

# *War Booty of 'Separate Entity' Protected by Sovereign Immunity*

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One of the lesser known incidents of the Gulf conflict, the removal of aircraft owned by Kuwait Airways Corporation from Kuwait to Iraq by the Iraqi Air Force and the Iraqi Airways Company, gave rise to the exceptional case of a 'separate entity', ie Iraqi Airways, successfully claiming immunity from the jurisdiction of the English courts under the State Immunity Act 1978.<sup>1</sup> In *Kuwait Airways Corporation v Iraqi Airways Company and Another*<sup>2</sup> the Court of Appeal was called upon to decide whether Iraqi Airways had acted 'in the exercise of sovereign authority' and whether it had lost its immunity by submitting to the court's jurisdiction under s 2 of the 1978 Act. Besides these questions of statutory interpretation the case highlights the limits set by the State Immunity Act 1978 to the enforcement in the English courts of State responsibility for international torts committed outside the United Kingdom.

## *The Facts*

On 2 August 1990 Iraq invaded Kuwait and Iraqi military forces occupied Kuwait airport. At the airport were fifteen aircraft owned by Kuwait Airways, five of which were removed from Kuwait to Iraq by the Iraqi Air Force. The remaining ten civilian aircraft were removed to Iraq on 6/8 August by Iraqi Airways, acting on instructions from the Iraqi Government. There they remained in the custody of Iraqi Airways which, after the transfer of ownership by decree of the Iraqi Revolutionary Command Council (RCC) in September 1990, made what limited commercial use of the aircraft it could in the prevailing circumstances. When military operations against Iraq became imminent, in January 1991, six of the aircraft were flown to Iran where they were interned until August 1992. The remaining four were later destroyed in air raids on Iraq by United Nations aircraft.

On 11 January 1991 Kuwait Airways Corporation issued a writ against Iraqi Airways Company and the Republic of Iraq claiming, pursuant to s 3(2)(a) and (c) of the Torts (Interference with Goods) Act 1977 and at common law, delivery up of the surviving aircraft with consequential damages for wrongful interference

<sup>1</sup> For a recent case in which the immunity of two separate entities, Iraqi Re-insurance Company and Iraqi Airways Ltd, was denied, see *Re Rafidain Bank* [1992] BCLC 301.

<sup>2</sup> 21 October 1993 (Nourse, Leggat, Simon Brown, LJ): [1994] 1 Lloyd's Rep 276. For short comments on this case, see S. Marks, 'State Agencies and Foreign Sovereign Immunity', 53 *CLJ* (1994), 213-16; and H. Fox, 'States in the Market Place', 110 *LQR* (1994), 199-204.

with them and, in respect of those that had been destroyed, payment of their value by way of damages. Judgments were entered in default of appearance against Iraqi Airways and the Republic of Iraq. Damages were assessed at something under US\$490m plus interest. The defendants applied to have the default judgments against them set aside. At first instance,<sup>3</sup> Evans J refused the application of Iraqi Airways on the ground that it was not immune from the jurisdiction of the English courts as the aircraft, though removed from a foreign country on government instructions, were to be put to commercial use.<sup>4</sup> Iraqi Airways successfully appealed.

### *The Decision*

Two main questions arose. The first question was whether Iraqi Airways Company, admittedly a 'separate entity'<sup>5</sup> for the purpose of the State Immunity Act 1978, was immune from the jurisdiction of the English courts by virtue of s 14(2), which provides:

A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

- (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
- (b) the circumstances are such that a State . . . would have been so immune.

The scheme of the State Immunity Act 1978 is such that a state has general immunity from the jurisdiction of the United Kingdom courts by virtue of s 1(1) 'except as provided in the following provisions of this Part of this Act'. Ss 2 to 11 then provide for a wide range of exceptions from immunity. The parties agreed that the question whether the requirement of s 14(2)(b) had been satisfied depended on whether the exception in s 3(1) and (3)(c) was applicable. According to that provision a state is not immune as respects proceedings relating to an 'activity . . . in which it engages otherwise than in the exercise of sovereign authority'.<sup>6</sup> Nourse LJ, delivering the judgment of the Court of Appeal, added those two requirements of s 14(2) together. The essential question thus was whether the action related to acts done by Iraqi Airways in the exercise of sovereign authority, being acts which, had they been done by the Republic of

<sup>3</sup> QBD, 16 April 1992: Transcript. The case is reported in *Financial Times*, 17 July 1992; 3 *Practical Law for Companies* (September 1992), 4. For a note on, *inter alia*, this case, see H. Fox, 'A "Commercial Transaction" under the State Immunity Act 1978', 43 *ICLQ* (1994), 193–202.

<sup>4</sup> Evans J set aside the judgment against the second defendant, the Republic of Iraq, on the ground of invalid service of writ.

<sup>5</sup> S 14(1) defines a 'separate entity' as an entity capable of suing and being sued and distinct from the executive organs of the government.

