FOREIGN RELATIONS AND THE JUDICIARY

LAWRENCE COLLINS*

I. INTRODUCTION

It is not generally appreciated that Francis Mann was not an international lawyer at all by training. His thesis at Berlin University was in company law. It was only after he had been in England for some time that he began to write about private international law, and his interest in public international law was developed as a result of his friendship with Sir Hersch Lauterpacht. It was not until 1943 that he published anything about public international law, and in that year he published a substantial article in two parts on the relationship between national law and international law,[1] in which he built on the previous work on Judicial Aspects of Foreign Relations by Louis Jaffe[2] and on acts of state by Sir William Holdsworth.[3] Subsequently he came to make this subject his own, at least in England,[4] where the subject has never attracted the attention which it has attracted in the United States.[5]

The purpose of this contribution is to highlight some modern developments on the relationship of the judiciary with the other organs of state, principally but not exclusively directed to these issues: first, how much life remains in the old principle that in the field of foreign affairs the executive and the courts should speak with one voice? Secondly, what is the role of international law, and especially treaty law, in the national courts? Thirdly, what are the limits of the judicial function, and are there are questions of international law which cannot or should not be determined by national courts because they are political questions or their adjudication may embarrass the executive in the conduct of foreign affairs?

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[1] *The Sacrosanctity of the Foreign Act of State* (1943) 59 LQR 42 and 155, reprinted in Mann, *Studies in International Law* (1973), 420. For an appreciation of his work see Collins (1993) 64 BYIL 55.

[2] 1933, as *Harvard Studies in Administrative Law*, vol 6.

[3] Holdsworth, *Act of State* (1941) 41 Col. LR 1313, and see Holdsworth, *History of English Law* (ed Goodhart and Hanbury, 1964), vol 14, 33–52.

[4] *Foreign Affairs in English Courts* (1986).

[5] See especially Henkin, *Foreign Affairs and the Constitution* (2nd edn 1996); Franck, *Political Questions/Judicial Answers* (1992); Franck and Glennon, *Foreign Relations and National Security Law* (1987); Glennon, Franck and Cassidy, *United States Foreign Relations Law: Documents and Sources*, in five volumes (1980–4); and, of course, Restatement of the Law Third, *Foreign Relations Law*.

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These are not questions of purely academic interest. They may arise in the context of commercial claims or claims to property, as when creditors of the International Tin Council sought to make the member states liable;[6] or when Kuwait Airways sought to recover planes which had been seized by the Iraqi authorities and transferred to Iraqi Airways.[7] But even more important matters have depended upon judicial rulings involving the relationship between national law, the foreign affairs power and international law. In 1974 Justice Douglas of the United States Supreme Court granted an order which had the effect of restraining the bombing of Cambodia, until his ruling was reversed on the following day by Justice Marshall after taking the views of the other justices.[8] In the following year, 1975, the French Conseil d'Etat refused to consider the legality in international law of the French security zone in the Pacific for testing nuclear weapons.[9] Ten years later the Supreme Court of Canada had to consider whether the testing of Cruise missiles in Canada pursuant to a treaty with the United States infringed the Canadian Charter of Rights and Freedoms.[10] Very recently, the High Court of Justiciary in Scotland had to decide whether defendants charged with malicious damage to a ship associated with the Trident missile programme had been rightly acquitted: the sheriff had directed the jury that the deployment of nuclear weapons was a breach of international law, and therefore illegal and criminal under Scots law, and so justified the actions of the defendants.[11]

In the United States two men were executed in 1998 and 1999 after the Supreme Court by a majority refused a stay, despite the fact that the International Court of Justice had earlier on the day scheduled for execution issued an ordonnance indicating that the United States should take all measures at its disposal to ensure that the condemned men were not executed.[12] And the Privy Council in 1999 decided by a majority that Trinidad could execute condemned men despite an order from the Inter-American Court of Human Rights requiring Trinidad to take all measures necessary to preserve their lives pending consideration of the case by the Inter-American Court.[13]

[6] See *JH Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 AC 418.

[7] *Kuwait Airways Corp. v Iraqi Airways Co (Nos 4 and 5)* [2001] 3 WLR 1117 (CA). Judgment from the House of Lords on appeal is awaited.

[8] *Holtzman v Schlesinger*, 414 US 1316 (1973).

[9] 1976 Clunet 126.

[10] *Operation Dismantle v The Queen* (1985) 18 DLR (4th) 481.

[11] *Lord Advocate's Reference No 1 of 2000*, 2001 SLT 507.

[12] *Breard v Greene*, 523 US 371 (1998); *Federal Republic of Germany v United States*, 526 US 111 (1999). Subsequently in the latter case the International Court decided that its orders on provisional measures had binding effect, and that the United States had been in breach of the order by failing to take all measures at its disposal to ensure that the condemned man was not executed pending the final decision of the Court in the case (on the effect of failure by the United States to accord consular facilities to the accused): *Germany v United States*, judgment of 27 June 2001. See also Higgins, in *Liber Amicorum Georges Abi-Saab* (2001), 547.

[13] *Briggs v Baptiste* [2000] 2 AC 40.

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II. THE ONE VOICE PRINCIPLE

The one voice principle in the field of foreign relations was most famously articulated by Lord Atkin: 'Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.' It was Vice-Chancellor Sir Lancelot Shadwell who seems to have been the first to articulate the one voice principle in 1828. After communicating with the Foreign Office, which informed him that Guatemala was still recognised as being under the sovereignty of Spain, Sir Lancelot Shadwell's opinion was that 'sound policy requires that the courts of the King should act in unison with the Government of the King'.[14]

Some ten years later 1839, the United States Supreme Court, in deciding that the executive failure to recognise the sovereignty of the State of Buenos Aires over the Falkland Islands bound the court said that the President's decision was conclusive: 'It is enough to know, that in the exercise of his constitutional functions, he has decided the question. . . . If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. . . . No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.'

Consequently the English courts have treated as unreviewable and conclusive facts of state certified by the Foreign Office concerning such matters as: whether a state was or was not recognised; until 1980 the question whether a foreign government was or was not recognised; whether a state of war existed or did not exist; the extent of the boundaries of the United Kingdom; and the extent of the boundaries of a foreign state.[15]

But the views of Her Majesty's Government on the law, even international law, were in no way conclusive. In the *Zeiss* case[16] Lord Upjohn said that while the Foreign Office expresses views on recognition in answer to questions submitted to them by the courts, the legal consequences are always left to the courts. In *The Philippine Admiral*[17] Lord Cross said that if the courts consulted the executive on such questions what might begin by guidance as to the principles to be applied might end in cases being decided irrespective of any principle in accordance with the views of the executive as to what is politically expedient.

[14] *Taylor v Barclay* (1828) 2 Sim 213, 221). In *Foster v Globe Venture Syndicate* [1901] Ch 811, 814 Farwell J repeated what Shadwell V-C had said, but Lord Sumner said, 'This seems to be rather a maxim of policy than a rule of law': *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797, 826. It was said of Sir Lancelot Shadwell that 'so fond was he of the water that . . . he once granted an injunction during the long vacation while immersed in that element' (Foss, *Biographica Juridica* (1870), 609).

[15] See Mann, *Foreign Affairs in English Courts* (1986), ch 2.

[16] *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, 950.

[17] [1977] AC 373, 399.

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It may be therefore that views expressed in the *Westinghouse* case[18] a little more than 20 years ago on the one voice principle go rather beyond what had been decided before. Lord Wilberforce referred to the policy of Her Majesty's Government which had been opposed to the assertion of extraterritorial antitrust jurisdiction by the United States, and said that 'the courts should in such matters speak with the same voice as the executive' and Lord Fraser said that, in the light of HMG's position that they considered that the sovereignty of the United Kingdom would be prejudiced by giving effect to the letters rogatory, 'the principle that ought to guide the courts in such a case is that a conflict is not to be contemplated between the courts and the Executive on such a matter'.

