

THE ACT OF STATE DOCTRINE: QUESTIONS OF VALIDITY AND ABSTENTION FROM UNDERHILL TO HABIB

MATTHEW ALDERTON*

Common law courts have historically considered it trite law that the courts of one country will not 'sit in judgment' on the acts of the government of another done within the latter's own territory. However, this 'act of state doctrine' has been almost universally regarded as one of uncertain content and application, and criticised due to the inconsistent results it produces. This article will examine the origins of the act of state doctrine and trace its development in the United States, the United Kingdom and Australia. This comparative analysis will seek to demonstrate that although the various decisions were all made within a unique legal setting, a number of common lessons can be drawn from the manner in which they were decided. It will be shown that the uncertainty and confusion in the doctrine have been brought about by the failure of some judges to properly understand its foundations and evolution, a situation which has at times been compounded when a forum court has arbitrarily borrowed from foreign jurisprudence without giving due consideration to the particular constitutional and jurisprudential context in which those cases were decided. It will be concluded that whilst the doctrine should be retained, too much reliance has been placed on broad notions found in long-outdated case law.

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I INTRODUCTION

Common law judges have historically taken an indifferent, and at times outwardly hostile, view to the examination of issues with 'international significance' in domestic courts. The reluctance of the judiciary to adjudicate upon such issues is founded on what are considered the axiomatic principles of state sovereignty, the separation of powers and the comity of nations. In sum, it has been the case that the judiciary has traditionally abstained from adjudicating upon issues which may impact upon the relations between states — that being the duty and province of the executive arm of government. Although the foundations of this practice are ostensibly sound, the judicial application of these principles to cases that contain complex factual and legal questions of a transnational nature often creates confusion and leads to inconsistent decision-making.

* BA, LLB (Hons) (Macq); LLM (UCL). The author would like to thank Michael Granziera, Karen Kemsley, Nariman Sahukar, Martin Smith and the anonymous referees for their helpful comments.

This phenomenon has been most prevalent in the judicial application of what has been termed the ‘act of state doctrine’. Generally, the doctrine has been described as being ‘a common law principle ... which prevents the [forum] court from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country’.¹ Although this principle appears relatively straightforward and uncontroversial, the doctrine has been almost universally regarded as one of uncertain content and application, and criticised due to the inconsistent results it produces.² As Michael Bazylar observed, ‘even though the doctrine has spawned a wealth of cases and scholarly writings’, there has been little agreement on the exact ‘scope of the doctrine or the policies underlying its application’.³ In fact, the doctrine ‘has been described variously as a doctrine of judicial prudence or deference, judicial restraint, judicial abstention, issue preclusion, conflict of laws, and choice of law’.⁴ It is no wonder then that ‘[a]s a result of all of this confusion, courts habitually misapply the doctrine’.⁵

This article will examine the origins of the act of state doctrine and trace its development in the United States, the United Kingdom and Australia. This comparative analysis will seek to demonstrate that, although the various decisions were all made within a unique legal setting, a number of common lessons can be drawn from the manner in which they were decided. In particular, the discussion will seek to demonstrate that while it may be inappropriate in many instances for the factual matrix of particular cases to be subject to judicial scrutiny, due consideration is often not given to the proper basis for reaching this decision. It will be further demonstrated that this problem has been compounded in Australia, where courts have tended to arbitrarily borrow from the jurisprudence of the US and the UK without giving appropriate weight to the particular constitutional and jurisprudential context in which those cases were decided. Finally, it will be concluded that although the exact nature and scope of the doctrine may differ between the three countries, what is certain is that courts should not use the doctrine for the dual purpose of dealing with the issues of *validity* and *abstention*. Rather, the case law demonstrates that the application of the doctrine has been the most sound when confined to the issue of validity.

II THE ORIGINS OF THE ACT OF STATE DOCTRINE

The expression ‘act of state’ is used in a number of contexts in the common law. For instance, it is used in relation to an act of the Crown ‘performed in the course of its relations with a foreign State’, ‘executive acts which are authorised or ratified by the Crown in the exercise of sovereign power’ and in relation to

¹ *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61, 106 (Lord Nicholls).

² See Michael Bazylar, ‘Abolishing the Act of State Doctrine’ (1986) 134 *University of Pennsylvania Law Review* 325; Fritz A Mann, *Foreign Affairs in English Courts* (Clarendon Press, 1986); Richard Garnett, ‘Foreign States in Australian Courts’ (2005) 29 *Melbourne University Law Review* 704. *Contra* Andrew D Patterson, ‘The Act of State Doctrine Is Alive and Well: Why Critics of the Doctrine Are Wrong’ (2008) 15 *UC Davis Journal of International Law & Policy* 111.

³ Bazylar, above n 2, 327.

⁴ *Ibid* 327–8 (citations omitted).

⁵ *Ibid* 328.

‘the executive and legislative acts of foreign States’.⁶ It is the latter use of the term which is the subject of this discussion.

According to *Dicey and Morris on the Conflict of Laws*, the act of state doctrine can be found ‘in several contexts, and it may not be possible to extract a general principle which will apply to all of them’.⁷ However, the case law suggests that this is primarily due to how the doctrine has been applied by the courts, rather than anything inherent in the nature of the doctrine itself. The jurisprudential origins of the doctrine are related to those of sovereign immunity and can be traced as far back as 17th century England.⁸ The genesis of the doctrine, as with that of state immunity, was thus strongly influenced by the notion of comity and respect for the territorial sovereignty of other states. The underlying concern of the judiciary was that it remained the province of the executive to conduct a state’s foreign affairs and that the judiciary should not involve itself (or bring into jeopardy) the conduct of such affairs. It was these principles which were also heavily present in early judicial considerations of the doctrine.

Certainly, the rationale for maintaining the distinction between the act of state doctrine and that of state immunity is clear: the need for courts to refrain from adjudicating upon certain issues which may jeopardise the international relations of states, where the parties before them are not those states themselves or representatives from those states. The doctrine therefore developed in a way which focused on the sovereign nature and location of the act, rather than the status of the person who engaged in that act.⁹ Further, unlike state immunity, and despite some judicial remarks to the contrary,¹⁰ the act of state doctrine can be accurately described as being a product of the common law, not international law.¹¹ Indeed, to this day the doctrine remains unique to common law systems.¹²

The decision which is often cited as having shaped the doctrine into its modern form is that of Fuller CJ in *Underhill v Hernandez* (‘*Underhill*’).¹³ Here, the US Supreme Court refused to examine the legality of the detention of the plaintiff (an American citizen) in Venezuela, as well as the confiscation of the plaintiff’s property, by a Venezuelan military commander.¹⁴ What became termed the ‘act of state doctrine’ was enunciated by Fuller CJ as follows:

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. 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.¹⁵

⁶ Lawrence Collins (ed), *Dicey and Morris on The Conflict of Laws* (Sweet & Maxwell, 14th ed, 2006) 113–14.

⁷ *Ibid* 114.

⁸ See *Blad v Bamfield* (1674) 3 Swans 604; 36 ER 992.

⁹ *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147, 268–9 (Lord Millett).

¹⁰ See *Oetjen v Central Leather*, 246 US 297 (1918) (‘*Oetjen*’).

¹¹ Mann, above n 2, 164; Garnett, above n 2, 705.

¹² Mann, above n 2, 164, 175; Garnett, above n 2, 705.

¹³ 168 US 250 (1897) (‘*Underhill*’).

¹⁴ *Ibid*.

¹⁵ *Ibid* 252.

While the first and last part of this passage can be regarded as being uncontroversial, it is the phrase ‘will not sit in judgment’ which has perhaps caused the most confusion. As can be seen from the discussion below, the case law immediately following *Underhill* tended to broadly interpret this phrase as meaning that courts should *abstain* from hearing cases in which such acts are in issue. However, as judicial understanding of the doctrine has evolved over the years, courts have increasingly taken a more confined approach, interpreting the phrase as simply requiring the forum court to deem such acts to be *valid*.¹⁶

The latter approach has led to the recent description of the doctrine as a ‘super choice of law rule’ which requires the forum court to uphold as valid an act of a foreign government where it would otherwise not do so under its own choice of law rules.¹⁷ Although this approach has also tended to carry more weight with commentators, in only a few cases has the strict and usual sense of the term ‘validity’ been in issue.¹⁸ What this effectively means is that in too many cases undue reliance has been placed on the doctrine by courts when deliberating upon an issue with an international element.

III THE ACT OF STATE DOCTRINE IN THE UNITED STATES

As indicated above, the act of state doctrine is a substantive rule of law created in the US.¹⁹ Given that the US is also where the vast majority of cases in which the doctrine has been invoked can be found, it is unsurprising that courts in other common law countries have looked to the decisions in the US for guidance on the circumstances in which to apply the doctrine.²⁰ However, as will be demonstrated below, the approach taken in many of these cases should be adopted with caution, as the outcomes were often predicated on factors unique to the US, and judicial understanding of the object and purpose of the doctrine in the US has evolved considerably in the century since *Underhill* was decided.

Following the decision in *Underhill*, early judicial interpretations of the doctrine tended to place weight on the notion of comity and the avoidance of conflict in international affairs as a basis for invoking the doctrine.²¹ For instance, in *Oetjen v Central Leather Co* (‘*Oetjen*’),²² the Court refused to

¹⁶ See *WS Kirkpatrick & Co Inc v Environmental Tectonics Corporation International*, 493 US 400 (1990) (‘*WS Kirkpatrick*’); *Habib v Commonwealth* (2010) 183 FCR 62 (‘*Habib*’).

¹⁷ *Habib* (2010) 183 FCR 62, 77.

