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Act of State and Other Problems with Restatement II (Revised)

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regard to seabed mining or navigation. The Reporter, Lou Henkin, considers the United States to have recognized the 200-mile zone in principle and that our disagreement is only with the idea that this zone is not to be considered "high seas" for certain purposes.

Sec. 521. Freedom of the High Seas

This is related to section 514 and will be considered along with section 517 which defines the boundaries of the exclusive economic zone on the continental shelf.

Part VII. Protection of Persons (Natural and Juridical)

Sec. 702. Customary International Law of Human Rights

The black-letter text contains the limiting language "as a matter of state policy" which is necessary to find or establish a violation by the state itself. The list of violations does not include sex discrimination, and after lengthy debate it was agreed that, looking at the world as a whole, other nations simply do not view sex discrimination in the same way the United States does and that there was no settled international law on sex discrimination which could be included in this *Restatement*. Property rights are not now specifically mentioned in the draft section 702, but the Reporters agreed to say something about property rights in the commentary.

Sec. 712. Economic Injury to Nationals of Other States

This section sparked the longest and most vigorous debate. The question circled around the concept of "prompt, adequate and effective" as equal to "just compensation." The Reporters agreed to add language to the Commentary to make clear that U.S. practice is to provide the property owner with "the substantial equivalent of prompt payment." This has not satisfied everyone, but is what the Reporters have agreed to at this time. The state is also to be held responsible for "creeping expropriation." There is admittedly a different approach taken in sections 712 and 713 from that in section 702, which holds the state to a high standard of responsibility.

Secs. 721 and 722. Applicability of Constitutional Safeguards and Rights of Aliens

These sections were not taken up last year but are in Tentative Draft Number 4 and will be taken up this year, and I expect will spark considerable debate.

Part VIII. Selected Law of International Economic Relations

The initial criticism which has been received with respect to part VIII, sections 801 and following, is that its coverage is too narrow and limited. This will be debated for the first time at the full meeting in May.

ACT OF STATE AND OTHER PROBLEMS WITH RESTATEMENT II (REVISED)

*by Malvina Halberstam**

Introduction

It gives me great pleasure to be here, today, to speak about the revised *Restatement*. I am a member of the American Law Institute, and have followed closely the work on the revised *Restatement* since its inception several years ago. It reflects the great thoughtfulness and broad scholarship of the Reporters and advisors who have worked on it. The Reporters' Notes and Comments alone will provide an invaluable resource for anyone interested in U.S. foreign relations law. I am grateful to the American Law

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Institute and to Professor Henkin, the chief Reporter, as well as the associate Reporters, for undertaking the monumental task of restating the U.S. law of foreign relations.

This *Restatement* will be of particular importance in the coming years, as more cases raise issues of international law or U.S. foreign relations law, since many judges do not have an extensive background in this area of the law, and there are relatively few cases in point. It is, therefore, also particularly important that the *Restatement* accurately reflect U.S. law or international law as interpreted by the United States on each subject.

My remarks will deal with provisions in or comments to sections 103, 202, 419, 433, 428 and 429.

Section 103

Section 103 of the revised *Restatement* puts resolutions of international organizations on a par with judgments of courts and arbitral tribunals as evidence of international law. It provides:

> In determining whether a rule has been accepted as international law . . . substantial weight is accorded to . . .
> b. Resolutions of International Organizations.

I believe that this provision is neither required by existing international law, nor is it desirable.

The General Assembly does not have lawmaking authority under the U.N. Charter, nor are General Assembly resolutions included among the sources of international law listed in article 38(1)(D) of the Statute of the International Court. A proposal to give the General Assembly lawmaking authority was overwhelmingly rejected at the San Francisco Conference, with only one state supporting the proposition. A draft resolution on the role of the International Court of Justice, which referred in the preamble to "the possibility that in deciding disputes the Court might take into consideration declarations and resolutions of the General Assembly," was rejected by a "wide spectrum of states from all parts of the world." It was criticized as an attempt at "indirect amendment of Article 38 of the Statute of the International Court," and as attributing to the General Assembly "powers which were not within its competence."