In the United States the views of the State Department on questions of international law are often presented to a court which is called upon to decide an issue of international law, and the State Department's views are normally given considerable weight by the courts, not least because the executive branch will have to answer to a foreign state for any violation of international law resulting from the action of a court.[19]

Westinghouse remains a rare case in which the views of the United Kingdom Government on a matter of international law were given effect in an area outside the traditional areas covered by certificates, and is perhaps best understood as an example of the principle recognised by Sir Jocelyn Simon, in the case on the recognition of divorces granted by judges in Rhodesia after the unilateral declaration of independence,[20] that the Attorney General has a right of intervention in a private suit whenever it may affect the prerogatives of the Crown, including its relations with foreign states, and where the case raises a question of public policy on which the executive may have a view which it may desire to bring to the notice of the court.

But such cases of intervention are rare,[21] and there is little published material on the relationship in practice between the judiciary and the executive in foreign affairs. It is true that in some cases in the House of Lords involving international law it can be said with confidence that the House reached a result that was consistent with the views of the government, or applied the views of the government. Thus in the *International Tin Council* cases the Department of Trade and Industry and the Attorney General were no doubt satisfied at the result that the member states were not liable for its debts. In the *Westinghouse* case the House of Lords accepted, and applied, the view of the government that the extra-territorial application of United States anti-trust law infringed British sovereignty. The effect of the decision in *Buttes Gas & Oil Co. v Hammer*[22] not to adjudicate, in litigation between two Californian

[18] [1978] AC 547, 617.
[19] Restatement of the Law Third, *Foreign Relations Law*, s 112, comment *b*.
[20] *Adams v Adams* [1971] P 188, 197–8.
[21] See *British Airways Board v Laker Airways Ltd* [1985] AC 50, where the intervention seems to have been rather half-hearted: see especially 69.
[22] 1982] AC 888.

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oil companies, on the continental shelf boundaries between two states in the Persian Gulf, was to prevent adjudication of a matter which might well have proved deeply embarrassing to the government of the United Kingdom in its foreign relations not only with those two states but also with Iran.

It is not possible to apply this type of analysis to the *Pinochet* case,[23] where the position of each of the governments involved was ambivalent. The Spanish Government was seeking extradition because it was the Spanish executive which in international law had the responsibility for executing the request which had been made at the instigation of the Spanish examining judge, Sr Garzon, and it was no secret that the Spanish Government was not only opposed to the extradition request, but had sought to have it quashed in the Spanish courts. It is likely also that the attitude of the Chilean government was ambivalent, and that it was divided on the question of General Pinochet's fate.

What of the British Government? The Director of Public Prosecutions was party to the proceedings but only to represent the Spanish Government. The Treasury Solicitor was there but only to brief counsel to address the House of Lords on the international law issues, not on behalf of the Crown but exclusively as that type of amicus whose role it is to present the legal arguments impartially.[24] Purely anecdotal material would suggest that the British Government was divided, with the Home Office or its ministers favouring extradition, and the Foreign Office and the Department of Trade and Industry opposed to it on grounds of commercial interest and foreign policy.

It was one of the great tragedies of British legal scholarship that the late Professor Clive Parry laid down his work on the British Digest of International Law after publishing five brilliant volumes,[25] and never took it up again, particularly for those[26] who assisted him in the research in the dusty Foreign Office files. If that work had been completed there would have been a vast resource on the relationship between the executive and the judiciary from the perspective of the executive, because the Foreign Office archives are a goldmine of empirical material on the relationship between the executive and the judiciary.

It was because evidence is so hard to come by that this author sought to take advantage of the 30-year rule to look at the Foreign Office archives at the Public Record Office in Kew, in a modest and small-scale endeavour to discover the attitude of the executive to litigation pending in the English courts

[23] See *R v Bow Street Metropolitan Stipendiary Magistrate, ex Pinochet (No 3)* [2000] 1 AC 147. The writer should declare an interest, since he appeared for the Chilean Government in *Pinochet (No 3)*.

[24] See *Allen v Sir Alfred McAlpine Ltd* [1968] 2 QB 229 (where Salmon LJ said that the role of the amicus was to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal argument on his behalf). See also *Secretary of State for Justice v Chan Wah* [2000] 3 HKLRD 641 (Hong Kong Court of Final Appeal).

[25] Parry, *British Digest of International Law*, vols 2b, 5–8 (1965–7).

[26] Who included John Collier, John Hopkins, Lady Fox, and the author of this article. Clive Parry was a brilliant, and much underrated, international lawyer.

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involving questions of foreign relations. The method was simple. Three important cases involving international law issues in which the government had not appeared, and where the decisions, or at any rate the crucial facts, fell outside the 30-year rule, were chosen as the basis for the research, in the hope that the Foreign Office archives would throw some light on the executive's attitude to the cases. The files which were looked at in the Public Record Office were, first, the case of *Schtraks* in 1962 on the status of Jerusalem; second, the *Zeiss* case in the 1960s on the status of East Germany, and the third was the early stages of the dispute which resulted in the 1981 decision of the House of Lords in *Buttes Gas & Oil Co v Hammer*.

In *Schtraks v Government of Israel*[27] Solomon Schtraks had been a party to a plan to abduct his nephew in Jerusalem[28] and take him away from Israel because the boy's parents were not going to give the boy a religious upbringing. Schtraks fled to England and the Israeli Government sought his extradition. The issue in the case was whether Jerusalem was to be regarded by the English court as a territory of Israel in the light of the fact that HMG did not recognise Israel's sovereignty over Jerusalem but did recognise that Israel exercised de facto authority in the part of the city that it then controlled. The Foreign Office files reveal that the Foreign Office considered briefing counsel to appear before the House of Lords as *amicus curiae*. Francis Vallat, the Legal Adviser (later Sir Francis Vallat), thought there might be advantage in having counsel on the spot who might be able to persuade the court that in the particular circumstances of the case the agreement should not be interpreted so as to exclude Jerusalem, since otherwise it would be rendered more or less nugatory so far as the Israelis were concerned. But Mr Figg, an official in the Foreign Office at the time, wrote the following note:[29]

> Frankly I feel a bit nervous about this suggestion of briefing counsel because if he goes beyond matters of fact the Israelis will take it as an expression of FO views and quote awkward things back at us later. This would make life more difficult for HM Ambassador in Tel Aviv who is perplexed enough as it is regarding the status of Jerusalem. . . . On the other hand if counsel does not appear in court the case may go against the Israeli Embassy who will no doubt be instructed to make a fuss. So be it.

On the same day Mr I M Sinclair (later Sir Ian Sinclair, Foreign Office legal adviser) wrote to say that he had discussed this matter with Francis Vallat, and as a result had informed the Home Office that the considered view of the Foreign Office was that it might be unwise to brief Treasury Counsel for the reasons given by Mr Figg.[30]

[27] [1964] AC 556.

[28] What is now called West Jerusalem, ie the part of Jerusalem under Israeli control even before the 1967 war.

[29] FO 371/164322.

[30] Ibid. The writer is unable to resist drawing attention to another Foreign Office document in the files, on which comment is unnecessary. A year later an official in the British Consulate in

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The next sample was the *Zeiss* case, in which the House of Lords was considering whether to uphold the judgment of Lord Denning in the Court of Appeal that the East German Zeiss had no standing to sue in England because it was incorporated under the law of an unrecognised state, East Germany. Ultimately the House of Lords decided to give effect to East German law and allow East German Zeiss to sue on the theory that although East Germany was not recognised it was to be regarded as the agent of the Soviet Union as occupying power and therefore its acts would be deemed to be the acts of the Soviet Union.