¹⁸ Fritz A Mann, ‘The Foreign Act of State’ (1990) 106 *The Law Quarterly Review* 352, 353.

¹⁹ See *Aksionairnoye Obschestvo Luther v James Sagor & Co* [1921] 3 KB 532, 548, 557 (‘*Luther*’). As noted by Mann, *Blad v Bamfield* (1674) 3 Swans 604; 36 ER 992 cannot be regarded as establishing the act of state doctrine in the UK and *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1; 9 ER 993 was decided on the basis of personal immunity: *ibid*.

²⁰ As noted by Hazel Fox, the US jurisprudence demonstrates that the doctrine has been used in litigation as both a sword and as a shield; in other words, as both a ‘judicial bar that requires abstention’ and one which ‘may confer a positive cause of action’. Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2002) 484, citing Gary B Born and David Westin, *International Civil Litigation in United States Courts: Commentary and Materials* (Kluwer Law and Taxation, 3rd ed, 1992) 684.

²¹ According to Bazzyler, the US Supreme Court obscured from the very beginning ‘the exact scope and meaning of the doctrine, using the same term to signify three different reasons for judicial abstention: providing personal immunity to [foreign government officials], preserving territorial choice of law, and avoiding international strife’. See Bazzyler, *above n* 2, 334.

²² 246 US 297, 304 (1918) (‘*Oetjen*’).

adjudicate upon the alleged seizure of goods by a Mexican revolutionary government, stating that to ‘permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly “imperil the amicable relations between governments and vex the peace of nations”’.²³ However, to read the statement as implying that the doctrine is a product of international law is plainly wrong. Indeed, the Court’s reliance on the notion of comity is curious, given that it is only in a few countries where the doctrine would be reciprocally applied.²⁴

Around the middle of the 20th century, US courts also tended to place weight on the well-settled principle that it remained the duty and province of the executive arm of government to conduct foreign affairs, and that the judiciary should refrain wherever possible from interfering with this prerogative. From this position, it is relatively easy to understand how support grew for the view that judges should *defer* to the executive when it was appropriate for the judiciary to consider matters with the potential to interfere with international affairs. This came to be known as the ‘*Bernstein* exception’, following the decision in *Bernstein v N V Nederlandsche-Amerikaansche Stoomvaart-Maatschappij* (‘*Bernstein*’).²⁵ Here, the plaintiff was able to obtain a letter from the US State Department declaring that it was the executive’s policy that US courts should not abstain, on the basis of the act of state doctrine, from adjudicating upon matters involving Nazi expropriations.²⁶

Although the instances in which the State Department has issued such letters have been rare, lower courts have tended to follow such recommendations where they have been made.²⁷ However, the exception has never been applied by a majority of the US Supreme Court and its existence has been subject to much debate. For instance, in *First National City Bank v Banco Nacional de Cuba*,²⁸ whilst the five judges in the plurality agreed that the Court should defer to the executive’s position that the doctrine should not apply, Brennan J, joined in dissent by Stewart, Marshall and Blackmun JJ, refused to recognise the *Bernstein* exception, believing that to do so would mean abdicating to the executive the judicial function to enforce the separation of powers.²⁹

It can be seen from the above that considerations relating to the separation of powers doctrine began to take precedence over external factors, such as the notion of comity between nations, in providing the rationale for the doctrine. The relationship between the act of state and separation of powers doctrines was crystallised in the US Supreme Court’s decision in *Banco Nacional de Cuba v Sabbatino* (‘*Sabbatino*’).³⁰ Here, the petitioner, an instrumentality of the Cuban

²³ Ibid.

²⁴ Garnett, above n 2, 715.

²⁵ 210 F 2d 375 (2nd Cir, 1954) (‘*Bernstein*’).

²⁶ As will be discussed below, the courts in the UK similarly refused to enforce such laws, but on the basis that they were contrary to the *lex fori*. See *Oppenheimer v Cattermole* [1976] AC 249 (‘*Oppenheimer*’).

²⁷ Bazyler, above n 2, 369–70.

²⁸ 406 US 759 (1972).

²⁹ Ibid 790–3.

³⁰ 376 US 398, 423 (1964) (‘*Sabbatino*’). Following the decision in *Sabbatino*, Congress passed the *Second Hickenlooper Amendment*, which prohibited US courts from declining to adjudicate upon similar expropriation claims: Pub L No 89-171, 79 Stat 653 (1964).

Government, brought a claim of conversion, which rested upon a decree of the Cuban Government that nationalised several sugar companies in which American citizens held an interest. The US Supreme Court found that the act of state doctrine precluded US courts from inquiring into the validity of such acts, even if they were committed in violation of international law.³¹

In its discussion of the doctrine, the Court placed emphasis on the federal nature of the rule and its constitutional underpinnings.³² Significantly, the Court clarified that the doctrine was not compelled by the inherent nature of sovereign authority (as was implied in *Underhill*), or by some principle of international law (as was expressed in *Oetjen*).³³ In this respect the Court acutely observed that although the ‘historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence’.³⁴ The doctrine was thus transformed from one of ‘external deference’ to one of ‘internal deference’.³⁵

The approach taken by the Court in *Sabbatino* was therefore a significant step away from the broad and inflexible principle of abstention pronounced in *Underhill*. This much can be seen from the Court’s affirmation of the position adopted in *Baker v Carr*,³⁶ that it would be an error to suppose that ‘every case or controversy which touches foreign relations lies beyond judicial cognizance’.³⁷ Nonetheless, it is clear that the Court continued to construe the

³¹ *Sabbatino*, 376 US 398, 433–4 (1964).

³² *Ibid* 424. The Court was of the view that the problems involved were uniquely federal in nature and that if it were left to the state courts to develop their own rules the purposes behind the doctrine would be undermined.

³³ *Ibid* 421.

³⁴ *Ibid*. Courts and commentators have taken from the Supreme Court’s decision what are termed the ‘*Sabbatino* factors’, as a guide to the circumstances in which the doctrine should be applied. These are summarised as follows (at 428):

- 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;
- the less important the implications of an issue are for foreign relations [of the forum state], the weaker the justification for exclusivity in the political branches; and
- [t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence.

³⁵ Daniel C K Chow, ‘Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe’ (1987) 62 *Washington Law Review* 397, 475. Chow is of the view that the act of state doctrine therefore represents ‘[a]n uneasy composite of nineteenth century concepts of positivist law and twentieth century principles of institutional competence and federal supremacy’: at 447.

³⁶ 369 US 186, 217 (1962). It is this decision in which the Supreme Court described ‘the political question doctrine’ in its modern form as follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

³⁷ *Ibid* 211.

doctrine within the prism of judicial abstention, rather than validity. It was only White J who appeared to be cognisant of the fact that the doctrine could be viewed as a corollary of normal conflict of law rules. Indeed, White J correctly noted that such conflict of law rules would have been sufficient to have ‘controlled the outcome of most of the act of state cases decided’ in the US.³⁸

Further, although the decision in *Sabbatino* certainly brought greater clarity to the content of the doctrine, it could not be said that the application of the doctrine became settled law. The US Supreme Court’s decision in *Alfred Dunhill of London, Inc v Republic of Cuba*³⁹ in particular demonstrates the confusion which continued to surround the application of the doctrine. In this case, interveners on behalf of the Cuban government alleged that the act of state doctrine prevented the Court from adjudicating upon whether Dunhill had infringed the trademark of five privately owned cigar manufacturers, who had fled to the US after the Cuban government had nationalised their property (which was placed under the interveners’ control), the contents of which Dunhill then imported into the US.

By a vote of five to four, the Court refused to apply the doctrine on the basis that it had not been proven that the interveners’ actions were public acts of state. The majority were of the view that the doctrine should not be extended to ‘acts committed by foreign sovereigns in the course of their purely commercial operations’.⁴⁰ In dissent, Marshall J stated that ‘[t]he carving out of broad exceptions to the doctrine is fundamentally at odds with the careful case-by-case approach adopted in *Sabbatino*’.⁴¹ Whether there is in fact a ‘commercial exception’ to the doctrine has caused significant confusion in the circuit courts. In this respect, the courts have adopted a range of approaches, from endorsing the exception, to acknowledging it as an important but not dispositive factor to take into account, to expressly disavowing the exception.⁴²

On the basis of the foregoing, and various lower court decisions,⁴³ Michael Bazylar was of the view that the act of state doctrine had been used by courts as an excuse to avoid deciding difficult international transaction cases, had resulted in violations of the separation of powers doctrine, had diluted the effectiveness of a number of important federal laws such as the *Foreign Sovereign Immunities Act*,⁴⁴ and was ‘probably the single most important reason for the arrested development of international law in the United States’.⁴⁵ It is noteworthy, however, that Bazylar was writing prior to the decision of the Supreme Court in *WS Kirkpatrick & Co Inc v Environmental Tectonics Corporation International*

³⁸ *Sabbatino*, 376 US 398, 445 (1964).

³⁹ 425 US 682 (1976).

⁴⁰ *Ibid* 706 (White J, joined by Burger, Powell and Rehnquist JJ).

⁴¹ *Ibid* 728 (Marshall J, joined by Brennan, Stewart and Blackmun JJ).

⁴² Patterson, above n 2, 126–8.

⁴³ See *Hunt v Mobil Oil Corp*, 550 F 2d 68 (2nd Cir, 1977); *Texas Trading & Milling Corp v Federal Republic of Nigeria*, 647 F 2d 300 (2nd Cir, 1981); *Empresa Cubana Exportadora de Azucar y Sus Derivados v Lamborn & Co*, 652 F 2d 231 (2nd Cir, 1981); *Timberlane Lumber Co v Bank of America National Trust & Savings Association*, 549 F 2d 597 (9th Cir, 1976); *International Association of Machinists (IAM) v OPEC*, 649 F 2d 1354 (9th Cir, 1981); *Clayco Petroleum Corp v Occidental Petroleum Corp*, 712 F 2d 404 (9th Cir, 1983); *Mannington Mills Inc v Congoleum Corp*, 595 F 2d 1287 (3rd Cir, 1979); *Ramirez de Arellano v Weinberger*, 745 F 2d 1500 (DC Cir, 1984) (*en banc*).

