proper arise acutely in all but the first two. The causes of these difficulties can be summed up in one word: nationalism—an element, to repeat, different from the dogma of "sovereignty," which is used as a tool in international dialectic but is disregarded at will when that seems desirable. The remedy, without which the necessary organizational and procedural steps, especially providing for obligatory adjudication, majority legislation, and enforcement action, must be unattainable, is correspondingly easy to formulate: relaxation of nationalism and development of a stronger spirit of international unity. This will be extremely difficult and is rendered all the more difficult by the great inequalities in both power and "civilization" existing among the nations.[57] All that is said today must be said with the reservation that current revolutionary developments in the use of nuclear energy and startling advances in medicine and education may so alter the premises of the problem that present opinions may prove totally inadequate. With this situation in mind, the future of world peace and human welfare as ministered to by international organizations may indeed look gloomy. Fear of nuclear annihilation and desperation over the miseries of life as lived by the bulk of humanity, together with the precocious current growth of "international machinery," may save humanity and the nations, but this can come about only by the exercise of wisdom and good will or, quite simply, manifestation of the spirit of conciliation among the nations, and this to a degree somewhat greater than that to which they have been manifested in the past fifty years.

PITMAN B. POTTER

## REFLECTIONS ON THE SABBATINO CASE

Few recent cases have enlisted as much discussion among international lawyers as the *Sabbatino* case in its progress through the United States District Court, the Court of Appeals, and finally the Supreme Court.[1] It is interesting to compare the opinion of the Court, which seemed to me correct but on a not wholly satisfactory international law basis, with the opinion of dissenting Justice White whose exposition of international law was in some respects more adequate, though he reached, I think, a wrong conclusion.

The applicable principles of international law seem to me the following:

(1) United States courts apply international law in suitable cases, in the absence of a statute or other rule of national law[2] which is so clearly

[57] Term employed in the Statute of the International Court of Justice, Art. 38, par. 1c. Relaxation of remaining elements of Communist or/and capitalist imperialism must also obviously be demanded. Indeed the over-all crucial problem in contemporary international organization lies precisely in the conflict between the policy of peaceful co-existence and the policy of violent extermination (of the other fellow).

[1] Banco Nacional de Cuba *v.* Sabbatino, 376 U. S. 398 (1964), 58 A.J.I.L. 779 (1964). Subsequent references are to the report of the case in this JOURNAL. For lower court opinions, see 193 F. Supp. 395 (1961), 55 A.J.I.L. 741 (1961); and 307 F. 2d 845 (1962), 56 A.J.I.L. 1085 (1962).

[2] The Paquete Habana, 175 U. S. 677 (1899).

conflicting that the court cannot make a reconciliation by interpretation of the statute on the presumption that the legislature did not intend to violate international law.[3] Justice White properly emphasized this point.

(2) The principle of international law involved in this case is that which Justice White called "the deeply embedded postulate in international law of the territorial supremacy of the sovereign, a postulate that has been characterized as the touchstone of private and public international law."[4] This proposition is amply supported by traditional international law which, since the Peace of Westphalia, has placed the rights of states ahead of the rights of individuals as defined by any religion or political ideology (*Cuius Regio eius Religio*),[5] by the basic principles of the United Nations Charter—"the sovereign equality of all its members" and respect for the territorial integrity, political independence and domestic jurisdiction of states,[6] and by the generally accepted basis of contemporary international relations—"peaceful co-existence of states with different economic and social systems."[7]

(3) This principle implies that acts under the authority of a sovereign state and within its jurisdiction as defined by international law should be respected by foreign courts unless there is a rule of international law or treaty which in the particular circumstances provides a rule of decision or gives a foreign court discretion. As the majority opinion stated, nonobservance of this implication, with the result that the acts involved were declared invalid, would "be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders."[8] The United Nations Charter prohibits even the United Nations from "intervening in matters which are essentially within the domestic jurisdiction of any state," and, in the absence of a permissive rule of international law, a declaration by a state that an act within the jurisdiction of another state

[3] Murray *v.* the Charming Betsey, 2 Cranch 64 (1804); American Banana Co. *v.* United Fruit Co., 213 U. S. 347 (1909).

