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# *The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare*

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## **Abstract**

*The article considers the history of the attempts to extradite or otherwise bring to trial the two Libyans suspected of carrying out the bombing of Pan Am Flight 103 over Lockerbie in 1988. As a result of sanctions and other diplomatic pressure, Libya did eventually agree to 'hand over' the suspects for trial in the Netherlands. The article considers whether the case has modified the law governing international cooperation in criminal matters, and specifically whether a 'third alternative' been added to the traditional aut dedere aut judicare principle — aut transferere. Under this principle, the requested state has hitherto had only two options: either to submit the case to its own competent authorities for prosecution, or to surrender the defendant to the authorities of the requesting state. Has the discretionary power of the requested state now increased and broadened by encompassing also the 'middle path': neither extradition, nor prosecution, but 'delivery' of the accused to a third state? Is the Security Council now playing a new role as an 'enforcer' of the principle of aut dedere aut judicare? If so, this raises further questions, such as the scope ratione materiae of the modified principle.*

## **1 Statement of Facts**

On 21 December 1988, Pan American Flight 103 took off from London's Heathrow Airport on its transatlantic flight to John F. Kennedy Airport in New York. At 6:56 p.m. EST, at an altitude of 10,000 metres, the *Maid of the Seas* made its last contact with ground control. Seven minutes later, the green cross-hair at air traffic control split into five bright blips as the aircraft exploded in midair. Her fiery skeleton, laden with the bodies of passengers and crew, rained down on the people of Lockerbie,

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Scotland. Within the hour, 243 passengers, 16 crew members and 11 townspeople were dead.

Between January 1989 and November 1991, a joint US–Scottish team tracked down leads in 50 countries, questioned 14,000 people, and combed some 845 square miles of countryside around Lockerbie. The fruits of their search: a shard of circuit board smaller than a fingernail, a fragment of an explosive timer embedded in an article of clothing, and a few entries in a private diary. These three pieces of physical evidence led investigators to two Libyan nationals, Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah. Libya's involvement was apparently confirmed with a forensic scientist's discovery of a tiny microchip of the bomb's trigger mechanism. This 'technical fingerprint' was embedded in a shirt that had come from the suitcase containing the bomb. The most significant link, however, came from two Libyan intelligence agents arrested in Senegal in 1988. At the time of their arrest, they were discovered carrying Semtex (plastic explosive) and several triggering devices. The connecting link between the Lockerbie timer and the two Libyan suspects came from Fhimah's own notebook.

Nearly three years later, the cumulative evidence led to the indictment of the two Libyan intelligence officers by a federal grand jury in Washington DC. The 193-count indictment accusing Fhimah and al-Megrahi with planning and carrying out the Lockerbie bombing represented the most extensive investigation ever conducted for an act of terrorism. Handed down on 14 November 1991, the indictment supplied the final piece of a multinational jigsaw puzzle that took three years to complete. On the same day, a similar indictment was handed down in the United Kingdom.

## 2 Legal Action and Libya's Response

Although neither formal diplomatic relations nor a bilateral treaty existed between the United States and the United Kingdom, on the one hand, and Libya, on the other, informal extradition requests were forwarded through the Belgian Embassy to Tripoli. Two weeks later, the two governments issued a joint declaration in which they demanded that Libya:

- 1 surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
- 2 disclose all it knows of the crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers; and
- 3 pay appropriate compensation.<sup>1</sup>

The first reaction of Libya was predictable: the Libyan Government refused to grant extradition, asserting that such an act constituted direct interference in Libya's

<sup>1</sup> Statement Issued by the Government of the United States on 27 November 1991, Regarding the Bombing of Pan Am 103, UN Doc. S/23308 (1991).

internal affairs. Later, Libya started its own judicial investigation. As a result, the competent authorities in Libya began criminal proceedings, and the examining magistrate ordered the two suspects to be taken into custody. Libya then went a step further by offering to admit both UK and US observers to the Libyan trial, or, in the alternative, to have the International Court of Justice determine which state had proper jurisdiction.

The Libyan Government has also indicated, at various times, that it might surrender the suspects for trial in a 'neutral' forum. But, finally, the government suggested that it would not object if the two suspects voluntarily surrendered for trial in Scotland (though, after consultation with Scottish counsel, the two suspects apparently decided not to surrender themselves).

Since the domestic criminal investigation conducted by the Libyan authorities is of crucial importance in this case as the only viable alternative to extradition (*judicare* as opposed to *dedere*) under the 1971 Montreal Convention, it warrants a more detailed discussion. On 18 November 1991, the Libyan authorities issued a statement indicating that the indictment documents had been received from the US and the UK and that, in accordance with the applicable rules, a Libyan Supreme Court judge had already been assigned to investigate the charges. The statement also, *inter alia*, asserted the Libyan judiciary's readiness to cooperate with all legal authorities concerned in the UK and the US.