⁴⁴ 28 USC § 1330 (1976).

⁴⁵ Bazylar, above n 2, 328–9.

(‘*WS Kirkpatrick*’),⁴⁶ which shifted the focus of the doctrine away from the prism of *abstention* and towards that of *validity*. The factual background of this case was one in which the petitioners allegedly obtained a construction contract from the Nigerian Government by bribing Nigerian officials. The respondent, an unsuccessful bidder for the contract, filed an action for damages against the petitioners and others under various US federal and state statutes.

Critically, the Supreme Court held that the act of state doctrine did not apply because ‘[n]othing in the present suit requires the Court to declare invalid, and thus ineffective ... the official act of a foreign sovereign’.⁴⁷ In particular, the Court was of the view that, although judgment in favour of the respondents would require the Court to declare the contract unlawful and impute to foreign officials improper motivation in the performance of official acts, this did not provide a sufficient basis for invoking the doctrine. As regards the nature of the doctrine itself, the Court noted that the doctrine had evolved over the years, and although it was once viewed as an expression of international law ‘resting upon “the highest considerations of international comity and expediency”’ (quoting *Oetjen*), it was more recently viewed as a consequence of the separation of powers preventing the judiciary from hindering the executive’s conduct of foreign affairs (citing *Sabbatino*).⁴⁸ The Court emphasised that the act of state doctrine ‘is not some vague doctrine of abstention’, but is rather confined to instances where the *outcome* of a case turns upon the validity of an official action by a foreign sovereign.⁴⁹

The Court further emphasised that while the underlying policies of the doctrine (international comity, respect for the sovereignty of foreign nations, and the avoidance of embarrassment to the executive branch in its conduct of foreign affairs), as well as those factors which were identified in *Sabbatino*, should be considered in determining whether or not the doctrine should be invoked, that did not mean that such policies are a doctrine unto themselves, justifying an expansion of the doctrine into uncharted fields whenever those policies are implicated.⁵⁰ As the Court succinctly put it:

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because *the validity of no foreign sovereign act is at issue*.⁵¹

The decision in *WS Kirkpatrick* was thus a significant move away from the judicial abstention interpretation of the doctrine that was evident in the cases which preceded it. The Court itself emphasised that the judiciary has the power,

⁴⁶ 493 US 400, 405 (1990).

⁴⁷ *Ibid.*

⁴⁸ *Ibid* 404.

⁴⁹ *Ibid* 406.

⁵⁰ *Ibid* 409. The Court noted that although the parties argued at length about the applicability of possible exceptions to the doctrine, it decided not to pursue those inquiries, since the factual predicate for applying the act of state doctrine did not exist: at 405.

⁵¹ *Ibid* 409–10 (emphasis added).

and ordinarily the obligation, to decide cases and controversies properly presented to it. In this context, the proper role of the doctrine was to merely require that a court, in considering such cases, should deem the acts of foreign sovereigns done within their own jurisdictions to be valid.⁵²

Despite what was said in *WS Kirkpatrick*, the confusion surrounding the abstention–validity dichotomy remains, and is particularly evident in the various decisions of the lower courts which have considered the doctrine. In particular, various lower courts have grappled with the application of the doctrine in respect of what can be termed ‘human rights cases’, where the defendant has sought to plead the doctrine as a ‘jurisdictional shield’.⁵³ Perhaps because of the subject matter in issue, the courts have been less willing to refrain from hearing such cases on the basis that they bring into question an act of a foreign state.

One approach which has been taken in this regard has been to apply the *Sabbatino* factors. A decision worth noting in this respect is that of the Court of Appeals for the Ninth Circuit in *John Doe I v Unocal Corp.*⁵⁴ Here, Burmese villagers brought claims under the *Alien Tort Claims Act*,⁵⁵ the *Racketeer Influenced and Corrupt Organizations Act*⁵⁶ and state law, alleging that the defendants directly or indirectly subjected them to forced labour, murder, rape and torture when a gas pipeline was built in the region in which they resided. The Court found that, whilst the Burmese military and Myanmar Oil (a state-owned company) were entitled to immunity under the *Foreign Sovereign Immunities Act*, the act of state doctrine did not prevent it from inquiring into whether the alleged conduct of the Burmese military violated international law in order to hold Unocal (which acquired a 28 per cent interest in the pipeline project) liable for aiding and abetting that conduct.

The Court considered that ‘the four factor balancing test’ weighed against applying the act of state doctrine.⁵⁷ First, the alleged acts in question (such as rape, murder and torture) were all *jus cogens* violations, which by definition meant that they were internationally denounced. Secondly, as the executive had already denounced Burma’s human rights abuses and imposed sanctions, it was hard to imagine how judicial consideration of the matter would so substantially exacerbate relations with Burma as to cause hostile confrontations. Thirdly, it would be difficult to contend that the alleged violations of international human rights were ‘in the public interest’. Thus, the only factor which weighed in

⁵² Ibid 409. As noted by Patterson, however, there have been decisions of the lower courts which have seemingly contradicted *WS Kirkpatrick*, yet have not been heard by the Supreme Court: see Patterson, above n 2, 122.

⁵³ It is noted that the *Torture Victim Protection Act of 1991* was enacted by Congress, inter alia, with the intention of removing the act of state doctrine as a jurisdictional shield in US courts where a suit is brought against an *individual* alleging acts of torture: Pub L No 102-256, 106 Stat 73 (1992). In *Clayco Petroleum Corporation v Occidental Petroleum Corporation*, 712 F 2d 404 (9th Cir, 1983) the Court rejected the argument that in enacting the *Foreign Corrupt Practices Act of 1977*, 15 USCA § 78dd-1 (1981), Congress intended to abrogate the doctrine.

⁵⁴ 395 F 3d 932 (9th Cir, 2002) (*‘Unocal’*).

⁵⁵ 28 USC § 1350 (1789).

⁵⁶ 18 USC §§ 1961–8 (1970).

⁵⁷ *Unocal*, 395 F 3d 932, 959 (9th Cir, 2002). The four factors were the three from *Sabbatino*, discussed above n 34, as well as ‘whether the foreign state was acting in the public interest’: *Liu v Republic of China*, 892 F 2d 1419, 1432 (9th Cir, 1989) (*‘Liu’*).

favour of applying the doctrine, but which did not outweigh the other three factors, was that the Court's condemnation of the alleged acts might offend the *current* government of Burma.⁵⁸

A different approach has been for the forum court to find that a breach of a fundamental human right cannot constitute an act of state. For instance, in *Sarei v Rio Tinto PLC*,⁵⁹ residents of Papua New Guinea brought a claim alleging that the defendant had been guilty of human rights violations arising from the operation of a copper mine. The Court of Appeal disagreed with the District Court's conclusion that the alleged racial discrimination constituted an official act which the act of state doctrine could insulate from scrutiny. The Court found that because international law does not recognise an act that violates *jus cogens* principles as a sovereign act, the alleged acts of racial discrimination could not constitute official sovereign acts.

Similarly, in *Forti v Suarez-Mason*⁶⁰ the Court found that the acts alleged to have occurred (including torture, murder and prolonged arbitrary detention by military and police personnel under the command of an Argentinean general) were not the public acts of a government official. The Court considered that the act of state doctrine required that the act be not only 'official', but also inherently governmental or public in nature.⁶¹ A slightly different approach was taken in *Mujica v Occidental Petroleum Corp*,⁶² where the Court was of the view that the act of state doctrine should not be invoked in circumstances where human rights violations *outweighed* other factors, such as US foreign policy considerations. The case was dismissed, however, on the 'political question' issue.⁶³

Together, these decisions reveal that confusion surrounding the nature and scope of the act of state doctrine in the US persists. What these decisions also reveal is that, while judicial scrutiny in some cases may raise real concerns of foreign relations and comity,⁶⁴ it should not be the function of the act of state doctrine to remedy such concerns, which are more appropriately dealt with under the head of a different canon, such as the political question doctrine. Rather, as the decision in *WS Kirkpatrick* demonstrates, the application of the doctrine in the US has been the most sound when confined to the question of validity.

IV THE ACT OF STATE DOCTRINE IN THE UNITED KINGDOM

Although the general tenet articulated in *Underhill* can be found throughout the UK case law, the application of the act of state doctrine has not been as frequent or tangible as in the US. Indeed, there was no consistent principle in the UK prior to the relatively recent litigation in *Kuwait Airways Corporation v*

⁵⁸ Ibid 959–60 (9th Cir, 2002).

⁵⁹ 456 F 3d 1069 (9th Cir, 2006). See also *Filártiga v Peña-Irala*, 630 F 2d 876 (2nd Cir, 1980).

⁶⁰ 672 F Supp 1531 (ND Cal, 1987).

⁶¹ Ibid 1542–6.

⁶² 381 F Supp 2d 1164 (CD Cal, 2005). See also *Liu*, 892 F 2d 1419 (9th Cir, 1989), where the Court was of the view that it would cause more embarrassment for the US if it were to abstain from hearing a wrongful death suit brought by an American citizen in relation to a death that occurred in the US, than to consider the foreign policy implications concerning the executive's relationship with China (the suit having being brought against the Director of the Defense Intelligence Bureau of the Republic of China).

⁶³ See discussion of *Baker v Carr*, 369 US 186 (1962), above n 36 and accompanying text.