[4] 58 A.J.I.L. 801 (1964). As early as 1688 Lord Chancellor Nottingham said in the House of Lords (Cottington's Case, 2 Swanst. 326, note, cited in Hilton *v.* Guyot, 159 U. S. 113 (1895)): "It is against the law of nations not to give credit to the judgments and sentences of foreign countries till they be reversed by the law and according to the form of those countries wherein they were given; for what right hath one kingdom to reverse the judgments of another."

[5] Quincy Wright, "International Law and Ideologies," 48 A.J.I.L. 616 (1954).

[6] U.N. Charter, Art. 2, pars. 1, 4, 7.

[7] Wright, note 5 above, and "Maintaining Peaceful Coexistence," in Wright, Evans and Deutsch (eds.), Preventing World War III, p. 410 ff. (New York, Simon and Schuster, 1962). The utility of this term as the minimum requirement of universal international law, without prejudice to co-operation among agreeing states, has been emphasized by James Brierly (The Outlook for International Law, 1944, p. 4) and Wolfgang Friedmann (The Changing Structure of International Law, 1964, pp. 15, 58 ff., 297). It is unfortunate that recent ideological controversies have obscured its clear meaning (John Hazard, 59 A.J.I.L. 59 (1965)).

[8] 58 A.J.I.L. 793 (1964).

is invalid may be considered by the latter an intervention in its domestic affairs.[9]

(4) The act of state doctrine is not absolute, as noted by Lauterpacht. Although he considered it "a consequence of the equality and independence of states," he recognized certain exceptions.[10] Courts need not enforce the criminal or fiscal laws of other states, and the force to be given to foreign judgments in civil actions *in personam* is a matter of private international law on which the practice of states may vary.[11]

The doctrine does not apply to *ultra vires* acts. Even sister States in the United States, in applying the "full faith and credit" clause of the Constitution, may inquire whether the State acted within its jurisdiction.[12] A court may lack jurisdiction in actions *in rem* because in time of peace the property involved was seized on the high sea,[13] because in time of war it was in neutral territory,[14] because it was in territory unlawfully occupied by an aggressor,[15] or because it was confiscated beyond the competence of a lawful belligerent.[16] Furthermore, problems of the scope of jurisdiction often depend on recognition of a foreign state or government, or a territorial change, and such recognition is usually considered a "political question" on which a national court as a matter of constitutional law must follow the political branch of its own government. In the absence of a political decision, however, a court may itself determine whether a foreign act is *ultra vires*.

The subordination of national courts to the political authority of their own governments in matters affecting foreign relations may make it impossible for a national court to apply the act of state doctrine if these authorities intervene in an extraordinary situation such as in the *Bernstein* case.[17]

The respect which international law normally requires a state to observe for a proper exercise of its jurisdiction by a foreign state, should be distinguished from the respect which that law requires states to observe toward a foreign state itself, its public property and its public agents.

[9] The Lotus (France *v.* Turkey), P.C.I.J. 1927, Ser. A, No. 10, p. 19; 2 Hudson, World Court Reports 20, 35.

[10] L. Oppenheim, International Law (8th ed., Lauterpacht), sec. 115 aa. See also Ben A. Wortley, "Indonesian Nationalization Measures," 55 A.J.I.L. 680 (1961); H. W. Baade, "The Validity of Foreign Confiscations," 56 *ibid.* 504 (1962).

[11] Hilton *v.* Guyot, 159 U. S. 113 (1895), and note 10 above.

[12] U. S. Constitution, Art. IV, sec. 1; Williams *v.* North Carolina, 325 U. S. 226 (1945).

[13] Hudson *v.* Guestier, 6 Cranch 281 (1810); Rose *v.* Himely, 4 Cranch 241 (1808).

[14] The Flad Oyen, 1 C. Rob. 135 (1799); The Appam, 243 U. S. 124 (1917), 11 A.J.I.L. 443 (1917).

