ACTS OF STATE AND THE APPLICATION OF INTERNATIONAL LAW IN CANADIAN COURTS

par Hugh M. KINDRED*

L'auteur étudie la réaction des tribunaux nationaux saisis d'un litige entre parties privées en matière civile devant lesquels on allègue qu'un gouvernement étranger reconnu aurait enfreint le droit international. Bien que les tribunaux canadiens reconnaissent le droit international comme faisant partie du droit en vigueur au Canada, dans les rares instances où ils ont eu à se prononcer, ces tribunaux se sont gardés de l'appliquer aux actes d'un gouvernement étranger. Par conséquent, le droit canadien n'est pas encore fixé quant à la capacité qu'auraient les tribunaux d'un état d'exercer leur juridiction sur des actes de souveraineté d'un état étranger malgré qu'en théorie tous les états soient régis par le droit international.

La démarcation entre la compétence juridictionnelle des cours sur le plan national et leur responsabilité sur le plan international demeure imprécise. Ces questions soulèvent, sans le résoudre, le problème des rôles respectifs attribués par la constitution aux tribunaux et au gouvernement dans le domaine des affaires extérieures. Un examen des arrêts britanniques et américains qui font jurisprudence fournit des éléments de comparaison susceptibles d'aider dans le futur les tribunaux canadiens aux prises avec les conflits entre le droit international, la division constitutionnelle des pouvoirs et les politiques gouvernementales créés de façon constante par les litiges portant sur les actes d'un gouvernement étranger.

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* Associate Professor of Law, Dalhousie University, on leave; Butterworths Overseas Legal Fellow at the Institute of Advanced Legal Studies, London. The author gratefully acknowledges the support of the Canada Council and the provision of facilities by the I.A.L.S.

Nation states readily assume the freedom of action that their sovereign authority would seem to imply. In large measure, international law supports them. But it also controls them. It delimits the jurisdictional freedom of one state out of a proportionate recognition of equality of action of others. What may happen, then, if a nation state exceeds international law by a public act committed against a private person or his property? The purpose of this article is to explore the response of the municipal courts to such a challenge upon a foreign act of state at international law in the course of civil litigation between private parties.

The willingness, indeed the duty, of Canadian courts to apply international law is well accepted. Dean MacDonald has fully demonstrated this assumption in his thorough case study of "The Relationship Between International Law and Domestic Law in Canada".[1] The test of their resolve to do so in the face of the sovereign act of a recognized foreign state has, however, not yet arisen four square. How they might respond in the light of their own circumstantial experience compared to the persuasive yet dissimilar attitudes of the highest courts of Britain and America is consequently of considerable speculative interest.

Act of state is not a legal term of art. It is best known as a municipal doctrine of American law but it is so widely and variously used that some definitional distinctions for the purposes of this article will be helpful. Here, reference to an act of state is simply intended to indicate an official public act, whether legislative, executive or judicial, of a recognized foreign government. The acts of unrecognized states and governments are treated differently and are not the subject of the present discussion. What is of concern is the effect of an official public act upon an individual and his ability to impugn it by international law within the jurisdiction of the recognizing state.

A safe beginning to the discussion is the fundamental principle of international law that demands respect for the legal independence and equality of nation states. For this reason the courts grant immunity from their jurisdiction to foreign sovereigns. As Chief Justice Taschereau said in *Desaulles* v. *Republic of Poland*:[2]

> "Il ne fait pas de doute qu'un état souverain ne peut être poursuivi devant les tribunaux étrangers. Ce principe est fondé sur

1. In MacDonald, Morris & Johnston eds. *Canadian Perspectives on International Law* (1974), 88.

2. (1944) S.C.R. 275, at 277.

> l'indépendance et la dignité des états, et la courtoisie internationale l'a toujours respecté."

