INTERNATIONAL LAW: A QUALIFICATION OF THE ACT OF STATE DOCTRINE

RICHARD E. SKOUSEN

It is commonly accepted throughout the world that a sovereign government is responsible for the maintenance of law and order within its borders.[1] Pursuant to this a sovereign enacts various laws, which laws reflect the existing social, economic and political conditions of that particular sovereignty. Generally a sovereign power is not subject to interference from other countries,[2] and when rights arise under such acts of the sovereign which are litigated by a different sovereign, the forum is bound to give recognition and effect to the law of the sovereignty wherein the rights arose. This policy of Private International Law or Conflict of Laws has been further developed into the so-called Act of State doctrine: "The courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory."[3]

The United States seems to have followed this doctrine when rights of a citizen of the United States or of some other nation have been called into question due to the practice of nationalization by a foreign sovereign of property located within that sovereign's territory.[4] However, in the recent federal case, *Banco Nacional De Cuba v. Sabbatino*,[5] which seemed to set forth facts which would call for an application of the Act of State doctrine, the District Court held that the Act of State doctrine was inapplicable. The case arose out of

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[1] I OPPENHEIM, INTERNATIONAL LAW 286 (Lauterpacht 8th ed. 1955).

[2] *Id.* at 289.

[3] Ricaud v. American Metal Co., 246 U.S. 304, 307 (1918).

[4] The Act of State doctrine has been followed in many cases that have come before the Supreme Court of the United States. Underhill v. Hernandez, 168 U.S. 250 (1897); American Banana Company v. United Fruit Company, 213 U.S. 347 (1909); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); *supra*, note 3. *Cf.* United States v. Pink, 315 U.S. 203 (1941); Shapleigh v. Mier, 299 U.S. 468 (1937); United States v. Belmont, 301 U.S. 324 (1936). District Courts of the United States and also state courts have previously followed the Act of State doctrine. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947); Eastern States Petroleum Co. v. Asiatic Petroleum Corp., 28 F. Supp. 279 (S.D.N.Y. 1939); Salimoff and Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); O'Neill v. Central Leather Co., 94 Atl. 789 (Conn. 1915).

[5] 193 F. Supp. 375 (S.D.N.Y. 1961).

an action by the financial agent of the Cuban government against a purchaser of sugar from a Cuban corporation for a money judgment for the alleged conversion of bills of lading and proceeds from the sale of sugar by a Cuban private corporation whose property had been expropriated. Judge Dimock held that the decree of the Cuban government nationalizing Cuban enterprises in which citizens of the United States had an interest violated international law and the court would not give recognition or enforce such decree. Therefore, the Cuban government was not entitled to a money judgment. In essence, the district court refused to recognize the long established Act of State doctrine and their reason for such refusal was that the acts of the Cuban Government violated international law. This decision seems to mark a change in the law by which the courts of the United States have been heretofore bound.[6]

A further study concerning the background and development of the Act of State doctrine needs to be discussed. Most recently, it was incorporated in the *Restatement of Foreign Relations Law of the United States* as follows:

> A state which applies the act of state doctrine and has jurisdiction to prescribe a rule governing the determination of a claim against a person or an interest in property refrains from exercising its jurisdiction to enforce such a rule to the extent that such exercise would involve an examination of the validity of certain types of acts of state of a foreign state.[7]

The foundation for the Act of State doctrine as it has been developed in this country was pronounced by Chief Justice Fuller in *Underhill v. Hernandez,* an 1897 case.[8] The case involved a citizen of the United States who was detained in a foreign country during an overthrow of that country's government. Underhill, the United States

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[6] *Supra,* note 4.

[7] RESTATEMENT, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 28(b) (Tent. Draft No. 4, 1960).

[8] 168 U.S. 250 (1897). The Underhill case was given credit for the promulgation of the Act of State doctrine in the United States, perhaps for the reason that it was the first case using such language before the Supreme Court of the United States. The Underhill case however borrowed its language concerning the Act of State doctrine from an early case in New York, Hatch v. Baez, 7 Hun 596 (N.Y. 1876). Even in that case the court relied on earlier English cases as the source of the rule.