After the hearing of argument in the House of Lords, but before judgment was delivered, on 22 December 1965, Mr J L Simpson of the Foreign Office Legal Adviser's Office wrote a confidential memo about the *Zeiss* case. He wrote as follows:[31]

On 15 December, Dr F A Mann, a senior partner in the firm of solicitors acting for the West German Zeiss, came to see me late in the evening, told me that the House of Lords seemed very much against his clients on the 'non-recognition' point and left with me a note of certain questions which it was proposed to move the House of Lords to address the Foreign Secretary next day. I may say that the proposed questions went to the very limit (if not over it) of the matters which the Foreign Secretary can properly certify to a court. It is not altogether unfortunate that on the following morning the House of Lords refused the motion to address further questions to the Foreign Secretary.

Dr Mann came to see me again late on the evening of 16 December and said in effect that all was lost from the West German Zeiss point of view. The House of Lords was quite clearly against them on the non-recognition point. . . .

I asked Dr Mann whether from the course which the argument took in the Lords, and the questions which the Lords put to counsel, he could judge what the Lords were likely to decide on the recognition point. He said he thought he could and has supplied me with a note in the following terms[32] . . . .

West German Zeiss and their legal advisers want any help that the Foreign Office can give at this late stage. . . . The procedure which we need to consider is whether the Law Officers should intervene in the proceedings on behalf of Her Majesty's Government as *amicus curiae.*

From a legal point of view the arguments for and against an intervention by the Law

Jerusalem wrote to Mr Crawford (Assistant Under-Secretary of State, and later Sir Stewart Crawford) at the Foreign Office, with copies to the British Embassies in Washington and Cairo, and to the British mission at the UN: 'For the first time in history (and probably not for the last) there is a Roman Catholic President of the United States. We all know how responsive an American President must be to the Zionist lobby, and how risky it is for a Roman Catholic President to appear at all responsive to the voice of the Vatican' (FO 371/170543).

[31] FO 371/183127. Sir Michael Kerr was instructed (together with Mr Mark Littman QC) as leading counsel by Francis Mann on the appeal to the House of Lords, and chaired the lecture of which this piece is the published version. In his remarks following the lecture, Sir Michael said that this was the first he had heard of Francis Mann's approach to the Foreign Office. It was a great loss when Sir Michael Kerr died on 14 April 2002.

[32] Mr Simpson then quotes Francis Mann's note, which was very similar to the ultimate holding by the House of Lords.

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Officers are finely balanced. Assuming that Dr Mann's forecast of the House of Lords judgment is correct, or approximately so, it will not be inconsistent with statements which the three western powers have from time to time made. Indeed, it will fit in quite well with statements to the effect that the three western powers continue to regard the Soviet Union as the responsible power for the Soviet zone. . . . . [W]e continue to maintain that the East German authorities are merely the puppets of the Soviet Union.

On the other hand, a judgment of the House of Lords on the lines predicted will mean that the acts (legislative, judicial and administrative) of the East German authorities will be held to be legally valid acts, at least within their proper sphere. . . .

The issues are of considerable importance, and I think it is most desirable that the Law Officers should be consulted about the desirability of their intervening as *amici curiae* in the House of Lords. . . .

On 23 December 1965 Mr A H Campbell wrote from the Foreign Office to the Ambassador in Bonn recording that Philip Allott, now Professor Philip Allott of Trinity College, Cambridge, but then a member of the Legal Adviser's Department, would be consulted, and suggesting they had to consider the political aspects. He said 'What would be the political effect in West Germany if the House of Lords were to reach a judgment on the lines predicted by Dr Mann? Would this be disagreeable from our point of view . . .?'

The response was not found in the file, but it is likely from the Foreign Office's masterly inactivity that the decision of the House of Lords that East German Zeiss had standing because East Germany was to be regarded as the agent of the Soviet Union was convenient to the British Government. It maintained its position of principle that East Germany was not recognised, but also maintained the valuable commercial relations intact. But the papers for the 1980s are not available and we do not know the reaction of the Foreign Office to the decision of the Court of Appeal in 1967 when the Court of Appeal in effect recognised the puppet state of Ciskei which had been set up by the South African government in the so-called homelands and was recognised by no other country.[33]

So also the most important recent decision of the Hong Kong Court of Final Appeal in *Chen Li Hung v Ting Lei Miao*,[34] granting a measure of recognition to a court decision of Taiwan, maintained the position of principle of the People's Republic of China but reached a pragmatic result consistent with its interests. The issue was whether a trustee in bankruptcy appointed by a Taiwanese court could sue in Hong Kong to recover assets in Hong Kong for the benefit of Taiwanese who had been defrauded by the bankrupt. The Hong Kong Court of Final Appeal decided that, notwithstanding that the position of the People's Republic was that the Government in Taiwan were usurpers and that Taiwan was a province of China, decided that the courts would give effect to the orders of non-recognised courts in these

[33] *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599.
[34] [2000] HKLRD 252.

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circumstances: where the rights involved were private rights, and where giving effect to such orders accorded with the interests of justice, the dictates of common sense and the needs of law and order, and giving them effect would not be inimical to the interests of the sovereign or otherwise contrary to public policy. There was nothing inimical to those interests in the circumstances of the case, because the present action was not for the benefit of the usurper regime, and was for the benefit of out of pocket depositors. To give effect to the Taiwanese order did not involve recognising the usurper regime or the courts in Taiwan. Lord Cooke of Thorndon mentioned that the preamble to the constitution of the People's Republic of China declared that Taiwan was a part of the sacred territory of China and that it was the duty of the entire Chinese people, including compatriots in Taiwan, to accomplish the great task of reunifying the motherland. Lord Cooke said that reunification would tend to be promoted rather than impeded if people resident in Taiwan, one part of China, were able to enforce in Hong Kong, another part of China, bankruptcy orders made in Taiwan.

III. TREATIES AND THE COURTS

The Crown's exclusive control of foreign relations involves that the treaty-making power belongs to the executive. So when Mr Raymond Blackburn MP sought a declaration against the Crown that accession to the Treaty of Rome was unlawful, Lord Denning accepted the argument of Mr Gordon Slynn that the exercise of the prerogative power of entering into treaties could not be challenged or questioned in the English courts.[35] But the Crown cannot alter the law of the land and as a result there is a distinction between the formation of treaties, which is for the executive, and the implementation of treaties in domestic law, which is a matter for the legislature.[36]

So also the interpretation of treaties when a question arises in a domestic court is, at least for English courts, a matter for the courts and not for the executive. In 1685 Sir Leoline Jenkins, the eminent civilian, advised the Crown that 'your Majesty's treaties with foreign nations are not to be any part of speculation or debate in the court of admiralty but to be interpreted by your Majesty's own royal judgment, with the advice of your most Honourable Privy Council'. But as long as 1794 Sir William Scott (later Lord Stowell) as King's Advocate advised that 'a private subject . . . has a right to take the opinion of his national courts of justice upon this question of interpretation, and . . . the executive government . . . has not a right to interfere . . .'

Not all countries have shared the view that the interpretation of treaties when they arise in a national court is a matter of law for the courts. In France a case arose concerning the interpretation of a treaty between France and

[35] *Blackburn v A-G* [1971] 1 WLR 1037 (CA).
[36] *A-G for Canada v A-G for Ontario* [1937] AC 326, 347 (PC).