Ten days later, the Libyan Government issued a communiqué in which it stated that the application made by the US and the UK would be investigated by the competent Libyan authorities who would deal with it in a manner that respected the principles of international law, including, on the one hand, Libya's sovereign rights and, on the other, the need to ensure justice both for the accused and for the victims. In the meantime, the Libyan investigating judge took steps to request the assistance of the authorities in the UK and the US, offering to travel to these countries in order to review the evidence and cooperate with his US and UK counterparts.

Since these offers were either explicitly rejected (parliamentary debates) or ignored, two identical letters were sent in January 1992 to the US Secretary of States and the UK Foreign Secretary by their Libyan counterpart, in which the latter pointed out that Libya, the United States and the UK were all parties to the 1971 Montreal Convention.<sup>2</sup> He then indicated that, as soon as the charges were laid against the two accused, Libya had exercised its jurisdiction over them in accordance with Libyan national law and with Article 5(2) of the Montreal Convention which obliges each contracting state to establish its jurisdiction over offences mentioned in the Convention where the alleged offender is present in its territory and it does not extradite him.

The two letters went on to note that Article 5(3) of the Convention did not exclude any criminal jurisdiction exercised in accordance with national law. Recalling the

<sup>2</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177.

stipulation adopted in Article 7 of the Convention<sup>3</sup> (*aut dedere aut judicare*),<sup>4</sup> the two letters indicated that Libya had already submitted the case to its judicial authorities and that an examining magistrate had been appointed. The letters then noted that the judicial authorities of the US and the UK had been requested to cooperate in the matter but, instead, the two countries had threatened Libya and did not even rule out the use of armed force. Libya maintained that, by refusing to provide details of its investigation to the competent authorities in Libya, or to cooperate with them, the US had failed to fulfil the obligation to afford assistance in criminal matters to Libya, as provided for in Article 11(1) of the Convention.<sup>5</sup>

### 3 Stalemate: Where to Go from Here?

Typically, under normal circumstances, the vast majority of cases in which extradition was denied end at that point — in a stalemate. The chances of the case being resolved to the satisfaction of all the parties involved are close to nil. This reality makes some countries think twice before authorizing their competent authorities to submit an extradition request to another state. Thus the pragmatic approach of ‘it doesn’t hurt to ask’ simply does not apply. Instead, there is much to lose and little to gain. Experience suggests that, once the extradition process is formally set in motion, it will take its own course, which is often an uneasy marriage between law and politics. Consequently, some states rather try to find a way around using formal extradition while other states ignore it altogether and resort to *fait accompli* instead. The Lockerbie case is unique in that it did not stop where it ought to have stopped, at the traditional dead end of an extradition denial.

Clearly, the two sides were on a conflicting course. While Libya relied on the codified rule of *aut dedere aut judicare* in Article 7 of the Montreal Convention, as the governing principle which entitled it to prosecute its own nationals especially in the absence of an extradition treaty, both the US and UK governments categorically demanded the surrender of the two suspects, and made it clear that nothing less than an unconditional compliance with their request would satisfy them. While Libya

<sup>3</sup> Article 7: ‘The Contracting state in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.’

<sup>4</sup> M. Cherif Bassiouni and Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1996) 3–70; Plachta, ‘Aut Dedere Aut Judicare: An Overview of Modes of Implementation and Approaches’, 6 *Maastricht Journal of European and Comparative Law* (1999) 331–365.

<sup>5</sup> Article 11: ‘(1) Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases. (2) The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.’

declared that it will try the accused, and invited the US and the UK to send their officials and lawyers to observe the trial, arguing that it was thus satisfying its obligations under the Montreal Convention, the UK and US governments demanded that the suspects be tried in their courts. While Libya contended that its domestic law forbade the extradition of its nationals, the US and the UK denied that this was a valid excuse for not surrendering the suspects.

### A *The Security Council and the International Court of Justice*

Determined not to submit all the evidence that had been gathered as a result of the extensive three-year-long investigation, the US and the UK (joined by France) presented the case before the UN Security Council and the General Assembly.<sup>6</sup> In January and March 1992, the Security Council adopted two resolutions on this matter: the first, Resolution 731, urged Libya to respond fully and effectively to the requests of the US, the UK and France,<sup>7</sup> while the second, Resolution 748, imposed economic sanctions on Libya.<sup>8</sup> The sanctions were extended in 1993.<sup>9</sup> Libya then brought the case before the International Court of Justice seeking provisional measures to prevent the US or the UK from taking any action to coerce Libya into handing over the two suspects or otherwise prejudicing the rights claimed by Libya.<sup>10</sup> On 14 April 1992, the ICJ declined (by a vote of 11 to 5) to order the provisional measures, thereby confirming the validity and binding force of Resolution 748.<sup>11</sup>

The following three interpretations of the UN Security Council's involvement in the Lockerbie case are possible:

- 1 Libya failed to demonstrate convincingly that it was capable of fulfilling the obligation which it claimed under the Montreal Convention, that is, to make a *bona fide* effort to prosecute the crimes.
- 2 The resolutions signalled a substantial loss of faith in the Montreal Convention's authority and efficacy in bringing the offenders to justice.
- 3 The Security Council offered an extraordinary remedy which, while upholding the existing extradition system, at the same time supplemented it with the recourse to that organ for intervention in exceptional situations, especially where the traditional treaty model proves unworkable.

