

## CASE NOTE

### KUWAIT AIRWAYS CORP V IRAQI AIRWAYS CO\*

#### THE EFFECT IN PRIVATE INTERNATIONAL LAW OF A BREACH OF PUBLIC INTERNATIONAL LAW BY A STATE ACTOR

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##### I INTRODUCTION

Civil courts have always been reluctant to sit in judgment on the acts of foreign sovereigns, particularly acts done within their own sovereign territory. That reluctance is expressed in a range of separate but closely related doctrines of private international law, each of which is ultimately based on the idea, drawn from public international law, that sovereignty is territorial.

First, is the doctrine of state immunity, according to which foreign sovereigns are immune from the jurisdiction of domestic courts.<sup>1</sup> The scope of this doctrine has been substantially restricted by statute, and it no longer applies in relation to commercial activities by, or on behalf of, a foreign sovereign.<sup>2</sup> Nevertheless it provides the clearest example of the idea that the sovereign nature of states precludes the civil courts of one state from judging the validity of the actions of another.

Related to the doctrine of state immunity, but separate from it, is the 'act of state' doctrine.<sup>3</sup> This too prevents a court from passing judgment on the legality of the act in question, but it does so because of the governmental character of the act done, rather than because of the sovereign character of the person doing it.<sup>4</sup> Thus, for example, the doctrine may apply to the acts of a private individual acting with governmental authority, as well as to the acts of a sovereign acting in

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\* [2001] 1 Lloyd's Rep 161. Application for leave to appeal to the House of Lords against the Court of Appeal's judgment was granted 1 May 2001 (unreported).

<sup>1</sup> See, eg, *Foreign States Immunities Act 1985* (Cth) s 9; *State Immunity Act 1978* (UK) s 1(1).

<sup>2</sup> See, eg, *Foreign States Immunities Act 1985* (Cth) s 11(1); *State Immunity Act 1978* (UK) s 3.

<sup>3</sup> See, eg, *A-G (UK) v Nissan* [1970] AC 179, 237 (Lord Pearson); *Dagi v Broken Hill Pty Co Ltd* [No 2] [1997] 1 VR 428, 453 (Byrne J).

<sup>4</sup> *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [No 3] [2000] 1 AC 147, 268–9 (Lord Millett), distinguishing immunity *ratione personae*, which is based on the status of the person doing the act, and immunity *ratione materiae*, which is based on the nature of the act done.

its own name.<sup>5</sup> This doctrine provides the usual basis for the general rule that courts will refuse to adjudicate upon the validity of the acts and transactions of a foreign sovereign state done within that sovereign's own territory, because to do otherwise would imperil amicable relations between governments.<sup>6</sup>

Related to the act of state doctrine, but separate from both it and the doctrine of state immunity, is the doctrine of 'non-justiciability', which prevents courts from dealing with sensitive issues in international relations.<sup>7</sup> A dispute between private individuals may turn upon matters that are contested by sovereign states, such as jurisdiction over territory to which the private dispute relates. The doctrine of non-justiciability requires the court to decline jurisdiction on the ground that there are no manageable judicial standards that it can use to judge the issues in question,<sup>8</sup> rather than because the validity of governmental acts is directly called into question.

These three doctrines of judicial restraint — state immunity, act of state and non-justiciability — are also related to the body of principles concerned with non-recognition of foreign laws and institutions. Common law courts have no jurisdiction to entertain an action to give effect to penal, revenue or other public laws of a foreign state.<sup>9</sup> This is the corollary of the deference given to the foreign sovereign's powers to legislate within its territory: common law courts will refuse any attempt by the sovereign to enforce its laws beyond the territorial limits of its authority.<sup>10</sup> Thus, for example, the courts of common law jurisdictions will normally give effect to an expropriation of assets situated in a foreign country by the government of that country,<sup>11</sup> but will refuse to give effect to a purported expropriation of assets situated outside the foreign country, even if those assets belong to a national of the country in question.<sup>12</sup>

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<sup>5</sup> See, eg, *Buron v Denman* (1848) 154 ER 450, 460 (Parke B; Alderson, Rolfe and Platt BB concurring).

<sup>6</sup> *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40–1 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ), citing *Underhill v Fernandez*, 168 US 250, 252 (1897); *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 933; *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 416 (1964); *Oetjen v Central Leather Co*, 246 US 297, 304 (1918).