In a recent arbitration involving the Libyan nationalization, the arbitrator, Professor R.J. Dupuy, refused to give legal effect to the U.N. resolution on the Charter of Economic Rights and Duties of States (Res. 3281 [XXIX] [1974]), even though it was passed by an overwhelming majority of the General Assembly, but without the affirmative vote of the Western states.

Voting in the General Assembly is entirely political, and not a reflection of what the states voting for the resolution believe international law to be, as the Reporters' Notes to the revised *Restatement* argue.

While several prominent scholars have argued that General Assembly resolutions, particularly those adopted by large majorities and often cited, should be given legal effect as indicative of a "general consensus" of customary international law, an opinion of the Legal Counsel of the United Nations took the position that such resolutions can "give an important impetus to the emergence of new rules," but that the declaration itself "does not give them the quality of binding norms." Professor Sohn, who I believe is one of the earliest and strongest proponents of the view that General Assembly resolutions should be given legal effect, assured me that he takes that position only with respect to General Assembly resolutions that (a) have been adopted unanimously or reflect a general consensus, and (b) were adopted in the belief that they reflect the

law on the subject. Section 103(b) of the *Restatement* does not contain even these qualifications.

The United States has repeatedly taken the position that U.N. resolutions do not have binding legal force. Eleanor Roosevelt did so in the early days of the United Nations, with respect to the Universal Declaration, even though she vehemently supported it. Ambassador Richardson did so more recently, with respect to the Declaration of Principles governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, which declared these to be "the common heritage of mankind." In response to a statement from the Chairman of the Group of 77, that, because of its special character and its adoption without dissent, the Declaration was "the authoritative expression of international law as to the regime of the seabed beyond national jurisdiction," Ambassador Richardson said:

> We cannot accept the suggestion that other states, without our consent, could deny or alter our rights under international law by resolutions, statements and the like.

Thus, the provision in section 103(b) that in determining whether a rule has been accepted as international law, "substantial weight is to be accorded to resolutions of international organizations" does not reflect either international law as seen by the United States or as seen by the international community, including the General Assembly itself, or the U.S. position on the legal effect of General Assembly resolutions.

Section 202

Following a listing in section 201 of the traditional requirements of statehood, section 202(2) provides:

> A state is required *not to recognize or treat as a state* an entity that has attained the qualifications of statehood in violation of international law. (emphasis supplied)

Comment (e) to this section states:

> Although an entity satisfies the requirements of § 201, international law requires that it not be recognized or treated as a state if it was created by threat or use of force by one state upon another in violation of the United Nations Charter.

Thus, section 202(2) and comment (e) in effect add another requirement to the traditional elements of statehood, *i.e.*, that statehood cannot be created by threat or use of force . . . in violation of the U.N. Charter. While the goal may be laudable, and consistent with our utopian views of the United Nations, the provision does not reflect customary international law and is potentially dangerous.

As set forth in section 201 of the *Restatement*, customary international law defines statehood in terms of a defined territory, permanent population, and government in control of the population, which engages or had the capacity to engage in foreign relations. That definition makes no reference to the manner in which the state came into existence. Almost every state has either come into being or acquired territory through threat or use of force at some point in its history.

In conflicts occurring since the adoption of the U.N. Charter, each side has generally claimed that its use of force was legitimate while the other side claimed that it was a violation of the Charter. Given this political situation, it is unlikely that the question whether the use of force was lawful will be answered objectively, even assuming that is possible. Indeed, the Reporters' Notes acknowledge that "Whether there has been an unlawful threat or use of force, however, may be disputed" and that "in most cases the issue will not be subject to authoritative interpretation." The effect of this

provision will not be to deter the illegal use of force or even to isolate these states that acquire territory thereby, but only to provide an additional argument for those states that seek to delegitimize other states.