The latter interpretation seems the most persuasive. The ICJ's ruling means that, under Article 103 of the UN Charter, Resolution 748 takes precedence over any other international agreement, including the Montreal Convention. In one sense, the

<sup>6</sup> See UN Doc. A/46/825, S/23306, 31 December 1991.

<sup>7</sup> SC Res. 731 (1992), 21 January 1992.

<sup>8</sup> SC Res. 748 (1992), 31 March 1992.

<sup>9</sup> SC Res. 883 (1993), 11 November 1993.

<sup>10</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, ICJ Reports (1992) at 114. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports (1992) at 3.

<sup>11</sup> *Ibid.*, at para. 39.

genuine choice between extradition and prosecution has been brought down to an alternative: extradite or extradite. On the other hand, given the UN Charter's Chapter VII exceptions to Article 2(7), the Security Council has the authority to determine whether a situation is so severe that it constitutes a threat to peace, a breach of peace, or an act of aggression. Therefore, the Security Council has the authority to take up such matters. In order to reconcile both the Security Council resolutions and the decision of the ICJ, it was suggested that international extradition law had not been violated or altered because, in exceptional cases, 'the law merely operates at a different level through the internationally sanctioned ways and means of the United Nations'.<sup>12</sup>

It is doubtful, however, whether the same solution could and should be viewed as the most appropriate mechanism to end a stand-off in other, similar cases.

## **B Other Options**<sup>13</sup>

### *1 At the Jurisdictional Level*

It would be possible to establish a hierarchy of jurisdictions to indicate which state is entitled to exercise jurisdiction in any given case where more than one country claims this right.<sup>14</sup> However, this option has some inherent problems. Any proposed hierarchy may be perceived as arbitrary unless agreed upon in an international instrument. Such an instrument designed to establish the hierarchy would need to contain clear-cut rules in order to avoid any ambiguity in interpretation and to eliminate discretion and arbitrariness. However, the rules may then prove to be too rigid and inflexible and therefore be unable to accommodate unforeseen circumstances. In the opposite case, if the rules allowed some flexibility and discretion, the question then arises as to who would exercise this discretion; in other words, who would be the 'keeper of the rules'?

### *2 At the Prosecutorial and Trial Levels*

There are a number of alternatives to straightforward extradition, which may be briefly stated.

- 1 The requested state may agree to extradite on condition.<sup>15</sup> Alternatively, the extradition may be done with the consent of the defendant.<sup>16</sup>

<sup>12</sup> Joyner and Rothbaum, 'Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?', 14 *Michigan Journal of International Law* (1993) 222, at 256.

<sup>13</sup> For a discussion of alternative solutions in cases where the refusal of extradition is based on the nationality of the requested person, see Plachta, '(Non-)Extradition of Nationals: A Neverending Story?', 13 *Emory International Law Review* (1999) 77, at 113–156.

<sup>14</sup> Examples include the draft Benelux Convention 'concernant l'applicabilité de la loi pénale dans le temps et dans l'espace' (1979); the Consultative Assembly of the Council of Europe's Recommendation 420 (1965) on the Settlement of Conflicts of Jurisdiction in Criminal Matters; and the draft European Convention on Conflicts of Jurisdiction in Criminal Matters. It should be noted, however, that none of these draft instruments ever came into force.

<sup>15</sup> For example, Article 4(2) of the Dutch Extradition Law (as amended in 1988).

<sup>16</sup> For example, Article 7(1) of the Swiss Law on Extradition and International Assistance in Criminal Matters of 1981. The consent must be in writing.

- 2 The defendant may be extradited to a 'neutral' forum, for example a third state, an international criminal tribunal or an ad hoc arrangement, such as 'Secretary-General custody' as suggested in the Lockerbie case.<sup>17</sup>
- 3 The transfer of criminal proceedings, combined with rendering legal assistance.
- 4 Abduction or other illegal or irregular forms of apprehension of the defendant.

### 3 At the Enforcement Level

At the enforcement level, there is also the option of the enforcement of foreign criminal sentences under the principle of *aut dedere aut poenam persequi*.<sup>18</sup>

## 4 Setting the Stage: Security Council Resolution 1192

The first breakthrough in bringing the suspects to justice came at a meeting in Tripoli in April 1998 between government officials, lawyers and UK representatives of the families of the victims. At the meeting, Libya confirmed that it would accept a plan devised by Robert Black, Professor of Law at the University of Edinburgh. His proposal involved the case being tried in a neutral country, operating under Scots law. Instead of a jury, there would be an international panel of judges presided over by a senior Scottish judge. While agreeing in principle to a neutral venue, Robin Cook, the UK Foreign Secretary, rejected Professor Black's proposal for an international panel and opted for an all-Scottish panel.