<sup>7</sup> *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 931–9 (Lord Wilberforce; Lord Fraser, Lord Russell, Lord Keith and Lord Bridge concurring); *J H Rayner (Mincing Lane) Ltd v Department of Trade & Industry* [1990] 2 AC 418, 499–500, 519–20 (Lord Oliver; Lord Keith, Lord Brandon and Lord Griffiths concurring). Note that some doubt has been expressed whether a separate doctrine of non-justiciability forms part (or should form part) of Australian law: *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1989) 19 FCR 347, 367–73 (Gummow J).

<sup>8</sup> *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 938 (Lord Wilberforce; Lord Fraser, Lord Russell, Lord Keith and Lord Bridge concurring).

<sup>9</sup> *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40–1 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ), approving the English position as stated in Lawrence Collins et al (eds), *Dicey and Morris on the Conflict of Laws* (11<sup>th</sup> ed, 1987) vol 1, 100–1.

<sup>10</sup> *A-G (New Zealand) v Ortiz* [1984] AC 1, 21 (Lord Denning MR).

<sup>11</sup> *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 41 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

<sup>12</sup> *Ibid*; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, 260 (Devlin J).

Related to the courts' refusal to enforce foreign public laws, but again forming a separate category, is the principle that courts will not give effect to foreign laws or policies that are contrary to domestic public policy.<sup>13</sup> Thus, for example, a court may refuse to enforce a contract to pay bribes or secret commissions to foreign government officials, even if such payments are commonly (although unlawfully) made in the country of the payment.<sup>14</sup> More broadly, it has been held that domestic courts should refuse on public policy grounds to give effect to laws that offend against fundamental standards of justice, human rights and morality.<sup>15</sup> Beyond this category, and most controversially of all, it has been suggested that a civil court should deny recognition to acts done in breach of international law.<sup>16</sup> Until recently, there was very little authority for that proposition,<sup>17</sup> but it received strong approval from the English Court of Appeal in the case under consideration in this note.

This complex cluster of doctrines nestles at the intersection between private and public international law. They are doctrines of private international law, to be applied in private civil litigation, but they depend very heavily on notions of authority, sovereignty and territoriality that are derived from public international law. Almost all of these doctrines were recently considered by the English Court of Appeal in *Kuwait Airways Corp v Iraqi Airways Co* ('*Kuwait Airways*').<sup>18</sup> For that reason, the decision deserves special attention, although it must be acknowledged that its titanic size — 673 numbered paragraphs — may be enough in itself to deter all but the most determined readers.

## II THE FACTS, THE PRIOR PROCEEDINGS AND THE RESULT

The plaintiff, Kuwait Airways Corporation ('KAC'), was the owner of ten aircraft that were situated at Kuwait International Airport at the time of the invasion of Kuwait by Iraqi military forces in 1990. The aircraft were seized by the Iraqi forces, and the Iraqi Government ordered them to be flown to Iraq. The Government, which is styled as the Revolutionary Command Council ('RCC'), then passed two resolutions proclaiming 'the sovereignty of Iraq over Kuwait

<sup>13</sup> P E Nygh, *Conflict of Laws in Australia* (6<sup>th</sup> ed, 1995) 281–5.

<sup>14</sup> *Fullerton Nominees Pty Ltd v Darmago* [2000] WASCA 4 (Unreported, Kennedy, Ipp and Wallwork JJ, 21 January 2000) [27]–[32] (Ipp J; Kennedy and Wallwork JJ concurring); *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, 456–61 (Phillips J).

<sup>15</sup> Eg, the racially discriminatory Nazi laws that the House of Lords would have refused to recognise in *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249, 278 (Lord Cross; Lord Hodson and Lord Salmon concurring) ('*Oppenheimer*'). See also the obiter comments in support of this principle in *Sykes v Cleary* (1992) 176 CLR 77, 112–13 (Brennan J), 135–6 (Gaudron J).

<sup>16</sup> See, eg, Nygh, above n 13, 285, where the author describes this proposition without supporting it.

<sup>17</sup> The only authority was the oft-cited, but hardly authoritative, decision of the Supreme Court of Aden in *The Rose Mary* [1953] 1 WLR 246, 253–9 (Campbell J).