<sup>6</sup> The Court of Appeal expressed no view on the submission of counsel for Iraqi Airways, Mr Beloff QC, that s 3(1)(a) only applied to proceedings in tort if they arose out of a transaction or activity entered into or engaged 'in the United Kingdom'. It is suggested that the wording of that provision speaks against that submission. Unlike s 5 of the Act which does not distinguish between sovereign and non-sovereign acts, s 3(1)(a) only applies to acts done 'otherwise than in the exercise of sovereign authority'. A jurisdictional link in order to justify the exercise of jurisdiction by the English courts over tortious acts done in the exercise of sovereign authority as in s 5 is therefore not required.

Iraq, would also have been done in the exercise of sovereign authority. It was clear that if the acts had been done by Iraqi Airways in the exercise of sovereign authority, they would necessarily have been done by Iraq in the like capacity. Nourse LJ therefore reduced the question still further to whether the action related to acts done by Iraqi Airways in the exercise of sovereign authority. He held that both s 14(2)(a) and s 3(3)(c) 'do indeed adopt the straightforward dichotomy between acts *jure imperii* and acts *jure gestionis*' which according to Lord Diplock had become 'a familiar doctrine in public international law'.<sup>7</sup> The question then was whether the action against Iraqi Airways 'related to' acts done by it *jure imperii*.<sup>8</sup> Nourse LJ defined an act *jure imperii* as 'one that can only be done by or at the behest of a sovereign state in exercise of its sovereign authority'. He continued: 'Such an act is often described as "governmental", in order to distinguish it from an act that can be done by a private citizen'. Nourse LJ held that by removing the aircraft from Kuwait airport and by accepting an unlawful transfer of possession, control and title it had acted as 'a dutiful accomplice of Iraq's in the forcible confiscation of the aircraft'.<sup>9</sup> This was 'as clear an act *jure imperii* as could possibly be imagined'.<sup>10</sup> Unlike Evans J at first instance, Nourse LJ attached no importance to the defendant's intention to use the aircraft for commercial and not governmental purposes when classifying its acts as *acta jure imperii*. He held that 'it is the nature of the act and not its purpose that is decisive'. In support of his view he referred to the case *I Congreso del Partido* in which Lord Wilberforce had quoted with approval the following passage in the judgment of the Federal Constitutional Court of the German Federal Republic in the *Claim against the Empire of Iran Case*:<sup>11</sup>

As a means for determining the distinction between acts *jure imperii* and acts *jure gestionis* one should rather refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity. It thus depends upon whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.<sup>12</sup>

Consequently, he held that the intention to use the aircraft for commercial purposes could not and did not transform the essential nature of the 'forcible

<sup>7</sup> *Alcom Ltd v Republic of Colombia* [1984] AC 580 at 600. According to Lord Diplock, however, the State Immunity Act 1978 only 'comes close' to adopting the straightforward dichotomy between *acta jure imperii* and *acta jure gestionis* 'in s 14(2) in relation to the immunity conferred upon "separate entities that are emanations of the state"'. (ibid, [italics added]).

<sup>8</sup> In order to see to what acts the action 'relates', according to Nourse LJ, regard must be had in the first instance to the allegations made in the points of claim. Cf also the speech of Lord Wilberforce in *I Congreso del Partido* [1983] AC 244 at 267.

<sup>9</sup> By 'confiscation' Nourse LJ meant expropriation without payment of any or of any proper compensation. It is of interest to note in this connection that 'on 25 September 1990 the President of the Council of the ICAO received a letter from the Representative of Iraq on the Council advising him that under a decree issued by the Revolutionary Control Council of the Republic of Iraq, the assets and property of the "former" Government of Kuwait, including aircraft of Kuwait Airways, have become the property of the Government of Iraq'. (UN Doc S/21862, annex, 5).

<sup>10</sup> For the classification of activities of a foreign occupying power as *acta jure imperii* see also the decision of the Tribunal of Rome in *Ministry of Foreign Affairs v Federici and Japanese State* 65 ILR 275.

<sup>11</sup> [1983] AC 244 at 263-4. See also Lord Edmund-Davies' speech at 276.

<sup>12</sup> 45 ILR 57 at 80.

confiscation' of the aircraft which could only have been carried out by or at the behest of a sovereign state in exercise of its sovereign authority. Thus Iraqi Airways was entitled to immunity from the jurisdiction of the English courts by virtue of s 14(2) of the State Immunity Act 1978.<sup>13</sup>

The second question was whether Iraqi Airways had lost its immunity by submitting to the jurisdiction of the English courts as provided for by s 2 of the Act. The argument that s 2 applied only to states and did not govern the question whether a separate entity had submitted to the jurisdiction was rejected by Nourse LJ on the ground that s 2 was effectively applied to separate entities by s 14(2)(b) which required that 'the circumstances are such that a State . . . would have been immune'. The question then turned on s 2(3)(b) according to which a separate entity is deemed to have submitted to the jurisdiction of the courts 'if it has . . . taken any step in the proceedings'. By sub-s (4)(a) that does not apply to any step taken for the purpose 'only' of claiming immunity. According to Nourse LJ sub-s (4) was a 'relieving provision'. He pointed out that there was no submission to the jurisdiction from which the separate entity had to be relieved if what it had done did not amount to a step in the proceedings. The first question therefore had to be whether Iraqi Airways had taken any step which amounted to a 'step in the proceedings' in the sense of s 2(3)(b). In order to decide that question Nourse LJ adopted as a general test that suggested by Lord Denning MR in *Eagle Star Insurance Co Ltd v Yuval Co Ltd*:

. . . a 'step in the proceedings' must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.<sup>14</sup>

Nourse LJ found that Iraqi Airways had advanced *forum non conveniens* and the doctrine of 'Act of State' only as grounds for holding that the court had no jurisdiction and had not relied on them by way of defence. By advancing those grounds (as well as by applying to stay the execution of the default judgment and by performing the conditions subject to which the stay was granted) Iraqi Airways had not affirmed the correctness of the proceedings or its willingness to go along with their determination by the English courts. It had done exactly the opposite. For those reasons Iraqi Airways had not taken a step in the proceedings within s 2(3)(b) of the 1978 Act. It was thus not to be deemed to have submitted to the jurisdiction of the English courts and its immunity remained intact.

<sup>13</sup> The Republic of Iraq was also entitled to immunity by virtue of s 1(1) of the 1978 Act.

<sup>14</sup> [1978] 1 Lloyd's Rep 357 at 361. In that case the question whether what had been done by the defendant amounted to a step in the proceedings arose in the context of s 4(1) of the Arbitration Act 1950 which provides that in order to ask the court proceedings to be stayed, the defendant must apply to the court 'at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings'.

### *The Distinction Between Acta Jure Imperii and Acta Jure Gestionis and the 'Nature Test'*

According to Nourse LJ the resolution of the problem whether the proceedings related to acts done by Iraqi Airways Company 'in the exercise of sovereign authority'<sup>15</sup> depended on the application of the 'well recognized distinction between acts *jure imperii* and acts *jure gestionis*'. The application of the *jure imperii/jure gestionis* dichotomy, however, only gives the problem a Latin label.<sup>16</sup> This becomes clear from the fact that, for example, Article 27(2) of the European Convention on State Immunity 1972<sup>17</sup> defines *acta jure imperii* as 'acts performed . . . in the exercise of sovereign authority'. Nourse LJ himself defined an act *jure imperii* as 'one that can only be done . . . in exercise of . . . sovereign authority'. The problem, irrespective of the label, thus remains the distinction between sovereign acts (*acta jure imperii*) and non-sovereign acts (*acta jure gestionis*).<sup>18</sup> Two main tests for the distinction between *acta jure imperii* and *acta jure gestionis* have been suggested: the (objective) 'nature test' and the (subjective) 'purpose test'.<sup>19</sup> Nourse LJ, as the judge of first instance, endorsed the nature test according to which an act is to be characterized by reference to its nature.<sup>20</sup> He thereby relied on the decision of the House of Lords in *I Congreso del Partido* in which Lord Wilberforce had adopted the nature test when applying the doctrine of restrictive immunity as part of the common law.<sup>21</sup> This test, however, lacks substance: merely to state that an act is to be characterized by its nature is to say little more than that it is not to be characterized by its purpose. The nature test, and indeed the judgment of Nourse LJ, says nothing about *how* the nature of an act is to be established. A clue as to how this may be done can be found in the passage from the *Claim against the Empire of Iran Case*<sup>22</sup> referred to by

<sup>15</sup> Cf ss 14(2)(a) and 3(3)(c).

<sup>16</sup> On the *acta jure imperii/acta jure gestionis* dichotomy see, eg, Ch Lewis, *State and Diplomatic Immunity* (3rd edn, London, 1990), 94-122; P. D. Trooboff, 'Foreign State Immunity: Emerging Consensus on Principles', *Recueil des Cours*, 200 (1986-V), 235-432 at 275-317.

<sup>17</sup> 11 *ILM* 470 (1972). See also Lord Diplock's definition of *jure imperii* in *Alcom Ltd v Republic of Colombia* [1984] 1 AC 580 at 597-8.

<sup>18</sup> As to the difficulty of distinguishing between acts *jure imperii* and acts *jure gestionis* see, eg, *I Congreso del Partido* [1983] AC 244 at 264, 265 (per Lord Wilberforce), at 278 (per Lord Bridge); *I Congreso del Partido* [1981] 1 All ER 1092 at 1101 (per Denning MR); *The Philippines Admiral* [1977] AC 373 at 402 (per Lord Cross). For criticism of the distinction see, eg, H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *BYBIL* (1951), 220-72 at 222, 224.

<sup>19</sup> Cf Ch Schreuer, *State Immunity: Some Recent Developments* (Cambridge, 1988), 15-22. For a combined nature-purpose test, see Article 2.2 of the ILC Draft Articles on Jurisdictional Immunities of States and Their Property (1991): *YbILC* 1991, Vol II-2, 14.

