sethia*[72] case was also based on international comity. Regazzoni ordered 500,000 jute bags from the English company K.C. Sethia Ltd. operating in India with the purpose of shipping these to South Africa. The company failed to deliver the goods duly ordered. It is important to note that since 1878, India had banned the exportation of any product to South Africa due to a long-standing disagreement between the two states. Regazzoni demanded damages from K.C. Sethia. The parties had previously stipulated the jurisdiction of the English courts for the settlement of disputes arising from the contract. On appeal, the case came before the House of Lords. Before the court, K.C. Sethia argued that both parties to the contract were aware of the fact that its goal was unlawful. Thus, according to the company, Regazzoni's claim could not be enforced by judicial means. The fate of the case was therefore contingent upon the English

70 A.M. Meyer, 'Liability of Prisoners of War for Offences Committed Prior to Capture: The Astiz Affair', 32 *The International and Comparative Law Quarterly* 4, 1983, pp. 948-980 at p. 971.

71 The judgment passed in the *Emperor of Austria v. Day and Kossuth* case also touches upon this as several international lawyers pointed out. *See e.g.*, 'Extrastate Collection of Taxes', 33 *Virginia Law Review* 2, 1947, pp. 179-187, at p. 181.

72 *Regazzoni v. K.C. Sethia Ltd*, England, House of Lords, 21 October 1957. Assessed by E. Lauterpacht, *International Law Reports*, London, Butterworths, 1961 pp. 15-27.

court taking foreign law into account, which foresaw the vitiating factor in question. The House of Lords found that the key to the case was the principle set forth in the *Emperor of Austria v. Day and Kossuth* case, according to which from the comity of nations the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, 'revenue laws' have always been made the exception; and this may be an example of an exception proving the rule.[73] Based on the foregoing the House of Lords rejected Regazzoni's damages claims.[74]

14.8 Final Thoughts

The *Emperor of Austria* case yields several important lessons. The first regards the meta-juridical risks of an action brought by one state before another state's municipal court: although Emperor Franz Joseph won the law suit in a legal sense, from a moral and political aspect he had suffered a devastating defeat. Perhaps, it is not even perceivable from the 21st century point of view what a loss of prestige it meant for the Austrian Emperor when a simple English lower-ranking noble, the vice-chancellor, investigated the lawfulness of his Hungarian rule. Albeit, several cases preceded the *Emperor of Austria* case where foreign states brought actions before other states' municipal courts, this tendency drastically declined after the dispute between the Austrian emperor and Kossuth was settled. It seems certain that the law suit gave momentum to the process leading up to the Austro-Hungarian compromise.

The *Emperor of Austria* case is remarkable also from a scholarly point of view, as it bears legal consequences reaching far beyond the English legal system. Maybe the most important legal implication of the *Emperor of Austria* case is of its public international law nature: this case established the modern concept of the monetary sovereignty of states, the *ius cudendae monetae*. Based on this prerogative, states enjoy an exclusive right to issue money not only in relation to minting coins, but also with regard to printing bank notes as well as granting others a permit to issue money, which must be observed by all

73 *British International Law Cases* 1964, p. 54.

74 The *comitas gentium* emerged in one other aspect of the *Emperor of Austria* case. Namely, it is also a rule of *comitas gentium* that foreign heads of state are entitled to proceed before the other state's court free of expenses. In the *Monaco v. Monaco* case reference was made to the *Emperor of Austria* case where the court afforded Franz Joseph an exemption from expenses based on the aforementioned rule of *comitas gentium*. Incidentally, the *Monaco v. Monaco* case was brought before the court by the prince of Monaco against his former son-in-law in order to determine that his grandson prince Rainer (the current monarch) may only be taken from Great Britain to another country with the permission of his grandfather. The court declared that if the plaintiff prince were to offer the reimbursement of costs previous *precedents* would not hinder its acceptance. The case was assessed by E. Lauterpacht, *Annual Digest and Reports of Public International Law Cases, Being a Selection from the Decisions of International and National Courts and Tribunals Given During the Years 1935-37*, London, Butterworth and Co. Publishers, 1941, p. 23.

on its sovereign territory. A further international law implication of this right is that the state may demand of other states, recognizing its legal personality, that they prohibit the infringement of this right by counterfeiting on their territory.