It is interesting to note that the Underhill case was really a situation involving "sovereign immunity" — the sovereign may not be sued unless and until it will give it consent. This case should then be compared with Hilton v. Guyot, 159 U.S. 113 (1895), a case decided four years earlier. A French company had recovered a judgment in a French court against an American company doing business in France. This judgment was sued on in this country. It was held that a court of the United States could re-examine the judgment and cause of action on the merits because France did not give reciprocity to a judgment secured in the United States and sued on in France. Actually this would probably have been a better case to apply the Act of State doctrine — if it were to be a binding rule of law.

citizen, then brought suit against Hernandez, the general whom he alleged had falsely imprisoned him. The Supreme Court however expressed the view that every sovereign state was bound to respect the independence of every other sovereign state and the courts of one country should not sit in judgment on the acts of the government of another done within its own territory. About twelve (12) years later, Justice Holmes further developed the Act of State doctrine in the case of *American Banana Company v. United Fruit Company.*[9] Later cases which undertook to try title of nationalized property such as in the *Sabbatino* case were *Oetjen v. Central Leather Co.*[10] and *Ricaud v. American Metal Co.*[11] These were companion cases handed down the same day. They represented similar factual situations which arose during the Mexican revolution. The uprising forces, which later formed the new Mexican Government, had confiscated certain properties of both Mexican nationals and of American citizens in Mexico. The confiscated properties had then found their way into the United States, but the courts of the United States refused to enforce the rights of American citizens to those properties, saying that they would not review the acts of another sovereign. The *Oetjen* case went so far as to state that to permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.[12]

The most recent case on this issue (besides the *Sabbatino* case) was a case arising out of a German confiscation during World War II.[13] The Nazi Third Reich forced the plaintiff by threats to transfer title of his ship to defendant's assignor. The ship was subsequently sunk. Plaintiff then sued the defendant for damages and insurance proceeds, but was denied recovery. The court indicated that in such a case they might be able to examine the acts of a foreign government, but in the absence of a positive intent on the part of the executive department that the action of the court would not embarrass the government in its conduct of foreign relations, such examination would be refused.

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[9] 213 U.S. 347 (1908). The case involved one United States corporation suing another United States corporation for alleged tortious acts by the latter corporation and the government of Costa Rica. Sovereign Immunity was not an issue in that case.

[10] 246 U.S. 297 (1918).

[11] 246 U.S. 304 (1918).

[12] Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918).

[13] Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947). It should be noted that this case was not handed down by the Supreme Court, therefore it must be weighted accordingly.

With the foregoing cases before us, it should now be considered as to whether the Act of State doctrine is a binding rule of law or merely a policy consideration of the court; to wit: at that particular time and under those particular circumstances it seemed the best thing to do.

The case cited as the origin of the Act of State doctrine was the *Underhill v. Hernandez* case[14] and we find that it was decided, in reality, on grounds of sovereign immunity;[15] to wit: the sovereign may not be sued by a person of a foreign country unless the sovereign consents to such a suit. This issue of sovereign immunity has never been subject to much dispute. Further, it must not be contended that international law should ever try to govern relations between a government and its own citizens. However, the way that the Act of State doctrine has been stated in the various cases — "the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory"[16] — it would seem to be all comprehensive of every situation. It is therefore suggested that the Act of State doctrine is not a binding principle of law, but a strong policy consideration. It is so strong that the courts of this country should not disregard the same unless the policy to be served by such action is more important. Such strong policy to the contrary appears to have been the situation in the *Sabbatino* case.[17] The United States State Department had delivered notice to the Cuban Government that they considered the nationalization law to be violative of international law.[18] Further, both the decree and the law pursuant to which it was adopted stated that the expropriations were directed toward United States interests.[19]

In the *Bernstein* case, the court stated that they would not look into the foreign action at that time because no executive pronouncement had been made on that particular point.[20] Further impetus to this viewpoint is given in the case of *Republic of Mexico v. Hoffman.*[21] The court therein stated that where the executive has decreed that a particular foreign government should be immune from suit, the question should not be inquired into; however, without such an executive mandate, the judiciary may declare *as a matter of policy* that the sov-