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Morocco on the financial consequences of the Moroccan nationalisation of French property. In administrative proceedings that went to the Conseil d'Etat, it was decided that the interpretation of the treaty given by the French Ministry of Foreign Affairs was binding. The practice had gone back to 1823. The practice of the ordinary civil courts in France had been to interpret treaties themselves provided that they did not raise issues that were liable to jeopardise good international relations, but if a question was unclear it had to be referred to the Ministry. So also the Criminal Division of the Cour de cassation deferred to the interpretation of the executive. The European Court of Human Rights was asked to rule on whether the practice of deferring to the executive was a violation of the right to access to a court under Article 6 of the Human Rights Convention. The French Government argued that the practice was in conformity with the Convention: its position was that the practice ensured uniformity of interpretation, the minister was the person best placed to inform the court of the mutual intention of the contracting parties, and the practice represented a proper balance of powers between the judiciary, the executive and the legislature. The European Court of Human Rights disagreed. Only an institution with full jurisdiction, and independence from the executive and the parties, was a tribunal within the meaning of Article 6. The involvement of the minister of foreign affairs had been decisive, and not open to challenge in the administrative court. The case had therefore not been heard by an independent tribunal.[37]

One of the most difficult and responsible duties of the Privy Council is to sit on appeals in capital cases from the Caribbean. In several recent cases the Privy Council has had to consider whether the authorities in the West Indies were permitted to execute prisoners on death row while their cases were being examined by the United Nations Human Rights Committee or by the Inter-American Commission on Human Rights, and in one case after the Inter-American Court of Human Rights had ordered the government of Trinidad to take all measures necessary not to execute the men while the court was considering the matter.[38] These decisions deserve fuller, and separate, treatment, and they are mentioned only for the purpose of drawing attention to one aspect—the effect in national law of the fact that the condemned men still had outstanding petitions to the UN Human Rights Committee and the Inter-American Commission on Human Rights when they were due to be executed.

The powers of those bodies derived from instruments binding in international law on those states that had adhered to them. The instruments were the Charter of the Organisation of American States and the American Convention on Human Rights and the Additional Protocol to the International Covenant. The UN Human Rights Committee and the Inter-American Commission had only power to make recommendations to states, and not binding decisions, but

[37] *Beaumartin v France* (1994) 19 EHRR 485.
[38] *Briggs v Baptiste* [2000] 2 AC 40.

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the condemned men sought to establish a right to see the international human rights process completed so that the authorities in their countries could take the recommendations into account when deciding whether to commute the death sentences.

None of the states concerned, Bahamas, Jamaica, and Trinidad, had enacted legislation to give effect to their international obligations under those international instruments that applied to them, nor had they enacted legislation giving their nationals rights under those instruments. In two of the cases, by a majority of 3 to 2, the Privy Council held that the treaties could give the condemned men no rights under the law of the Bahamas.[39] In two other cases, by majorities of 3 to 2 and 4 to 1, the Privy Council held that the effect of the constitutions of Trinidad and Jamaica was to give condemned men a right not to be executed until the human rights bodies had reported and the authorities in the West Indies had had a chance to consider their reports.[40] In a fifth case, by a majority of 4 to 1, the Privy Council decided that an interim order of the Inter-American Court of Human Rights requiring Trinidad to ensure the men were not executed had no effect in Trinidad law.[41]

The Law Lords and former Law Lords who took the view that no account should be taken of the petitions to the human rights bodies emphasised that the international instruments were not part of the law of the country concerned. Lord Lloyd of Berwick said that no change to the constitution of the Bahamas could have been introduced by the state having joined the Organisation of American States because it would mean that the Government had introduced new rights into domestic law by entering into a treaty obligation.[42]

For Lord Hoffmann the right to enter into treaties was one of the surviving prerogative powers of the Crown. The Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government. The rule that the treaties cannot alter the law of the land is one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative.[43]

Those who took the view that the condemned men had a right that the reports of the human rights bodies be considered before a final decision on execution were taken did not dissent from the view that unincorporated treaties are not part of the law of the land. But in their view the condemned men had a right under the constitution not to have the outcome of any international process pre-empted by executive action. Lord Millett said that the applicants were not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the

[39] *Fisher v Minister of Public Safety and Immigration (No 2)* [2000] 1 AC 434; *Higgs v Minister of National Security* [2000] 2 AC 228.
[40] *Thomas v Baptiste* [2000] 2 AC 1; *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.
[41] *Briggs v Baptiste* [2000] 2 AC 40.
[42] *Fisher v Minister of Public Safety and Immigration (No. 2)* [2000] 1 AC 434, at 445.
[43] *Higgs v Minister of National Security* [2000] 2 AC 228, at 241 ff.

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Constitution. By ratifying a treaty which provided for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution. In the case involving the interim order of the Inter-American Court of Human Rights Lord Millett emphasised that *Thomas v Baptiste* (in which he had delivered the majority opinion) was not intended to overturn the constitutional principle that international conventions do not alter the law of the land except to the extent that they are incorporated by legislation.[44] But Lord Nicholls, dissenting, said that[45]

> by acceding to the [American Convention on Human Rights] Trinidad intended to confer benefits on its citizens. The benefits were intended to be real, not illusory. The Inter-American system of human rights was not intended to be a hollow sham, or, for those under sentence of death, a cruel charade.

In the latest case, *Lewis v Attorney General of Jamaica*,[46] the majority decided that the condemned men had a right not to be executed until the human rights bodies had reported and the government authorities in Jamaica had had a chance to consider them. In *Lewis* the Board referred to the general rule that that a ratified but unincorporated treaty does not in the ordinary way create rights for individuals enforceable in domestic courts, and, speaking through Lord Slynn, it went on:[47]

> But even assuming that that applies to international treaties dealing with human rights, that is not the end of the matter . . . [W]hen Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision [in the Constitution] to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered.

What is important about this passage is that, although it is entirely consistent with theory, the opening words contemplate the possibility that unincorporated treaties relating to human rights may be given effect without legislation. This may be inconsistent with the decision of the House of Lords in *R v Home Secretary, ex p Brind*.[48] But it may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases.

Certainly it may be that we have moved on since the *International Tin Council* and *Arab Monetary Fund* cases.[49] In reaching the obviously correct,

[44] *Briggs v Baptiste* [2000] 2 AC 40, 54. [45] [2000] 2 AC at 55.
[46] [2001] 2 AC 50. [47] At 84–5. [48] [1991] 1 AC 696.
[49] *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114.

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and indeed inevitable, results that the member states were not liable for the debts of the International Tin Council, and that the Arab Monetary Fund could sue for the millions of dollars of which it had been defrauded, the courts felt unable to use international law to reach those results. The distinctly parochial approach, justly criticised by Sir Robert Jennings in his 1989 FA Mann lecture[50] and by Dame Rosalyn Higgins in her 1991 Hague Lectures,[51] perhaps reached its low-point in the description by a distinguished former Master of the Rolls of an international organisation as something coming from 'the invisible depths of outer space' and the holding that for the purposes of English law the International Tin Council had been created by a statutory instrument and that the Arab Monetary Fund was to be treated as having been created under Abu Dhabi law.

IV. THE POLITICAL QUESTION

In the *International Tin Council* case[52] in the Court of Appeal Kerr LJ reached the same result as the House of Lords, but on the more attractive and principled ground that the issue of the liability of the member states under international law was justiciable in the national court, and that under international law the member states were not liable for the debts of the international organisation. The idea that some matters are simply not justiciable is not one which comes easily to lawyers and judges. But in the field of foreign affairs it is an idea which has gained much currency as a result of constitutional doctrine in the United States, and as a result of its adoption by the House of Lords in the *Buttes Gas* case.

In 1991 the Foreign Secretary decided to make a grant to Malaysia under the Overseas Development and Co-operation Act 1980 for the funding of the Pergau Dam in Malaysia. The Act gave the Foreign Secretary the power to make aid available for the purpose of promoting the development or maintaining the economy of a foreign country, or the welfare of its people. The Ministry of Overseas Development was opposed to the Foreign Secretary's decision, because it considered that providing funds for the project would not be consistent with the prudent and economical administration of the aid and trade provision, and that the Pergau project had been funded only because aid policy was subordinated to other commercial and foreign policy priorities. A pressure group that sought to ensure that foreign aid was properly used applied to the court to challenge the Foreign Secretary's decision.