<sup>18</sup> [2001] 1 Lloyd's Rep 161.

and its annexation to Iraq.<sup>19</sup> The planes were then flown to Basra, in Iraq proper. A later Iraqi Government resolution, *RCC Resolution 369*, purported to dissolve KAC and to vest all of its property throughout the world, including the ten planes in Iraq, in the defendant, Iraqi Airways Company ('IAC').<sup>20</sup> IAC had little use for the planes, but it did maintain them, register them with Iraqi serial numbers and paint some of them in its livery.

The United Nations Security Council passed a series of resolutions condemning the Iraqi invasion of Kuwait, declaring the annexation of Kuwait to have no validity,<sup>21</sup> and calling upon all states to take appropriate measures to protect assets of the legitimate government of Kuwait and its agencies.<sup>22</sup> A later resolution set a deadline for the withdrawal of Iraqi forces from Kuwait.<sup>23</sup> When Iraq did not meet the deadline, a coalition of UN member states used armed force to expel Iraqi troops from Kuwait. Iraq eventually acknowledged in principle its liability for any losses caused during the invasion, and its obligation to return Kuwaiti property, in *RCC Resolution 55*, which, among other things, retroactively repealed *RCC Resolution 369*.

Four of the ten aircraft were removed to Mosul ('the Mosul Four'), in Northern Iraq, once the military offensive began, and were later destroyed by bombing. The other six were taken to Iran ('the Iran Six'), where they remained until hostilities were over.<sup>24</sup> The Iran Six were subsequently returned to KAC, with a considerable bill (some US\$20 million) for storage, sheltering and maintenance costs. KAC also claimed to have suffered other losses as a result of being kept out of possession of the Iran Six (for example, the extra cost of leasing substitutes for them).

KAC sued IAC and the Republic of Iraq in the Commercial Court of England and Wales, seeking damages for the loss of the Mosul Four and for losses suffered as a result of being deprived of possession of the Iran Six. The Republic of Iraq successfully challenged the validity of the service of the writ, and it took no further part in the proceedings in its own name.<sup>25</sup> IAC, a state-owned and state-controlled entity, raised the defence of state immunity. The House of Lords eventually held that IAC was entitled to state immunity in relation to the acts of taking the aircraft and removing them from Kuwait to Iraq, which were exercises

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<sup>19</sup> *Kuwait Airways* [2001] 1 Lloyd's Rep 161, [4] (Henry, Brooke and Rix LJ) citing *RCC Resolution 312* and *RCC Resolution 313*. Subsequent decrees issued by the President of Iraq also purported to make Kuwait a 'Governate' of Iraq, and appointed officials to administer the Governate on behalf of the central Iraqi Government.

<sup>20</sup> *Ibid* [7].

<sup>21</sup> SC Res 662, 45 UN SCOR (2934<sup>th</sup> mtg), UN Doc S/Res/662 (1990), 29 ILM 1327; reaffirmed in SC Res 667, 45 UN SCOR (2940<sup>th</sup> mtg), UN Doc S/Res/667 (1990), 29 ILM 1332; SC Res 670, 45 UN SCOR (2943<sup>rd</sup> mtg), UN Doc S/Res/670 (1990), 29 ILM 1334; and SC Res 678, 45 UN SCOR (2963<sup>rd</sup> mtg), UN Doc S/Res/678 (1990), 29 ILM 1565.

<sup>22</sup> SC Res 661, 45 UN SCOR (2933<sup>rd</sup> mtg), UN Doc S/Res/661 (1990), 29 ILM 1325.

<sup>23</sup> SC Res 678, 45 UN SCOR (2963<sup>rd</sup> mtg), UN Doc S/Res/678 (1990), 29 ILM 1565.

<sup>24</sup> *Kuwait Airways* [2001] 1 Lloyd's Rep 161, [8]–[9] (Henry, Brooke and Rix LJ).

