the separation of Under-Secretary-General Gobbi from UN services and the subsequent need for his replacement. In my view this argument is neither valid nor convincing. The Secretary-General has the primary and ultimate responsibility that tasks entrusted to him be carried out effectively. He cannot help it if governments fail to cooperate, but changes within his own staff may not be legitimately adduced as a reason for inadequate performance of duties.

While it cannot be denied that many member states of the United Nations practiced a "double standard" in their appreciation of the cases of Chile and Poland, the Secretary-General's role in the Polish case was a dubious one inasmuch as he prepared in his reports a suitable ground for virtually dropping the matter. It is not difficult to understand the delicate position of the Secretary-General but, taking into account the particular human rights mandate he had received, I would not go so far as Professor Franck to attribute to the Secretary-General a certain degree of resourcefulness and courage in the Polish case.

It is significant and revealing that the current "double standard" debate in which the United States plays such a vocal role, serves essentially political and ideological purposes in the context and the ramification of East-West rivalries. That debate scarcely focuses on other apparent discrepancies and inconsistencies in the handling of human rights situations. A glaring and troubling case in point was the situation in Argentina under the military dictatorship after 1976. While forceful UN action was largely targeted on Chile, neighboring Argentina with a degree of terror and a level of gross violations of human rights going well beyond Chilean proportions, never figured explicitly on the human rights agendas of the United Nations. It was only by way of indirect action, through the adoption of resolutions on the general issue of enforced or involuntary disappearances and the creation of a working group with a global mandate for "disappeared" persons, that the Argentinean situation could be tackled. For an in-depth analysis of the "double standard" issue, a comparison between the Chilean and Argentinean cases seems to be at least as pertinent as a comparison between the Chilean and Polish cases.

As a final remark I would submit that, even if it is true that the United States has within its own constitutional domain a strong sense for and commitment to equal protection and fair standards of justice, the standards practiced by the present United States administration in assessing human rights violations in other nations are by no means less political and less biased than the standards applied by the majority of the UN membership.

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Act of State and the Restatement

TO THE EDITOR IN CHIEF:

Professor Halberstam does not like the act of state doctrine, and thinks the reporters of the *Restatement* shouldn't either.[1] She thinks the present

[1] Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AJIL 68 (1985).

members of the U.S. Supreme Court, or most of them, would not say what the Court said in *Sabbatino* in 1964. Whether or not this is true we have no way of knowing. Even if it were true, the same could probably be said about other decisions of the Court—*Miranda,* for instance, possibly *Baker v. Carr,* perhaps *Engel v. Vitale.* One would not suppose, however, that the drafters of a *Restatement* should proceed on the assumption that those cases are not current law. The evidence is strong that the present Supreme Court, if not unanimously in agreement with Justice Harlan's opinion of 1964, is not so disturbed about it as to overcome the Court's commitment to *stare decisis.*

Of course, if we thought the act of state doctrine was a passing phenomenon, an approach to the function of courts whose time had passed or was about to pass, we should have devoted less space to it. We think the doctrine will continue to be controversial, but probably not disappear—whatever the *Restatement* might say or not say. In the first place, the doctrine was enunciated by the U.S. Supreme Court almost 90 years ago, and has been upheld by each generation of the Court that has considered it. As doctrines go—particularly doctrines that depend neither on the command of the Constitution nor on a mandate from Congress—that is a fairly sturdy record. Second, it is instructive that after the *Dunhill* case[2] was argued to the Supreme Court in the spring of 1975, the Court put the case over for reargument and invited the parties (and the Solicitor General) to address the question "Should this Court's holding in . . . *Sabbatino* be reconsidered?"[3] Neither the parties nor the Solicitor General took up the invitation.[4] Justice White, who had dissented so vehemently in *Sabbatino,* was content to write for the plurality in *Dunhill* about particular facts and to propose a commercial exception to the doctrine.[5] Again, in the recent *Bancec* case,[6] the Court might have said the doctrine no longer appeals to it; instead, it addressed the question of piercing the corporate veil of state-owned enterprises in the context of a counterclaim for setoff.

Professor Halberstam seems to fear that the new *Restatement* has come to the rescue of a doctrine that without such effort would soon collapse. Our impression is rather the opposite: The courts, by and large, seem content with the act of state doctrine, with some limitations—notably the territorial limitation[7] and a limitation with respect to counterclaims for setoff.[8] The American business community is far from united in opposition

[2] Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

[3] *See* 422 U.S. 1005 (1975).

[4] The State Department's Legal Adviser, Monroe Leigh, wrote a separate communication, stating that the Department would not anticipate embarrassment to the conduct of the foreign policy of the United States if the Court should decide to overrule the holding in *Sabbatino.* This position was not, however, incorporated into the brief of the Solicitor General.

[5] Justice Powell, who had said in First National City Bank of New York v. Banco Nacional de Cuba, 406 U.S. 759, 774 (1972) (Powell, J., concurring), that he disagreed with the Court's opinion in *Sabbatino,* said so again in a one-paragraph opinion in *Dunhill,* but seems to have made no effort to win the Court to his view. 425 U.S. at 715.