Conversely they are not bound to give extraterritorial effect to foreign acts of state in derogation of Canada's own sovereignty. While the internal acts of a recognized sovereign state will not usually be called in question under local, as opposed to international law, their authority in Canada rests upon Canadian territorial power not upon their foreign origin. As amply demonstrated by Rand J. in the case of the *Elise,* "whether viewed as recognition of legal effects of foreign law or as affirmative enforcement of foreign law,... its application is through the act and authority of the territorial state..."[3]

Consequently local principles of conflicts and of public policy prevent the operation of foreign acts of state in certain instances. Thus *United States of America* v. *Harden*[4] is Supreme Court authority for the common rule that the courts will not entertain a suit to recover foreign taxes or to enforce a foreign judgment for those taxes. Likewise *Elise*[5] itself and *Brown, Gow, Wilson et al.* v. *Beleggings-Societeit N.V.*[6] contain careful consideration of the interests and application of Canadian public policy to foreign decrees. These examples of local law are also in accordance with international law, absent any special treaty relations such as conventions against double taxation or in favour of reciprocal enforcement of judgments, for a foreign state must have equal regard for Canadian sovereignty. As the circumstances in the early British Columbia case of *Cranstoun* v. *Bird and Huddart*[7] demonstrate, each nation state may prescribe laws universally but generally may enforce them only territorially. Thus the forcible carriage of Cranstoun against his will on an English ship from Honolulu to Vancouver, though undertaken on the authority and instigation of the government of Hawaii, nevertheless turned into a trespass at English law by the captain and the owner as soon as the vessel cleared Hawaiian waters.

But local law, as opposed to local jurisdiction, is beside the point when the assertion of one party to a civil action is that the foreign

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3. *Laane and Baltser* v. *Estonian State Cargo & Passenger Steamship Line,* (1949) S.C.R. 530, at 544.

4. (1963) 41 D.L.R. (2d) 721. Followed recently in *Re Dwelle Estate,* (1969) 69 W.W.R. 212 (Alta. S.C.).

5. Supra n. 3.

6. (1961) O.R. 815.

7. (1896) 4 B.C.R. 569.

act of state relied upon by the other party is in breach of international law. Typical examples are the assertion of unlawful confiscations of property or nationality by public decree. The *Sabbatino*[8] case is the most famous American instance; *Oppenheimer* v. *Cattermole*[9] is the most important and recent British one. But before the implications for Canada of these decisions are explored, the conclusions, or more significantly the omissions, of Canadian jurisprudence must be observed.

The case most pregnant with issues was *Juelle et al.* v. *Trudeau et al.*[10] Yet its determination provided more questions than answers. It was a classic example of title to moveable property, having been confiscated abroad, being refought within the Canadian jurisdiction. The plaintiffs alleged they were the true owners of seven horses bred from the stock of their stud farm in Cuba which was violently and illegally confiscated by Castro forces. The defendants pleaded that, having received an offer to sell the animals from a representative of the Cuban government, they purchased them in good faith from the registered owners in Cuba and had since peaceably possessed them and raced them in Canada. On the evidence, the trial court held the seizure contrary to Cuban law and of null effect upon the plaintiffs title.[11] On appeal, the court regarded the confiscation as fully in compliance with Cuban law and hence effective to transfer ownership to the defendants' vendors.[12]

The cause for reversal was the sharply different reading of Cuban law between the two courts. The trial judge appears to have applied the pre-revolutionary law, while the justices of appeal referred to the decrees and constitutional amendments of Castro's government. Which was correct? Without engaging in a discussion of Canadian choice of law rules, it is enough for the public international law focus of this article to point out that there was a prerequisite question of recognition that was never asked. Whether the Castro regime was a government recognized by Canada, as certified by the Secretary of State, would, upon the authority of the leading English decision of *Luther* v. *Sagor*,[13] have determined

8. (1964) 376 U.S. 398.

9. (1976) A.C. 249.

10. (1968) 7 D.L.R. (3d) 82 (Q.S.C.); rev'd (1972) C.A. 870.

11. (1968) 7 D.L.R. (3d) 82, at 86.

12. (1972) C.A. 870, at 871-872 (P.Q.).

13. (1921) 3 K.B. 532 (C.A.).

whether the revolutionary decrees should have been applied or ignored.