In *R v Foreign Secretary, ex parte World Development Movement Ltd*[53] a divisional court set aside the Foreign Secretary's decision. Although the Foreign Secretary was entitled when making decisions under the Act to take

[50] (1990) 39 *ICLQ* 513, 524–6.
[51] Reprinted as Higgins, *Problems and Process*, 1994. See especially, 206–13.
[52] [1988] 3 All ER 257 (CA).
[53] [1995] 1 WLR 386.

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into account political and economic considerations and to consider the impact on the credibility of the United Kingdom in withdrawing an offer already made, on the evidence no developmental promotion purpose within the meaning of the Act existed at the relevant time and the decision was therefore unlawful. The applicants had standing in view of the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty, and the prominent role of the applicants in giving advice, guidance and assistance regarding aid.

If this case had arisen in the United States it is likely that the action would have failed for two separate reasons. The first is that the American rules for standing in administrative law are much narrower than those in England. The second is that it is likely that the case would have been regarded as involving the exercise by the executive of the foreign affairs power, and, in the American terminology, a non-justiciable political question. In the United States there are several and partially overlapping principles which are designed to protect the exercise of the foreign affairs power by the President and the federal government.

The starting point is that the executive has the exclusive right to regulate the foreign affairs of the United States. When Representative John Marshall, later Chief Justice of the United States, was defending President John Adams in the House of Representatives for having surrendered an alleged murderer to the British authorities without any judicial process, he said 'The President is the sole organ of the nation in its external relations and its sole representative with foreign nations.' His power, and the power he shares with the Senate to conclude and ratify treaties, limits the power of states to legislate in matters affecting foreign relations,[54] and allows the Congress to encroach on areas which would otherwise be reserved to the States.

Recently a California statute was enacted to give a cause of action to all individuals forced to labour without compensation by enemy states during the Second World War.[55] In proceedings by Chinese and Koreans who claimed to have been forced by Japan to be slave labourers, the State Department had asserted:

> By enacting the statute, California has created its own policy in a particular area of foreign relations—one which judges the activities of foreign governments and corporations during World War II, and the treaties and agreements Japan and other nationals made in the wake of the war. If each state were free to impose burdens that diverge from the foreign policy interests of the nation as a whole as expressed by the President and to have its own foreign policy, it would significantly reduce the President's 'economic and diplomatic leverage' and, hence, his authority to negotiate agreements with foreign governments.

[54] *Zschernig v Miller*, 389 US 429, 440 (1968).

[55] *Re World War II Era Japanese Forced Labor Litigation*, 164 F Supp 2d 1160 (ND Cal 2001). See also *Frumkin v JA Jones Inc (In Re Nazi Era Cases Against German Defendants Litigation*), 129 F Supp 2d 370 (D NJ 2001).

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The California law was held to be unconstitutional. California law demonstrated a purpose to influence foreign affairs directly, it targeted particular countries, it did not regulate an area that Congress had expressly delegated to the States to regulate, it established a judicial forum for negative commentary about the Japanese government and Japanese companies, the Japanese government asserted that litigation of the claims could complicate and impede diplomatic relationships of the countries involved, and the United States, through the State Department, contended that it impermissibly intruded upon the foreign affairs power of the Federal Government.

The second principle which re-enforces the primacy of the executive in foreign affairs is that the principle that the President has power by executive agreement (ie by a treaty which does not require the advice and consent of the Senate) to affect private rights of US citizens when the government settles claims with foreign states. In the aftermath of the hostages crisis Iranian assets were to be transferred to security accounts to satisfy claims in the US-Iranian claims tribunal. The Supreme Court held that the President had the power by executive order to vacate attachments made by American creditors so that Iranian property could be transferred. The Court said that where 'the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where . . . Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.'

The third method in the United States which re-enforces the power of the federal government in the field of foreign relations is the 'political question' doctrine. This is not really one concept but several, and although (with the one possible exception of the *Buttes Gas* case) English law probably does not know the political question doctrine as such there are significant parallels with English law. The political question doctrine was re-stated in the famous decision of the Supreme Court on the apportionment of voting districts, *Baker v Carr*,[56] when the Supreme Court took the opportunity to discuss the operation of the political question doctrine in the foreign affairs field. It rejected the idea that all questions touching relations are political questions. It accepted that resolution of issues in the foreign affairs field might turn on standards that defy judicial application, or involve the exercise of discretion vested exclusively in the executive or the legislature, and 'many such questions uniquely demand single-voiced statement of the Government's views'. The effect of that decision is that the political question doctrine may prevent adjudication of an issue where the constitution assigns responsibility to what was described as a co-ordinate political department; or where there is a lack of judicially discoverable and manageable standards for resolving a dispute; or where the court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government.

[56] 369 US 186 (1962).

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Baker v Carr was not a foreign affairs case, but the Supreme Court reverted to the political question doctrine in the foreign affairs context in *Goldwater v Carter*,[57] in which a number of senators led by Senator Barry Goldwater sought to challenge President Carter's termination of the Mutual Defense Treaty with Taiwan. The Supreme Court dismissed the action, with four of the justices declaring the issue to be non-justiciable because it involved the authority of the President in the conduct of foreign relations. So also last year the Eleventh Circuit Court of Appeals was asked to decide in *Made in the USA Foundation v United States*,[58] whether the North American Free Trade Agreement (NAFTA) required approval as a treaty by two-thirds of the Senate, as the appellants, the National and Local Labour Organisations promoting the purchase of American made products, urged, or whether, as the United States government urged, it did not require consent because it was an executive agreement. It was held that what constituted a 'treaty' requiring Senate ratification presented a non-justiciable political question.

The political question doctrine came to be of crucial importance in the many cases arising out of the Vietnam war, in which there were numerous challenges to the legality of the war, mainly on the ground that Congress shared in the war-making power and had not authorised the President to widen the war. So in the leading case at the Circuit Court of Appeals level, *Atlee v Laird*,[59] there was a class action alleging that the conduct of the war violated treaties to which the US was a party, and seeking an injunction to restrain the expenditure of funds supporting the war. The court dismissed the claim on the ground that the very nature of executive decisions as to foreign policy was political, not judicial. The decisions were wholly confided by the Constitution to the political departments of the government, executive and legislative. They were delicate, complex and involved large elements of prophecy. They were and should be undertaken only by those directly responsible to people whose welfare they advance or imperil. They were decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility. So also whether Congress had taken sufficient action to authorise the war could not be the subject of adjudication because it had been committed to another branch of government.

The Supreme Court avoided ruling on the merits in all these by refusing certiorari.[60] But it did not manage to avoid controversy. In *Holtzman v*

[57] 444 US 996 (1979).

[58] 242 F 3rd 1300 (11th Cir 2001).

[59] 347 F Supp 689 (ED Pa 1972), affd (without opinion, Douglas, Brennan, and Stewart JJ. dissenting) *sub. nom. Atlee v Richardson*, 411 US 911 (1973).

[60] See *Mora v McNamara*, 387 F 2d 862 (DC Cir 1967), cert denied, 389 US 934 (1967), with Stewart and Douglas JJ dissenting. See also *United States v Mitchell*, 369 F 2d at 323 (2d Cir 1966) cert. denied, 386 US 972 (1967) Douglas J dissenting. In *Massachusetts v Laird*, 400 US 886 (1970) Douglas J. dissented on a certiorari petition, and concluded it was wrong to deny a hearing to a state which was attempting to determine whether it was constitutional to require its citizens to fight in a foreign war without a congressional declaration, because, Justice Douglas said, 'the question of an unconstitutional war is neither academic nor "political".'