Despite this agreement on the venue and the make-up of the court, there were a number of other issues which had to be addressed and resolved before the defendants could agree to leave Libya. Such issues included guarantees about their safe transfer from Libya and their safe return to Libya in the event of their acquittal. What will the conditions of their detention be? What access will they have to their legal team? How long are they expected to remain in custody before the trial takes place? What access will the defence team be given to the prosecution evidence? And how much time will the defence have to prepare their case?

In an effort to make a trial in Scotland (or by Scottish judges in a neutral third country) and under Scots law more attractive to Libya, the Permanent Representative of the UK to the UN addressed a letter to the President of the Security Council on 31 October 1997,<sup>19</sup> in which he invited representatives of the UN to visit Scotland and to study the Scottish judicial system. After consulting with the Security Council, Secretary-General Kofi Annan accepted the invitation and requested two scholars to undertake this study. In their report on the Scottish judicial system, they concluded

<sup>17</sup> It was suggested by Libya that the Secretary-General should attempt to create some 'mechanism' whereby Resolution 731 could be implemented.

<sup>18</sup> For a comprehensive discussion of this proposition which is aimed at supplementing the traditional principle of *aut dedere aut judicare*, see Michael Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation. A Comparative Study* (1993) 191.

<sup>19</sup> UN Doc. S/1997/845.

that the Libyans accused would receive a fair trial in Scotland.<sup>20</sup> Their rights during the pre-trial, trial and post-trial proceedings would be protected in accordance with international standards. The presence of UN and other international observers can be fully and easily accommodated. As time passed without resolution of the matter, support for the economic sanctions against Libya began to erode. Proposals by Libya and by regional organizations, such as the Arab League, suggested a trial of the two suspects by international, or perhaps Scottish, judges sitting in the Netherlands. In a letter addressed to the UN Secretary-General dated 24 August 1998, the Acting Permanent Representatives of the UK and the US proposed an arrangement for a trial in the Netherlands by Scottish judges.<sup>21</sup> After noting prior assurances that had been given regarding the fairness of a trial in their jurisdictions and their ‘profound concern’ at Libya’s disregard of the Security Council’s demands, the two governments stated:

3. Nevertheless, in the interest of resolving this situation in a way which will allow justice to be done, our Governments are prepared, as an exceptional measure, to arrange for the two accused to be tried before a Scottish court sitting in the Netherlands. After close consultation with the Government of the Kingdom of the Netherlands, we are pleased to confirm that the Government of the Netherlands has agreed to facilitate arrangements for such a court. It would be a Scottish court and would follow normal Scots law and procedure in every respect, except for the replacement of the jury by a panel of three Scottish High Court judges. The Scottish rules of evidence and procedure, and all the guarantees of fair trial provided by the law of Scotland, would apply. Arrangements would be made for international observers to attend the trial.

4. The two accused will have safe passage from the Libyan Arab Jamahiriya to the Netherlands for the purpose of the trial. While they are in the Netherlands for the purpose of the trial, we shall not seek their transfer to any jurisdiction other than the Scottish court sitting in the Netherlands. If found guilty, the two accused will serve their sentence in the UK. If acquitted, or in the event of the prosecution being discontinued by any process of law preventing any further trial under Scots law, the two accused will have safe passage back to the Libyan Arab Jamahiriya. Should other offences committed prior to arrival in the Netherlands come to light during the course of the trial, neither of the two accused nor any other person attending the court, including witnesses, will be liable for arrest for such offences while in the Netherlands for the purpose of the trial.

5. The two accused will enjoy the protection afforded by Scots law. They will be able to choose Scottish solicitors and advocates to represent them at all stages of the proceedings. The proceedings will be interpreted into Arabic in the same way as a trial held in Scotland. The accused will be given proper medical attention. If they wish, they can be visited in custody by the international observers. The trial would of course be held in public, adequate provision being made for the media.

6. We are only willing to proceed in this exceptional way on the basis of the terms set out in the present letter (and its annexes), and provided that the Libyan Arab Jamahiriya cooperates fully by:

- (a) Ensuring the timely appearance of the two accused in the Netherlands for trial before the Scottish court;

<sup>20</sup> UN Doc. S/1997/991, Annex.

<sup>21</sup> Letter Dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, UN Doc. S/1998/795 (1998).



- (b) Ensuring the production of evidence, including the presence of witnesses before the court;
- (c) Complying fully with all the requirements of the Security Council resolutions.