<sup>20</sup> The nature test was expressly adopted in §1603(d) of the US Foreign Sovereign Immunities Act 1976: 15 *ILM* 1388 (1976). According to the ILC's Special Rapporteur, Mr Sucharitkul, the absolute nature test causes hardship to developing countries, particularly as they promote national economic development (*YbILC* 1982, Vol I, 199). See also the commentary to Article 2.2: *YbILC* 1991, Vol II-2, 20. For criticism of the nature test, see J. Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', 54 *BYBIL* (1983), 75-118 at 95.

<sup>21</sup> [1983] AC 244 at 263. See also the speech of Lord Edmund-Davies, *ibid*, at 276. For other decisions in which English courts have adopted the nature test when applying the doctrine of restrictive immunity as part of the common law, see *Trendex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at 566 (per Stephenson LJ), at 576, 579 (per Shaw LJ); and most recently *Litrell v United States of America* (CA, 12 November 1993), Transcript, *The Times*, 24 November 1993, *Independent*, 2 December 1993.

<sup>22</sup> 45 *ILR* 57 at 80.

Nourse LJ in his judgment. In that case the German Federal Constitutional Court held that the nature of an act depended on whether the State had acted 'in the exercise of its sovereign authority, that is in public law, or like a private person, that is in private law'.<sup>23</sup> In civil law countries such as Germany courts have established the nature of an act by reference to the (formalistic and as it seems sometimes rather arbitrary)<sup>24</sup> public/private law dichotomy characteristic to their legal system.<sup>25</sup> Those courts have to answer two questions. First, by what law is a certain act governed and, secondly, does the law governing a certain act qualify as public or private law. Ultimately, the problem of distinguishing between sovereign and non-sovereign acts becomes the problem of distinguishing between public and private law. The common law does not, or at any rate not yet, know any strict and clear distinction between public and private law and does not provide any rules and techniques for such a distinction.<sup>26</sup> In *Davy v Spelthorne Borough Council* Lord Wilberforce said:

The expressions 'private law' and 'public law' have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they must be used with caution, for, typically, English law fastens, not upon principles but upon remedies.<sup>27</sup>

The 'civil law version' of the nature test by which the nature of an act is to be established by reference to the public/private law dichotomy therefore cannot be 'imported' into the common law.<sup>28</sup> If the nature test is to be more than an empty formula at common law the courts will have to devise and reveal their own criterion or criteria by which the sovereign or non-sovereign nature of an act is to be established.<sup>29</sup> Until then the distinction between acts *jure imperii* and acts

<sup>23</sup> Reference to the 'private law character' of the relevant act was also made by Lord Wilberforce in *I Congreso del Partido* [1983] AC 244 at 267; and Rose LJ in *Litrell v United States of America* (CA, 12 November 1993), Transcript.

<sup>24</sup> Until recently bus services operated by the German Railway Administration were governed by public law while the same services operated by the German Postal Administration were governed by private law.

<sup>25</sup> On the public/private law dichotomy in civil law jurisdictions see Ch Szladits, 'The Civil Law System', in D. René (ed), *International Encyclopedia of Comparative Law*, Vol II, Ch 2 (Tübingen, 1974), 15-76 at 15-48.

<sup>26</sup> It is interesting to note that in the *Church of Scientology Case* (1978) the plaintiffs argued before the German Federal Supreme Court that the exercise of police power by New Scotland Yard (an activity unquestionably involving the exercise of sovereign authority) was treated as a private law activity in English law: 65 ILR 193 at 197.

<sup>27</sup> [1984] 1 AC 262 at 276. As to the present state of the distinction between public and private law in English law see the decisions of the Court of Appeal in *Re State of Norway's Application (No 1)* [1989] 1 All ER 661 at 677, 679 (per Kerr LJ) and *Re State of Norway's Application (No 2)* [1989] 1 All ER 701 at 739 (per Woolf LJ). It is of interest to note in this context that in *Re State of Norway's Application (Nos 1 & 2)* the House of Lords found tax gathering (an activity undoubtedly involving the exercise of sovereign authority) to be a 'civil matter' in English law ([1989] 1 All ER 745). On the distinction between public and private law see also P. Cane, *An Introduction to Administrative Law* (2nd edn, Oxford, 1992), 12-19. Contra such a distinction in English law, see C. Harlow, 'Public' and 'Private' Law: Definition without Distinction', 43 *MLR* (1980), 241-65.

<sup>28</sup> The 'import' of the civil law version of the nature test in any case would not have been without difficulties. This may be illustrated by the fact that there are about twenty to thirty theories of how to distinguish between public and private law, none of which commands general approval. See I. von Münch, 'Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat', in H.-U. Erichsen, W. Martens (eds), *Allgemeines Verwaltungsrecht* (3rd edn, Berlin, 1978), 1-53 at 14-15.

<sup>29</sup> Compare the different approaches in the *Kuwait Airways cases* and in *Litrell v United States of America* (CA, 12 November 1993), Transcript, *The Times*, 24 November 1993; *Independent*, 2 December 1993.