[14] 168 U.S. 250 (1897).
[15] See note 8.
[16] Ricaud v. American Metal Co., 246 U.S. 304, 307 (1918).
[17] 193 F. Supp. 375 (S.D.N.Y. 1961).
[18] 43 Department of State Bull. 141, 171 (1960); 42 Department of State Bull. 153 (1960).
[19] See argument and reasoning in the Sabbatino case, 193 F. Supp. 375 (S.D.N.Y. 1961).
[20] 163 F.2d 246 (2d Cir. 1947).
[21] 324 U.S. 30 (1945).

ereign is immune from suit.[22] Thus, if the Act of State doctrine grew out of the Sovereign Immunity doctrine, which as stated in the *Hoffman* case was merely a matter of policy, how could it be claimed that the Act of State doctrine itself was anything but a matter of policy?

From the cases which have been examined, it is quite apparent that the Act of State doctrine has been strongly entrenched in American policy; therefore, there is a necessity that the basic policy behind the theory for the application of international law should also be examined.

In dealings between our nation and other nations our country has in the past considered itself bound to certain broad principles which have come to be known as the "law of nations" or "international law." These rules are generally based on comity and the reciprocity of other nations and have governed our country to country relations and dealings since the beginning of our free nation.[23] Since no court can apply any law save that of the government of which it is a part,[24] the United States Supreme Court has seen fit to encompass international principles within the law of the United States.

> International law is part of our law, and must be ascertained and administered by the court of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive act or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made them peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[25]

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[22] See also The Steamer "Siren" & Cargo v. United States, 7 Wall. 152 (1868).

[23] I OPPENHEIM, INTERNATIONAL LAW (Lauterpacht 8th ed. 1955). In determining sources of international law, the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, states some widely accepted sources:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilized nations;
d) . . . judicial decisions and the teaching of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law. . . .

[24] RESTATEMENT, CONFLICT OF LAWS § 1 (1934).

[25] Hilton v. Guyot, 159 U.S. 113 (1895); The Paquete Habana, 175 U.S. 677 (1900). Underlying reasons may be found in JESSUP, A MODERN LAW OF NATIONS 2 (1948). It was there stated, "Until the world achieves some form of international government in which a collective will takes precedent over the individual will of the sovereign state, the ultimate function of law, which is the elimination of force for the solution of human conflicts, will not be fulfilled."

Not only our courts, but our government has given solid proof of its adherence to this view, by arguing to the International Court of Justice as the main point in *Switzerland v. United States*,[26] that the courts in the United States administer international law because it is the law of the land.

It seems from the foregoing authority that it would be incumbent upon courts of the United States to enforce the rules of international law. To do so, the courts must first determine what principles of international law are involved in the particular case in issue. If it is found that the rules of international law are contrary to some other law principles, such as the Act of State doctrine, it then becomes a question as to which one should be applied. Which is superior? And can there be some reconciliation between the two?

The *Sabbatino* case dealt with nationalization by the Cuban Government of certain properties within their domain.[27] It is a universally recognized principle that a state may expropriate property within its territorial jurisdiction. In fact, it has been a matter of common practice followed by countries which have experienced economic, social, and political convulsions.[28]

However, the United States Government has continuously proclaimed that this right of expropriation is subject to certain qualifications; to wit, it must be made for reasons of public utility, it must not be discriminatory or arbitrary in nature or application and may only be accomplished upon the payment of adequate and effective compensation.[29] It was found by the district court that the Cuban

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[26] Oral Proceedings, Nov. 5-17, 1958, 140-141, I.C.J. Distr. 58/185.

[27] 193 F. Supp. 375 (S.D.N.Y. 1961).