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Schlesinger[61] the New York Federal Court granted an injunction to restrain the bombing of Cambodia because it lacked Congressional authorisation. The Court of Appeals stayed the injunction pending appeal, and the plaintiffs applied unsuccessfully to Justice Marshall to vacate the stay. The problems in attempting to strike an equitable balance were almost insurmountable. There were genuine issues of standing, judicial competence and constitutional law which went to the root of the division of power in a constitutional democracy, but he was unwilling to upset the stay granted by the Court of Appeals on his own. He said:[62]

> When the final history of the Cambodian war is written, it is unlikely to make pleasant reading. The decision to send American troops 'to distant lands to die of foreign fevers and foreign shot and shell'[63] . . . may ultimately be adjudged to have been not only unwise but also unlawful. But the proper response to an arguably illegal action is not lawlessness by judges charged with interpreting and enforcing the laws. Down that road lies tyranny and repression. We have a government of limited powers, and those limits pertain to the Justices of this court as well as to Congress and the Executive. Our constitution assures that the law will ultimately prevail, but it also requires that the law be applied in accordance with lawful procedures.

But on the following day Justice Douglas lifted the stay, and effectively granted an injunction preventing the bombing of Cambodia.[64] He said: 'The merits of the present controversy are . . . to say the least, substantial, since denial of the application before me would catapult our airmen as well as Cambodian peasants into the death zone.' Whereupon Justice Marshall telephoned all the other members of the Supreme Court and obtained their approval to re-impose the stay.[65] Subsequently the Circuit Court of Appeals reversed the lower court decision on the ground that whether or not a basic change in the war had occurred presented a bluntly political question, which was not justiciable. Justice Stewart revealed in a posthumously released interview that he had serious doubts over the constitutionality of US participation in Vietnam.[66]

It is clear, that at least one aspect of the political question doctrine has its counterpart in the rule in the United Kingdom that the exercise of the royal prerogative cannot, at least in some respects, be the subject of judicial review. It is necessary to say 'in some respects' because at least since the *GCHQ*

[61] 361 F Supp 553, revd 484 F 2d 1307 (2d Cir 1973), cert den 416 US 936 (1974).
[62] 414 US 1304, 1315.
[63] A quotation from Justice Black in the Pentagon Papers case: *New York Times v United States*, 403 US 713, 717 (1971).
[64] 414 US 1316, 1320.
[65] 414 US 1321(1973). Justice Douglas's reaction was: 'A Gallup Poll type of enquiry of widely scattered Justices is, I think, a subversion of the regime under which I thought we lived': 414 US, at 1324.
[66] See Franck and Glennon, *Foreign Relations and National Security Law* (1987), 762.

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case[67] in 1984 that the exercise of powers under the royal prerogative may be subject to judicial review. But it is equally clear from that decision that matters of national security, the defence of the realm, the making of treaties, and the conduct of foreign policy are not matters which are justiciable. The majority in the Canadian Supreme Court in the decision on the legality of the testing of cruise missiles[68] dismissed the action on the ground that there was no causal connection between the testing of the missiles and any possible violation of rights under the Charter of Rights and Freedoms. Justice Wilson concurred on the ground that even if the testing of the missiles increased the risk of nuclear war that would not be a breach of rights under the Canadian Charter, but she thought that the fact that the royal prerogative was in issue would not prevent adjudication of rights.

The same point was touched upon in Scotland recently in *Lord Advocate's Reference No 1 of 2000*.[69] Three women were charged with malicious damage to a naval vessel associated with the Trident missile programme. They were acquitted by direction of the Sheriff who accepted the argument, in the light of expert evidence for the accused, that the deployment of nuclear weapons was a breach of customary international law, and as such, illegal and criminal under Scots law and therefore justified the action of the accused. The Lord Advocate referred to the High Court of Justiciary certain questions, including the relevance of the belief of an accused person that his or her actions were justified in law, on the ground that the deployment of nuclear weapons was contrary to international law. It was held that having regard to the advisory opinion of the International Court of Justice on the use of nuclear weapons,[70] there was no basis for a contention that the deployment of Trident in pursuit of a policy of deterrent constituted a 'threat' of force of the kind that would be contrary to international law, and that customary international law provided no justification for an individual damaging or destroying property even if it was to be used for purposes which could be described as illegal under international law. It was said that the question of justiciability did not arise, because it was the government which had initiated the appeal. But the High Court of Justiciary did re-affirm that, despite the observations of Justice Wilson in the Canadian Supreme Court, the consistent view in the United Kingdom was that the disposition of the armed forces was non-justiciable.[71]

[67] *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374.
[68] *Operation Dismantle v The Queen* (1985) 18 DLR (4th) 481.
[69] 2001 SLT 507.
[70] ICJ Rep. 1996, 66.
[71] In *R v Ministry of Defence, ex parte Smith* [1996] QB 517 at 539 Simon Brown LJ said that the legality of the rule prohibiting homosexuals from the armed forces was justiciable: only the rarest cases would today be ruled strictly beyond the purview of the court, only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue.

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V. JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS

The final aspect of the political question doctrine in the United States which has a bearing on the subject matter of this piece is the idea that court should not embark on the resolution of a dispute when there is, to quote *Baker v Carr*, 'a lack of judicially discoverable and manageable standards for resolving it,' or in Justice Powell's formulation in *Goldwater v Carter*,[72] 'Would resolution of the question demand that a court move beyond areas of judicial expertise?' It must be emphasised that this doctrine has rarely been applied in the United States to the determination of issues under international law, and never by the Supreme Court. The typical case in which the doctrine has been invoked in this sense is voting apportionment[73] and the legality of gerrymandering,[74] or in one case whether the training of the National Guard was adequate.[75]

But it has been applied by courts below the Supreme Court to avoid deciding issues that might otherwise be governed by international law. The most recent decision which this author has been able to find is *76 3rd Avenue Associates v Consulate General of the Socialist Republic of Yugoslavia*,[76] in which landlords sought to recover unpaid rent for offices leased to the former Socialist Federal Republic of Yugoslavia for use as consular offices in New York. As result of the break-up of Yugoslavia, the former Federal republic had been replaced by five successor states: Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, and the Federal Republic of Yugoslavia. The State Department asserted that

> it is the fundamental position of the United States . . . that the . . . SFRY has ceased to exist and that no state represents its continuation. . . . Each of the states . . . that has emerged on its territory . . . is a successor. Each has interests in the assets and liabilities of the former SFRY, but those interests have not yet been determined by the executive.

It was decided that there were no judicially discoverable and manageable standards for resolving the issue of which was the successor state, and the case did not lend itself to judicial resolution. To determine a matter that was in the course of international negotiation would also trespass upon the Executive Branch's authority in foreign policy and raise separation of powers concerns. What was being said that the determination of which state is a successor state depends on principles and policies to be determined on the international political level and the final result would ultimately turn on agreement and recognition. Since that process had not been completed the court could not determine which state was liable.

[72] 444 US 996 (1979).
[73] *Baker v Carr* itself.
[74] *Davis v Bandemer*, 418 US 109 (1986).
[75] *Gilligan v Morgan*, 413 US 1 (1973).
[76] 218 F 3d 152 (2d Cir 2000).

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VI. NON-JUSTICIABILITY AND ACT OF STATE

It must be emphasised that reluctance to embark on cases in which there are no judicially manageable standards is based on a particular view of the judicial function, and not on the so-called act of state doctrine, from which it is quite separate. This is not the place to go into the history of the act of state doctrine, and the way in which English law and United States law influenced each other from the case in which the ex-Duke of Brunswick sought to complain that King William IV had conspired to depose him,[77] to the case in which Mr Underhill, who was in charge of the waterworks in a city in Venezuela and who claimed to have been falsely imprisoned by a general in the revolutionary forces,[78] to the cases involving expropriation of leather hides and lead bullion in Mexico,[79] and of timber in Russia.[80]

In its classic form it appears in the opening words of the judgment of the United States Supreme Court in *Underhill v Hernandez*:[81]

> 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.