⁶⁴ Patterson, above n 2, 113.

Iraqi Airways Co [Nos 4 and 5] ('*Kuwait Airways*').⁶⁵ As will be discussed below, the significance of this litigation can be found in the Court's confirmation that the act of state doctrine should be considered separate from that of non-justiciability.⁶⁶

Although the cases in which the act of state doctrine has been cited have been few, the principles which provided the early justification for the doctrine in the US were similarly present in the UK jurisprudence. In particular, courts in the UK attached significant weight to the notion of comity to support the position that the forum court should not adjudicate upon the acts of a foreign state done within its own territory. For example, in a decision which predated *Underhill*, Lord Esher MR stated in *Companhia de Moçambique v British South Africa Co* ('*Moçambique*'):⁶⁷

With regard, then, to acts done within the territory of a nation, all are agreed that such nation has without more jurisdiction to determine the resulting rights growing out of those acts; but, with regard to acts done outside its territory it has no jurisdiction to determine the resulting rights growing out of those acts, unless such jurisdiction has been allowed to it by the comity of nations.⁶⁸

The decision, which came to be known as the '*Moçambique* rule', stands for two propositions: that a 'court will not exercise jurisdiction in respect of the title to, or possession of, land situated abroad; and ... the court will not enforce an action for trespass to foreign land'.⁶⁹ The second proposition has now been abolished in the UK pursuant to the *Civil Jurisdiction and Judgments Act 1982* (UK) s 30(1).⁷⁰

The development of the act of state doctrine in the UK was therefore closely tied from an early stage to issues of territorial sovereignty⁷¹ and pre-existing choice of law rules. This is evident from the decision in *Luther v Sagor* ('*Luther*'),⁷² where the Court considered, and upheld as valid, a Soviet expropriatory decree. Here, Scrutton J held that it would have been 'a serious breach of international comity' if the Court was to adjudicate upon whether the decree was contrary to principles of 'justice and morality'.⁷³

However, as choice of law rules developed, it became generally accepted that courts in the UK would not enforce a legislative or executive act of a foreign

⁶⁵ [2002] 2 AC 883 ('*Kuwait Airways*').

⁶⁶ See especially the decision of the Court of Appeal: *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 and 5]* [2001] 3 WLR 1117, 1187 [265], 1193 [285].

⁶⁷ [1892] 2 QB 358 ('*Moçambique*').

⁶⁸ *Ibid* 395.

⁶⁹ Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 8th ed, 2010) 64–5.

⁷⁰ In respect of proceedings brought in England and Wales or Northern Ireland. The proposition still exists in Australia, outside of New South Wales and the Australian Capital Territory (*Dagi v The Broken Hill Pty Co Ltd [No 2]* [1997] 1 VR 428, 434). The High Court of Australia has reserved 'for further consideration in an appropriate case' whether there is a need for the *Moçambique* rule to be retained: *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520 [76].

⁷¹ As in the US, the principle has been confined to acts done within the limits of a sovereign state's own territory: see *Princess Paley Olga v Weisz* [1929] 1 KB 718; *Peer International Corporation v Termidor Musical Publishers Ltd* [2004] Ch 212.

⁷² [1921] 3 KB 532.

⁷³ *Ibid* 558–9.

government if that act was contrary to the public policy of the UK. At present, a UK court will not enforce: foreign penal or fiscal laws;⁷⁴ discriminatory legislation directed against an individual or particular class of individuals;⁷⁵ or legislation which is in contravention of clearly established principles of international law.⁷⁶

The above approach was, however, clearly insufficient to provide a basis for courts to refrain from hearing cases which did not concern the validity of an act of a foreign government *per se*, but rather concerned other matters of international relations such as the territorial boundaries of states and matters arising out of treaties. Thus, running parallel to the act of state cases were those decisions in which UK courts *abstained* from adjudicating upon matters which had the potential to cause embarrassment to the executive in the conduct of its foreign affairs.⁷⁷

Whilst these decisions were all founded upon similar principles, such as the separation of powers and the notion of comity, they lacked a clear unifying doctrine until the decision in *Buttes Gas and Oil Co v Hammer [No 3]* ('*Buttes Gas*').⁷⁸ In this matter, the plaintiff (a Californian oil company, which had a concession granted by the Ruler of Sharjah) brought an action in defamation against the defendant (also a Californian oil company), who had alleged that the plaintiff had conspired with the Ruler of Sharjah to deprive it of its rights in the Arabian Gulf. The defendant pleaded justification and cross-claimed for damages for fraudulent conspiracy, both of which brought into issue the validity of oil concessions granted by neighbouring states in the Arabian Gulf over their territorial and offshore waters.

After examining the diverse array of cases which related to judicial abstention, Lord Wilberforce arrived at the conclusion that the matter was non-justiciable, as it would require the Court to adjudicate upon the transactions of foreign sovereign states.⁷⁹ His Lordship considered that this principle was one of 'judicial restraint or abstention',⁸⁰ which was 'inherent in the very nature of the judicial process'.⁸¹ His Lordship stated:

Leaving aside all possibility of embarrassment in our foreign relations ... there are ... *no judicial or manageable standards* by which to judge these issues ... the court would be in a judicial no-man's land: the court would be asked to review

⁷⁴ *Government of India v Taylor* [1955] AC 491, 503.

⁷⁵ See above n 26 and accompanying text. The Court refused to recognise a Nazi confiscatory decree which deprived Jews of their property. Although the US Supreme Court reached a similar position in *Bernstein*, as discussed above, the Court did so on the basis of a letter obtained by the plaintiff from the US State Department.

⁷⁶ See *Kuwait Airways* [2002] 2 AC 883.

⁷⁷ See *Cook v Sprigg* [1899] AC 572; *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo 22; 15 ER 9, 32–3.

⁷⁸ [1982] AC 888 (Lord Wilberforce) ('*Buttes Gas*').

⁷⁹ A similar approach was taken by the United States Courts of Appeal for the Fifth and for the Ninth Circuits in *Occidental of Umm al Qaywayn Inc v A Certain Cargo of Petroleum*, 577 F 2d 1196 (5th Cir, 1978) and *Occidental Petroleum Corp v Buttes Gas and Oil Co*, 461 F 2d 1261 (9th Cir, 1972). In the former, the Court considered that the resolution of a territorial dispute between sovereign states was a 'political question' that was outside of the judicial power of the Court.

⁸⁰ *Buttes Gas* [1982] AC 888, 934.

⁸¹ *Ibid* 932.

transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say at least part of these were ‘unlawful’ under international law.⁸²

The emphasis placed on the lack of ‘judicial or manageable standards’ was therefore similar to that of the US political question doctrine.⁸³ Significantly, Lord Wilberforce also did not consider it appropriate for the principle of non-justiciability to be considered as a variety of the act of state doctrine.⁸⁴ Although the decision has been approved by courts since, it has not universally found support amongst commentators.⁸⁵

The separation between the act of state doctrine and that of non-justiciability was confirmed in *Kuwait Airways*.⁸⁶ Here, Kuwait Airways Company brought proceedings in the UK against the State of Iraq and the Iraqi Airways Company (‘IAC’) in relation to the confiscation of 10 Kuwaiti aircraft following the invasion and occupation of Kuwait by Iraq. The IAC argued, citing *Luther*, that Resolution 369, a confiscatory decree validly passed by the Iraqi government, was one which the Court must accept as valid.⁸⁷ Citing *Buttes Gas*, it was further argued that the transactions in question (the invasion of Kuwait, Resolution 369, and the relevant UN Security Council Resolutions)⁸⁸ were all transactions between states which were non-justiciable in the Court.⁸⁹

Whilst the state of Iraq was successful in establishing that it was entitled to state immunity which prevented the Court from adjudicating upon its actions (the confiscation of the aircraft),⁹⁰ the IAC was unsuccessful in pleading non-justiciability and the act of state doctrine in respect of its retention and use of the aircraft. The House of Lords upheld the decision of the Court of Appeal to the effect that it was legitimate, in appropriate circumstances, ‘for an English court to have regard to the content of international law in deciding whether to recognise a foreign law’, and that the non-justiciability principle discussed by

⁸² *Ibid* 938 (emphasis added).

⁸³ See above n 36 and accompanying text.

⁸⁴ *Buttes Gas* [1982] AC 888, 931.

⁸⁵ Mann was heavily critical of the decision in *Buttes Gas*, and was of the view that it should be treated as an altogether special one, which did not lay down any rule of general application. See Mann, above n 2, 27, 69–71.

⁸⁶ A history of the litigation is given by Lord Nicholls: *Kuwait Airways* [2002] 2 AC 883, 1076–7.

⁸⁷ On 5 March 1991, Iraq, in conforming to its obligations under the ceasefire, repealed Resolution 369. *Kuwait Airways* [2002] 2 AC 883, 1079.

⁸⁸ SC Res 660, UN SCOR, 45th sess, 2932nd mtg, UN Doc S/RES/660 (2 August 1990), which condemned the invasion as a breach of the peace and demanded immediate Iraqi withdrawal; SC Res 661, UN SCOR, 45th sess, 2933rd mtg, UN Doc S/RES/661 (6 August 1990), which called upon all states to take appropriate measures to protect the assets of the legitimate government of Kuwait and its agencies, and not to recognise any regime set up by the occupying power; SC Res 662, UN SCOR, 45th sess, 2934th mtg, UN Doc S/RES/662 (9 August 1990), which called upon all states not to recognise the annexation; SC Res 674, UN SCOR, 45th sess, 2951st mtg, UN Doc S/RES/674 (29 October 1990), which condemned the seizure by Iraq of public and private property in Kuwait; SC Res 678, UN SCOR, 45th sess, 2963rd mtg, UN Doc S/RES/678 (29 November 1990), which authorised military action against Iraq; SC Res 686, UN SCOR, 46th sess, 2978th mtg, UN Doc S/RES/686 (2 March 1991), which set out the conditions for a ceasefire. See *Kuwait Airways* [2002] 2 AC 883, 1079 (Lord Nicholls).