Annexed to the letter was the proposed agreement between the Netherlands and the UK as well as the relevant UK legislation. On the same day, US Secretary of State Madeleine Albright released a statement in which she declared:

We note that Libya has repeatedly stated its readiness to deliver the suspects for trial by a Scottish court sitting in a third country. This approach has been endorsed by the Arab League, the Organization of African Unity, the Organization of the Islamic Conference and the Non-Aligned Movement. We now challenge Libya to turn promises into deeds. The suspects should be surrendered for trial promptly. We call upon the members of organizations that have endorsed this approach to urge Libya to end its ten years of evasion now. Let me be clear — the plan the US and the UK are putting forward is a ‘take-it-or-leave-it’ proposition. It is not subject to negotiation or change, nor should it be subject to additional foot-dragging or delay. We are ready to begin such a trial as soon as Libya turns over the suspects.<sup>22</sup>

On the next day, in a letter to the Security Council, Libya stated:

1. Libya is anxious to arrive at a settlement of this dispute and to turn over a new page in its relations with the States concerned.
2. Libya’s judicial authorities need to have sufficient time to study [the proposal] and to request the assistance of international experts more familiar with the laws of the States mentioned in the documents.
3. We are absolutely convinced that the Secretary-General of the UN, Mr Kofi Annan, must be given sufficient time to achieve what the Security Council has asked of him, so that any issue or difficulty that might delay the desired settlement can be resolved.<sup>23</sup>

Nonetheless, the Security Council passed Resolution 1192 on the matter on 27 August 1998, in which it fully endorsed the plan proposed by the US and the UK. Throughout the autumn of 1998, Libya reacted ambivalently to the proposal, on the one hand welcoming the ‘evolution’ in the US and UK position, while on the other hand expressing concern about the trial’s proposed location in the Netherlands, a former US air base, which was agreed upon by the Dutch and UK governments. The Libyan Government announced that it would need to inspect the location before assenting to holding the trial there.<sup>24</sup> In a speech to the UN General Assembly, Libya’s ambassador to the UN criticized other aspects of the proposal, insisting that the accused should serve their sentences in either Libya or the Netherlands — and not in Scotland — if convicted. Moreover, three top Libyan intelligence officials reportedly were tried, convicted and jailed in Libya in connection with the Lockerbie incident, possibly as a means of blocking their testimony in the trial in the Netherlands.

<sup>22</sup> Secretary of State Madeleine K. Albright, Statement on Venue for Trial of Pan Am No. 103 Bombing Suspects (24 August 1998), [www.secretary.state.gov/www/statements/1998/980824a.html](http://www.secretary.state.gov/www/statements/1998/980824a.html).

<sup>23</sup> Letter Dated 25 August 1998 from the Charge d’Affaires AI of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/803 (1998).

<sup>24</sup> See e.g. Letter Dated 26 August 1998 from the Charge d’Affaires AI of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/808 (1998); see also UN Doc. S/PV.3920 (1998), at 4.

Although in December 1998, the Libyan Parliament reportedly approved the handing over of the two suspects for trial, Libyan leader Colonel Qaddafi informed the Dutch media on the tenth anniversary of the bombing that the solution lay in having an ‘international court’ consisting of ‘judges from America, Libya, England and other countries’.<sup>25</sup> On 30 September 1998, President Clinton authorized the use of approximately US\$8million to support the establishment and functioning of the court in the Netherlands.<sup>26</sup>

### Table 1 From Lockerbie to Camp Zeist: Key Dates

21 December 1988	Pan Am flight 103 from London to New York is blown up over Lockerbie, Scotland.
14 November 1991	US and the UK accuse Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah of Libya of involvement. Libya denies any involvement.
23 March 1992	Libya’s UN delegate says the suspects will be handed over to the Arab League, but the West rejects Libya’s conditions.
31 March 1992	Security Council Resolution 748 requires Libya to surrender the suspects by 15 April 1992 or face a worldwide ban on air travel and arms sales.
30 April 1992	The Libyan leader, Colonel Qaddafi, says that Libya will not hand over the two suspects.
11 November 1993	The Security Council tightens sanctions.
23 March 1995	The FBI offers a record US\$4m reward for information leading to the arrest of the two Libyan suspects.
19 April 1995	Libya sends a flight of Muslim pilgrims to Saudi Arabia despite the air embargo.
11 June 1997	Libya says in a letter to the UN Secretary-General that sanctions had caused losses to Libya of US\$23.5billion.
20 March 1998	The Security Council debates the Lockerbie issue, with widespread support for a trial in a neutral country.
22 April 1998	After a visit to Libya, representatives of victims’ families say the Libyan Government has agreed to a trial in the Netherlands under Scots law.
24 August 1998	The UK and US agree two suspects can be tried in The Netherlands under Scots law.
27 August 1998	The Security Council unanimously endorses the plan.
13 February 1999	A South African envoy meets with Colonel Qaddafi and states there is an accord.