Section 419

The jurisdictional provisions of the *Restatement* were much debated at a meeting of the American Law Institute and, I believe, returned to the Reporters for redrafting. I want to discuss here not the issues that were the subject of this debate, but a portion of the comment to section 419. The Comment states:

> Under this section, prohibitions by the state in whose territory the act is to be carried out ordinarily prevail over orders of other states. For instance, an order of state X to its nationals to discriminate on the basis of race, sex or religion in hiring personnel in the United States, or in entering into commercial arrangements in the United States, would not be a good defense to a charge of unlawful discrimination under United States law. Correspondingly, if U.S. nationals were charged under U.S. law with unlawful employment discrimination in state X, a showing that under the law of X conforming to American standards in hiring practices would be subject to criminal penalties, would be a good defense to such an action in the United States.

This would seem to preclude application of a U.S. law that specifically prohibits U.S. citizens from engaging in human rights violations abroad. Such a rule is not required by international law, and indeed may in some instances be contrary to international law as set forth in the *Restatement* itself, and would, in some circumstances, be unthinkable. That a state may penalize its citizens for acts done outside its territory is well established under international law and under the U.S. Constitution.

Whether and to what extent the United States should regulate conduct of its citizens abroad is a very complex policy question for Congress and the President to decide. They should not be precluded from barring conduct abroad where appropriate, and particularly where extreme human rights violations are concerned, by a rule that makes the foreign law, without any qualification as to the content of that law, a defense. I would therefore suggest adding to the rule some language to the effect that territorial law prevails, "except where the conduct in question is a violation of the international law of human rights, as set forth in section 702 of the *Restatement*" or as "recognized universally."

Section 433

Section 433 deals with "External Measures in Aid of Enforcement of Criminal Law." Comment (a) states:

> The acts and omissions of U.S. officials are subject to the restraints of the U.S. Constitution whether they are committed in the United States or abroad. Therefore, U.S. law enforcement officers sent abroad in the exercise of their duties may not engage in conduct that would be prohibited under the Constitution if carried out in the United States.

I believe the proposition that law enforcement officials may not engage in conduct abroad that would be prohibited if carried out in the United States is not required by existing law and involves important questions of policy and constitutional interpretation that should be left open for future consideration by Congress and the Supreme Court.

While it is clear, as section 721 of the *Restatement* provides, that "the provisions of the Constitution safeguarding individual rights . . . limit governmental authority ex-

ercised abroad as well as in the United States" (*Reid v. Covert*, 354 U.S. 1 [1957]), it does not follow that "therefore" anything that would be a violation of the Constitution if done in the United States would be a violation if done abroad. For example, the Fourth Amendment prohibition of "unreasonable" searches and seizures has been interpreted to bar a search of premises without a warrant even when there is probable cause, but not to bar a search of a car under the same circumstances without a warrant, since a car may be moved out of the jurisdiction before the officers can get the warrant. It is at least arguable that the failure to obtain a warrant for a search or seizure abroad would not be "unreasonable," and would thus not violate the Fourth Amendment, under circumstances in which a warrant would be required in the United States.

The question of whether the requirements otherwise applicable to searches and electronic surveillance—a warrant based on probable cause to believe that a crime has been committed and that evidence of it can be obtained from the person or premises to be searched—should apply to foreign threats to national security, even where the search or electronic surveillance is in the United States, is the subject of considerable difference of opinion. (See *United States v. United States District Court*, 407 U.S. 297 [1972]; the Foreign Intelligence Surveillance Act of 1978, and Senate Hearing thereon.) A strong argument can be made that U.S. agents gathering intelligence information abroad should not be subjected to restrictions that are not required by the foreign state and that other states' agents are not required to satisfy, or at the very least should not be subjected to the same restraints that would apply to a search in the United States in the course of an investigation of a routine crime. Since the Supreme Court has not yet resolved these issues, I think the *Restatement* should not take a position precluding the possibility of subjecting foreign intelligence gathering activity abroad to different criteria than would apply to conduct by U.S. officials in the United States.