[15] Declaration regarding forced transfers of property in enemy controlled territory, 8 Dept. of State Bulletin 21 (1943); Anderson *v.* N. V. Transandine Handel Maatschappij, 289 N.Y. 9 (1942), 28 N.Y. S. 2d 547; 36 A.J.I.L. 701 (1942).

[16] State of the Netherlands *v.* Federal Reserve Bank of New York, 201 F. 2d 455 (1953); 47 A.J.I.L. 496 (1953).

[17] Bernstein *v.* N. V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij, 173 F. 2d 71 (1949), 44 A.J.I.L. 182 (1950); and 210 F. 2d 375 (1954), 48 A.J.I.L. 499 (1954). The Supreme Court took a somewhat dim view of the Bernstein letter in Sabbatino. See Richard Falk, "The Complexity of Sabbatino," 58 A.J.I.L. 937 ff. (1964).

The rules of international law concerning the latter immunities rest on the principle that one state cannot exercise jurisdiction over another, or over another state's agents, in such a manner as to interfere with their exercise of legitimate functions. Sometimes the act of state doctrine has been referred to in connection with such immunities as in the cases of *The Exchange, The Cristina* and *The Pesaro.*[18] In such cases the issue concerns a sovereign immunity which should be respected even if the foreign sovereign gained possession of property by illegal methods, exercised beyond its jurisdiction. So also the immunity of diplomatic officers and of consular officers for acts within the scope of their official functions does not illustrate the act of state doctrine. Military officers have no right to employ force outside the jurisdiction of their state, except in pursuance of an express agreement defining the status of such forces, in a defensive necessity, as in *The Caroline* case, or during a state of war. Consequently any immunity of such officers depends on the interpretation of such agreement or necessity, or upon the fact that the use of force was within the jurisdiction of the state in whose behalf it was exercised, as in *Underhill* v. *Hernandez,* thus resembling the act of state doctrine.[19] A military officer using force outside his state's jurisdiction even with the authority of his own state clearly enjoys no immunity.[20]

While the act of state doctrine is not absolute, there seems little doubt that international law requires national courts to recognize titles to property established by an act of executive or judicial authority of another state within its own jurisdiction as established by international law. According to Justice Gray in *Hilton* v. *Guyot:*

> A judgment *in rem,* adjudicating a title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "the sentence of a competent court, proceeding *in rem,* is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coordinate tribunal is capable of making the inquiry" (Williams v. Armroyd, 7 Cranch 423, 432). The most common illustration of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. But the same rule applies in judgments *in rem* under municipal law.[21]

(5) States are obliged to make reparation to other states if their acts of state, legislative, executive or judicial, even within their jurisdiction, deny justice to a national of a complaining state after he has exhausted local remedies. This proposition has been recognized in numerous arbitral awards, although, as pointed out by the majority opinion and as indicated

[18] The Schooner Exchange *v.* McFaddon, 7 Cranch 136 (1812); Berizzi Bros. *v.* The Pesaro, 271 U. S. 562 (1926); The Cristina, [1938] A.C. 485.

[19] Underhill *v.* Hernandez, 168 U. S. 250 (1897).

[20] Horn *v.* Mitchell, 232 Fed. 819, 824 (1916).

[21] Hilton *v.* Guyot, 159 U. S. 113 (1895).

by the debates in the U.N. International Law Commission on responsibility of states for injuries to aliens, there are widely different opinions on what constitutes a denial of justice, particularly in regard to nationalizations of property.[22]

These principles were stated by the Supreme Court in *Underhill* v. *Hernandez,* quoted with approval by the majority in *Sabbatino:*

> Every sovereign State is bound to respect the independence of every sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[23]

The same principles were clearly stated by the United States Court of Claims, acting as an international tribunal in considering claims of United States citizens arising from French condemnations of American vessels from 1791 to 1800, for the settlement of which on principles of international law the United States had assumed responsibility by the Treaty of 1800:

> The decision of the English court [Baring v. Royal Exchange Assurance Co., 5 East 99], then, goes to this extent, that in an action between individuals the decree of the French court which had jurisdiction is final; so would it also be final as to the vessel, and the purchaser at the confiscation sale could rest upon the decree as good title against all the world.
>
> But all this does not affect the position of the United States Government against the Government of France.
>
> Lord Ellenborough says that no matter how iniquitous the construction given the treaty by the French court, he, as a judge, is bound to follow it. But so is not the Government of the United States. That Government could have objected either that the court was corrupt, or that there existed no treaty, or that there had been manifest error in construing it. All such questions may be outside the right of a court to consider, but they are within the right and form part of the duty of the political branch of the Government. If the French court, acting within its jurisdiction, construed the treaty iniquitously, the courts might not have power to remedy the wrong, but the owner had a right to appeal to his Government for redress, and that Government, when convinced of the justice of his complaint, was bound to endeavor to redress it.
>
> The decree is an estoppel on the courts, but it is no estoppel on the Government; in fact, the right to diplomatic interference arises only after the decree is rendered. Of course, precedents for cases of this kind are not to be found in the reports of courts, for no such

[22] U.N. International Law Commission, discussion of state responsibility, 57 A.J.I.L. 255 (1963), 58 *ibid.* 318, 323 (1964); Louis B. Sohn and R. R. Baxter, "International Responsibility of States for Injuries to the Economic Interests of Aliens," 55 *ibid.* 545, 559, 569 ff. (1961); Martin Domke, "Foreign Nationalizations," 55 *ibid.* 585 ff. (1961); S. N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" *ibid.* 863 ff.; Wolfgang Friedmann, The Changing Structure of International Law 318 ff. (New York, Columbia University Press, 1964); opinions of Lord McNair, Henri Rolin, and Alfred Verdross, on Indonesian nationalization of Dutch properties (1958), in 6 Netherlands International Law Review 218 ff. (Extra issue, 1959); note 33 below.

[23] Note 19 above, and Sabbatino, 58 A.J.I.L. 785 (1964).

> case can, in the nature of things, come before a court unless by virtue of a special and peculiar statute, such as that under which we now act; but diplomatic history is full of them.[24]

The majority opinion in *Sabbatino,* somewhat inconsistently with its statement quoted under (3) above, said:

> We do not believe this doctrine [act of state] is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see *Underhill, supra; American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347; *Oetjen, supra,* at 303, or by some principle of international law. If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it.[25]

While, of course, refusal to follow the act of state doctrine does not divest the foreign state of its territorial sovereignty, it seems to me that it does curtail its independence in exercising its jurisdiction and manifests a lack of respect for its jurisdiction, if not an intervention in its jurisdiction, by other states.

The refusal to enforce the penal laws of another state seems to me a different situation. Enforcement of foreign criminal law would involve more than respect. It would involve active co-operation, which international law does not require, although, by the practice of extradition, states normally do co-operate in the administration of the criminal justice of other states. Furthermore, the usual application of the *non bis in idem* (double jeopardy) rule, by which states refrain from exercising criminal jurisdiction in cases which have been dealt with by other sovereign states, manifests the normal inclination of states to respect one another's criminal jurisdiction.[26] Similarly, the frequent entry into agreements to avoid double taxation manifests an inclination to respect the financial powers of other states.

Instead of relying on international law for applying the act of state doctrine in the present case, the Supreme Court recognized the fifth of the above propositions, but held that the protection of nationals against denials of justice by other states is an executive function. On the principle of separation of powers and "political questions" the Court ought not to act in a way which might embarrass the Executive and in this case the Executive had urged application of the act of state doctrine. This ground of expediency makes it possible for the Court to be guided by the Executive and to apply, or not to apply, the act of state doctrine as the latter directs, but it subjects the Court to the criticism that it is a political agency. Furthermore, it is difficult to see how the Executive would be embarrassed by application of the act of state doctrine as a rule of international law (except possibly in an extreme case such as *Bernstein*) unless the two states are

[24] Cushing, Administrator *v.* U. S., 22 Ct. Claims 1 (1886).

[25] Sabbatino, 58 A.J.I.L. 788 (1964).