[28] I OPPENHEIM, *op. cit. supra* note 1, at 352; Ninth International Conference of American States, U. S. Dept. of State Publication 3263 p. 67 (Nov. 1948); United States v. Belmont, 301 U.S. 324 (1937) (confiscation of the American assets of a Russian corp.) Comment: *The Expropriation of Oil Properties by Mexico*, 32 AM. J. INT'L. L. 519 (1938); Doman, *Compensation for Nationalized Property in Post-War Europe*, 3 INT'L. L.Q. 323 (1950) (Payment in long-term interest bearing bonds redeemable out of proceeds of nationalized enterprises); 323, 335 (compensation in state obligations with other flexible arrangements possible — Poland), 337 (compensation in government bonds — Yugoslavia), 338 (compensation in accordance with future act of parliament — Hungary), 339 (compensation in securities payable out of proceeds of nationalized entnerprises — Romania), 340 (reduced scale compensatiton paid in interest bonds of Bulgarian state); 58 MICH. L. REV. 100 (1959) (appropriation of oil properties in Iran); DOMKE, *American Protection Against Foreign Expropriation in the Light of the Suez Canal Crisis*, 105 U. PA. L. REV. 1033 (1957) (expropriations in Egypt); DOMKE, *Indonesian Nationalization Measures before Foreign Courts*, 54 AM. J. INT'L. L. 305 (1960).

[29] 43 Dept. of State Bull. 171 (1960); UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. XVII; 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, Chap. XI, 653 (1942); *Nationalization of Property of Aliens*, 13 N.Y.C. BAR ASS'N REC. 367 (1958); 43 AM J. INT'L. L. 171 (1951). See also Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

nationalization did not conform to these qualifications,[30] therefore the Cuban decree of nationalization was violative of international law and under the circumstances of the case the forum would not enforce the foreign decree.

In the *Sabbatino* case, the issues of International law and the Act of State doctrine met head on for the first time in an American court. The court in the *Sabbatino* case distinguished *Ricaud v. American Metal Co.*[31] on that very ground, saying that the issue would have been germane in that decision, but it was not raised and hence the language of the court in the *Ricaud* case foreclosing a re-examination by a court of the United States of acts of a foreign state did not supply an answer to the *Sabbatino* case.[32]

Other countries have dealt with this very problem and come to varying decisions. Under three cases with the same factual situations in each case, the English court of Aden in the famed *"Rose Mary"* case[33] found the confiscatory acts of the Iranian Government to be violative of international law and thus refused to enforce the claims of an owner claiming under the government of Iran, while both the Italian court[34] and the Japanese court[35] found that the acts were not violative of international law.[36] From these cases it can be seen that foreign countries have evidenced some willingness to examine the validity of foreign acts under international law, but they have been unable to agree on what constitutes international law.

The greatest support for the examination of acts of foreign sovereigns in the light of international law has come from legal writers and jurists throughout the world.[37] Several policy reasons have been set forth for the support and supremacy of international law in dealings between nations. International law involved in a case should not only be recognized and applied because it represents a univer-

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[30] Banco Nacional De Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961).

[31] 246 U.S. 304 (1918).

[32] 193 F. Supp. 375, 380 n. 5 (S.D.N.Y. 1961).

[33] Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary), 1 WEEKLY L.R. 246 (Aden 1953).

[34] Anglo-Iranian Oil Co. v. S.U.P.O.R., 5 INT'L & COMP. L.Q. 607, (1955) Int'l L. Rep. 23 (Civil Court of Rome 1954).

[35] Anglo-Iranian Co. v. Idemitsu Kosan Co., 4 INT'L & COMP. L.Q. 280 (High Court of Tokyo 1953).

[36] For further cases where varying countries disagree on the necessary qualifications that nationalization must meet before complying with international law, see DOMKE, *op. cit. supra,* note 28.

[37] I OPPENHEIM, *op. cit. supra,* note 1 at 267-270; Fachiri, *Recognization of Foreign Laws by Municipal Courts,* 12 BRIT. YR. BK. INT'L L. 95, 102-106 (1931); Morgenstern, *Foreign Acts Contrary to International Law,* 4 INT'L L.Q. 326, 344 (1951); Zander, *The Act of State Doctrine,* 53 AM. J. INT'L L. 826 (1959); Comment, *"Act of State" Doctrine,* 58 MICH. L. REV. 100 (1959); Note, *Acts of State and the Conflict of Laws,* 35 N.Y.U.L. REV. 234 (1960).