Restatement Sections 428 and 429: Act of State

My last point, for which I have reserved the largest portion of my time, involves what will no doubt be one of the most controversial provisions of the revised *Restatement*: the act of state doctrine.

Section 428 of the *Restatement* provides:

> Subject to § 429, courts in the United States will refrain from examining the validity of an act of a foreign state taken in its sovereign capacity within the State's own territory.

This provision is, of course, based on the Supreme Court decision in *Sabbatino*. The Court there stated: "The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government," even if it is alleged that the taking is contrary to international law or to the U.S. Constitution.

The Supreme Court's decision in *Sabbatino* met with overwhelming, though not universal, criticism from academicians and practitioners alike and was very quickly overruled by Congress in an amendment to the Foreign Assistance Act. This amendment, known as the Hickenlooper amendment, provides:

> No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right [to property] is asserted by any party . . . based upon . . . an act of state in violation of the principles of international law . . . .

Professor Lowenfeld, one of the associate Reporters for the revised *Restatement,* stated that the Hickenlooper amendment has reversed the ruling of the Court in *Sabbatino* that U.S. courts should not review the validity of foreign acts of state. He wrote:

> In the *Sabbatino* case the Executive Branch had argued and the Supreme Court had held, that United States courts should not review the official acts of foreign governments affecting property within the foreign state . . . . The majority of the organized Bar has argued, and the Congress has now agreed, that the courts of the United States should review the official acts of foreign governments if these acts affect property beneficially owned by United States citizens and are alleged to be in violation of the principles of international law.

Nevertheless, section 428 of the *Restatement* reasserts the act of state doctrine as set forth in *Sabbatino.*

Section 428 is subject only to section 429, which provides that:

> The act of state doctrine will not be applied to claims to *specific property located in the United States* based on the assertion that the foreign state confiscated the property in violation of international law. (Emphasis added.)

This exception, for specific property located in the United States, intended to take account of the Hickenlooper amendment, is a very narrow—some have referred to it as "niggardly"—construction of the Hickenlooper amendment. The Hickenlooper amendment is not limited by its terms to "specific property" located in the United States. While there is a legislative history to support such a construction, there is also legislative history to the contrary.

The broad reassertion of the act of state doctrine in section 428 and the narrow exception provided in section 429 do not reflect that "Congress substantially 'repealed' the decision of the Supreme Court by enacting the Hickenlooper amendment," as Professor Henkin, the chief Reporter for the *Restatement,* stated some years ago. Furthermore, in the intervening years, there has been more criticism of the act of state doctrine. Four Justices of the Supreme Court have either rejected *Sabbatino* or expressed approval of the "Bernstein" exception to the act of state doctrine. And a bill is now pending in Congress which is intended "to eliminate any bar of the Act of State doctrine to the application of international law in the determination of the merits of any case." In view of that, I do not believe that proposed sections 428 and 429, which essentially reaffirm the decision in *Sabbatino,* with an exception based on the narrowest possible construction of the Hickenlooper amendment, properly restate the U.S. law on the subject.

It should be noted that the act of state doctrine is not a doctrine of judicial self-restraint or abstention, comparable to the political question doctrine. The language of the Court in *Sabbatino* and in section 428 of the *Restatement* is somewhat misleading in that respect. The Supreme Court in *Sabbatino* stated: "We decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government." The *Restatement* similarly states that U.S. courts "will refrain from examining the validity of an act of a foreign state. . . ."

However, the Court in *Sabbatino* did not dismiss the case, as it does when the case involves a political question. Instead, it proceeded to enforce the Cuban decree, notwithstanding that its discriminatory and confiscating character violated both international law and the U.S. Constitution. Thus, what the Supreme Court actually held in *Sabbatino,* and what the *Restatement* provides, is that a U.S. court must affirmatively enforce a foreign act of state, even if that act violates international law and the U.S. Constitution.

Acknowledging that the rule it was promulgating was not required either by international law or by the Constitution, the Court gave two reasons for its decision: (1) a judicial determination of the validity of a foreign act of state under international law might embarrass the executive in its conduct of foreign affairs; and (2) since the content of the applicable international law in this area is unsettled, it should not be determined by municipal courts.