*jure gestionis* remains a (subjective) value judgment disguised as a pseudo-objective test. A fact revealed by the present case in which the Court of Appeal and the first instance judge reached diametrically opposed results despite both endorsing the nature test for the characterization of the acts of Iraqi Airways Company.

### *Deemed Submission to the Jurisdiction*

S 2(3)(b) provides that a state (or separate entity) is deemed to have submitted to the English courts if it has taken any step in the proceedings. By sub-s (4)(a) that does not apply to any step taken for the purpose only of claiming immunity. When deciding whether a state had lost its immunity by reason of a deemed submission to the jurisdiction, the High Court in earlier cases normally asked whether the step in the proceedings was taken 'for the purpose *only* of claiming immunity' and not whether the step taken amounted to a 'step in the proceedings'.<sup>30</sup> By contrast, Nourse LJ pointed out that there was no submission if what was done by the defendant did not amount to a step in the proceedings and that the first question to be examined therefore had to be whether it had taken a 'step in the proceedings'. He defined 'a step in the proceedings' as a step which affirms the correctness of the proceedings and the willingness of the defendant to go along with the determination by the English courts. Steps disputing or challenging the jurisdiction of the English courts<sup>31</sup> are doing exactly the opposite. He consequently held that an objection to the jurisdiction both on the ground of state immunity and, at the same time, on grounds of *forum non conveniens* and the act of state doctrine did not amount to a step in the proceedings in the sense of s 2(3)(b).<sup>32</sup>

Several objections may be raised against this interpretation of s 2(3)(b) and (4)(a). First, the definition of 'any step in the proceedings' in s 2(3)(a) adopted by Nourse LJ makes sub-s (4)(a) virtually unnecessary as any step taken for the purpose only of claiming immunity constitutes a rejection of the correctness of the proceedings and a denial of the defendant's willingness to go along with their determination by the English courts and therefore, *per definitionem*, does not amount to a step in the proceedings in the first place.<sup>33</sup> Secondly, s 2(3)(b)

<sup>30</sup> See, eg, *A Company Ltd v B Company Ltd & Another* (QBD, 1 April 1993), Transcript (per Saville J); *Kuwait Airways Corporation v Iraqi Airways Company and Another* (QBD, 16 April 1992), Transcript; *Financial Times*, 17 July 1992 (per Evans J); and *Australia and New Zealand Banking Group Limited v The Commonwealth of Australia and Others; Amalgamated Metal Trading Ltd and others v Department of Trade and Industry and others* (QBD, 28 April 1989), Transcript; *The Times*, 16 May 1989 (per Evans J).

<sup>31</sup> For example, applications under RSC Order 12 Rule 8(1).

<sup>32</sup> However, Nourse LJ stated *obiter* that a defendant who seeks a stay of proceedings on the ground of *forum non conveniens* will usually take a step in the proceedings. On the question whether a state that applies to the court to decide the question of *forum non conveniens* before the question of state immunity is deemed to have submitted to the jurisdiction of the court, see *A Company Ltd v B Company Ltd & Another* (QBD, 1 April 1993): Transcript. For a note on that case, see *Corporata Briefing*, 7 (1993), 216-18.

<sup>33</sup> Nourse LJ himself concluded: 'It is clear that a defendant who does no more than claim immunity takes no step in the proceedings'. ([1994] 1 Lloyd's Rep 274 at 283).

speaks of 'any' step as opposed to a particular *kind* of step in the proceedings. That 'any' step in the proceedings also comprises steps relating to the jurisdiction of the court is clear from the fact that sub-s (4)(b) must expressly exclude 'any step taken for the purpose only of claiming immunity' from the deemed submission which results from taking 'any step in the proceedings'. As already pointed out, if 'any step in the proceedings' did not comprise steps relating to the jurisdiction, sub-s 4(a) would not be necessary. It is of interest to note in this connection that unlike the European Convention on State Immunity 1972<sup>34</sup> and the ILC Draft Articles on Jurisdictional Immunities of States and their Property (1991)<sup>35</sup> which expressly speak of 'any step in the proceedings relating to the merits', the State Immunity Act 1978 speaks of 'any step in the proceedings'. The 1978 Act is in that respect wider than those instruments. Thirdly, the interpretation of Nourse LJ does not take into account that s 2(3)(b) speaks of a 'deemed' submission to the jurisdiction of the English courts. In *Re Dulles's Settlement Trusts*, *Dulles v Vidler* Denning LJ (as he then was) said:

I cannot see how anyone can fairly say that a man has *voluntarily* submitted to the jurisdiction of a court when he has all the time been vigorously protesting that it has no jurisdiction.<sup>36</sup>