⁸⁹ *Kuwait Airways* [2002] 2 AC 883, 1080.

⁹⁰ *Kuwait Airways Corporation v Iraqi Airways Co* [1995] 1 WLR 1147.

Lord Wilberforce in *Buttes Gas* did not require the Court to shut its eyes to a breach of an ‘established principle of international law committed by one state against another when the breach is plain and ... acknowledged’.⁹¹

As Lord Steyn held, it would have been contrary to the international obligations of the UK ‘were its courts to adopt an approach contrary to its obligations under the United Nations Charter and the relevant Security Council Resolutions’.⁹² It followed that it would be contrary to domestic public policy to give effect to Resolution 369. Thus, the Court was obliged not to recognise Resolution 369 ‘as a law at all’, or take it into account ‘for any purpose’.⁹³ It is also noteworthy that Lord Hope considered that although very narrow limits should be placed on any exception to the act of state doctrine and ‘care must be taken not to expand its application beyond the true limits of the principle’, there was ‘no need for [judicial] restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated’.⁹⁴ Lord Hope was of the view that it was judicial restraint, *not* abstention, which was required in such circumstances.⁹⁵

The decision in *Kuwait Airways* is regarded as being of particular importance given that the Court confirmed that UK courts will not enforce the legislative and executive acts of foreign governments executed within their territory, if such acts are clearly in breach of public international law.⁹⁶ However, in real terms the decision can be viewed as simply an extension of the well-accepted principle discussed above that UK courts will not enforce laws which are contrary to the public policy of the *lex fori*.⁹⁷

⁹¹ *Kuwait Airways* [2002] 2 AC 883, 1080–1 (Lord Nicholls).

⁹² *Ibid* 1103.

⁹³ *Ibid* 1104.

⁹⁴ *Ibid* 1109.

⁹⁵ *Ibid*.

⁹⁶ Note that the task of defining what constitutes a ‘clear breach of international law’ will not be an easy one for courts in the future. In particular, it is uncertain whether courts will tend to focus on the nature of the norm in question (for instance, whether it is of a *jus cogens* nature, forms part of customary international law, and/or was created by treaty), or on the complexity of establishing whether in fact the breach occurred. Certainly, in *Kuwait Airways*, the fact that it was ‘plain beyond argument’ that the seizure and assimilation were ‘flagrant violations of rules of international law of fundamental importance’ made the task more straightforward: see *ibid* 1079 (Lord Nicholls).

⁹⁷ It is worth noting that in *Peer International Corporation v Termidor Music Publishers Ltd* [2004] Ch 212 the Court rejected an argument which sought to use the reasoning in *Kuwait Airways* in reverse. Here, the Court was required to determine a preliminary issue concerning ownership of copyright in the UK of Cuban musical compositions. The Court of Appeal upheld the decision of the primary judge that Cuban Law 860 was confiscatory and wholly ineffective to divest the claimants of copyright vested in them, because title to property situated in England, whether movable or immovable, should be determined by English law and a foreign decree could not be permitted to affect the ownership of that property. The Court rejected, *inter alia*, the submission that ‘an English court can give effect to the legislation of a foreign state affecting property in the [UK] where that foreign state is regularising a matter of legitimate interest and the legislation accords with [UK] ... *public policy*’, as it would ‘subordinate English property law to that of a foreign state’; ‘the rule would be founded and would operate by reference to public policy which could change from time to time and would be uncertain’; it would ‘require the English courts to assess the merits of the foreign [legislation]’; it would ‘lead to intractable problems when the property was situated in a third state’; it would ‘require the court to balance one public policy against the public policy that states [did] not interfere with property situated abroad’; and it would ‘lead to great uncertainty’: at 230 (emphasis added).

For the purposes of this discussion, the value of the approach taken by the Courts in *Buttes Gas* and *Kuwait Airways* can be found in the Courts' belief that a doctrine of abstention (non-justiciability) should remain distinct from that of validity (the act of state doctrine). Even so, the Lords' consideration in *Kuwait Airways* of the relationship between state immunity, the act of state doctrine and non-justiciability was minimal and did little 'to dispel the general incoherence of thought in this branch of the law'.⁹⁸ Indeed, as Fritz Mann has noted, the emphasis placed by the US Supreme Court on the federal nature of the doctrine leaves the doctrine in the UK on less stable ground⁹⁹ — a discrepancy which the courts will need to turn their minds to in the future. As the experience of the Australian courts discussed below will show, it is imperative that UK courts remain cognisant of the fact that the content and application of the doctrine itself depend on the particular constitutional and jurisprudential factors which are unique to the forum state, and that the doctrine should evolve in the UK accordingly.

V THE ACT OF STATE DOCTRINE IN AUSTRALIA

In Australian courts, it has been taken as trite law that an allegation that a foreign sovereign state has acted unlawfully within its own territory will not be justiciable.¹⁰⁰ Ostensibly, such a proposition appears relatively straightforward and without controversy. However, as in the US and UK, the application of this principle to complex factual situations has created judicial confusion as to the nature of the doctrine and the circumstances in which it is to be applied. Further, as noted above, this confusion has been compounded in Australia by the tendency of judges to arbitrarily borrow from the jurisprudence of the US and the UK without more careful consideration of the contexts in which those decisions were made.

The reasoning of the US Supreme Court in *Underhill* was quickly picked up by the High Court of Australia in *Potter v The Broken Hill Proprietary Company Ltd* ('*Potter*'),¹⁰¹ which confirmed the existence of the act of state doctrine as part of the common law of Australia. Here, the High Court held that the forum court should not enforce property rights granted by a foreign sovereign; in this case, the grant of a patent was an act of state which could not be impugned.¹⁰² The decision of the High Court thus appeared to amalgamate the reasoning of Fuller CJ in *Underhill* with the reasoning of the House of Lords in

⁹⁸ Fox, above n 20, 497.

⁹⁹ Mann, above n 2, 176.

¹⁰⁰ See, eg, *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40–1 ('*Spycatcher*'); *Sadiqi v Commonwealth [No 2]* (2009) 181 FCR 1, 53, where McKerracher J held that it was not open to the forum court to examine the role or authority of the President of Nauru, the Principal Immigration Officer of Nauru or any other Nauruan official acting on behalf of the sovereign state.

¹⁰¹ (1906) 3 CLR 479 ('*Potter*').

¹⁰² Cf *Mannington Mills Inc v Congoleum Corporation*, 595 F 2d 1287, 1294 (3rd Cir, 1979), where the Court held that the granting of patents by a foreign sovereign did not constitute 'a considered policy determination by a government to give effect to its political and public interests', and so was 'not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs'.

Moçambique.¹⁰³ As Richard Garnett observed, however, the application of the act of state doctrine in that case should have brought about the *opposite* result, namely, that the foreign patent should have been accepted as valid, as to do otherwise would show disrespect for the act of a foreign state done within its own territory.¹⁰⁴

The confusion over the juridical foundations of the doctrine can similarly be seen in *Spycatcher*, where the High Court invoked the common law principle, discussed above, that domestic courts will not enforce a foreign penal or public law.¹⁰⁵ Before the Court, the Attorney-General of the UK sought an injunction to restrain a former officer of the British Secret Service and his publisher from publishing his memoirs in Australia, which allegedly contained information of a confidential nature which was acquired during his employment. Although the Court's ultimate reasoning was sound, the majority's consideration of the act of state doctrine is troubling for three reasons. First, the majority decision categorised the act of state doctrine as being a principle of international law.¹⁰⁶ As discussed above, however, such a statement is undoubtedly incorrect, the act of state doctrine being a product of the common law, not international law. Secondly, although the majority made mention of the fact that the decision in *Underhill* received approval in *Sabbatino*, it relied on the decision in *Oetjen* to support the notion that the doctrine rests on notions of international comity and expediency.¹⁰⁷ As discussed above, the Supreme Court in *Sabbatino* expressly rejected the position advanced in *Oetjen* that the doctrine was compelled by such considerations. Thirdly, the majority referred to the decision in *Buttes Gas*, stating that 'the principle is one of "judicial restraint or abstention" and is "inherent in the very nature of the judicial process"'.¹⁰⁸ However, such a statement is misleading, given that Lord Wilberforce was expressly referring in this regard to the issue of non-justiciability, and not the act of state doctrine. Moreover, Lord Wilberforce did not consider that it was appropriate for the doctrine of non-justiciability to be considered a variety of the act of state doctrine.

The unhelpful fusion of the *Moçambique* rule and the act of state doctrine, which first appeared in *Potter*, was even more pronounced in the decision of the Full Court of the Federal Court in *Petrotimor Companhia de Petroleos SARL v Commonwealth* ('*Petrotimor*').¹⁰⁹ Here, the applicant contended that, by changing the definition of the continental shelf by enacting the *Seas and Submerged Lands Act 1973* (Cth), Parliament had appropriated its property in the concession without paying just terms contrary to s 51(xxxi) of the *Australian Constitution*. The Court held that the concession granted by the Portuguese government to the applicant was a 'foreign immovable' to which the *Moçambique* rule applied, and that the Court therefore had no jurisdiction to

¹⁰³ See above n 70 and accompanying text. The *Moçambique* rule was abolished in New South Wales by the *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW) s 3.

¹⁰⁴ Garnett, above n 2, 718.