The argument that a judicial determination of the question would interfere with the executive's conduct of foreign affairs was also cited by the Supreme Court in its decision in *Republic of Mexico v. Hoffman* some years ago, which held that courts were bound by the executive's determination to grant or deny a foreign state's claim of sovereign immunity. Professor Jessup criticized that decision in an editorial in the *American Journal of International Law* as an abdication of the judicial function. He said:

> It is the normal process of international affairs to insist that a question of this character must be submitted to the courts and that the diplomatic channel should be utilized only where the courts fail to do justice.

The Foreign Sovereign Immunities Act of 1976 removed the determination of claims of sovereign immunity from the executive and vested it in the courts under a restrictive theory of immunity, as set forth in the Act. Numerous cases have been decided by the courts under the Act without any indication that these decisions have interfered with the executive's conduct of foreign affairs.

Although the State Department urged the rule that the Court adopted in *Sabbatino*, it no longer takes that position. In several cases that arose after *Sabbatino*, the Legal Adviser submitted a letter to the Court that judicial determination of the legality of the foreign act of state would not interfere in its conduct of foreign affairs. In *Alfred Dunhill v. Republic of Cuba*, Monroe Leigh, the Legal Adviser, after reviewing these cases, concluded:

> At least on a case-by-case basis, the trend in Executive Branch pronouncements has been that foreign relations considerations do not require application of the Act of State doctrine to bar adjudication under international law. . . . In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

The other reason given by the Supreme Court for its decision in *Sabbatino* was that U.S. courts should not decide questions of international law, at least if the relevant international law is controversial. It was this aspect of *Sabbatino* that evoked the sharpest criticism.

The proposition that international law is part of U.S. law and must be applied by U.S. courts has its origins in the earliest decisions of the Supreme Court. As the Supreme Court stated in the oft-quoted language in *Hilton v. Guyot*:

> International law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation, duly submitted to their determination.

Nor was application of international law by U.S. courts limited to those rules of international law that were undisputed. In *Paquete Habana*, the landmark decision generally cited for the proposition that international law is part of U.S. law, three Justices

dissented because they disagreed with the majority's interpretation of the applicable international law. They did not argue, however, that international law should not be applied because it was unclear.

Municipal courts in the United States and other countries constantly interpret and apply international law. Since there are few international tribunals and their jurisdiction is very limited, municipal courts play a major role in the interpretation and development of international law. Indeed, this *Restatement* provides in section 103(a) that in determining whether a rule has been accepted as international law, "substantial weight is to be accorded" to judgments of municipal courts.

A rule that would preclude municipal courts from deciding whether acts of other states that are invoked in litigation before these courts comply with international law would be inimical to the development of international law in two respects: first, it would eliminate a major source for the interpretation, application and development of international law. Second, it would help those states that choose to violate international law to do so, since few states have systems of government in which their own courts would invalidate governmental acts on the ground that they violate international law and since there is rarely an international tribunal to which the question can be taken. A resolution, proposed by the International Law Committee and adopted by the New York City Bar Association, provides:

> Whereas it is important both for the redress of individual wrongs and for the realization of the rule of law in international affairs, that U.S. courts be encouraged to exercise the judicial function of inquiry into the validity under international law of the acts of foreign states when such inquiry is necessary to determine the rights of litigants and will not prejudice the conduct of the foreign relations of the United States:
>
> Now, therefore, be it
>
> RESOLVED, that the Association of the Bar of the City of New York is of the view that the U.S. Department of State should make a public declaration to the effect that (1) it is the policy of the U.S. Government that U.S. courts (both Federal and State) consider themselves free from any restraint based on deference to the executive branch of the government in the conduct of this country's foreign relations which prevents judicial inquiry into the validity under international law of the acts of foreign states whenever such inquiry is necessary for the determination of controversies within the jurisdiction of such a court and will neither violate recognized principles of sovereign immunity, to the extent such principles may be applicable, nor prejudice the conduct of the foreign relations of the United States; and (2) if the Department of State, after such notice as the court deems reasonable, does not indicate otherwise in a particular case, the absence of such prejudice shall be presumed.