That case would appear to contain almost identical elements though in an earlier era. The new Russian Soviet Government seized the plaintiff's timber mill. The defendant purchased some of the stock of the mill after the seizure and imported it into Britain where the plaintiffs claimed uninterrupted title to it. In a famous judgment, the Court of Appeal held the trial judge had been correct at the time to ignore the decrees of the Soviet regime because it was not then recognized by the British government. But the justices found it necessary to reverse his decision for the plaintiffs, and to apply the Soviet law in favour of the defendants as a result of the recognition of the Russian Soviet government by the British government in the interim. In other words, executive recognition determined the choice of Russian rules, if it was foreign law that was to be applied. Unfortunately neither of the courts in *Juelle* v. *Trudeau* gave reasons for their particular selection of Cuban controls on property. Perhaps the conclusion to be implied is that recognition or non-recognition is not a matter of judicial concern in the treatment of foreign acts of state in Canada.

The omission of the recognition question has another dimension of much greater significance. It is noticeable that neither Canadian court doubted its capacity, or hesitated, to decide upon the Cuban act of state. Concern for this issue was the basis of the British court's recourse to executive recognition in *Luther* v. *Sagor*. As Bankes L.J. said:[14]

> "The Government of this country having... recognized the Soviet Government as the Government really in possession of the powers of sovereignty in Russia, the acts of that Government must be treated by the Courts of this country with all the respect due to the acts of a duly recognized foreign sovereign state."

And if it is rhetorically asked what kind of respect that might be, his brother Warrington L.J. provided the explicit reply:[15]

> "It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country."

He went on to quote as authority a well known source of the American act of state doctrine, namely *Oetjen* v. *Central Leather Co.*:[16]

14. Ibid. at 543.

15. Ibid. at 548. And see Scrutton L.J. ibid. at 556.

16. (1918) 246 U.S. 297, at 303.

> "Every sovereign state is bound to respect the independence of every other 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."

Thus from these early cases judicial concern not to interfere or to sit in judgment upon the affairs of another nation state has been manifested mostly strongly in both British and American courts. Is it to be presumed from *Juelle* v. *Trudeau* that Canadian courts are not likewise careful of foreign sovereignty? The trial court clearly judged the Castro regime's behaviour as invalid according to previous Cuban law. Though the appeal court reversed this decision, it did not explicitly or impliedly reject the right to make such a judgment. Indeed its own decision could be viewed as an affirmative judgment of Castro's revolutionary decrees.

In light of the Canadian courts' seeming readiness in *Juelle* v. *Trudeau* to exercise their ordinary jurisdiction in the face of acts of state, it is the more surprising they did not entertain any consideration of the validity of the foreign laws and decrees, which they were applying, according to international law. To put the issue shortly, if they could pass judgment on the Cuban seizures, why were not the standards of international law applied?

This contention was precisely the subject matter of that most famous case on the American act of state doctrine, *Banco Nacional de Cuba* v. *Sabbatino et al.*[17] The US Supreme Court's ultimate rejection of a jurisdiction or power to apply international law to a Cuban confiscation so similar to the seizure in *Juelle* v. *Trudeau* will be discussed shortly. The importance of the case here, as also the more recent but different House of Lords decision of *Oppenheimer* v. *Cattermole,*[18] is that both courts clearly saw the enforcement of international law was at stake. They carefully debated the capacity of the judicial organs of one state to subject to their jurisdiction the sovereign acts of another notwithstanding that all sovereign states must submit to international law. None of this appears in *Juelle* v. *Trudeau* as it might. As a result the only conclusion is that this important question is still a matter of open principle for Canada.

Nothing more helpful to these questions can be found in the two other Canadian cases relevant to acts of state. If anything, they are even more circumstantial to these issues of international law. In the

17. (1964) 376 U.S. 398.

18. (1976) A.C. 249.

earlier case of the *Elise*[19] the Estonian Soviet regime purportedly nationalized all Estonian vessels everywhere and transferred them to the plaintiffs, a newly created state steamship line. At the time the Elise was on the high seas but when she came into the port of St. John, New Brunswick she was arrested and sold by court order to meet crew's wages. The outstanding balance in court then became the subject of dispute between the plaintiffs and Laane and Baltser, the original owners as defendants.