¹⁰⁵ *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

¹⁰⁶ *Ibid* 40.

¹⁰⁷ *Ibid* 41.

¹⁰⁸ *Ibid*.

¹⁰⁹ (2003) 126 FCR 354 ('*Petrotimor*').

entertain the suit.¹¹⁰ The Court considered that the act of state doctrine and the non-justiciability doctrine were interrelated, one being a manifestation of the other.¹¹¹

As discussed by Perram J in *Habib*, the reasoning of the Full Court in *Petrotimor* is disconcerting on two levels. First, as there was no suggestion that the concession had not been validly granted, there was no risk that the Court would have to pass judgment on that question. Secondly, the reasoning of the Court suggested that the guarantee of just terms in s 51(xxxi) of the *Constitution* did not extend to property subject to the *Moçambique* rule.¹¹² Further, as Garnett observed, the validity of the decree should have been recognised in much the same way as was done by the UK court in *Luther* — to do so otherwise would involve showing a lack of recognition (and respect) for the acts of Portugal done within its own borders.¹¹³ The Court's confusion of the doctrines was apparent throughout, illustrated by its description of the act of state doctrine as one 'which is often said to be a principle of international law'.¹¹⁴ The better approach would have been for the Court to simply categorise the matter as involving the judicial determination of whether the acquisition of property by the Australian Commonwealth government was constitutionally valid. The fact that the rights to that property were originally granted by the Portuguese government was inconsequential.¹¹⁵

A better understanding of the function of the doctrine and its constitutional limits was demonstrated by Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation*,¹¹⁶ where his Honour held that an allegation that false statements had been made by the Australian government to the German government was justiciable. His Honour was of the view that, where there is subject matter for the exercise of federal jurisdiction under Chapter III of the *Constitution*, 'no question of "non-justiciability" ordinarily will arise'.¹¹⁷ Relevantly, his Honour considered that 'Australian rules of private international law dealing with foreign torts and title to moveables may of their own force give effect to the foreign act of State without recourse to [the act of state doctrine]'.¹¹⁸ His Honour found that, in any event, the doctrine was inapplicable in the present circumstances where the applicant did not seek to bring into dispute the actions of the German government, but rather raised allegations concerning the shortcomings of the Australian government.¹¹⁹

¹¹⁰ Ibid 366–9 (Black CJ and Hill J).

¹¹¹ Ibid 369.

¹¹² *Habib v Commonwealth* (2010) 183 FCR 62, 78–9.

¹¹³ Garnett, above n 2, 719.

¹¹⁴ *Petrotimor* (2003) 126 FCR 354, 366.

¹¹⁵ Such an approach was taken by the District of Columbia Circuit, sitting *en banc*, in *Ramirez de Arellano v Weinberger*, 745 F 2d 1500 (DC Cir, 1984). The Court found, *inter alia*, that the fact that the property was located in Honduras was inconsequential to determining whether the taking of the property of an American citizen by the US government was constitutionally proper.

¹¹⁶ (1988) 19 FCR 347 ('*Ditfort*').

¹¹⁷ Ibid 369.

¹¹⁸ Ibid 372.

¹¹⁹ Ibid 371.

Tamberlin J reached a similar decision in *Hicks v Ruddock*,¹²⁰ in which the applicant brought judicial review proceedings against the Australian Attorney-General's decision not to request Mr Hicks' release from Guantanamo Bay and return to Australia. The respondent, in seeking summary dismissal of the proceedings, submitted, inter alia, that the act of state doctrine prohibited the Court from considering this issue, as it would involve judicial scrutiny of the legality of the applicant's detention in the US. Conversely, the applicant argued that his trial by a US military commission would be contrary to international law (namely, the *Third Geneva Convention*),¹²¹ and would therefore come within the exception to the act of state doctrine pronounced in *Kuwait Airways*.¹²² Thus, it was submitted that the Court should not be prohibited from examining whether extraneous or irrelevant considerations had influenced the decision of the executive not to request his return to Australia.

Tamberlin J found that neither the act of state doctrine, nor that of non-justiciability, justified summary judgment.¹²³ His Honour appeared to follow the approach taken by Gummow J in *Ditfort*, namely, that the act of state doctrine should not preclude a court from examining the legality of the actions of the executive government of Australia pursuant to the *Constitution* s 61. However, it is unclear whether his Honour was saying that the act of state doctrine did not prohibit the Court from adjudicating upon the lawfulness of the detention of the applicant, or merely that the doctrine did not prevent the Court from examining the decision of the executive in respect of its power to protect Australian citizens overseas pursuant to s 61 of the *Constitution*. Nor is it apparent from Tamberlin J's reasons whether his Honour was of the opinion that non-compliance with the provisions of the *Third Geneva Convention* would be sufficient to constitute a breach of a 'clearly established norm of international law', pursuant to the test laid down in *Kuwait Airways*.¹²⁴

Tamberlin J also had an opportunity to consider the content of the act of state doctrine in *Lloyd Werft Bremerhaven GmbH*.¹²⁵ In considering an application for release of a vessel from arrest, his Honour was required to determine the owner of that vessel, an issue complicated by the demise of the former USSR and the steps subsequently taken by the Republic of the Ukraine to reorganise its shipping fleet. One of the questions before the Court was whether the Ukrainian Cabinet Decree concerning the management of those assets constituted an act of state. His Honour correctly noted that the doctrine depends on the character of the act in question, not the character of the party to litigation.¹²⁶ His Honour found that the Decree was a 'governmental act' and reflected governmental

¹²⁰ (2007) 156 FCR 574.

¹²¹ The applicant argued that his trial would be contrary to the provisions of the *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

¹²² *Hicks v Ruddock* (2007) 156 FCR 574, 585.

¹²³ *Ibid* 587.

¹²⁴ See *Kuwait Airways* [2002] 2 AC 883, 1109 (Lord Hope). See also above n 96 and accompanying text.

¹²⁵ *Lloyd Werft Bremerhaven GmbH v The Owners of the Ship 'Zoya Kosmodemyanskaya' as Surrogate for the Ships 'Taras Shevchenko', 'Delphin' (Previously 'Kazakhstan II' Previously 'Byelorussiya' and 'Kazakhstan')* (Unreported, Federal Court of Australia, Tamberlin J, 15 May 1997).

¹²⁶ *Ibid* [85].

decisions taken at the highest level of the Ukrainian government, a position which was not affected by the fact that the vessel in question engaged in international commerce.¹²⁷ In line with the US ‘human rights’ cases discussed above, the focus of *Tamberlin J* was on the nature of the alleged act and the intention with which it was done.

Although the reasoning adopted above by Gummow and Tamberlin JJ can be considered a move in the right direction, it was not until the decision of the Full Court of the Federal Court in *Habib* that much of the confusion surrounding the application of the doctrine in Australia was dispelled. The applicant, Mr Habib, sought redress for what he alleged was complicity by the Commonwealth of Australia in acts of torture committed upon him by officials of the governments of the US, Egypt and Pakistan.¹²⁸ In order to ultimately succeed, the applicant was required to establish that the foreign officials committed offences proscribed by Australian law.¹²⁹ In this context, the Commonwealth argued that the act of state doctrine prohibited the Court from addressing the application. The Commonwealth submitted that the doctrine is informed by the principles of the separation of powers and international comity and that to permit the validity of the acts of a sovereign state to be examined and perhaps condemned by the courts of another would ‘imperil the amicable relations between governments and vex the peace of nations’.¹³⁰

In the opinion of the Court, the act of state doctrine had no application in these circumstances. Perram J, in particular, attached significant weight to the constitutional framework in which the proceedings were commenced. For his Honour, the constitutionally-entrenched separation of powers doctrine dictated that it was ‘the province and duty of the judicial department to say what the law is’.¹³¹ His Honour stated that ‘[t]he doctrine ensures that courts exercising the judicial power of the Commonwealth determine whether the legislature and the executive act within their constitutional powers’.¹³² Consequently, as the jurisdiction of the Court was engaged,¹³³ whatever the nature and scope of the act of state doctrine might be, it could not have any application where it was alleged that Commonwealth officials had acted beyond the bounds of their

¹²⁷ *Ibid* [83].

¹²⁸ Habib alleged that in the period from 4 October 2001, when he was arrested by agents of the Pakistan government, to that of 28 January 2005, when he was repatriated to Australia, he was mistreated (and in some cases tortured) by officials from the governments of Pakistan, Egypt and the US. Significantly, in relation to the outcome of the proceedings in question, Habib also alleged that Australian officials (from the Australian Security and Intelligence Organisation, the Australian Federal Police and the Department of Foreign Affairs and Trade) were implicated in his mistreatment when he was detained in Pakistan, Egypt, Afghanistan and Guantanamo Bay: *Habib* (2010) 183 FCR 62.

¹²⁹ See the *Crimes (Torture) Act 1988* (Cth) s 6 and the *Criminal Code Act 1995* (Cth) ss 268.26, 268.74.

¹³⁰ *Habib* (2010) 183 FCR 62, 86.

¹³¹ *Ibid* 72, quoting *Marbury v Madison*, 5 US 137, 177 (1803). A principle which is regarded as axiomatic in Australia: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J).

¹³² *Ibid*, quoting *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 (Gummow and Hayne JJ).