[6] First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983).

[7] For the latest illustration of reliance on the territorial limitation, see Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985).

[8] *See* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983); First Nat'l City Bank of New York v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

to what Professor Halberstam calls "this bizarre doctrine." Banks, for instance, have repeatedly relied on the doctrine, and have been disappointed when it was not applied to shield them from multiple liability.[9] As for the major oil companies, not only have they used the doctrine successfully themselves in various civil actions;[10] consider how the Seven Sisters would have reacted had the assault on the OPEC cartel in a U.S. district court not been deflected by invocation of the act of state doctrine.[11]

Opposition comes largely from those who opposed the doctrine long before *Sabbatino.* The arguments are not new; indeed, most of the quotations Professor Halberstam adduces are from the 1960s, except for one report of a committee of the New York City Bar Association, cited three times, that dates from 1959. Some of the opponents, whom Professor Halberstam now joins, would like (or would have liked) to have the *Restatement* help them to accomplish what they have been unable to accomplish through legislation or litigation.

Professor Halberstam accuses the reporters of the new *Restatement* of doing what Justice Harlan said he would not do—"adopting an all-encompassing rule."[12] We had not thought we were doing so. In any event, we have responded to the criticism that our black-letter formulation of the doctrine sounded too rigid. We have also responded to criticism from those who said we focused too much on taking of property, as well as from those who urged us to limit the section to taking of property. In the version placed before the American Law Institute in the spring of 1985, we took account of the fact that Justice Harlan, writing in the context of an expropriation, had drawn on the *Underhill* decision of 1897,[13] which involved a claim of wrongful arrest and detention. In the revised version, the black letter reads as follows:

> Subject to a controlling act of Congress or international agreement, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.[14]

[9] *Compare* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5 (1984) (act of state doctrine applied to relieve bank of liability on a certificate of deposit issued in Cuba) *with* Garcia v. Chase Manhattan Bank, 735 F.2d 645 (2d Cir. 1984) (act of state doctrine not applied because obligation deemed situated outside of Cuba). *See also, e.g.,* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981), *cert. denied,* 459 U.S. 976 (1982) (act of state defense rejected and bank held liable to depositor at Saigon branch).

[10] *See, e.g.,* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983).

[11] International Ass'n of Machinists & Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).

[12] *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

[13] Underhill v. Hernandez, 168 U.S. 250 (1897).

[14] RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §469 (Tentative Draft No. 6, 1985). By comparison, §428, contained in Tentative Draft No. 4 (1983), read: "Subject to §429 [dealing with the so-called Hickenlooper Amendment], courts in the United States will refrain from examining the validity of an act of a foreign state taken in its sovereign capacity within the state's own territory."

As with other sections of the *Restatement,* 10 Comments and 13 Reporters' Notes elaborate on these terse phrases, describing the various exceptions and limitations to the doctrine that have grown up, some confirmed by the Supreme Court, others still in doubt.[15] It is in these interstices—exceptions, limitations and interpretations of the limitations—that the act of state doctrine in the United States seems to us likely to develop. The *Restatement* does not provide instant answers to the many issues that have arisen, but it provides a convenient—and we believe correct—point of departure for the courts, for advisers and for advocates.

We have attempted to report on the act of state doctrine, as on many other doctrines and puzzles in our field, as scholars and not as advocates. We have come neither to praise *Sabbatino* nor to bury it. There having been no burial, there can hardly have been a resurrection—with or without the *Restatement.*

LOUIS HENKIN
ANDREAS F. LOWENFELD*

TO THE EDITOR IN CHIEF:

March 20, 1985

In a review of the *Soviet Year-Book of International Law 1982,* published in your October 1984 issue (at p. 1018), Dr. E. T. Usenko is presented as a scholar "well known for his participation in the International Law Commission's work" (p. 1019). Knowing Professor Usenko's erudition and diplomatic skills, I have little doubt that, given a chance, he would ably represent the Soviet legal doctrine in that prestigious body. The fact remains, however, that since 1967 another recognized international lawyer—Professor Nikolai A. Ushakov—has been the Soviet member of the Commission. He is the fifth Soviet scholar to serve in this capacity. Vladimir M. Koretsky (1949–1952), Feodor I. Kozhevnikov (1952–1953), Sergei B. Krylov (1954–1956) and Grigory I. Tunkin (1957–1966) were his predecessors.

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THE FRANCIS DEÁK PRIZE

The Board of Editors of the *American Journal of International Law* announces with pleasure the selection of Michael J. Glennon as recipient of the Francis Deák Prize for 1985. The prize was awarded to Professor Glennon for his article, *The War Powers Resolution Ten Years Later: More*

[15] *See, e.g.,* the exception for commercial transactions set forth in part III of Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695–706 (1976), concurred in by only four of the five Justices making up the majority in that case, but not by Justice Stevens.

* Of the Board of Editors. Professors Henkin and Lowenfeld are, respectively, Chief Reporter and one of the associate reporters of the *Restatement of the Foreign Relations Law of the United States (Revised).*