The signatories to the report and resolution included John R. Stevenson, subsequently Legal Adviser, Professor Richard N. Gardner, Philip C. Jessup, subsequently a judge on the International Court of Justice, Professor Willis L.M. Reese, and Stephen M. Schwebel, currently a judge on the International Court of Justice. Monroe Leigh, who subsequently served as Legal Adviser, and Professor Richard R. Baxter, who subsequently was appointed to the International Court of Justice, also expressed their opposition to *Sabbatino*, as did a number of other academicians and practitioners. Thus, the roster of those who have argued that U.S. courts have an obligation to determine whether foreign acts of state comply with the requirements of international law includes three judges of the International Court and two past Legal Advisers.

Richard A. Falk, who argues that concepts of sovereignty and respect for divergent social philosophies of government make it inappropriate for one state to apply its view of international law to the acts of another state, would only preclude municipal courts

from considering the validity of an act of state under international law if, in his words, "the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies." Where, however, the foreign act violates a generally accepted principle of international law, "then domestic courts fulfill their role by refusing to further the policy of the foreign legal system." Although he was highly critical of the District Court's opinion in *Sabbatino,* he agreed that the conclusion that the Cuban decree was invalid was correct insofar as it was based on the ground that it was discriminatory. He stated:

> The decree was discriminatory, as it expropriated only the property of American nationals. Here, respectable international authority supports the conclusion of invalidity drawn by Judge Dimock. In fact, if the discriminatory facts were used to classify the case in the first instance, then the expropriation no longer falls within the domain of legitimate diversity. This means that objections to substantive review disappear, and an American domestic court would be entitled to refuse the plaintiff recovery. That is, discriminatory economic legislation violates universal standards.

He added:

> Also, it is generally agreed and appears to be good policy to allow a domestic court to refuse to enforce foreign confiscatory legislation.

What Professor Falk is advocating then is not that the judiciary be denied the power to determine the validity of acts of state under international law, but that it not apply international law as interpreted by the West to issues on which the Soviet Union or Third World countries take a different position. Thus, even Professor Falk did not urge the absolute bar to municipal court consideration of the validity of acts of state under international law that proposed section 428 of the revised *Restatement* adopts.

Professor Henkin has argued in defense of *Sabbatino*:

> International law does not tell the United States how to react to Cuban acts that violate international law. The United States is free to condone, acquiesce in, implement, or even applaud them.

I hesitate to disagree with Professor Henkin, whom I greatly respect as a brilliant and eminent scholar. Nevertheless, I would suggest that international law does not—and certainly ought not—permit one state to implement another state's laws that violate international law; a state's use of its courts and its police to enforce another state's decree that violates international law is itself a violation of international law.

It is a general principle of law, recognized in most legal systems, that one who aids and abets another in violating the law is himself guilty of a violation. Article 27 of the International Law Commission Draft Articles on State Responsibility provides:

> Aid or assistance by a State to another State . . . if rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act.

In the United States, judicial enforcement of a private act renders the conduct "state action" and, if discriminatory, a violation of the Constitution. Thus, in *Shelley v. Kraemer*, the U.S. Supreme Court held that when a state's courts enforce a discriminatory contract, the state is itself guilty of discrimination. Similarly, the Court has stated that by admitting illegally obtained evidence, the courts would be participating in the illegality.

Even Professor Henkin apparently would not extend his argument that a state "is free to condone, acquiesce in, implement, or even applaud" another state's laws that

violate international law, to violations of human rights. The Reporters' Notes to section 428 state:

> A claim arising out of an alleged violation of human rights—for instance a claim by the victim of torture or genocide—would probably not be defeated by the act of state defense since the international law of human rights contemplates external scrutiny of such acts.