<sup>25</sup> Crossette, ‘10 Years after Lockerbie, Still No Trial’, *New York Times*, 22 December 1998, A14.

<sup>26</sup> Memorandum on Funding for the Court to Try Accused Perpetrators of the Pan Am 103 Bombing, 34 *Weekly Comp. Pres. Doc.* (30 September 1998) 1939.

- 19 March 1999      President Nelson Mandela of South Africa goes to Libya and, with Colonel Qaddafi, announces that the two suspects will be handed over by 6 April 1999.
- 5 April 1999      The suspects are handed over to the UN, and the sanctions are suspended.

## **5 *Aut Dedere Aut Judicare Aut Transferere*: A Newly Emerging Rule of International Law of Extradition?**

On 5 April 1999, more than a decade after the bombing, the two Libyans charged with planting the bomb arrived in the Netherlands to face trial for the crime. As a result, the UN immediately removed the sanctions on Libya. The end of those sanctions allowed international air travel and the sale of vital industrial equipment to resume. The step also released Libyan assets that had been frozen in a number of countries. The Scottish judges will have to weigh the still secret evidence provided by the US and the UK and decide whether the two Libyans are guilty of planting the bomb. The judges will then face the fundamental questions of who gave the orders to blow up the plane and why. The UK and the US have outlined the main conclusions of their case, but have withheld the evidential particulars.

The operation of transporting the two Libyans was intricate, complex and above all secret. No one except Hans Corell, the chief legal counsel for the UN — not even Secretary-General Kofi Annan — knew the details surrounding the logistics for the surrender of the two Libyan suspects. All the legal and logistical problems were resolved by mid-November. Mr Corell even asked Italy to lend the UN an aircraft, onto which UN markings were painted. Mr Corell located and interviewed trustworthy pilots, personally approved the flight plan to the Netherlands and recruited doctors and nurses to accompany the two ‘passengers’, as he called them. He even ordered appropriate food — no ham, shellfish or alcohol, in light of Muslim dietary prohibitions — and took steps to ensure that the food would not be poisoned.

Then Qaddafi balked at the deal. So Kofi Annan orchestrated a discreet but relentless political campaign to persuade Qaddafi, including a hitherto secret appeal by Prime Minister Yevgeny Primakov of Russia. As part of this appeal, the US assured Libya that the trial would not be used to undermine Qaddafi’s rule in Libya. One of the reasons why the high officials of the UN were involved in this case was their growing awareness and concern that the sanctions imposed on Libya were not working. Libya was slowly persuading the Organization of African Unity, the Arab League and other countries that the two Libyan suspects would never get a fair trial in the UK or the US. Chad, Niger and Gambia, among other African states, began flouting the UN sanctions by flying their leaders or senior officials into Tripoli airport. And, in summer 1998, the 53 members of the Organization for African Unity voted to stop abiding by the sanctions. At the same time, by rejecting every Libyan proposal, the US and the UK had found themselves in a situation of being perceived as the stubborn, negative ones. In December 1998, Kofi Annan flew to Libya to meet with Qaddafi. After several hours

of face-to-face discussions in the leader's tent outside Sirte, his desert capital, Annan left convinced that Qaddafi had realized that a deal 'had to be done'. The chance that Qaddafi would surrender the suspects as promised increased substantially only after President Mandela announced it on 19 March 1999, in a speech made at Qaddafi's side in Tripoli.

Thus, an Italian plane took the two Libyans, each accompanied by a relative and a lawyer, to the Dutch military air base. Dutch authorities at first took the two Libyans into custody after they arrived in the afternoon but a few hours later formally extradited them to the UK — on paper, that is — so the Scottish police could take over. Dutch military helicopters took the Libyans to Camp Zeist, a former military base a few miles outside Utrecht. Some of the camp's buildings were converted to include a detention unit for the suspects and a room for the Scottish court. The camp, once used by the US military and then taken over by the Dutch, is kept under tight guard by Scottish police officers. From now until the end of the trial, Camp Zeist is legally 'Scottish soil'. The suspects will be tried by three Scottish judges under Scots law, accused by Scottish prosecutors, defended by Scottish lawyers and watched over by more than 100 Scottish police and prison officers. The trial itself will be open to the public. The cost of converting the base and preparing for the trial has been estimated at close to US\$200m, which will be shared by the UK and the US. Some of the work was held off until the Scottish authorities were reasonably sure that the two men would be handed over. In addition to this figure, the estimated cost of the trial itself is over £10m. From a legal perspective, the trial will be unique. The only comparable cases have been war crimes trials but they have all been held under international law.