The feature distinguishing these circumstances from the seizures in *Juelle* v. *Trudeau* is that the vessel was outside the territory of the Estonian state at the time of its confiscatory act. This fact ought to have raised a jurisdictional issue at international law, namely whether Estonia had the power over a locally registered ship to nationalize it extraterritorially. The parties obviously thought the extraterritorial aspect significant for, having secured an executive certificate from the Secretary of State, the defendants contended:[20]

> "that the said statute and decrees are (a) acts of a *de facto* government only, (b) confiscatory in nature and not recognized by our law as effective in transferring property outside of the jurisdiction of the promulgating authority, and (c) are contrary to the constitution of Estonia as it existed prior to June 17, 1940."

The admissions of the parties concluded by framing the questions at issue, the first of which asked:[21]

> "Were the Decrees and Statutes herein recited effective in nationalizing the steamship ELISE and transferring ownership to the plaintiff herein?"

Thus faced with the question of the validity of the foreign acts of state, the whole court, in several opinions, decided it merely upon principles of Canadian conflicts of law. The Supreme Court held that the Estonian decrees were not enforceable in Canada because of their penal or confiscatory character. Although this decision was a perfectly appropriate legal solution, it did not directly answer the merits of the issue framed by the parties nor, consequently, did it advance the understanding of the relationship of international law to foreign acts of state.

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19. *Laane and Baltser* v. *Estonian State Cargo and Passenger Steamship Line*, (1949) S.C.R. 530.

20. Ibid. at 534.

21. Ibid.

Likewise in the other factually more complicated case of *Brown, Gow, Wilson* v. *Beleggings-Societeit N. V.*[22] the opportunity was not taken to address points of international interest. The case concerned the authority of the Netherlands government to confiscate by wartime decrees the property of German enemy aliens. Some of the affected property was in the form of bearer certificates held in Ontario to shares in a Dutch company. At issue was the effect of the Dutch decrees upon the certificates held extraterritorially. In a lengthy and careful judgment, McRuer C.J.H.C. first decided that the domiciliary law of the company governed the question and he then held that no local Canadian law or policy prevented its recognition and application. He got no nearer to international law than the citation of four treaties[23] on German reparations, to most of which both Canada and the Netherlands were parties, as evidence of Canadian policy to cooperate with the other Allies in the distribution of German property. Thus once more an understanding of conflicts[24] rather than international law was promoted.

It is not altogether surprising that Canadian courts have shied away from applying international law to foreign acts of state when other relatively straightforward and adequate solutions through local conflicts rules are at hand. The issues involved in determining international validity are difficult and may seem treacherous to a court not used to international diplomacy and rightly anxious to retain its independence from government. However, these attitudes are insufficient reasons for a court to avoid its paramount duty to apply the law, including international, when called upon to do so. The principle considerations that Canadian courts may expect to face can be usefully reviewed from recent experience in Britain and America.

In both countries judicial regard for foreign acts of state had a common source. The early American case of *Underhill* v. *Hernandez* roundly declared:[25]

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done

22. (1961) O.R. 815.

23. Bretton Woods Agreement, ibid. at 855; Paris Agreement on Reparations, ibid. at 855-856; Brussels Agreement, ibid. at 856-857; and Bonn Convention, ibid. at 858.

24. For a discussion of these aspects of the case see the case note by Ziegel and Dunlop (1962) 40 Can. Bar Rev. 490.

25. (1897) 168 U.S. 250, per Fuller C.J. at 252. The earliest roots of the doctrine may be traced to the English case of *Blad* v. *Bamfield,* (1674) 36 E.R. 992.

> 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."

As already noted,[26] this doctrine was repeated in the subsequent U.S. case of *Oetjen* v. *Central Leather Co.* from which it was quoted as authority in the leading British decision of *Luther* v. *Sagor*. Since then, the common doctrine has developed distinctly different municipal characteristics in the two countries.

As declared, the doctrine noticeably fails to refer to international law. Instead it suppresses judicial jurisdiction in favour of governmental diplomacy. In other words, the act of state doctrine is more concerned with the national division of constitutional powers than the application of international law. Herein lies the key to its separate development as a municipal doctrine in Britain and America, and to the complexity of applying international law to foreign acts of state.

Although not stated, the authority for the assertion that "every sovereign state is bound to respect the independence of every other sovereign state" is implicitly that basic principle of sovereignty which constitutes the foundation of international law. Thus far the courts must be taken not merely to be relying on but to be applying international law. However, it does not necessarily follow from their declared premise that they must conclude that they "will not sit in judgment on the acts of the government of another (country)". Their duty to apply international law[27] suggests the opposite conclusion.