[26] Harvard Research draft conventions on Extradition, Art. 9, and on Jurisdiction with Respect to Crime, Art. 13; 29 A.J.I.L. Supp. 144 ff., 602 ff. (1935).

parties to a treaty explicitly guaranteeing each other's nationals against expropriation, or recognizing and precisely defining freedom from expropriation as a human right. No such treaties were involved in *Sabbatino*. They would be under the Rome Convention of the Council of Europe, and the national courts of states bound by this convention should maintain human rights as against acts of other member states. The existence of the Commission and Court of Human Rights under the Council of Europe assures correction, if such action by a national court fails to interpret the convention properly.

The critics of the majority opinion in *Sabbatino* [27] seem to regard the rule of international law to be applied by the Court as number (5) above, rather than number (3). They fail to distinguish between rules of international law defining a state's jurisdiction and those limiting its exercise of jurisdiction. A court is, as suggested under (4) above, free to examine on the basis of international law whether an act of a foreign state is *ultra vires*. If it finds that it is, it should hold that a violation of private rights flowing from such an *ultra vires* act is of no effect. On the other hand, foreign courts must assume that acts in exercise of the jurisdiction which international law accords to a foreign state are valid, subject to the exceptions mentioned in (4) above.

There are legal difficulties in the effort of a national court to apply the fifth principle which concerns primarily a controversy between two states, although interests of private individuals are involved. For a national court of the plaintiff state to apply this principle, apart from the danger mentioned by the majority opinion in *Sabbatino* as well as by John Locke, that no one is likely to be a good judge in his own case, there is the difficulty that the parties before it are not likely to be the parties whose rights and duties are involved in the fifth principle. While in *Sabbatino* the plaintiff (Banco Nacional) was deemed to be Cuba (somewhat contrary to the principle that a corporation, even though acting as an agent of a state should be deemed to have an independent jural personality)[28] and the defendant was a representative of the original owner who had suffered from the Cuban act of state, often the defendant would be an individual whose title to property rested on the foreign act of state and the plaintiff would be the original owner of the property. The state which had, in international law, been injured by the act of state because of injury to its national, would not usually be a party at all, though it is true the court may get information from it, as it did in *Sabbatino,* indicating whether it has espoused the cause of its national whose property has been expropriated. But even if directly or indirectly the two parties in the international litigation are represented in the national litigation, if the national court is to apply the principle of international law referred to in (5) above, it should answer the following questions:

[27] White, J., dissenting in Sabbatino, and John R. Stevenson, "The State Department and Sabbatino," 58 A.J.I.L. 707 ff., 795 ff. (1964).

[28] Harvard Research draft convention on Competence of Courts in regard to Foreign States, Art. 26; 26 A.J.I.L. Supp. 616 ff. (1932).

(a) Was the injured individual a national of the state that claims to have been injured as a result of an injury to its national? In *Sabbatino* the injured party was a Cuban corporation the majority of whose stockholders were American. As Cuba considered the corporation American, probably this question could easily be answered in the affirmative, but issues such as that in the *Nottebohm* case [29] may arise, making the issue of nationality difficult to determine.

(b) Has the individual exhausted all local remedies? This may be difficult to determine. The International Court of Justice refused judgment in the *Interhandel* case on the ground that this allegedly Swiss Corporation had not exhausted remedies available to it in the United States.[30] An article in this JOURNAL for April, 1964, indicates the importance of this rule, protecting a state's jurisdiction from foreign intervention:

> . . . The rule has its roots in the general proposition that an alien entering a country submits himself voluntarily to the legal regime prevailing in that state. It demands in effect that he who brings his physical presence or property within the territorial confines of a foreign state should be regarded as having assimilated himself into the state to the extent that the alien is obliged to present his complaints against that state to its courts, as are its own nationals, rather than take them back to his own government for international adjustment. That the receiving state should demand this is no more than a normal manifestation of a constant human tendency to dislike and resist outside intrusion in private affairs, a tendency felt by groups as well as individuals, exemplified in numerous institutions and phenomena of social and political activity, and often displayed in the political arena beneath the banner of that "illusive conception," sovereignty. . . .[31]

(c) Was the individual actually injured by the act of state and how much? This problem has often proved complicated as indicated by Miss Whiteman's three volumes on *Damages in International Law.*