At first sight this statement seems to support the exclusion of steps relating to the jurisdiction from 'any step in the proceedings'. However, s 2(3)(b) does not provide that a State has 'voluntarily' submitted to the jurisdiction if it has taken any step in the proceedings but that it is 'deemed' to have submitted if it has taken any step in the proceedings. The word 'deemed' means that a State that has taken any step in the proceedings must be treated as if it has submitted to the jurisdiction of the court even if the step taken does not constitute a submission.<sup>37</sup> Many modern statutes rely upon the device of 'deeming', a kind of *fiction legis*. Viscount Simonds regarded 'its primary function as to bring in something which would otherwise be excluded'.<sup>38</sup> In the case of s 2(3) that something brought in which would otherwise be excluded is steps in the proceedings which do not constitute a (voluntary) submission such as steps relating to the jurisdiction.<sup>39</sup> If 'any step in the proceedings' only included steps which affirm the correctness of the proceedings and the willingness of the defendant to go along with the determination by the English courts there would be no need for a 'deemed' submission as such steps already constitute a (voluntary) submission.

<sup>34</sup> Article 3(1): above, n 17.

<sup>35</sup> Article 8.1 (b): *YBILC* 1991, Vol II-2, 28.

<sup>36</sup> [1951] 1 Ch 842 at 850 (italics added). This view was endorsed by Lord Fraser in *Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA and another* [1984] 1 All ER 760 at 762.

<sup>37</sup> On the meaning of 'deemed' see, eg, *St Aubyn and Others v Attorney-General* [1952] AC 15 at 53 (per Lord Radcliffe); *Robert Batcheller & Sons Ltd v Batcheller* [1945] 1 Ch 169 at 176; and *The Queen v The County Council of Norfolk* (1891) 60 LJQB 379 at 380-1 (per Cave J).

<sup>38</sup> *Barclays Bank Ltd v Inland Revenue Commissioners* [1961] AC 509 at 523.

<sup>39</sup> The other two alternatives of s 2(3), the institution of the proceedings and intervention, constitute a (voluntary) submission. The need for a 'deemed' submission therefore only arises with respect to the taking of 'any step in the proceedings'.



It is suggested that on a literal and grammatical interpretation of s 2(3)(b) and (4)(a) together 'any step in the proceedings' is to be understood to comprise all steps in the proceedings, irrespective of whether they relate to the merits or to the jurisdiction. This wide interpretation is supported by the fact that the taking of 'any' step in the proceedings does not concern the question of submission to jurisdiction but, as Nourse LJ rightly pointed out, whether the defendant 'had lost its immunity by reason of a [deemed] submission to the jurisdiction'. From the wording of the provision it becomes clear that the defendant who does more than claim immunity is to lose his immunity from (otherwise existing) jurisdiction. This is justified by the fact that the defendant who is in fact immune has no need to dispute the jurisdiction of the court on grounds other than immunity.<sup>40</sup> Indeed, the defendant who is in fact immune has no need to dispute the jurisdiction of the court at all as the court is to give effect to its immunity even though it does not take any step in the proceedings.<sup>41</sup> As Saville J rightly pointed out in *A Company Ltd v B Company Ltd & Another*, if a foreign sovereign is immune from the jurisdiction of the English courts, 'that is the end of the matter'.<sup>42</sup> In such a case the court has no power to decide any other question that might be raised in the context of the proceedings. The defendant who asks the court to decide, for example, whether or not England is the appropriate forum, must necessarily lose his immunity because if the immunity continued to exist the court would have no power to decide that question.<sup>43</sup>

The decisive question of s 2(3)(b) and (4)(a) therefore is whether a step in the proceedings has been taken 'for the purpose only of claiming immunity'. The purpose of a step in the proceedings such as an application under RSC Order 12 Rule 8(1)(g) for a declaration that the court has no jurisdiction can only be determined on the ground(s) of the application. Iraqi Airways applied for a declaration that the court had no jurisdiction in respect of the plaintiff's claim both on the ground of state immunity and, at the same time, on grounds of *forum non conveniens* and Act of State.<sup>44</sup> Iraqi Airways thus took a step in the proceedings which cannot be described as 'only' for the purpose of claiming immunity.<sup>45</sup> Consequently, the Court of Appeal should have held that Iraqi Airways had lost its immunity by virtue of a deemed submission to the jurisdiction of the court. This result could have easily been avoided by Iraqi Airways by

<sup>40</sup> If the claim for immunity is dismissed by the court, the defendant may lodge a further acknowledgement of service and the case then proceeds as if no application under RSC Order 12 Rule 8(1) had been made: Rule 8(6). In that case the defendant may rely on *forum non conveniens* and act of state doctrine by way of defence.

<sup>41</sup> Cf s 1(2) of the State Immunity Act 1978.

<sup>42</sup> QBD, 1 April 1993: Transcript. See also *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72, at 194-5, 252, in which the Court of Appeal held that, whenever the question of immunity is raised, this question must be decided as a preliminary issue in favour of the plaintiff before the substantive action can proceed.

<sup>43</sup> The defendant cannot ask the court to exercise a jurisdiction from which he is immune.

<sup>44</sup> The act of state doctrine would have been of little help in the present case as it is limited to acts done by the foreign sovereign in its own territory: *The 'Flora Larga'* [1983] 2 Lloyd's Rep 171 at 194 (CA). According to Nourse LJ the relevant act was the removal of the aircraft from Kuwait.