sally recognized standard of justice, but it is necessary to apply international law in order to provide adequate protection for American interests abroad and to gain security in property transactions. By such application, tensions among nations will be eased — it is confiscation that vexes the peace of nations and not the application of international law to remedy that confiscation. Further, it is necessary to apply international law in order to provide a remedy for American citizens who lose property due to confiscatory acts of a foreign government. Proponents of the application of international law have argued that such enforcement will undoubtedly have the healthful result of enhancing respect for the acts of foreign states which are in conformity with international law.[38] And as stated most explicitly in the *Sabbatino* case, "it would be almost incomprehensible for the forum to implement a foreign violation of international law by extending to the forum the operation of this international wrong."[39]

Above have been summarized some of the arguments used by the advocates of the application of international law in all cases. It should also be recognized that the advocates of the Act of State doctrine have many strong and persuasive arguments.[40] Acts of a foreign state effective within the boundaries of that state should not be questioned by other nations, and the application of the Act of State doctrine by all nations would assure the certainty and security of title to property that is important to international commerce. Otherwise, ownership rights would depend on whims, caprice, and rules of the particular jurisdiction through which the property was transported. Consistent with the application of the Act of State doctrine the proper remedy in this type of a situation would be to invoke the aid of the executive department through diplomatic channels or treaties. These are the recognized methods for dealing with foreign countries, and the executive department of our government is charged by the Constitution of the United States with the formation and execution of our foreign relations,[41] not the judiciary.

Possible procedural difficulties that may be encountered by the strict application of the Act of State doctrine may well be illustrated by the following example. Assume that X country confiscated property of C, a citizen of the United States. Assume further that X sells this property to D, another citizen of the United States. D then

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[38] *Ibid.*

[39] 193 F. Supp. 375, 381 (S.D.N.Y. 1961).

[40] Reeves, *Act of State Doctrine and The Rule of Law — A Reply*, 54 AM. J. INT'L L. 141 (1960); Lipstein, *Case and Comment on the Rose Mary*, 1956 CAMB. L.J. 138; Seidi-Hohenvelden, *Extraterritorial Effects of Confiscations and Expropriations*, 49 MICH. L. REV. 851 (1951).

[41] U. S. CONST. art. II, § 2, para. 2.

transports the property to Y country. C brings an action in a Y court to replevy the property. The court of Y decides to apply principles of international law, thus declares that D has no title to the property, for his title was derived through X, which had confiscated the property from C in violation of international law. Assume further that C brings the property to the United States and that D then brings an action in the United States to recover the property. If the United States court sought to apply the Act of State doctrine, which act of state would it refer to, the acts of X or the acts of Y?[42] Thus, by the application of a strict rule as to the Act of State doctrine, the courts of the United States may find themselves in a quandary. But, if they chose to apply principles of international law, the court would analyze the principles of international law involved in the case, and then use those which they regarded as applicable.

A better solution to this problem of the difference between the Act of State doctrine and International Law might be found in an international court of justice.[43] However, by allowing another court of international jurisdiction to solve such problems, the United States must be careful not to put too much power in another sovereignty. Further, if the court of the United States had the power to question the acts of a foreign sovereign without executive approval, courts of foreign countries would be able to do the same with acts performed within America by the Government of the United States. The United States, having done likewise, would have no argument. It should be remembered that the United States is founded on a Constitution which has served as a framework for law and justice for over 200 years. Other countries and nationalities do not have such a framework, and too much power outside the United States might cause decisions to be handed down which would not be in accord with our own sense of justice and fair play. When these decisions of an international court or a court of a foreign nation begin to affect industry and citizens of the United States, the courts of the United States might look back on the Act of State doctrine and wish that it were still in full force, with perhaps a few minor qualifications consistent with certain public policy considerations. It is the opinion of this writer that the Act of State doctrine should still be used by the courts of this country and that it should only be overridden when absolutely necessary in the interest of American citizens and their government.

[42] The court may however choose to follow general principles of Conflict of Laws and Judgments and thus apply the theory of Res Judicata to the second judgment, even though it may be in error. Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); RESTATEMENT, JUDGMENTS § 42 (1942); *cf.* state court applying this rule in Ambatielos v. Foundation Co., 203 Misc. 470, 116 N.Y.S. 2d 641 (1952).

[43] 13 N.Y.C. BAR ASS'N REC. 367 (1958).