(d) Did the injury result from a denial of justice by the act of state? The District Court and the Court of Appeals, though claiming to be applying international law in *Sabbatino,* dealt only with this last question and found that a nationalization of property which was retaliatory, discriminatory and uncompensated was a denial of justice under international law, a proposition which would require a great deal of examination in a world where nearly two thirds of the states (those from Latin America, Asia, Africa and the Communist world) believe that international law does not now support the strict rule in regard to purposes of, and compensations for, nationalizations of property which have been in the past supported by the capital-exporting states. This strict rule has been supported by arbitral tribunals, constituted while such states were the dominant influence in the

[29] Nottebohm Case (Liechtenstein *v.* Guatemala), [1955], I.C.J. Rep. 4; 49 A.J.I.L. 396 (1955); Josef L. Kunz, "The Nottebohm Judgment," 54 *ibid.* 536, 549 (1960).

[30] The Interhandel Case (Switzerland *v.* U. S.), [1959], I.C.J. Rep. 6; 53 A.J.I.L. 671, 682 ff. (1959).

[31] David R. Mummery, "The Content of the Duty to Exhaust Local Judicial Remedies," 58 A.J.I.L. 390 (1964), and 1964 Proceedings, American Society of International Law 107 ff.

world, but the debates in the International Law Commission and in the General Assembly of the United Nations suggest that international law on this subject may be in process of change.[32] As suggested by the majority in *Sabbatino,* the assumption that the Court's examination of the justice of a foreign act of state in this field would contribute to "an acceptable body of law concerning state responsibility for expropriations" rests upon "the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies." [33]

If one goes over the cases, it appears that the most frequent failure to apply the act of state doctrine is in cases in which the victim is a national of the forum state and there is no question of respecting a sovereign immunity of the state whose act is in question. Thus the Supreme Court of the United States in *Hilton* v. *Guyot* [34] found a way to avoid application of a French judgment, thus permitting it to examine the claim of an American citizen. Dutch courts differed from German courts in refusing to respect the acts of Indonesia in taking over Dutch property.[35] A British court refused to respect the Iranian take-over of the Anglo-Iranian Oil Company, while Italian and Japanese courts applied the act of state doctrine.[36] The British Court of Chancery, though holding that international law did not permit British courts generally to refuse to recognize uncompensated expropriations by a foreign state, considered that the decision of the Aden Court in *The Rose Mary* was justifiable because British public policy did not permit recognition of foreign discriminatory expropriations so far as they applied to British nationals.[37]

On the other hand the act of state doctrine is almost universally applied when the victim is a national of the expropriating state, as in *Salimoff, Banco de Espana,* and *Oetjen,*[38] and it is usually applied when he is a national of a third state.[39]

Non-application of the doctrine appears therefore to be motivated by a desire to protect the property interests of nationals of the forum state.

[32] Note 22 above.

[33] Sabbatino, 58 A.J.I.L. 795 (1964).

[34] Note 11 above.

[35] Martin Domke, "Indonesian Nationalization Measures before Foreign Courts," 54 A.J.I.L. 305 ff. (1960); Hans W. Baade, "Indonesian Nationalization Measures before Foreign Courts—a Reply," *ibid.* 801 ff.

[36] Baade, *loc. cit.* 833; William H. Reeves, "Act of State Doctrine and the Rule of Law—a Reply," 54 A.J.I.L. 141, 147 (1960).

[37] Re Helbert Wagg & Co. Ltd., [1956] 1 All E. R. 129, 139 (Ch.), 50 A.J.I.L. 683 (1956); Baade, *loc. cit.* 834.

[38] Salimoff *v.* Standard Oil Co., 262 N.Y. 220 (1933); Banco de Espana v. Federal Reserve Bank of N. Y., 114 F. 2d 438 (1940); Oetjen *v.* Central Leather Co., 246 U. S. 297 (1918). Property of American nationals was involved in Ricaud *v.* American Metal Co., 246 U. S. 304 (1918). See Baade, *loc. cit.* 832.

[39] According to Baade, most, but not all, writers support the proposition "that expropriations of the property of nationals of third states will not be refused recognition either on the basis of public international law or on the basis of private international law." *Loc. cit.* 834.