The second important aspect of the case is that it clarified the relationship between the non-codified British constitution and public international law. The Permanent Court of International Justice quoted the case in this respect. Public international law is part of English common law, as a result English judges are to take its rules into account. However, should there be a conflict between international law and statute law, according to the concept in English law, then statute law shall prevail. At the same time Great Britain must assume international liability for a possible breach of international law.

The *Emperor of Austria* case brought up further points in international law which occupy international lawyers even after over a century. With a view to the lessons of the case, the question arose whether or not there exists a general legal obligation according to which states are to impede an attack originating from their territory against another state. In the author's opinion, the *Emperor of Austria* case substantiates the existence of such an obligation, an obligation ever so topical since 11 September 2001. Another possible lesson from the *Emperor of Austria* case could be that in international law cases even where they have no criminal jurisdiction, municipal courts can consider adjudicating damages claims of injured parties for reasons of equity.

The *Emperor of Austria* case is of extraordinary significance in English private international law also yielding important lessons for other states' legislation in the field of private international law. There may be cases where the state would bring an action in its own name but primarily on behalf of its citizens before another state's court against an unlawful and detrimental activity conducted against the state itself and by definition all of its citizens. States normally deny enforcing other states' public law before their courts. There may be cases however where the foreign state's claim is to some extent related to its public law – nevertheless, for reasons of equity the settlement of the case could be reasonably expected of the other state's court. The *Marquesa* and *Marcos* cases substantiate the fact that the lessons from *Emperor of Austria* case have contributed to finding a fair solution in such cases. The *Emperor of Austria* case could in the future facilitate the adoption of national rules of private international law which allow the enforcement of claims related to the redemption of stolen assets taken abroad by criminal government representatives without, at the same time opening, the door to enforcing property claims stemming from governments' criminal activities.[75]

75 Such as the case of princess Olga Paley, *see* note 46.

Certain misinterpretations[76] notwithstanding, the *Emperor of Austria* case contributed greatly to the development of English civil law and private international law as well as the development of public international law. The *Emperor of Austria* case contains several important legal aspects that may serve as a starting point for further developments in international law, even in the 21st century. This is why the *Emperor of Austria* case may go on to be a source of inspiration and reflection not only for lawyers of the 19th and 20th centuries, but for lawyers of our times as well.

76 According to Geneviève Burdeau, the *Emperor of Austria v. Day and Kossuth* case may be associated with the questions related to the legal status of governments in exile. In Burdeau's opinion governments in exile may be classified into two categories: the first category encompasses governments which have been banished by hostile military occupation, while the other category includes all other types of governments in exile. She deemed Kossuth's foreign activities as belonging to the second group, even though in the *Emperor of Austria* case Kossuth is exclusively referred to as a private person. The author adds that at the time of Ferdinand V Kossuth was the minister of finance and as such he was entitled to minting money, however, the English court denied him this right considering he did not have any *de facto* power in Hungary. In Burdeau's opinion the case concludes that governments in exile do not enjoy the right of minting money. (G. Burdeau, 'L'exercice des competences monétaires par les Etats', *Recueil des Cours, Collected Courses of the Hague academy of International Law*, 1988, pp. 215-369 at pp. 280-81). The commentary on the Harvard Research Draft Convention on Jurisdiction with Respect to Crime refers to the *Emperor of Austria* case as one which confirms that even the most reluctant states are prepared to exercise criminal jurisdiction when the case concerns counterfeiting other states' money, letters of credit or stamps – albeit we know that according to the judgment passed by the English justices the Kossuth banknotes were not deemed as counterfeit money. (*The American Journal of International Law*, Vol. 29, Supplement: Research in International Law, 1935, p. 561) What's more, the *Emperor of Austria* case was earlier drawn upon to evidence the fact that equity courts do not exercise criminal jurisdiction. ('Jurisdiction of a Court of Equity in the Commission of Criminal Acts' (Author: C.A.D.) 6 *Michigan Law Review* 6, 1908, pp. 491-493, at p. 491).