While the Reporters are to be commended for at least including a caveat on human rights, it is problematic in several respects. First, it is only a sentence in the Reporters' Notes, not a qualification of the black-letter rule. Secondly, even this sentence in the Reporters' Notes does not categorically state that the act of state doctrine does not apply to human rights violations. It states that a claim arising out of such violations "would probably not be defeated by the act of state defense." Thirdly, it gives as the reason for the distinction between human rights and other rules of international law that international law "contemplates external scrutiny of such acts." Does international law not contemplate external scrutiny of other acts that violate international law? Indeed, it is only relatively recently that the proposition that human rights violations are a legitimate matter of international concern has been generally accepted. International scrutiny of a state's confiscation of property of aliens is far older.

Much has been written about the extent to which decisions in other states are consistent with or inconsistent with the position taken by the U.S. Supreme Court in *Sabbatino*. I will not engage in an analysis of the foreign cases here, though it seems to me that in not one has a court of one state required a citizen of that state to turn over property in his possession to the government of another state, pursuant to an act of the latter which deprived him of that property as retaliation against his government in violation of international law. I do, however, wish to discuss the decision of the House of Lords in *Buttes Gas & Oil Co. v. Hammer*, since it is cited in the Reporters' Notes to the *Restatement* for the proposition that the House of Lords decided "to adopt the American view of the Act of State Doctrine."

While the opinion does rely on act of state and cites the Supreme Court decision in *Sabbatino*, it differs from *Sabbatino* and section 428 of the *Restatement* in two significant respects. First, the act in question was not a discriminatory confiscation of property of a British citizen, intended as an act of retaliation against his government. It was an agreement between Iran and two emirates, both of whom "were adjacent independent sovereign states in the Arabian Gulf, whose foreign relations were controlled by the United Kingdom government under treaty," entered into with the approval of Britain, settling a dispute among them over territorial sea rights off their respective coasts. U.S. courts have long deferred to the executive in matters involving disputed claims of sovereignty over territory, quite apart from the act of state doctrine. In *Williams v. Suffolk Insur. Co.*, for example, decided in 1839, the Supreme Court held that plaintiff was entitled to insurance compensation for its ship seized by Argentina off the Falklands (even though the Government of Argentina had warned that it would seize ships entering without prior authorization) on the ground that the executive had recognized British, not Argentinian, claims to sovereignty over the Falkland Islands.

Secondly, the House of Lords characterized the act of state doctrine as one of judicial restraint or abstention, and dismissed not only Occidental's counterclaim, which challenged the validity of the foreign act of state, but also Buttes' initial action which asserted the validity of the foreign act of state. Thus, although the Court did not adjudicate the validity of the act of another sovereign, it also did not enforce that act. In *Sabbatino*, by contrast, the Court enforced the illegal Cuban action.

The continued vitality of *Sabbatino* as a judicial rule in the United States is open to serious question. While the Supreme Court has not overruled *Sabbatino*, four Justices of the Supreme Court have either explicitly rejected it or adopted the Bernstein exception. Justice White, of course, rejected the Court's position in *Sabbatino* in his dissenting opinion in that case. Justice Powell, in a concurring opinion in *First National City Bank* stated: "I believe that the broad holding of *Sabbatino* was not compelled by the principles, as expressed therein, which underlie the Act of State Doctrine. . . . Had I been a member of the *Sabbatino* Court, I probably would have joined the dissenting opinion of Mr. Justice White." Echoing the argument of Professor Jessup that total judicial deference to the executive constitutes an abdication of the judicial function, Justice Powell said:

> I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process. Nor do I think the doctrine of separation of powers dictates such an abdication. . . . Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law.

Justice Rehnquist, in an opinion joined in by Chief Justice Burger and Justice White, delivered the judgment of the Court, based on the Bernstein exception. He wrote:

> We conclude that where the executive branch . . . expressly represents to the court that application of the Act of State Doctrine would not advance the interests of American foreign policy, the doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the Act of State Doctrine.