Viewed only as a municipal consequence of the independence of equally sovereign states it is undoubtedly correct that the courts of one country should not judge the acts of another by their own national laws. So far the declared conclusion is acceptable as a procedural or jurisdictional delimitation imposed by international law. But the international responsibility of the courts is greater than auto-limitation of their municipal authority: it arguably includes the power, if not the duty, to adjudicate upon acts of states according to substantive rules of international law.

The common emphasis of courts on municipal matters readily leads them to overlook their additional international obligations, as the previous survey of Canadian jurisprudence shows. When pressed to fulfil them, the courts then become shy of the implications of an international adjudication upon the conduct of foreign

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26. Supra p. 276.

27. See the reference in n. 1.

relations by their own government. They would rather leave the "redress of grievances by reason of such acts (of state)", as the doctrine states, to "be obtained through the means open to be availed of by sovereign powers as between themselves". This reaction is a further auto-limitation of jurisdiction. It may be appropriate when necessitated by the constitutional division of the state's sovereign powers, but, unless so justifiable,[28] is otherwise another arguable evasion of the courts' international responsibilities.

These core issues to the treatment of foreign acts of state were first faced in the United States in that celebrated and much discussed[29] case *Banco Nacional de Cuba* v. *Sabbatino*.[30] The Cuban government in effect confiscated and then resold for its own account to the same purchaser a cargo of sugar lying in a Cuban port. A Cuban state bank later brought this action in New York to recover the purchase price but its title and its interest in the monies was challenged by the original owner of the sugar, a corporation registered in Cuba but principally owned by American residents. It succeeded at trial and on appeal because the courts refused to apply the act of state doctrine in the face of a violation of international law, which they so found on the evidence that the Cuban acts were retaliatory, discriminatory and without adequate compensation.

In reversing these decisions,[31] the Supreme Court reasserted the force of the act of state doctrine even in the face of breaches of international law. The most extraordinary feature of this judgment is that, in rejecting a challenge to the validity of the Cuban government's act at international law, the Court believed it was advancing the application of international law.

On its face the decision was paradoxical if not contradictory. The court well understood that the act of state doctrine was municipal, not international, in origin and authority and consequently concerned itself chiefly with constitutional separation of powers. But the court was also fully aware of the international implications of its municipal considerations. Of the act of state doctrine the court observed:[32]

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28. Even then only nationally, not internationally.

29. Falk, *The Role of Domestic Courts in the International Legal Order* (1964); Mooney, *Foreign Seizures: Sabbatino and the Act of State* Doctrine (1967). As well as these two books, *Sabbatino* and its progeny have generated over 80 legal articles to date.

30. (1964) 376 U.S. 398.

31. With one vigorous dissent by Mr. Justice White, ibid. at 439.

32. Ibid. at 427-428.

> "... its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

Clearly the court appreciated it had to balance the application of municipal divisions of U.S. sovereignty and the enforcement of international law. The issue is real for any state, including Canada, though the considerations supplied may be criticized. In the event the balance achieved by the U.S. Supreme Court resulted in a decicion notable for its narrowness:[33]

> "Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, 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, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

This language cannot be taken to support the act of state doctrine without exception, indeed quite explicitly to the contrary. Nor can the reference to customary international law be read as implying a wider exclusion than expropriation cases, on which the court went on to discover so great uncertainty[34] as obviously to have weighed in its scales for balancing principles.

Nevertheless the decision was remarkable in the light of the Court's knowledge[35] that its own State Department had asserted that the Cuban confiscation violated international law. It is

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33. Ibid. at 428.

34. Contrary to the lower courts and Mr. Justice White.

35. (1964) 376 U.S. 398, at 432.

strange, notwithstanding the dilemma expressed,[36] that the Court's desire not to interfere in the Executive's field of authority should lead it to decide contrary to the government's explicit opinion. Further the Court rejected the contention that municipal courts could make a significant contribution to the development of international law, especially as the volume of decisions of international tribunals is so slight.[37] It is these considerations which give disturbing force to the much wider statement of principle with which this portion of the judgment concluded:[38]

> "However offensive to the public policy of this country and its constituent states an expropriation of this kind may be, we conclude that both the national interest and progress towards the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application."