¹³³ *Judiciary Act 1903* (Cth) s 39B(1A)(b) and under the *Australian Federal Police Act 1979* (Cth) and the *Australian Security and Intelligence Organisation Act 1979* (Cth).

authority under Commonwealth law.¹³⁴ Jagot J similarly found that the act of state doctrine, being merely ‘a rule of the common law but no more’, could not exclude the Court’s jurisdiction to restrain a Commonwealth officer from acting ultra vires.¹³⁵ The claim raised by the applicant was thus manifestly justiciable given that it concerned the limits of the powers of the Commonwealth.¹³⁶

Whilst Perram J considered that his reasons concerning the justiciability of the matter were sufficient to dispose of the issue,¹³⁷ his Honour proceeded to consider the content of the doctrine and how it may have been relevant to the facts of the case. His Honour was of the view that the Court should proceed on the basis that the doctrine exists as part of Australian law.¹³⁸ Beyond this, however, his Honour held that there is ‘little clarity’ as to what constitutes the doctrine.¹³⁹ His Honour was of the opinion that ‘the doctrine is a super choice of law rule requiring the *lex fori* to apply foreign law as the *lex causae* where it otherwise would not do so under its own private international law rules’.¹⁴⁰ In other words, the doctrine is concerned with the validity of foreign sovereign acts, rather than being a rule of abstention.¹⁴¹ As discussed above, his Honour also considered that much of the conceptual confusion surrounding the doctrine has been due to the fusion of a rule of jurisdiction (*Moçambique*) with a rule of validity (*Underhill*).¹⁴² Further, the issue of ‘deference’ (akin to the US political question doctrine), as discussed by Lord Wilberforce in *Buttes Gas*, should be viewed, at least in regard to the federal jurisprudence of Australia, on the basis of an absence of a ‘matter’ or of parties with standing and as separate from the act of state doctrine.¹⁴³

On this basis, Perram J also made two further observations. First, his Honour was of the view that, if the doctrine was one of abstention, there could be no ‘human rights exception’.¹⁴⁴ In other words, ‘the absence of a matter in the requisite sense is a constitutional prohibition on the exercise of federal jurisdiction’ and the fact that there might be a ‘human rights breach’ located within such a suit simply could not provide an answer to that problem.¹⁴⁵ ‘If, on the other hand, the doctrine is [construed as] a super choice of law rule then there are no especial difficulties in declining to give effect to particular foreign laws which are repellent to the public policy of [the *lex fori*].’¹⁴⁶ Secondly, his Honour

¹³⁴ *Habib* (2010) 183 FCR 62, 72.

¹³⁵ *Ibid* 100.

¹³⁶ *Ibid*.

¹³⁷ *Ibid* 77.

¹³⁸ *Ibid*, citing *Spycatcher* (1988) 165 CLR 30, 40–1, and *Petrotimor* (2003) 126 FCR 354.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*, citing *Ditfort* (1988) 19 FCR 347 and *WS Kirkpatrick*, 493 US 400 (1990).

¹⁴² *Ibid* 78–9.

¹⁴³ *Ibid* 79.

¹⁴⁴ *Ibid* 80.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*, citing *Wolff v Oxholm* (1817) 6 M & S 92; 105 ER 1177; *Re Fried Krupp Actien-Gesellschaft* [1917] 2 Ch 188; *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140; *Oppenheimer* [1976] AC 249, 277–8 (Lord Cross), 282–3 (Lord Salmon); *R v Home Secretary; Ex parte L* [1945] KB 7, 10; *Lowenthal v A-G* [1948] 1 All ER 295, 299; *Kuwait Airways* [2002] 2 AC 883, 1080–1 (Lord Nicholls, with whom Lord Hoffman agreed on this issue), 1101–3 (Lord Steyn) and 1110–11 (Lord Hope).

was of the view that the doctrine will apply whether or not the act in question occurs outside the territory of the foreign state in question. His Honour considered that if the doctrine is concerned with validity, then it could not be a defence to the applicant's claims as the litigation was not concerned with the validity of the acts performed on the applicant, but whether in fact they occurred.¹⁴⁷ Alternatively, if the doctrine involved a principle of abstention or deference whose end is the avoidance of diplomatic embarrassment, his Honour could see no particular reason why the investigation of the acts of another state was likely to be less embarrassing just because they were committed abroad.¹⁴⁸

In contrast to Perram J, Jagot J placed greater emphasis on the fact that the case law in both the US and the UK had developed significantly since *Underhill* was decided in 1897, particularly in tandem with principles of international law which had developed post-World War II.¹⁴⁹ Her Honour found that the cases on which the Commonwealth relied

do not support a conclusion that the act of state doctrine prevents an Australian court from scrutinising the alleged acts of Australian officials overseas in breach of peremptory norms of international law to which effect has been given by Australian laws having extra-territorial application. The case law indicates to the contrary.¹⁵⁰

In particular, her Honour was of the view that the US jurisprudence which considered the '*Sabbatino* factors' demonstrated, on the facts in *Habib*: that 'the prohibition on torture is the subject of an international consensus'; that although 'Australia's "national nerves" might be attuned to the sensibilities of its coalition partners this has to be weighed in a context where the prohibition on torture forms part of customary international law and those partners themselves are signatories to an international treaty denouncing torture'; that 'the governments of the foreign states in question all remain in existence'; and that 'it would be difficult to contend that the alleged violations of international law identified in Mr Habib's claim were in the public interest'.¹⁵¹ Similarly, her Honour found that the jurisprudence of the UK demonstrated there was no reason why an Australian court 'should not give effect to clearly established principles of international law', particularly where those principles involve protection against the infliction of torture which the Commonwealth Parliament has prohibited.¹⁵² Consequently, her Honour concluded that the weight of authority did not support the protection of such conduct from judicial scrutiny other than in the face of a valid claim for sovereign immunity.¹⁵³

¹⁴⁷ Ibid 80, citing *Sharon v Time Inc*, 599 F Supp 538, 546 (SDNY, 1984), which was cited with approval by Scalia J in *WS Kirkpatrick*, 493 US 400, 406 (1989).

¹⁴⁸ Ibid 81.

¹⁴⁹ Ibid 95. Black CJ agreed with the reasons of Jagot J to the effect that the common law authorities did not support the application of the act of state doctrine in Habib's case: at 65. The Chief Justice was also of the view that, if to the contrary the choice was more finely balanced, the same conclusion should be reached. His Honour stated that 'the common law should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms': at 67.

¹⁵⁰ Ibid 96.

¹⁵¹ Ibid 96-7.

¹⁵² Ibid 97, quoting *Kuwait Airways* [2002] 2 AC 883 [139].

¹⁵³ Ibid 96.

Her Honour also considered it to be relevant that the prohibition on torture was an agreed absolute value from which no derogation is permitted for any reason. Simply put, the international community had 'spoken with one voice against torture'.¹⁵⁴ In the circumstances of the present case, whilst the Court would be required to make factual findings about the conduct of foreign officials, the matter inherently concerned an Australian court determining whether, as alleged, Australian officials aided foreign officials to inflict torture upon an Australian citizen, where the acts of those foreign officials, if proved as alleged, would themselves be unlawful under Australian laws having extraterritorial effect.¹⁵⁵

Given the above, her Honour considered it unnecessary to determine the territorial scope of the act of state doctrine. Her Honour suggested, however, that given that the applicant accepted that the US had 'complete control' over the areas where the acts of torture were said to occur (such as Guantanamo Bay), it would seem illogical to confine the doctrine to the sovereign territory of the US.¹⁵⁶

Leaving the legality of the decision aside, it could be said that an inherent unfairness would have existed if the act of state doctrine was applied, given that it was the defendant, the Commonwealth of Australia, which sought to invoke the doctrine, arguing that the proper procedure should be for that defendant to take up the applicant's claim through diplomatic channels with the foreign countries in question. In any event, the decision of the Court was a watershed moment in Australian jurisprudence, finally bringing clarity to the application and content of the act of state doctrine. The Court aligned the Australian jurisprudence with that in the US, recognising that the act of state doctrine could have no application in the circumstances where the inherent question was not whether the alleged acts were valid, but whether in fact they had occurred.¹⁵⁷ As in the US and the UK, the doctrine was thus construed as being concerned with the validity of foreign acts, not judicial abstention.

VI THE ACT OF STATE DOCTRINE REVISITED

As with state immunity, the act of state doctrine developed in an era when governments confined themselves to a narrow range of activities and transnational litigation concerning trade and human rights was in its infancy. The consequence of this is that the doctrine is now straining to cope with a diverse array of subject matters beyond its original design.¹⁵⁸ Certainly, as noted by the US Supreme Court in *WS Kirkpatrick*, judicial understanding of the doctrine has undergone some evolution over the years.¹⁵⁹ Nevertheless, the above case law demonstrates an at times deep misunderstanding of the nature and content of the

¹⁵⁴ *Ibid* 97.

¹⁵⁵ *Ibid*. Her Honour noted in this context that the Commonwealth disavowed any suggestion that Australian jurisprudence should adopt an approach of deference to the advice of the executive about the state of foreign relations from time to time, as has been done in the US.

¹⁵⁶ *Ibid*.

¹⁵⁷ See above n 147 and accompanying text.

¹⁵⁸ Michael Singer, 'The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice' (1981) 75 *American Journal of International Law* 283.

¹⁵⁹ *WS Kirkpatrick*, 493 US 400, 404 (1989).

doctrine. Consequently, although the decisions of courts in the US, the UK and Australia were all made within a unique legal setting, a number of common lessons can be drawn from the manner in which these cases were decided.