<sup>45</sup> Contra Evans J in *Kuwait Airways Corporation v Iraqi Airways Company and Another* (QBD, 16 April 1992), Transcript. The judge's reasoning, however, was not approved of by the Court of Appeal.

advancing *forum non conveniens* and Act of State, only subsidiarily, in case its plea of state immunity had been unsuccessful.

### *Possible Action In Rem?*

Once the present United Nations sanctions against Iraq are lifted and relations between the United Kingdom and Iraq are normalized the surviving aircraft could theoretically be used by Iraqi Airways for commercial flights to the United Kingdom. The question may therefore be asked whether Iraqi Airways could successfully claim immunity from the jurisdiction of the English courts under s 14(2) with respect to an action *in rem* against the aircraft brought by Kuwait Airways for possession of the aircraft. Immunity from jurisdiction presupposes that the English courts have subject-matter jurisdiction in the first instance.<sup>46</sup> The only Admiralty jurisdiction given to the High Court in relation to aircraft is to claims in the nature of salvage, towage and pilotage.<sup>47</sup> The State Immunity Act 1978 does not confer jurisdiction on the courts which they would otherwise not have.<sup>48</sup> As the High Court thus does not have jurisdiction *in rem* against aircraft in an action for possession the question of immunity of Iraqi Airways would not arise at all.

The question could however arise with regard to actions *in rem* for possession of captured property to which the Admiralty jurisdiction of the High Court does extend such as ships.<sup>49</sup> S 14(2) requires that for a separate entity to be immune the proceedings must 'relate to' anything done by it in the exercise of sovereign authority. According to Nourse LJ an action 'relates to' the acts of which the plaintiff makes complaint. In case of captured property this will normally be the (continued) wrongful interference by unlawful possession. Nourse LJ said that when Iraqi Airways had removed the aircraft from Kuwait it had wrongfully interfered with them. Everything else had followed from that. Although, he argued, it might be correct to say that there had been a fresh interference *die in diem*, those interferences had been 'merely extensions or embellishments of the original removal'. The removal of the aircraft by Iraqi Airways was classified by Nourse LJ as an act *jure imperii*. An action *in rem* against a ship or any other captured property subject to the Admiralty jurisdiction removed from Kuwait under the same circumstances as the aircraft would therefore have related to an act done in the exercise of sovereign authority.

<sup>46</sup> Both s 14(2) and s 1(2) speak of immunity 'from' jurisdiction, thereby implicitly assuming that jurisdiction exists. State immunity thus is a procedural bar to existing jurisdiction. As to the relationship between jurisdiction and immunity, see also R. Higgins, 'Certain Unresolved Aspects of the Law of State Immunity', 29 *NILR* (1982), 265-76 at 270-2.

<sup>47</sup> See Supreme Court Act 1981, s 20 sub-s (7)(a) in connection with sub-s (2)(j), (k) and (l). See also *The Glider Standard Austria SH* [1965] P 463. In that case Hewson J suggested reform of the Administration of Justice Act 1956, s 1, which in the relevant part is identical with the Supreme Court Act 1981, s 20. He said: 'It may be that facilities *in rem* for the enforcement of any claim against owners of, or those in possession of aircraft, should be provided. Aircraft, like ships, do not usually remain for long in any jurisdiction. They generally move out of one into another'. (*ibid*, 466).

<sup>48</sup> L. Collins (ed), *Dicey and Morris on the Conflict of Laws*, Vol I (12th edn, London, 1993), 243.

<sup>49</sup> For the extent of the Admiralty jurisdiction of the High Court see Supreme Court Act 1981, s 20.

According to the second requirement of s 14(2), for a separate entity to be immune the circumstances have to be such that a state would have been so immune. The relevant exception to the general immunity of a state under s 1(1) of the 1978 Act may be found in s 10(2)(a) which provides that a state is not immune as respects an action *in rem* against a ship in its possession or control 'if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes'. Nourse LJ held that Iraqi Airways wrongfully interfered with the aircraft for the first time when it removed them from Kuwait. All subsequent acts he considered merely extensions or embellishments of the original removal. The cause of the action thus arose at the time of the removal of the aircraft from Kuwait. The question then is whether, at the time of the removal, the aircraft were in use or intended for use for commercial purposes. S 17(1) defines 'commercial purposes' as the purposes (a) of any contract for the supply of goods or services, (b) of any loan or other transaction for the provision of finance, (c) of any guarantee or indemnity in respect of any such transaction, (d) of any other financial obligation, or (e) of any other transaction or activity into which a state enters or in which it engages otherwise than in the exercise of sovereign authority.<sup>50</sup> The aircraft were used for the purpose of their removal from Kuwait. This removal was classified by Nourse LJ as an act *jure imperii*. At the time of their removal the aircraft were thus in use for the purpose of an activity involving the exercise of sovereign authority. According to the definition of s 17(1), at the time of their removal, the aircraft were therefore not in use or intended for use for commercial purposes. The fact that the aircraft may have been intended for use for commercial purposes in the future is not relevant in this connection as the aircraft must have been intended for such use at the time of their removal.<sup>51</sup> Had a ship been removed from Kuwait in similar circumstances as the aircraft a state would therefore have been immune as respects an action *in rem* against the ship and by virtue of s 14(2) the same would have been true for a separate entity.<sup>52</sup>