With the two accused Libyans now awaiting trial in the Netherlands, the question arises as to whether the Lockerbie case has modified the law governing international cooperation in criminal matters. Specifically, has a 'third alternative' been added to the traditional *aut dedere aut judicare* principle — *aut transferere*? Under this principle, the requested state has had only two options: either to submit the case to the competent authorities for prosecution, or to surrender the defendant to the authorities of the requesting state. Has the discretionary power of the requested country now increased and broadened by encompassing also the 'middle path': neither extradition, nor prosecution, but 'delivery' of the accused to a third state? Or, perhaps, one could argue that the 'delivery' is a *de facto* extradition, particularly from the perspective of the requested state and its domestic law. However, if we assume, for the sake of argument, that 'delivery' is substantially a new element, then one would be compelled to acknowledge that the Security Council is now playing a new role as an 'enforcer' of the principle of *aut dedere aut judicare*. If so, this raises further questions, such as the scope *ratione materiae* of the modified principle. It is to be assumed that the intervention of the Security Council in extradition may be justified, in so far as the situation constitutes a threat to international peace and security, thereby legitimizing the action of the Security Council under Chapter VII of the UN Charter. But, then again, the question arises as to whether such an intervention would have to be restricted to terrorists.

## **6 Osama bin Laden: An Aftermath of Lockerbie or the Lockerbie Rule Continued?**

Encouraged by the clear success of the strategy employed in the Lockerbie case, the US Government has been trying to use the same tactic in the most recent case of Osama bin Laden. Roving from camp to camp in fear of US missiles, reduced to communicating with minions through hand-carried computer disks, strictly watched even by his Afghan 'hosts', Osama bin Laden is one of the world's most sought-after fugitives for his suspected role in the bombings of US embassies in Kenya and Tanzania in 1999. Bin Laden, the messianic heir to a Saudi Arabian construction fortune, wants to eliminate the US presence in Islamic lands. He is on the FBI's most-wanted list and has a US\$5m bounty on his head. He is under federal indictment in New York, and Afghanistan's Islamic fundamentalist Taliban government is the target of US economic sanctions for harbouring him. The US remains publicly committed to his capture. In secret meetings in 1999 in Washington, New York and Pakistan, US representatives have continued to press Taliban officials to turn over bin Laden. In summer 1998, Saudi Arabia and Afghanistan's Taliban militia reached a secret deal to send bin Laden to a Saudi prison, nearly two months before the embassy bombings. But the deal crumbled in the wake of the bombings and was dead by the time US forces retaliated two weeks later with missile attacks on camps linked to bin Laden.

Prince Turki al-Faisal, the Saudi chief of intelligence, led a small Saudi delegation to Taliban headquarters in Kandahar, Afghanistan, in June 1998. They sought either bin Laden's ouster from Afghan territory or his detention for trial in Saudi Arabia for advocating the government's overthrow. During their three-hour meeting, Taliban supreme leader, Mullah Mohammed Omar, and his ruling council agreed to end the sanctuary bin Laden had enjoyed in Afghanistan since 1996. But the surrender would have to be carefully orchestrated so that it 'would not reflect badly on the Taliban' and would not appear to be 'mistreating a friend'. The key to that initial deal was a Saudi pledge that bin Laden would be tried only in an Islamic court — a condition of surrender that would have precluded his extradition to face any US prosecution. Final terms for the bin Laden handover were being hammered out between Taliban and Saudi envoys during the same period that authorities now believed the embassy attacks were being plotted. Those negotiations ended amid a flurry of recriminations in the aftermath of the bombings. The embassy bombings were linked immediately to bin Laden by Western authorities, with the apparent side-effect of rallying support for bin Laden within the Taliban. Subsequent retaliatory US missile attacks on bin Laden's Afghan training camps only hardened that support. In summer 1999, a Taliban spokesman stated that bin Laden would never be forced out of Afghanistan against his will. The spokesman specifically ruled out any future surrender deals with the US or Saudi Arabia. However, the Taliban are willing to turn the matter over to a committee of Islamic scholars from Saudi Arabia and other countries in the region who would act as arbitrators. Moreover, they proposed asking an international group of Islamic scholars to look into the case and perhaps find a way to meet the US request.

But they have always stopped short of actually agreeing to place bin Laden in US custody.

On 6 July 1999, President Clinton banned all commercial and financial dealings between the US and the Taliban, accusing the Taliban of continuing to provide refuge to bin Laden. Clinton's executive order froze all Taliban assets in the US, barred the import of products from Afghanistan and made it illegal for US companies to sell goods and services to the Taliban. US officials said the measure was intended to put pressure on the Taliban to surrender bin Laden.<sup>27</sup> In a letter to Congress explaining his order, Clinton said: 'The Taliban continues to provide safe haven to Osama bin Laden allowing him and [his] organization to operate from Taliban-controlled territory a network of terrorist training camps and to use Afghanistan as a base from which to sponsor terrorist operations against the US.' Clinton's order does not address trade between Afghanistan and other countries, and its immediate effect is likely to be modest.