In the end, the furor created by the decision, at least as much on political as on legal grounds, resulted in it being rapidly over-taken by events. Congress quickly passed the "Hickenlooper Amendment" to the Foreign Assistance Act of 1961,[39] which is concerned with the suspension of foreign aid to countries that unlawfully expropriate the property of American nationals. The amendment states:[40]

> "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 including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law... Provided... (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court..."

Thus only by national legislation was the authority and judicial application of international law rescued in the United States.

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36. Ibid. at 432-433: "In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided."

37. Ibid. at 434.

38. Ibid. at 436-437.

39. U.S.C. 22 § 2370.

40. Pub. L. 88-633 § 301(d) (1964).

Nevertheless two cautions are contained in the legislation itself. First it is noticeable that the "Hickenlooper Amendment", for politically historical reasons, is only concerned with "a case in which a claim of title or other right to property is asserted..." The amendment thus nicely dealt with the *Sabbatino* affair but not necessarily with all other acts of foreign states. The U.S. courts have continued to work out the scope of the "Hickenlooper Amendment" and the life of the act of state doctrine outside of it. These decisions[41] are not of direct importance to Canada to the extent that they are judicial interpretations of peculiarly American legislation. Yet their multiplicity and complexity do add one extra lesson for Canadian courts, namely that when they eventually deliberate the issues posed by a case like *Sabbatino,* they should do so in principle and not piecemeal.

The second caution to the legislative resuscitation of international law in the United States is contained in the proviso. Although international law shall be paramount in expropriation cases at least, yet the executive government, in the form of the President, may suggest otherwise on foreign policy grounds. Though executive suggestion is not an uncommon technique of American government, in the different constitutional context obtaining in Canada it smacks too much of interference with judicial independence. Indeed Mr. Justice Ritchie, writing for the majority in *Le Gouvernement de la République Démocratique du Congo* v. *Venne*[42] expressly repudiated the value for Canadian courts of American decisions employing executive suggestions in otherwise analogous cases of state immunity.

Nevertheless the American solution does point out for Canada the continuing need to find some constitutional method of judicially accomodating foreign policy. The judicial application of international law should not be evaded in such a way as to break it and to make Canada internationally delinquent. Yet the courts must also uphold the constitutional division of Canadian sovereignty that gives exclusive authority to the government to conduct foreign

41. See for instance *Bernstein* v. *N.V. Nederlandsche Amerikansche,* 210 F. 2d 375 (1954 U.S.C.A. 2d. Cir.); *Banco Nacional de Cuba* v. *Farr,* 383 F. 2d 166 (1967 U.S.C.A. 2d. Cir.) cert. denied 390 U.S. 956; *French* v. *Banco Nacional de Cuba,* 242 N.E. 2d 704 (1968 N.Y.); *Banco Nacional de Cuba* v. *First Nat. City Bank of New York,* 442 F. 2d 530 (1971 U.S.C.A. 2d. Cir.) rev'd. 406 U.S. 759 (1972); *Maltina Corp.* v. *Cawy Bottling Co.,* 462 F. 2d 1021 (1972 U.S.C.A. 5th Cir.) cert. denied 409 U.S. 1060; *Occidental of Umm Al Qaywayn Inc.* v. *Cities Service Oil Co.,* 396 F. Supp. 461 (1975 U.S.D.C., La.).

42. (1971) S.C.R. 997, at 1005.

policy. Perhaps the recent English case in the closely analogous constitutional circumstances of Britain will provide assistance to Canadian courts on this aspect of acts of state.

In Britain, as already noted,[43] the validity of foreign acts of state became issues of recognition and immunity by way of *Luther* v. *Sagor*. The persuasiveness of that case, and in particular the judgment of Scrutton L.J., has prevented the assertion in the higher courts that a particular foreign act of state violates international law until very recently.