### Conclusion

As the 'forcible confiscation' of movable property in a foreign country during wartime can only be carried out in exercise of the occupying state's sovereign authority, the occupying state and separate entities acting at its behest are immune from the jurisdiction of the English courts in respect of actions both *in personam* and *in rem*. The consequence of this finding is that war booty of foreign

<sup>50</sup> Cf *Alcom Ltd v Republic of Colombia* [1984] 1 AC 580 at 586-7 (per Sir John Donaldson MR).

<sup>51</sup> The alternative 'intended for use' comprises cases in which the property was not in use at all at the time when the cause of action arose. For example, a ship may have been intended for use for commercial purposes at the time when it was being repaired.

<sup>52</sup> Cf s 1605(a)(3) of the US Foreign Sovereign Immunities Act 1976 which expressly provides that a state shall not be immune 'in any case in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state . . .'. See also Ch H. Schreuer, *State Immunity: Some Recent Developments* (Cambridge, 1988), 54-7.

states and separate entities is (indirectly) protected by the State Immunity Act 1978. This consequence, which may seem odd at first sight, was explained by Nourse LJ by the fact that 'a municipal court has no jurisdiction to determine what in reality is a dispute of international law'. In *The Charkieh*, a case concerning the sovereign immunity of the Khedive of Egypt, Sir Robert Phillimore observed in 1873:

The object of international law . . . is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state. . . .<sup>53</sup>

The 'forcible confiscation' of the Kuwaiti aircraft during the Gulf conflict constituted an internationally wrongful (but nevertheless sovereign) act which entailed the international responsibility and liability of Iraq.<sup>54</sup> For the English courts to assert jurisdiction in this case would have been inconsistent with the dignity of Iraq. It was Lord Wilberforce who with respect to acts contrary to international law pointed out that 'the whole purpose of the doctrine of state immunity is to prevent such issues being canvassed in the courts of one state as to the [sovereign] acts of another'.<sup>55</sup> Such cases are more appropriately dealt with through diplomatic representation and negotiation or formal presentation of an international claim.<sup>56</sup> Kuwait Airways, through the Government of Kuwait, may file a claim for damages with the UN Compensation Commission in Geneva (UNCC) which was established by the UN Security Council on 3 April 1991 in order to pay compensation (out of a fund financed by Iraq) for any direct loss, damage or injury resulting from Iraq's unlawful invasion and occupation of Kuwait.<sup>57</sup> Four years after the end of the Gulf conflict more than 2.3 million people, companies and governments have filed claims for a total of US\$81 billion with the UNCC which so far has no substantial funds to distribute.<sup>58</sup> This and

<sup>53</sup> (1873) LR 4 A & E 59 at 97.

<sup>54</sup> See UN SC Res 674 paras 8 and 9 (1990); 686 para 2(b) (1991); 687 para 16 (1991). See also Decision 9, para 12 adopted by the Governing Council of the UN Compensation Commission (UNCC) on 6 March 1992: 31 *ILM* 1039 (1992).

<sup>55</sup> *I Congreso del Partido* [1983] AC 244 at 272. The same view was taken by Waller LJ: [1981] 1 All ER 1092 at 1109; and Goff J: [1978] 1 QB 500 at 532. For a different view see the judgment of Lord Denning MR: [1981] 1 All ER 1092 at 1103.

<sup>56</sup> The latter, however, normally requires a (general or *ad hoc*) agreement between the parties to submit the dispute to judicial or arbitral settlement.

<sup>57</sup> SC Res 687. On the UNCC in general see, eg, C. Alzamora, 'Reflections on the UN Compensation Commission', 9 *Arbitration International* (1993), 349–58; J. R. Crook, 'The United Nations Compensation Commission—A New Structure to Enforce State Responsibility', 87 *AJIL* (1993), 144–57; D. L. Bethlehem, 'Claims Against Iraq: The Security Council Initiative', *OGLTR*, Vol 9, No 2 (1991), 39–45.

<sup>58</sup> See *The Times*, 12 April 1994, 35, *The Guardian*, 25 May 1994, 12.

the fact that Iraqi Airways and Iraq have considerable (now frozen) assets in the United Kingdom<sup>59</sup> may explain why Kuwait Airways has tried to invoke the compulsory jurisdiction of the English courts.

Stefan Talmon\*

<sup>59</sup> An estimated US\$0.5 billion to US\$1 billion: 'Claims Against Iraq: The UN Compensation Commission and Other Remedies', 86 *ASIL Proceedings* (1992), 477-500 at 481, 488.

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