By the time the United States Supreme Court revisited the act of state doctrine in 1964 in the *Sabbatino*[82] case involving the legality of Cuban expropriation of US owned sugar, the principal areas of doubt or controversy over its application were these: what was the policy behind it? Did it depend on the dictat of the executive? Did it apply if the acts impugned were claimed to be contrary to international law. In England the policy behind the rule had been said by Scrutton LJ to be this:[83]

> it appears a serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality'. Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognised.

When Scrutton LJ referred to a serious breach of international comity, he probably meant a breach of international law. Comity is a chameleon word. Traditionally it was used to denote those obligations that fell short of legal

[77] *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1.
[78] *Underhill v Hernandez*, 168 US 250 (1897).
[79] *Oetjen v Central Leather Co*., 246 US 297 (1918); *Ricaud v American Metal Co*, 246 US 304 (1918).
[80] *Luther v Sagor* [1921] 3 KB 532 (CA).
[81] 168 US 250, 252 (1897).
[82] *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964).
[83] [1921] 3 KB at 548.

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obligation and were to be regarded as matters of courtesy and good practice. Earlier this year, in deciding whether to exhume the remains of a Brazilian national hero, the Oxford Consistory Court said that the principle of the comity of nations was a relevant factor. The principle related to the body of rules which sovereign states observed towards one another from courtesy or convenience, but which were not binding as rules of international law.[84] Comity has also been much relied on in England, Canada, Australia and the United States as a limiting factor in the grant of anti-suit injunctions, but (except in the United States) without much analysis of its content: in some cases it is simply a reference to the courtesy due to foreign courts and foreign legal systems. In other cases, where the courts have emphasised the need for the forum to have an interest in the subject matter of the dispute, the concept of comity is close to being used as a synonym for the rules of jurisdiction in public international law.[85]

But in the *Sabbatino* case the United States Supreme Court rejected the idea that the act of state doctrine was required by international law: 'We do not believe,' said the court, 'that this doctrine is compelled either by the inherent nature of sovereign authority . . . or by some principle of international law.' Instead it had constitutional underpinnings arising out of the relationship between the executive and the judicial branches. The engagement of the judicial branch in challenges to the validity of foreign acts of state might hinder rather than further the policy interests of the United States and of the international community. Piecemeal judicial intervention could interfere with negotiations being conducted by the executive branch with the foreign country concerned.

The Supreme Court did not decide whether the act of state doctrine should not be applied if the executive were to express the view that it would not be embarrassed by the court deciding on the validity of expropriation by the foreign country, but in the *First National City Bank* case,[86] a majority of 6 to 3 considered that the application of the doctrine should not depend on the view of the State Department in the particular case. Oddly, in later cases the Supreme Court became more executive minded than the executive when it declined an invitation by the executive to reconsider the act of state doctrine, after the Legal Adviser to the State Department, Monroe Leigh, told the Supreme Court that adjudication of cases involving acts of state had not embarrassed the executive's conduct of foreign relations.[87]

The third question was whether the act of state doctrine applied where the act was alleged to be contrary to international law. The Supreme Court said that it did apply to such a case, certainly where the content of international law was uncertain, and in the absence of a treaty or other unambiguous agreement

[84] *Re St Mary the Virgin, Hurley* [2001] 1 WLR 931.

[85] This subject will be treated in greater detail in a forthcoming piece, where further references will be found.

[86] *First National City Bank of New York v Banco Nacional de Cuba*, 406 US 759 (1972).

[87] *Alfred Dunhill of London Ltd v Republic of Cuba*, 425 US 682 (1976).

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regarding controlling legal principles. In England, the position remained controversial, although in 1953 Sir Hartley Shawcross (now Lord Shawcross) and Mr E. Lauterpacht (now Professor Sir Elihu Lauterpacht) had persuaded the Supreme Court of Aden to order restitution to Anglo-Iranian Oil (later BP) of a cargo of oil expropriated by Mossadeq's Iran, and in the 1970s and 1980s the House of Lords indicated that foreign legislation which was gross violation of human rights could be disregarded.[88]

The Court of Appeal in England, in an extensive judgment, has now decided that the legislative act of a foreign state within its own territory could be refused recognition if it is contrary to international law, but before that is dealt with it is necessary to mention the *Buttes Gas* case.[89] In 1970 the Ruler of Sharjah, one of the Trucial States and subsequently part of the United Arab Emirates, announced that he had extended his territorial waters from three to twelve miles. This had the effect of including, in an oil concession granted to Buttes Gas, continental shelf nine miles off an island called Abu Musa, then under the sovereignty of Sharjah. But the neighbouring Ruler of Umm al Qaywayn had granted a concession over the same area to Occidental Petroleum, on the basis that the area three miles outside Abu Musa was part of the continental shelf of UAQ. Occidental Petroleum claimed that the decree had been deliberately back-dated by the Ruler of Sharjah and by Buttes in collusion in order to claim the territory to be part of Buttes's concession after Occidental (to the knowledge of Buttes) had discovered oil there.

When the Ruler of UAQ and Occidental failed to accept a recommendation from HM Political Agent to cease drilling, the Royal Navy turned back Occidental's drilling platform and, after a show of force by HMG (including buzzing his residence with fighter bombers), the Ruler of UAQ told Occidental not to operate within a twelve-mile limit around Abu Musa. Dr. Armand Hammer, the chairman of Occidental, gave a press conference in London in which he accused Buttes of using improper methods and colluding with the Ruler of Sharjah to back-date the decree. Buttes sued for slander. Subsequently, Occidental counterclaimed in the English court for fraudulent conspiracy. Buttes applied to strike out the counterclaim on the ground that it was precluded by the act of state doctrine because it called in question the acts of the Rulers and the British Government. The Court of Appeal refused to strike out the action.[90] Buttes sought leave to appeal to the House of Lords against the decision, but an Appeal Committee refused the application in February 1975. In November 1980, the Appeal Committee of the House of Lords gave Occidental leave to appeal from a discovery order, but also gave leave to Buttes to appeal out of time (almost six years later) from the decision of the Court of Appeal in 1974.

[88] *The Rose Mary* [1953] 1 WLR 246.

[89] *Buttes Gas & Oil Co v Hammer (Nos 2 and 3)* [1982] AC 888. The account of the facts that follows is based on Collins, in (1995–6) 6 King's Coll. LJ 20.

[90] *Buttes Gas & Oil Co v Hammer* [1975] QB 557.

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On the appeal, the House of Lords held that there was a principle of English law, which was inherent in the very nature of the judicial process that municipal courts would not adjudicate on the transactions of foreign States; that, accordingly, where such issues were raised in private litigation, the court would exercise judicial restraint and abstain from deciding the issues raised; and that, since the pleadings raised issues involving the court in reviewing transactions in which four sovereign States were concerned and being asked to find at least part of those transactions unlawful under international law, the issues raised were non-justiciable and incapable of being entertained by the court.[91]

In coming to the conclusion that the issues were not justiciable, Lord Wilberforce, delivering the only speech, relied on the decision of the Court of Appeals for the Fifth Circuit[92] in the American litigation, in which the American court had refused to adjudicate on the case. Lord Wilberforce said: 'When the judicial approach to an identical problem between the same parties has been spelt out with articulation in a country . . . so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours . . . spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it.'

But the decision of the American court was squarely based on the 'political question' doctrine. The decision was that determination of the boundary between Sharjah and UAQ was a matter for the State Department, whose policy as between the contending states was deliberately neutral. The judiciary could not rule on the question without an executive determination. Nor, said the American court, were there judicial or manageable standards for determination of the issue of sovereignty. That was an understandable decision, and very much like the case of the Yugoslav embassy.[93] The views of the executive on the recognition of the boundaries were decisive, and yet the executive had deliberately not expressed a view. But in *Buttes Gas* the application under appeal was to strike out the proceedings. It was not an appeal from judgment at trial, and no Foreign Office certificate had yet been called for. This point was not addressed, and instead reliance was placed on Foreign Office letters to the rulers emphasising that the dispute involved international issues.