In discussing the title of the defendant, Sagor, purchaser from the Russian Soviet government, Scrutton L.J. developed his reasoning from the international immunity of a sovereign state. He said:[44]

> "But where the sovereign state is defendant I cannot conceive the Courts investigating the truth of its allegation that the goods in question, which it exported from its own territory, are its public property.... What the Court cannot do directly it cannot in my view do indirectly. If it could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from that Government by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign state. Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the Courts could investigate the title without infringing the comity of nations. But it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will."

The critical step in this opinion is that a possible claim to immunity by a defendant foreign state can indirectly prevent investigation of all its activities. But the step is too great: the judgment grants altogether too large a municipal scope to the concept of state immunity. As a right at international law, sovereign immunity was never so strong as to override the fundamental principle of obedience to international law. There is no reason why the local courts should denigrate the sovereignty of their own state in order to sanction the lawlessness of another state. The extremity of Scrutton L.J.'s view that "the remedy appears to be to refuse to recognize it as a sovereign state. Then the courts could

43. Supra pp. 274-275.

44. (1921) 3 K.B. 532, at 555-556.

investigate the title without infringing the comity of nations" can be seen from recent judicial practice[45] limiting the immunity of states when they engage in commercial activities. In these circumstances courts are now quite ready to subject foreign sovereigns and their acts to municipal, let alone international, law.

Yet the reasons for Scrutton L.J.'s view remain significant. They turn out to be less concerned with international law than with national foreign policy. He continued his judgment:[46]

> "Further, the Courts in questions whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction... In the present case we have from the Foreign Office a recognition of the Soviet Republic in 1921 as the *de facto* Government, and a statement that in 1917 the Soviet authorities expelled the previous Government recognized by His Majesty. It appears to me that this binds us to recognize the decree of 1918 by a department of the Soviet Republic, and the sale in 1920 by the Soviet Republic of property claimed by them to be theirs under that decree, as acts of a sovereign state the validity of which cannot be questioned by the Courts of this country..."

The import of these reasons is that the courts must follow the guidance of the government, delivered by way of an executive certificate of diplomatic recognition, in their handling of foreign acts of state. Scrutton L.J.'s major concern was apparently to avoid any diplomatic embarassment of the government. He thought it possible by directing the courts to exercise their jurisdiction only in unison with foreign policy.

The major objection to such judicial subjection to executive policy is the implied denial of the rule of law. Scrutton L.J. sensed the difficulty of judicial interference with the government's exclusive authority in the conduct of foreign affairs, but then helplessly fell in with it thereby subverting the courts' preeminent

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45. In Britain, see e.g. *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan*, (1975) 3 All E.R. 961; *The Philippine Admiral*, (1977) A.C. 373 (P.C.); *Trendtex Trading Corpn. Ltd.* v. *Central Bank of Nigeria*, (1977) Q.B. 529 (C.A.). In Canada, see e.g. *Allan Construction Ltd.* v. *Government of Venezuela*, (1968) R.P. 145; *Venne* v. *Democratic Republic of the Congo*, (1968) 5 D.L.R. (3d) 128 (Q.C.A.), rev'd (1971) S.C.R. 997; *Penthouse Studios Inc.* v. *Government of Venezuela*, (1969) 8 D.L.R. (3d) 686 (Q.C.A.); *Smith* v. *Canadian Javelin Ltd.*, (1976) 12 O.R. (2d) 244; *Zodiak International Products Inc.* v. *Polish People's Republic*, (1977) 81 D.L.R. (3d) 656 (Q.C.A.).

46. (1921) 3 K.B. 532, at 556.

duty to apply the law, including international. As Lord Cross has recently warned in another case concerning state immunity:[47]

> "... if the courts consult the executive on such questions what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient."

So strong has been the influence of *Luther* v. *Sagor,* however, that the House of Lords did not have a chance to "sit in judgment" on a foreign act of state until 1976.[48] *Oppenheimer* v. *Cattermole*[49] was an action by a German Jewish immigrant to appeal his British income tax assessments on a German pension. The case turned on his continued German nationality. Part of the decision dwelt on the legal effects of the horribly discriminatory Nazi decree of 1941 that deprived Jewish emigrants first of their citizenship and consequently of their property.