If enforcement of a "human right" to property were the motive for refusal to apply the doctrine, the nationality of the victim should be irrelevant. This motive seems to have figured in the resolution of the New York City Bar Association, which wanted national courts to ignore the doctrine on grounds not only of international law but also of the constitutional law of the expropriating state and of the public policy of the forum.[40] The position of the lower courts in *Sabbatino* and of several comments upon it was similar.[41] The *Bernstein* exception opened the way for United States courts to protect human rights violated by the Nazis, even though the victim was not a United States citizen.[42] In practice, however, an interest in "human rights" seems not to have been an important reason for refusing to apply the act of state doctrine.

To summarize, commentators and courts seem to fall into five classes on the act of state issue.

First are those who hold that, in the absence of an explicit treaty, public international law generally requires national courts to respect acts of official agencies of a foreign state within the latter's jurisdiction as defined by international law, even if these acts are deemed unjust according to standards of international law, of the public policy of the forum, or of the foreign state's own constitution.[43]

A second group holds that the issue is one of private international law and that, unless under special treaty obligation, a national court can apply its own system in this field in respect to foreign acts of state. The issue is, therefore, one of municipal law.[44]

A third group holds that the issue is political, and national courts should follow the prescriptions of the political organs of their own governments in the matter, thus holding that the issue is one of the public law of the forum, distributing functions to the judiciary, the executive, and the legislature.[45]

[40] James N. Hyde, "The Act of State Doctrine and the Rule of Law," 53 A.J.I.L. 635 (1959).

[41] Notes 1 and 27 above.

[42] Note 17 above.

[43] See notes 18, 24; Reeves, *loc. cit.* 41, note 36 above; Michael Cardozo, 1964 Proceedings, Am. Soc. of Int. Law 50, 53, and note 45 below; Archibald King, "Sitting in Judgment on the Acts of Another Government," 42 A.J.I.L. 811, 822 ff. (1948). Richard Falk (*loc. cit.* note 17 above) recognizes some exceptions, and approves the flexibility of the Supreme Court's opinion in Sabbatino, but regrets the Court's emphasis upon its subordination to the policy of the Department of State. In the Interhandel case (note 30 above) the United States denied the jurisdiction not only of the Swiss court but also of the International Court of Justice to question its confiscatory act of state. Clearly an international court is not so limited. In the Tinoco Arbitration (Great Britain *v.* Costa Rica), 18 A.J.I.L. 147 (1924), the arbitrator (Chief Justice Taft), while holding Costa Rica generally bound by the acts of the *de facto* Tinoco government, held it was not responsible when these acts violated the Costa Rican Constitution in force during the Tinoco regime.

[44] See Lauterpacht and Baade (notes 10 and 35 above).

[45] Sabbatino, note 25 above. Michael Cardozo, while generally urging "Judicial Deference to State Department Suggestions" (48 Cornell Law Quarterly 461 (1963)), believes that American courts should follow the act of state doctrine unless there is clear evidence of a different executive policy (p. 478). The amendment to the U. S. Foreign Assistance Act of 1964 (Oct. 7, 1964, 78 Stat. 1009, below, p. 380), declares,

A fourth group holds that public international law permits national courts to examine foreign acts of state, and to apply or not to apply them, according to their view of the essential justice of the act as determined by standards of international law, human rights, or the public policy of the forum.[46]

Finally there are those who adhere to the first group generally, but apply the opinion of the fourth group when a national of the forum state is the victim.[47]

The present writer inclines to the first of these views, subject to the exceptions stated in (4) above. Failure to apply the act of state doctrine, except when international law or treaty provides a clear rule of decision or gives discretion to the forum, manifests a lack of respect for the jurisdiction of another state and, in addition to the legal difficulties mentioned above, results in many practical difficulties among which are the following:[48]

It results in a national court assuming competence to criticize the interpretation by a foreign state of international law or even of its own constitution. The first would seem to be within the sole competence of an international court or of diplomatic negotiation, and the second within the competence of the highest court of the foreign state. In any case the result is likely to be uncertainty of the title to goods in international trade and variation in the validity of a title in different states. National courts will decide differently if they are free to apply their own standards of international law, of conflict of laws, of human rights, of public policy, or of subjective justice. Application by national courts of what each considers an international law standard cannot be expected to produce uniform results in a matter so controversial as the propriety of an act of state nationalizing property.[49]