<sup>25</sup> *Kuwait Airways Corp v Iraqi Airways Co* [1995] 3 All ER 694, 702–4 (Lord Goff; Lord Jauncey, Lord Mustill, Lord Slynn and Lord Nicholls concurring).

of governmental power by the Republic of Iraq.<sup>26</sup> However, the House of Lords held that IAC was not entitled to immunity in relation to its retention and use of the aircraft after the proclamation of *RCC Resolution 369*, because acts done after that time were not done in the exercise of sovereign authority, but as a consequence of IAC's purported ownership of the aircraft.<sup>27</sup>

The proceedings thus continued against IAC alone in relation to its actions in the period after the proclamation of *RCC Resolution 369*, when all the aircraft were in Iraq, until the Iran Six were removed. There was a two-stage trial, separating issues of liability from those of the quantum of damages. Mance J considered the liability of IAC in what became known as the 'Stage 1 trial'.<sup>28</sup> Because KAC was suing in England in relation to torts allegedly committed in Iraq, the choice of law rule in effect at the time<sup>29</sup> required it to show that IAC's actions would have amounted to conversion if they had occurred in England *and* that they amounted to the Iraqi tort of usurpation. Mance J held that IAC was liable in relation to all ten aircraft,<sup>30</sup> so the case moved on to the 'Stage 2 trial' before Aikens J.<sup>31</sup> The Stage 2 trial raised the question of whether IAC's tortious acts were the cause of KAC's losses, or whether the disposition of the ten aircraft (and their eventual fate) would have been the same even if they had not been assimilated into the IAC fleet. Applying a simple 'but for' standard, Aikens J held that the disposition of the ten aircraft would have been exactly the same if there had been no usurpation or conversion of them by IAC and they had remained KAC aircraft under the disposition of Iraqi Government actors. The Mosul Four would have been flown to Mosul and destroyed there; the Iran Six would have been flown to Iran and detained there until their eventual return. Thus Aikens J held that none of KAC's losses flowed from IAC's tortious conduct.

IAC appealed Mance J's decision on liability; KAC appealed Aikens J's decision on quantum.<sup>32</sup> The Court of Appeal upheld Mance J's decision on liability and the part of Aikens J's decision that related to the Mosul Four.<sup>33</sup> It allowed KAC's appeal against Aikens J's decision in relation to the Iran Six.<sup>34</sup> In combination, these decisions resulted in IAC being held liable to pay KAC damages in relation to the Iran Six, but not the Mosul Four, which would have been destroyed by bombing even if there had been no tortious usurpation or conversion of them. The Court of Appeal remitted the action to the Commercial

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<sup>26</sup> Ibid 712–15 (Lord Goff; Lord Jauncey and Lord Nicholls concurring), 717–19 (Lord Mustill), 720–2 (Lord Slynn).

<sup>27</sup> Ibid 711 (Lord Goff; Lord Jauncey and Lord Nicholls concurring), 717–19 (Lord Mustill dissenting), 720–2 (Lord Slynn dissenting).

<sup>28</sup> *Kuwait Airways Corp v Iraqi Airways Co* [1999] Commercial Law Cases 31.

<sup>29</sup> Being the infamous 'double actionability' rule in *Phillips v Eyre* (1870) LR 6 QB 1, abolished by the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) s 10.

<sup>30</sup> *Kuwait Airways Corp v Iraqi Airways Co* [1999] Commercial Law Cases 31.

<sup>31</sup> *Kuwait Airways Corp v Iraqi Airways Co* [2000] 2 All ER (Comm) 360.

<sup>32</sup> IAC also cross-appealed against some of Aikens J's findings of fact.

<sup>33</sup> *Kuwait Airways* [2001] 1 Lloyd's Rep 161, [654] (Henry, Brooke and Rix LJ).

<sup>34</sup> Ibid.

Court for an assessment of the damages flowing from the usurpation and conversion of the Iran Six.<sup>35</sup>

### III THE COURT OF APPEAL'S DECISION

The Court of Appeal's decision covered a very wide range of issues of fact and law, including such matters as the scope and nature of the English law of conversion and the Iraqi tort of usurpation, and also speculation about how the aircraft would have been handled if they had not been transferred to IAC. It is not possible to analyse all of these issues in this note, which focuses on the Court's consideration of the doctrines described in the introduction, a discussion which arose mainly in the context of the appeal against Mance J's decision on liability. That decision turned on a threshold question about the effect of *RCC Resolution 369*.<sup>36</sup> None of IAC's supposed acts of conversion or usurpation (registering the aircraft with Iraqi numbers, painting them in IAC livery, etc) could be regarded as unlawful if the court were to recognise the effect of *RCC Resolution 369*, which transferred the aircraft from KAC to IAC as part of the supposed dissolution of KAC and its universal succession by IAC.<sup>37</sup> At the time when *RCC Resolution 369* was passed, the aircraft were in Basra, which was unquestionably part of Iraq. Hence, IAC argued, the decree that expropriated the aircraft and transferred them to IAC was a sovereign act of the Government of Iraq in relation to property in Iraq, and so the English Court of Appeal was bound to give effect to it under the act of state doctrine.<sup>38</sup> Although the UN Security Council resolutions raised questions about the validity of *RCC Resolution 369* as a matter of international law, IAC said that the non-justiciability doctrine demanded the conclusion that those questions were not justiciable in private litigation in an English court.<sup>39</sup>