In fact, the result was perfectly understandable. The litigation was stale. It had little to do with England. The political aspects were delicate. It may be that Lord Wilberforce realised that even if the case went to trial the Foreign Office would not express a view on the boundaries and the court would be in

[91] For parallel US proceedings see *Occidental Petroleum Corp. v Buttes Gas and Oil Co*., 331 F Supp 92, affd 461 F 2d 1261, cert den 409 US 950 (1972); *Occidental of Umm al Qaywayn, Inc. v A Certain Cargo of Petroleum*, 396 F Supp 461, affd 577 F 2d 1196, cert den 441 US 928 (1979).

[92] *Occidental of Umm al Qaywayn v A Certain Cargo of Petroleum*, 577 F 2d 1196 (5th Cir 1978).

[93] Above, text at n 76.

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a judicial no-man's land. The suggestion which is made by this author is therefore that all that *Buttes Gas* decided is that where a case in a national court raises the issue of the territory of a foreign state, and the Foreign Office refuses to certify what boundaries it recognises (eg, for fear of offending one or more of the states concerned or because the matter is being negotiated) then the issue is not justiciable. Almost a hundred years before *Buttes Gas* the United States Supreme Court said 'Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges. . . .'

But the decision in *Buttes Gas* has been taken as authority for a general principle that 'the courts will not adjudicate upon the transactions of foreign states.' It was this assumption which unnecessarily complicated the very welcome decision of the Court of Appeal in *Kuwait Airways Corp v Iraqi Airways Co*.[94] Deference was paid to *Buttes Gas* in that decision by the recognition that there are certain sovereign acts which call for judicial restraint on the part of national courts, particularly where there may be no 'judicial or manageable standards' by which to resolve the dispute, whether the court would be in a 'judicial no-man's land.' But the actual decision was that the expropriation of Kuwaiti aircraft by Iraq in gross violation of UN Security Council resolutions condemning the Iraqi invasion of Kuwait was not entitled to recognition in England. It was in breach of international law, it was contrary to English public policy, and did not raise non-justiciable issues. The decision is of considerable importance because it is the first decision clearly to decide that the acts of a foreign state within its territory and which would otherwise be applicable according to accepted principles of private international law may be refused recognition because they are contrary to public international law.

The Court of Appeal was sensitive to the role of the executive in foreign relations: the court took account of HMG's policy of compliance with the Security Council resolutions condemning the Iraqi invasion of Kuwait expressed in a letter by Sir Franklin Berman, the Foreign Office Legal Adviser, and decided that in the circumstances

> there was nothing precarious or delicate, and nothing subject to diplomacy, which judicial adjudication might threaten; there could be no embarrassment to diplomatic relations, no casus belli, and nothing to vex the peace of nations in judicial investigation. . . . [T]he Berman letter provided an opportunity for the executive branch of government to make known to the judicial branch any concern it might have felt about the non-justiciability of the issued raised by [Kuwait Airways'] claim, and to do so against the background of the speech of Lord Wilberforce in the Buttes Gas case. . . . In the event the letter emphasised Her Majesty's Government's commitment to its obligations under the UN Resolutions.

[94] [2001] 3 WLR 1117, 1207.

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VII. CONCLUSIONS

This piece has in essence been about the limits of the application of international law by national courts. These are not issues which arise very frequently. Even in the United States the Supreme Court has only rarely pronounced on questions of international law. Professor Henkin has said:[95]

> The Supreme Court . . . intervenes only infrequently and its foreign affairs cases are few and haphazard. The Court does not build and refine steadily case by case, it develops no expertise or experts; the Justices have no matured or clear philosophies; the precedents are flimsy and often reflect the spirit of another day.

There is no doubt that in the period in which the *International Tin Council* cases were decided the judicial climate for the application of international law was distinctly icy. Earlier generations had a more open attitude to international law. In a very sophisticated and now somewhat overlooked opinion in the 1930s the Privy Council said that 'speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question.' The *Pinochet* and *Kuwait Airways* cases mark a major shift in favour of the application of international law.

At the beginning of this piece the question was posed of how much life there was in the principle that the executive and the judiciary should speak with one voice in foreign affairs. It is not, of course, a general principle of law, but it is founded on the idea that to the outside world the internal separation of powers is irrelevant. Even in the political sphere important issues of foreign policy, especially with regard to armed hostilities, tend towards the bi-partisan, although there are of course major exceptions: the Suez adventure, or attitudes to the European Union, are obvious examples. Courts, especially appellate courts, have to be sensitive to the policy implications of their judgments. Against this background, it is altogether understandable, although perhaps surprising 100 years after Oliver Wendell Holmes and 70 years after Jerome Frank, that a most distinguished Law Lord emphasised in the *Pinochet* case that although there were some political views on the case, the job of the House of Lords was to decide questions of law, and only questions of law.

It would be for a political scientist to assess whether in fact the judiciary and the executive have spoken with one voice in the wider sense, but it would seem that only two modern decisions were clearly contrary to the foreign policy objectives of the United Kingdom. The first was the decision of the House of Lords in *Laker Airways*,[96] in which the House of Lords rejected the use of the anti-suit injunction as a tool for asserting the objections of the British Government to the exercise of United States anti-trust jurisdiction over

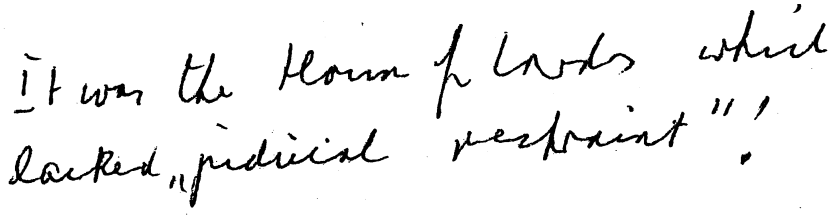
[95] *Foreign Affairs and the US Constitution*, 2nd edn (1996), 148.
[96] *British Airways Board v Laker Airways Ltd* [1985] AC 58.

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British Airways and British Caledonian: the government was deeply opposed to the use by the Laker Airways liquidator of US anti-trust law in effect to regulate transatlantic air traffic. But the case had sufficient connections with the United States to justify the assertion of American jurisdiction. The second was the decision[97] in which the Court of Appeal applied the logic, but not the policy, of the *Zeiss* case to recognise the South African puppet state of Ciskei.

What the cases show, in those decisions which are not determined by the binding nature of the Foreign Office certificate, is what may be described as a sensitivity to foreign policy interests, and certainly not deference to the views or objectives of the executive. That comes over very clearly from the reliance in the *Kuwait Airways* case on the views of Sir Franklin Berman, and it also underlies what is the good sense of at least the result in *Buttes Gas*. Indeed, it may be that the wisdom of the result, if not the force of the reasoning, has been confirmed by the results of the writer's research at the Public Record Office in Kew. The crucial parts of the dispute in 1969 and 1970 fall outside the 30 year rule. In the Public Record Office computerised index there is a Ministry of Defence file DEFE24/576, entitled Iranian claim to Tumbs and Abu Musa islands. Excitement at this find was tempered by the annotation that the description is open but the public does not have permission to order this document. In other words the only thing that is not secret about the file is its title. The Foreign Office informed the author, when he enquired about files relating to the *Buttes Gas* case, that all of the relevant files, involving those over 30 years old remain, with the agreement of the Lord Chancellor, closed.

But it is very doubtful if Francis Mann would agree that the result in *Buttes Gas* was sensible, and he will have the last word. After his death, his son David Mann gave this author the interleaved copy of Francis Mann's book on *Foreign Affairs in English Courts*. Against the passage from the speech of Lord Wilberforce in *Buttes Gas* on the need for judicial restraint these words appear in his handwriting:



[97] *Gur Corp v Trust Bank of Africa Ltd*. [1987] QB 599 (CA).

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