Refusal by national courts to apply the act of state doctrine cannot provide a remedy for any but a small proportion of unjust acts of a foreign state, and may hamper efforts of the foreign office or international agencies to effect more substantial remedies. Furthermore, such refusal is almost certain to hamper the development of a generally accepted standard of international law concerning denial of justice or human rights because it will commit states to a multiplicity of standards asserted by their respective national courts.

Finally, such refusal, in manifesting disrespect for a foreign state's exer-

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on the other hand, that, unless the President intervenes, the courts should decline to observe the act of state doctrine in regard to foreign confiscations from Jan. 1, 1959, to Jan. 1, 1966.

[46] The lower courts in Sabbatino, White, J. dissenting in Sabbatino, Domke, Stevenson, Hyde, New York City Bar Association (notes 1, 27, 35, 40 above), John G. Laylin and Myres S. McDougal, 1964 Proceedings, American Society of International Law 33 ff., 57. Baade, who regards the matter as one of private international law, believes that in the absence of an explicit treaty, there is no standard of international law concerning the validity of expropriations. The only obligation is that of adequate compensation (*loc. cit.* note 35 above, p. 830).

[47] British Court of Chancery, note 37 above.

[48] Reeves, *loc. cit.* note 36 above.

[49] See note 33 above, and Reeves, *loc. cit.* 146 ff.

cise of the jurisdiction which international law accords it, tends to contribute to international tension or even hostilities, as did refusal of courts or other agencies of the injured countries to respect Iran's nationalization of the Anglo-Iranian Oil Company (1953), Egypt's nationalization of the International Suez Canal Company (1956), Indonesia's nationalization of Dutch properties (1958), and Cuba's nationalization of American properties (1960). The fact that refusal to respect foreign acts of state has contributed to international conflict nullifies the argument that acts of state are "mere acts of internal legislation not addressed to foreign powers" and so may safely be ignored by foreign courts.[50]

Application of the act of state doctrine, within the limits stated, seems essential for the peaceful co-existence of states with different social and economic systems, deemed, on both sides of the Iron Curtain and by the United Nations Charter, to be the basic principle of contemporary international law.[51] Until a code of "human rights" defining the property and other rights of individuals has been generally accepted, national courts should continue, as they usually have in the past, to follow the act of state doctrine, and to leave examination of denials of justice to diplomacy or international adjudication.

QUINCY WRIGHT

## THE ORGANIZATION OF AMERICAN STATES: THE TRANSITION FROM AN UNWRITTEN TO A WRITTEN CONSTITUTION

The Organization of American States, celebrating this year its 75th anniversary, is a unique example of a political institution which, in all but a technical sense, antedates its constituent document. As a formal legal body, functioning in accordance with a Charter which defines its principles and the agencies by which it undertakes to pursue its objectives, it is actually but seventeen years old. But the signing of the Charter at the Conference at Bogotá in 1948 did not create the organization as a working body; rather it gave to the existing Union of American Republics a more precise juridical character; it defined in more specific form the powers and functions of an established institution; in a sense it amended the unwritten constitution of an organization that had been growing over the years and had now come of age.

The Act of Congress of 1888 authorizing the President to call a Conference of American States and the invitation issued by Secretary Bayard the following year contemplated nothing other than the development of commerce and the promotion of some plan of arbitration. The Conference was duly called, and on April 14, 1890, now known as Pan American Day, a committee report was signed creating a permanent association for "the

[50] Baade, *loc. cit.* 807, note 35 above. See also notes 4, 8, 9, above, and Reeves, *loc. cit.* 154 ff.

[51] Falk (*loc. cit.* 948, 951, note 17 above) points out that in the decentralized state of international society, "vertical" controls of states are weak and consequently "horizontal" forces of international order must be recognized, implying "dependence of international society upon patterns of mutual respect for territorial law."