KAC responded by arguing that the facts of the case did not fall within the act of state doctrine for two reasons: first, *RCC Resolution 369* dealt 'only incidentally with assets in Iraq [such as the ten aircraft then at Basra] being primarily concerned with the universal succession by IAC of KAC';<sup>40</sup> and secondly, the aircraft were only in Iraq because they had been stolen from Kuwait and brought across the border.<sup>41</sup> Alternatively, KAC argued that 'as a matter of English public policy, no effect should be given to *RCC Resolution 369* because it [was] in breach of clearly established principles of public international law.'<sup>42</sup> IAC responded by saying that the public policy exception was limited to laws that constitute a grave infringement of human rights, as in *Oppenheimer*.<sup>43</sup>

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<sup>35</sup> Ibid [563], [652].

<sup>36</sup> Ibid [236].

<sup>37</sup> Ibid.

<sup>38</sup> Ibid [237].

<sup>39</sup> Ibid [240]–[241].

<sup>40</sup> Ibid [238].

<sup>41</sup> Ibid.

<sup>42</sup> Ibid [239].

<sup>43</sup> [1976] AC 249, 278 (Lord Cross; Lord Hodson and Lord Salmon concurring).

The Court of Appeal accepted KAC's arguments on the threshold question, holding that no effect should be given to *RCC Resolution 369*. After a long consideration of authorities and academic writings, the Court began its answer by dealing with the non-justiciability issue. The Court had earlier reiterated the existence in England of a doctrine of non-justiciability — a matter still in doubt in Australia — and had also emphasised that it is separate from the act of state doctrine.<sup>44</sup> The Court said that the non-justiciability inquiry is a fact sensitive one, but guidance can be found by asking whether there are 'judicial or manageable standards' by which to resolve the dispute, whether the court would be in a 'judicial no-man's-land', or perhaps whether there would be embarrassment in the forum's foreign relations, at least where that possibility is brought to the Court's attention by the Executive.<sup>45</sup> For example, sensitive issues involving diplomacy between states, or uncertain or controversial issues of international law are situations calling for judicial restraint, even though the circumstances might not fall within the act of state doctrine. In essence, the principle of non-justiciability seeks to distinguish disputes involving sovereign authority, which can only be resolved on a state-to-state level, from disputes that can be resolved by judicial means.

Although the facts of the present case obviously arose in the *context* of large state-against-state disputes about sovereign authority, the Court held that the *issues* raised were justiciable. The issue was simply whether the transfer of title in the aircraft from KAC to IAC was effective. That issue, in itself, was not unmanageable — there was nothing 'precarious or delicate ... 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'.<sup>46</sup> As there was no need to decide any large questions of international law, there was no reason not to adjudicate the issue.

The Court of Appeal also considered the applicability of the act of state doctrine. The issue of the transfer of title by *RCC Resolution 369* having been held to be justiciable, the next question obviously was should the Court recognise the resolution as a valid act of state giving effect to that transfer? The Court held that it should not. *RCC Resolution 369* was 'fundamentally exorbitant', in that it sought to affect the status of a company (KAC) beyond the borders of the legislating state (Iraq), together with its assets, wherever in the world they might be.<sup>47</sup> Since the resolution was, in general, an extraterritorial one, it should not be recognised at all, not even in relation to those assets (such as the ten aircraft) within Iraq at the time it was made. Furthermore, the Court said, obiter, that it was immaterial that the aircraft were inside the sovereign

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<sup>44</sup> *Kuwait Airways* [2001] 1 Lloyd's Rep 161, [265] (Henry, Brooke and Rix LJ).

<sup>45</sup> *Ibid* [319].

<sup>46</sup> *Ibid* [334].