Finally, legislation is pending in Congress to eliminate the rule declared in *Sabbatino* and adopted by the *Restatement*. A bill introduced by Senators Mathias and Domenici, designated "The International Rule of Law Act," states:

> No court in the United States shall decline on the ground of the Federal Act of State Doctrine to make a determination on the merits in any case in which the Act of State is contrary to International Law.

Testifying at the hearings on this bill before the Senate Judiciary Committee, the Legal Adviser to the State Department did not oppose it. While urging the Committee "to proceed cautiously when considering as sweeping a proposal as § 1434," he stated:

> When the courts refuse to decide issues of International Law properly presented to them, they forego the opportunity to apply International Law where it provides an appropriate basis for decision. They also fail to do justice to the parties before them.

And, contrary to the Supreme Court position in *Sabbatino* that a judicial determination of the validity of a foreign act of state under international law might embarrass the executive in its conduct of foreign affairs, the Legal Adviser said: "The refusal to pass on questions of foreign governmental conduct may actually frustrate important foreign policy objectives."

In summary, given the storm of protest that *Sabbatino* evoked from the academic community and practicing bar, the swift reversal of its specific holding by Congress in the Hickenlooper amendment, the Legal Adviser's suggestion to the Supreme Court in the government's brief in *Dunhill* that *Sabbatino* be overruled and the decision of the Supreme Court in *First National City Bank*, in which one Justice rejected the *Sabba-*

tino ruling and three others stated it should not apply to cases in which the executive indicates that a judicial determination will not interfere in its conduct of foreign affairs, I think sections 428 and 429 of the *Restatement* do not accurately reflect the law on the subject and should not be adopted. Indeed, in view of the above, I believe it would not be inappropriate for the *Restatement* to adopt the contrary position, *i.e.*, that a court should not decline to determine the validity under international law of an act of state invoked by one of the parties in litigation before it, at least if the executive gives no indication that such a determination would be detrimental to the conduct of foreign affairs. The application of the political doctrine question to cases in which it is applicable under the criteria set forth in *Baker v. Carr* and a proviso that would preclude consideration in those situations in which the executive advises the court that a determination of the foreign act's compliance with international law, though not barred by the political doctrine question, would nevertheless be harmful to the conduct of U.S. foreign affairs, should suffice to safeguard the privacy of the executive in the conduct of U.S. foreign affairs.

Some Reflections on the International Law Component of the Foreign Relations Law of the United States: Restatement Second (Revised)

*by Christopher Osakwe**

In my brief presentation I propose to examine three closely related issues, *i.e.*, what is meant by the foreign relations law of the United States, what is the relationship between the foreign relations law of the United States and general international law, and to what extent does the *Restatement Second (Revised) of the Foreign Relations Law of the United States* accurately reflect the state of general international law today.

Before moving to these issues let me take just a few minutes to state a few basic facts about the efforts of the American Law Institute to restate the foreign relations law of the United States. The very first point to bear in mind is that the *Restatement Second* is not an official document of the U.S. Government. Secondly, it is not, and does not purport to be, a digest of international law. Thirdly, it is not a restatement of "international law as applied by the United States" in the same sense that the late Professor Hyde used that term, nor is it a restatement of international law as practiced by "civilized nations." Rather, it is an attempt by a private organization (the American Law Institute), albeit an association of the foremost legal experts in the United States, to codify the perceived essence of the foreign relations law of the United States.

Like all private codifications, the *Restatement Second* can only reflect the views of its codifiers. However, because the *Restatement Second* is the only codification of its type of the foreign relations law of the United States it takes on an extra dimension, *i.e.*, it is generally perceived, rightly or wrongly, as persuasive evidence of the law that it seeks to restate: courts (both U.S. and foreign) rely on it to a substantial degree, scholars all over the world cite it profusely, government officials (both here and abroad) look up to it for a general crystallization of the operative rules of general international law. Because of this universal authority which the *Restatement Second* commands, and rightly deserves, it behooves us as members of the American Society of International Law to sit back and ask ourselves the simple question: does the *Restatement Second* truly reflect the general understanding of the norms of general inter-

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