First, although the doctrine was created in order to deal with matters of an ‘international’ character, it is, and always has been, a product of domestic law. In particular, the doctrine is a creation of the common law, heavily influenced by the separation of powers doctrine. Further, as noted above, while the notion of comity may be relevant in understanding the historical roots of the doctrine, it would be incongruous for that alone to justify the existence of the doctrine, given that it would only be reciprocally applied in a few countries.¹⁶⁰

Secondly, while notions of comity and certainty suggest that courts from one country should ‘speak with one voice’ on issues of general application, the content and application of the doctrine itself depend on the particular constitutional and jurisprudential factors which are unique to the forum state. Although the legal systems of the US, UK and Australia all share common features, each is unique in its constitutional makeup, and due weight should be placed on this fact when courts look to foreign decisions for guidance. It is evident from the US case law in particular that the doctrine’s development was heavily influenced by factors unique to the US, such as the necessity for the doctrine to be deemed *federal* in nature. Such concerns obviously have little, if any, presence in unitary systems such as the UK. Further, the use of the doctrine by lower courts in the US as a basis for *abstaining* from hearing certain cases which brought into question matters of international relations can be put down in part to the absence of any concrete ‘international political question’ doctrine which is comparable to that of non-justiciability in the UK.

As Perram and Jagot JJ acutely observed in *Habib*, whatever the nature and scope of the act of state doctrine might be, it cannot exclude or override the constitutional powers and limits of the forum court.¹⁶¹ Conversely, the Court in *Petrotimor* erred by failing to recognise that the doctrine should not have prevented that Court from adjudicating upon whether the Australian government acquired property otherwise than on ‘just terms’, as mandated by s 51(xxxi) of the *Constitution*.¹⁶²

Thirdly, it is clear from the case law in all three countries that judges should avoid falling into the trap of dealing with ‘international law issues’ under the one umbrella. Although cases with a foreign element will often also involve consideration of questions relating to sovereign immunity,¹⁶³ whether the matter is justiciable, and other choice of law rules, each doctrine serves a unique purpose and the examination of each should be kept separate.¹⁶⁴ It is rarely

¹⁶⁰ Garnett, above n 2, 715.

¹⁶¹ (2010) 183 FCR 62. Perram J in particular warned of the constitutional limits in Australia of common law doctrines imported from unitary systems such as England: at 73.

¹⁶² *Ibid* 74.

¹⁶³ As noted by Fox, the act of state doctrine requires the forum court to ‘go some way in endorsing the validity of the act of the foreign State’ in question, whereas state immunity requires the court to remain neutral in the sense that it is not the appropriate forum: Fox, above n 20, 481.

¹⁶⁴ In *World Wide Minerals Ltd v Republic of Kazakhstan*, 296 F 3d 1154 (DC Cir, 2002) the Court approached its task on the basis that as the act of state doctrine is a substantive rule of law, other jurisdictional questions (such as state immunity) must be decided first.

helpful, and usually only perpetuates confusion, to determine the content of one doctrine by analogy to another. The decisions in *Potter* and *Petrotimor* in particular demonstrate the confusion that is caused when one rule is fused with another.

More than anything else, it has been the relationship between the act of state doctrine and the concept of justiciability which has led to inconsistent decision-making. Therefore, although the exact nature and scope of the doctrine may differ between the three countries, what is certain is that courts should not use the doctrine for the ‘dual purpose’ of dealing with the issues of *validity* and *abstention*. While there are certainly good reasons for courts to abstain from hearing certain cases that may bring into jeopardy the foreign affairs of its own government, such issues should be dealt with under the rules pertaining to the political question doctrine (in the US),¹⁶⁵ non-justiciability (in the UK),¹⁶⁶ or whether there is a ‘matter’ within Chapter III of the *Australian Constitution*.¹⁶⁷ Such questions are themselves inherently controversial,¹⁶⁸ and only add uncertainty to the law when combined with the issue of validity. The better approach is to treat issues going to the justiciability of the matter as a preliminary jurisdictional question, leaving the act of state doctrine to be applied as a substantive rule of law.¹⁶⁹ Whilst it is acknowledged that certain considerations may overlap, it is argued that the least confusion is caused by courts ensuring that judicial scrutiny of such legal questions does not become muddled.

As the case law demonstrates, the application of the doctrine has been the most sound when confined to the question of validity. As recognised by the US Supreme Court in *WS Kirkpatrick*, the act of state doctrine should be read as requiring that courts in one state will not adjudicate upon (in the sense of questioning the legality of) the acts of a foreign state done within its own territory. Perhaps then, the most accurate description of the doctrine is that which Perram J proffered in *Habib* — namely, a ‘super choice of law rule’ which requires the forum court to apply foreign law where it would otherwise not do so under its own choice of law rules.¹⁷⁰ Certainly, the outcome of many of the cases discussed above would have been the same if the court in question had applied existing choice of law principles, such as the *lex loci delicti* (in *Underhill*) or the *lex situs* (in *Luther*, but see *Petrotimor*).¹⁷¹ This much was recognised by White J

¹⁶⁵ See *Alperin v Vatican Bank*, 410 F 3d 532, 544 (9th Cir, 2005), quoting *Marbury v Madison*, 5 US 137, 170 (1803). See also *Baker v Carr*, 369 US 186 (1962). According to Bazylar, ‘the political question doctrine is particularly well suited for application in cases that would otherwise be dismissed on act of state grounds’: Bazylar, above n 2, 390.

¹⁶⁶ See *Buttes Gas* [1982] AC 888.

¹⁶⁷ See, eg, *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 554–5 (Gaudron, McHugh and Gummow JJ); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 229 (Mason J); *Minister for Arts, Heritage & Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 307 (Wilcox J); *Gerhardy v Brown* (1985) 159 CLR 70, 137–8 (Brennan J); *Thorpe v Commonwealth* (1997) 144 ALR 677, 693 (Kirby J); and *Thomas v Mowbray* (2007) 233 CLR 307, 353–5 (Gummow and Crennan JJ).

¹⁶⁸ See above n 62. Similarly, in *Sabbatino* White J was of the view that there was a possibility of embarrassment to the executive from the blanket presumption of validity applicable to all foreign expropriations: *Sabbatino*, 376 US 398, 466 (1964).

¹⁶⁹ See above n 164 and accompanying text.

¹⁷⁰ *Habib* (2010) 183 FCR 62, 77.

¹⁷¹ Garnett, above n 2, 716–17.

in *Sabbatino*, who stated that normal conflict of law rules would have been sufficient to have controlled the outcome of most of the act of state cases decided in the US.¹⁷²

Commentators such as Garnett and Mann have therefore called for the doctrine to be abolished on the basis that it no longer serves any useful or legitimate purpose, given that it either duplicates the existing methods of jurisdictional control and regulation in cases involving foreign states, or is a source of injustice and a denial of private rights.¹⁷³ Although there is some force in this argument, it is the opinion of this writer that there is no inherent need to abandon the doctrine given that the problems have historically arisen in its application, rather than its object or purpose. Further, although ordinary choice of law rules may provide similar methods for adjudicating disputes, it should be recognised that the circumstances which may lead to the application of the act of state doctrine are rarely ordinary. Unlike other transnational disputes in which conflict of laws rules are applied, disputes which seek to challenge the validity of the executive and legislative acts of a foreign government within its own territory may have repercussions of international significance beyond the parties before the court and nearly always bring into issue the proper delineation of functions between the executive and judiciary encapsulated in the separation of powers doctrine. The principle that common law courts will not enforce laws which are contrary to the public policy of the *lex fori* does not sufficiently take into account such concerns. It is this ‘judicial reminder’ which is inherent in the act of state doctrine — and is one which cannot easily be found in ordinary choice of law rules.

VII CONCLUDING COMMENTS

Many of the above cases could be described as being *sui generis* in character. Nonetheless, together they demonstrate that a better understanding of the juridical foundations of the act of state doctrine would result in a more uniform and consistent application of the doctrine. This is significant, as litigation in which the doctrine is considered, especially in the areas of international trade and human rights, will increasingly occur. Whilst it may be true that, in Fuller CJ’s words, the courts in one country should not ‘sit in judgment’ of the acts done by a foreign government within its own territory, such a broad statement is of little use when applied by municipal courts to diverse and complex factual situations. The better approach is to recognise that there exist a number of separate judicial tools, each unique in its content and function, to be utilised by courts where applicable. These include sovereign immunity, non-justiciability, the act of state doctrine and choice of law rules.

Like conflict of laws jurisprudence generally, the act of state doctrine should be ‘concerned essentially with the *just* disposal of proceedings having a foreign element’.¹⁷⁴ Courts should not too eagerly relinquish their judicial function

¹⁷² *Sabbatino*, 376 US 398, 445 (1964).

¹⁷³ See Garnett, above n 2, 716; Mann, above n 2, 181–2; cf Joseph Dellapenna, ‘Deciphering the Act of State Doctrine’ (1990) 35 *Villanova Law Review* 1, 126–30, who argues that the doctrine does not need to be abolished in the US, but should rather be amended by legislation.

¹⁷⁴ *Kuwait Airways* [2002] 2 AC 883, 1078 (Lord Nicholls) (emphasis added).

simply because a matter involves a ‘weighty’ matter of state.¹⁷⁵ In too many cases have courts refrained from adjudicating upon matters which are properly within jurisdiction, often placing undue reliance on broad notions found in long-outdated case law. The expansion and prevalence of the rule of law in most countries now means that foreign governments recognise the independence of the judiciary in resolving the disputes which are before them ‘on their merits, in accordance with the applicable law’.¹⁷⁶ Perhaps the reason why *Underhill* has so frequently been cited amongst commentators and judges is the eloquence of the words and simplicity of the original message. As noted by Mann, however, the use of such ‘lofty and high-flown phrases ... [has] led the law into a quagmire’.¹⁷⁷ It is hoped that a more careful analysis by courts as to the juridical foundations of the doctrine and the legal context in which the doctrine has been applied will help to prevent this from recurring in the future.

¹⁷⁵ *Operation Dismantle v The Queen* [1985] 1 SCR 441, 471 (Wilson J).

¹⁷⁶ *Sabbatino*, 376 US 398, 450–1 (1964) (White J).

¹⁷⁷ Mann, above n 2, 164.