<sup>47</sup> *Ibid* [370].

territory of Iraq when *RCC Resolution 369* was made, because they had first been illegally seized outside of Iraq.<sup>48</sup>

In the alternative, the Court held that it was entitled to refuse recognition of *RCC Resolution 369* because it was in breach of clearly established principles of international law.<sup>49</sup> As noted in the introduction to this note, there was formerly very little direct authority to support the existence of a public policy exception of this kind, but that did not deter the Court. After considering English and American authorities at length, as well as academic writings on the subject, the Court concluded that the public policy exception was not confined to *Oppenheimer*-like cases of grave infringements of human rights — rather, it was wide enough to take account of clearly established breaches of international law.<sup>50</sup> Beneath the cluster of doctrines about state action, the Court saw ‘the constant theme of the role of universal, or at least generally accepted, principles of private and public international law’.<sup>51</sup> The Court recognised that if domestic public policy could be shown to differ from the mandates of clearly established principles of international law, then courts would be required to follow the dictates or limits of that domestic public policy.<sup>52</sup> However, the Court also went on to note that there is every reason to think that in most cases domestic public policy will be at one with, and ‘illuminated by, clearly established principles of international law.’<sup>53</sup>

So was *RCC Resolution 369* a breach of clearly established international law principles? The Court held that it was: the UN Security Council resolutions clearly stated this and required UN members, such as the United Kingdom, to give effect to them.<sup>54</sup> Thus the resolution could not be recognised in the UK.

#### IV ANALYSIS

So far as points of law are concerned, the Court of Appeal’s decision is significant for two main reasons. First, it confirms the existence of a doctrine of non-justiciability separate from the act of state doctrine. Secondly, it confirms that the public policy exception to the recognition of foreign laws extends beyond laws that are a grave affront to human rights to include laws that are clearly in breach of international law.<sup>55</sup>

So far as the application of the law to the facts is concerned, the Court’s decision can hardly be regarded as surprising, given the widespread criticism of Iraq’s conduct in relation to Kuwait. As the House of Lords had earlier held that Iraq and IAC enjoyed state immunity in relation to their conduct up to, but not including, the proclamation of *RCC Resolution 369*, the Court’s focus was

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<sup>48</sup> Ibid [386]–[388].

<sup>49</sup> Ibid [372].

<sup>50</sup> Ibid [323], [372].

<sup>51</sup> Ibid [323].

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid [378]–[379].

<sup>55</sup> Neither of those propositions has yet been adopted in Australia.

brought to bear squarely on *RCC Resolution 369* itself. As we have seen, the Court refused to give effect to the resolution for two reasons, either of which would have been sufficient in itself: the resolution was ‘exorbitant’ because of its extraterritorial effect, and recognition of it would be contrary to public policy because it breached clearly established principles of international law. The first of these two reasons contains a troubling weakness; the second is much more convincing, but is based on a new principle of uncertain dimensions.

There is nothing controversial in the idea that a court should refuse to give extraterritorial effect to a foreign ‘public’ law. As discussed in the introduction, this has long been a well-established principle of private international law. Thus, for example, it would unquestionably have been correct for the Court to refuse to give effect to *RCC Resolution 369* in relation to KAC’s property in its London or Geneva offices. But why should it follow that the resolution had no effect in relation to property within the sovereign territory of Iraq? Effectively, the Court’s response was that the whole resolution was so tainted by its exorbitant nature that none of it could be regarded as effective, not even the parts that applied to property within Iraq. The Court stated:

Resolution 369 opens with the provision for KAC’s dissolution. It is in that context that all its rights and liabilities, and all its assets, are to be transferred to IAC. If, however, the provision for KAC’s dissolution is ineffective for recognition in this forum, it is hard to see why a limited transfer of such assets as happened to be situate in Iraq at the relevant time should be recognised. Moreover, there is no separate provision for transfer of KAC’s assets located in Iraq. It is not therefore as though the application of a blue pencil rule to extraterritorial assets could save a provision dealing with assets within Iraq.<sup>56</sup>