Oppenheimer argued that the decree must be ignored as it was contrary to international law. The invalidity of confiscatory acts of foreign states by international law was thus squarely placed before the House of Lords. Buckley L.J. had turned the issue aside in the Court of Appeal by seeking to rely on principles of conflicts, much as Canadian courts have done,[50] but in reversing his opinion Lord Cross[51] wrote:[52]

> "If a foreign country purported to confer the benefit of its protection on and to exact a duty of allegiance from persons who had no connection or only a very slender connection with it our courts would be entitled to pay no regard to such legislation on the ground that the country in question was acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognize."

By these words Lord Cross deliberately assured to the British courts the authority to apply international law to foreign acts of state. Their international jurisdiction was confirmed. But he admonished

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47. *The Philippine Admiral,* (1977) A.C. 373, at 399 (P.C.).

48. The only British cases in the intervening interval of 55 years were *The Rose Mary,* (1953) 1 W.L.R. 246, adjudicated in Aden, and *In re Helbert Wagg,* (1956) Ch. 323, which contains ambiguous references to the previous decision. Cf. Ziegel, Confiscation in English Private International Law, (1959) 6 McG.L.J.1.

49. (1976) A.C. 249.

50. See the survey of Canadian cases, supra p. 278.

51. With whom Lords Hodson and Salmon agreed.

52. (1976) A.C. 249, at 277.

them to be cautious in its exercise, saying:[53]

> "A judge should, of course, be very slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction. He may well have an inadequate understanding of the circumstances in which the legislation was passed and his refusal to recognize it may be embarassing to the branch of the executive which is concerned to maintain friendly relations between this country and the foreign country in question."

The wisdom of Lord Cross' caution in the face of foreign state jurisdiction is well taken, but his reasons do not spring wholly from that basic international principle of sovereignty. He was concerned at least as much with the national conduct of foreign policy. To that extent Lord Cross' judgment continues to reflect elements of the judicial attitude so pervasively extended by *Luther* v. *Sagor*. But, unlike that case, and indeed unlike the U.S. Supreme Court's decision in *Sabbatino,* the House of Lords has established the application of international law as paramount.

The force of this ordering of priorities is important for Canada. The House of Lords has provided a different approach from the U.S. Supreme Court to foreign acts of state. The old antagonisms they arouse between national foreign policy and international law have been resolved in principle in a new way. Undoubtedly a full accomodation of both judicial and executive jurisdiction on the international plain has yet to be made. The American courts have begun the process from their perspective in the aftermath of *Sabbatino* with customary vigour.[54] But the House of Lords did not leave the British courts with a bare principle, totally undirected in its application.

Lord Cross took a first step in the formulation of guidelines for the exercise of the courts' international jurisdiction over foreign acts of state when he explained:[55]

> "But I think... that it is part of the public policy of this country that our courts should give effect to clearly established rules of international law. Of course on some points it may be by no means clear what the rule of international law is."

The phrase "public policy of this country" was presumably used by Lord Cross in its technical sense of the policy of English law. Hence

53. Idem. at 277-278.

54. See the references in n. 41.

55. (1976) A.C. 249, at 278.

his statement is an assertion that English law obliges the courts to apply "clearly established" rules of international law without regard for national foreign policy. The element of legal policy permits a judicial discretion over the clarity of their establishment.

Certitude of international law, it may be recalled,[56] was a consideration, but in the event not a controlling one, in the U.S. Supreme Court's discussion of the enforcement of international law. That the House of Lords has declared itself for the certain application of certain law is undoubtedly of importance to Canadian courts. But what degree of clarity is acceptable remains to be seen. In light of the frequent evidentiary arguments over the sources of international law and judicial sensitivity towards matters of foreign policy, the kind of duty or discretion a British court has when it considers an asserted international rule "by no means clear" may be even more significant for Canada. That also remains to be seen.

Nevertheless the House of Lords has provided a workable lead in the application of international law to foreign acts of state that can bear further judicial explication by British and Canadian courts alike. There is, of course, no necessity for Canadian courts to adopt either the British or the American course of accomodation to the dissonance between international law, constitutional authority and government policy that disputes concerning foreign acts of state regularly arouse. However, given the gravity of the issues, they will continue to overlook them at their peril and to ignore comparative judicial exposition and experience of them to their loss.

56. See the quotation at n. 32.