This is not particularly convincing reasoning on the part of the Court. The Court did not explain *why* it could not apply a ‘blue pencil’ rule — separating the extraterritorial effect of the resolution from its territorial effect within Iraq. That is, after all, how general words in statutes are normally treated in private international law cases — any apparent or intended extraterritorial effect is ignored, and the statute is read down to apply only to situations properly within the territorial or constitutional powers of the legislature. The Court’s refusal to do that in this case was said to stem from the fact that ‘the provision for KAC’s dissolution is ineffective for recognition in this forum’.<sup>57</sup> But why could the Court not also take a ‘blue pencil’ approach to the provision for KAC’s dissolution? Plainly, it was entitled to ignore the Iraqi dissolution of a Kuwaiti company so far as the rest of the world was concerned. However, even though a law dissolving a foreign corporation might be largely futile — the simple act of legislating it out of existence could not work if its existence did not depend on Iraqi law — why should that dissolution be regarded as being legally ineffective within Iraq? If Iraq had legislated to dissolve not Kuwait Airways but British Airways, that legislation would have been largely quixotic because it would have had little effect on British Airways, but surely Iraqi citizens would have been

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<sup>56</sup> *Kuwait Airways* [2001] 1 Lloyd’s Rep 161, [369] (Henry, Brooke and Rix LJ).

<sup>57</sup> *Ibid.*

legally obliged to accept that there was no such entity as British Airways any more, at least so far as conduct inside Iraq was concerned. The actual legislation, *RCC Resolution 369*, was validly made by the Government of Iraq and it applied to property within Iraq's territorial jurisdiction. Normally, such legislative action would unquestionably deserve recognition, despite the fact that it was combined with unenforceable extraterritorial action.

Imagine, for example, that Country X, having ousted a hated dictator, passes a law expropriating all of the former dictator's assets, wherever in the world they might be found. Imagine that, after the law is passed, the former dictator flees to England, taking millions of dollars worth of Country X's assets with him. According to the view taken by the Court of Appeal in the present case, the expropriation law would be *entirely* invalid because of its purported extraterritorial effect. If the provisions in this hypothetical legislation for domestic expropriation and for foreign expropriation were separate, there might be a different result. However, the application of the Court of Appeal's reasoning would have the effect that no 'blue pencil' could save the domestic expropriation, and, in the view of the English courts, the legislation could have no effect on assets within Country X. Hence, Country X could not rely on its own expropriation law to seek return of any assets now found with the dictator in England.

Such a result would seem to be flatly inconsistent with the act of state doctrine. One might object that the dictator analogy is imprecise, because there the assets were always within the country up to and including the moment when the expropriating law was passed, whereas in the present case the aircraft were stolen outside Iraq and brought within it. However, the Court of Appeal expressly stated that its decision did not depend on that alternative argument, which had been raised by KAC.<sup>58</sup> The Court said, obiter, that KAC's argument had 'much to commend it', but that this part of the decision did not depend upon it.<sup>59</sup> And surely it would have been inappropriate for it to have based its decision on that argument, given the earlier decision of the House of Lords that IAC and Iraq were entitled to state immunity in relation to the original appropriation. If the validity of the original taking was immune from adjudication, how could the Court have been entitled to regard it as 'unlawful', or (to use words it used elsewhere) as an 'exorbitant act of international piracy'?<sup>60</sup> That may have been a fair (indeed, entirely accurate) description so far as public international law was concerned, but should it have been open to a civil court to make that judgment about the actions of a foreign sovereign?

Iraq took valuable property from a country reluctant to be treated as its colony, carried that property back to Iraq and then handed it over to a state-owned institution. That behaviour was widely and properly deplored, but it is worth remembering that the capitals of Europe (including London, the seat of the Court of Appeal in this case) are filled with treasures brought home in much the same way. One key feature that separates the European countries' 19<sup>th</sup> century

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<sup>58</sup> Ibid [386].

<sup>59</sup> Ibid.

<sup>60</sup> Ibid [336].

colonial plunder from Iraq's attempted 20<sup>th</sup> century equivalent is the role played by the UN Security Council. The UN Security Council unanimously and emphatically denounced Iraq's actions and demanded their reversal.<sup>61</sup> That made the Court of Appeal's decision not to recognise *RCC Resolution 369* on the alternative ground of the public policy exception a relatively simple one. Once it had accepted that the public policy exception extends beyond *Oppenheimer*-like human rights violations to breaches of international law, the fate of *RCC Resolution 369* was effectively sealed. As the Court pointed out:

[T]he very matters which are before the court, and which KAC seek to rely on for the purpose of showing that Resolution 369 should not be recognised, have already been determined, if not by an international court, at any rate by an international forum, of which nearly all the nations of the world are members, and whose decisions are binding on all those nations, including the United Kingdom and Iraq.<sup>62</sup>

In the light of the Security Council resolutions, it would have been odd, to say the least, if the Court of Appeal had given effect to *RCC Resolution 369* by application of the act of state doctrine. The Court would then have been doing precisely what the Security Council had instructed all UN members not to do — giving recognition to the annexation of Kuwait and the taking of the Kuwaiti Government's assets. UN *Security Council Resolution 661* required all countries, including the UK, '[t]o take appropriate measures to protect assets of the legitimate Government of Kuwait',<sup>63</sup> and *Security Council Resolution 662* required all 'to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation'.<sup>64</sup>

The UN Security Council resolutions made it easy to conclude that *RCC Resolution 369* was a breach of international law, but other cases might not be so simple. In declaring the existence of the new, beyond-*Oppenheimer* principle, the Court referred to 'universal, or at least generally accepted, principles of ... public international law',<sup>65</sup> but it also added that if the mandates of those principles were to differ from those of domestic public policy, then domestic public policy should prevail.<sup>66</sup> That is hardly surprising, as it would be difficult to imagine a court in any country contravening domestic public policy in order to give effect slavishly to the mandates of international law.

Nevertheless, the very possibility that there could be such a conflict between domestic policy and international law casts doubt on the Court's characterisation of public international law principles as 'universal or at least generally accepted'. Many principles of public international law are not sufficiently developed nor sufficiently widely accepted to be regarded as universal. Can a nation's breach of non-universal principles safely be ignored under the new *Kuwait Airways*

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<sup>61</sup> See, eg. SC Res 660, 45 UN SCOR (2932<sup>nd</sup> mtg), UN Doc S/Res/660 (1990), 29 ILM 1325. *Security Council Resolution 660* was carried 14 votes to 0; Yemen did not exercise its vote.

<sup>62</sup> *Kuwait Airways* [2001] 1 Lloyd's Rep 161, [378] (Henry, Brooke and Rix LJ).

<sup>63</sup> SC Res 661, 45 UN SCOR (2933<sup>rd</sup> mtg), UN Doc S/Res/661 (1990), 29 ILM 1325.

<sup>64</sup> SC Res 662, 45 UN SCOR (2934<sup>th</sup> mtg), UN Doc S/Res/662 (1990), 29 ILM 1327.

<sup>65</sup> *Kuwait Airways* [2001] 1 Lloyd's Rep 161, [323] (Henry, Brooke and Rix LJ).

<sup>66</sup> *Ibid.*

principle of private international law? If so, how is the line between ‘universal or generally accepted’ principles of public international law and ones still developing to be drawn? Determinations of that kind are often made by the International Court of Justice in deciding whether a norm has become part of customary international law, but is it appropriate for a civil court deciding a private dispute to make such a determination? And if that civil court can determine whether the principle of international law is sufficiently universal or generally accepted to fall within the principle, how is it then to go about the task of determining whether there has been a breach if there is no handy Security Council resolution to help it decide? Is the principle to be confined to cases like *Kuwait Airways* itself, where the breach of international law has already been authoritatively established by some international body, or can it be applied in other cases, where the breach is merely alleged? The Court of Appeal answered none of these questions and they will have to be resolved in future cases.

Questions of this kind about the scope of the new principle return us to the issue of non-justiciability. Once the English courts had accepted that the issue was justiciable before them, it became obvious that they could not recognise *RCC Resolution 369*, which would presumably have embarrassed the UK Government in its relations with the UN, if not in other diplomatic fora. But was it appropriate to regard the issue as justiciable by civil courts in the UK? As we have seen, the Court of Appeal’s answer to the non-justiciability question was to regard the issue narrowly, treating it merely as a question of title to property, and to apply a fairly conservative test for non-justiciability, that being the question of whether there are ‘manageable judicial standards’ by which to judge the issue. But was that an appropriate test for non-justiciability? Surely *all* questions about reparation and restitution after violent state action to seize assets are better dealt with by an international tribunal such as the Iran–United States Claims Tribunal, rather than by the private courts of a single country. Even though the Court did have ‘manageable judicial standards’ by which it could judge the issue, the underlying theme of judicial restraint in the face of state action might have suggested that it would have been better to decline to adjudicate on a matter that involved such sensitive matters of international relations.

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