On 20 August 1998, a US presidential executive order froze the US assets of bin Laden and forbade any financial transactions between US companies and bin Laden's entities.<sup>28</sup> US government officials argued that capturing bin Laden was feasible and morally necessary, citing Libya's handover of the two Lockerbie suspects as proof.

A federal grand jury in New York has indicted bin Laden on murder and conspiracy charges for allegedly directing the embassy attacks. The indictment also links bin Laden to deadly attacks on US military personnel in Saudi Arabia and Somalia.<sup>29</sup> Specifically, he is charged with conspiracy, bombing of US embassies, and 224 counts of murder. The indictment described bin Laden as the leader of a group called *al Qaeda* or 'the Base', a terrorist group 'dedicated to opposing non-Islamic governments with force and violence'. The indictment charged that the *al Qaeda* leadership was headquartered in Afghanistan and Peshawar, Pakistan between 1989 and 1991, and in Sudan from 1991 until 1996, returning to Afghanistan in 1996. US support for the governments of Saudi Arabia, Egypt and Israel, and UN and US involvement in the 1991 Gulf War and in Operation Restore Hope in Somalia in 1992 and 1993, 'were viewed by *al Qaeda* as pretextual preparations for an American occupation of Islamic countries'. According to the indictment, bin Laden formed an alliance with the National Islamic Front in the Sudan and with representatives of the Hezbollah, issuing orders to other members of *al Qaeda* that US forces in Saudi Arabia, Yemen and Somalia should be attacked, as well as a general order in May 1998 warning that all US citizens were targets. The indictment also charged that bin Laden sought to obtain chemical and nuclear weapons and their components.<sup>30</sup>

<sup>27</sup> Lancaster, 'Afghanistan Rulers Accused of Giving Terrorist Refuge: Clinton Bans Trading with Taliban Militia', *Washington Post*, 7 July 1999, A15.

<sup>28</sup> See Executive Order No. 13,099, 63 Fed. Reg. 45,167 (1998); see also Continuation of Emergency Regarding Terrorists who Threaten to Disrupt the Middle East Peace Process, 64 Fed. Reg. 3393 (1999) (continuing sanctions).

<sup>29</sup> Indictment, *United States v. Usama bin Laden*, S(2) 98 Cr. 1023 (LBS) (SDNY 4 November 1998), [www.heroes.net/pub/heroes/indictments.html](http://www.heroes.net/pub/heroes/indictments.html).

<sup>30</sup> See also 'US Indicts Osama bin Laden on Embassy Bombing Charges', Agence France Presse, 4 November 1998, available in LEXIS, News Library, Wire Service Stories File.

Here, it can be seen that four strategies are being used by the US in their fight against terrorism:

- 1 procedures and measures inherent in the criminal justice system;
- 2 seeking treaty agreements to establish new international norms and enforcement mechanisms;
- 3 disruption of terrorist structures through civil sanctions; and
- 4 the prudent use of military force to prevent terrorist attacks and to degrade terrorist infrastructures.<sup>31</sup>

It should be noted, however, that, particularly in the 1990s, the US Government tried, with success, another method, which was to engage the Security Council in the law enforcement operations. The bin Laden case illustrates this strategy. In its Resolution 1214, adopted on 9 December 1998, the Security Council stated that it was, *inter alia*:

Deeply disturbed by the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts, and reiterat[es] that the suppression of international terrorism is essential for the maintenance of international peace and security. [The Security Council] demands also that the Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice.

Finally, in October 1999, the US asked the Security Council to impose economic sanctions on the Taliban, demanding that the Taliban turn over bin Laden.<sup>32</sup> In the operative part of Resolution 1267, adopted on 15 October 1999, the Security Council, *inter alia*:

Demands that the Taliban turn over Usama [*sic*] bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.

At a time when the UN Security Council often has trouble reaching agreement on whether one crisis or another constitutes a threat to international peace, the 15-member Council was nevertheless able to reach solid agreement on the growing dangers of international terrorism. The Security Council voted unanimously to wage a common fight against terrorists everywhere.<sup>33</sup> Such an agreement is remarkable, and all the more so as two Islamic countries voted in favour. As was pointed out by the US representative during the debate, the resolution will send a direct message to bin Laden and terrorists everywhere: 'You can run, you can hide, but you will be brought

<sup>31</sup> Wedgwood, 'Responding to Terrorism: The Strikes Against bin Laden', 24 *Yale Journal of International Law* (1999) 559.

<sup>32</sup> Crossette, 'US Presses Security Council for Sanctions Against the Taliban', *New York Times*, 7 October 1999, A9.

<sup>33</sup> Crossette, 'UN Council in Rare Accord: Fight Terrorism', *New York Times*, 20 October 1999, A8.

to justice.<sup>34</sup> He added that this action will bring new pressure on the Taliban to turn over bin Laden to authorities in a country where he will be brought to justice.

The resolution gave the Taliban a clear choice. It had 30 days in which to turn over bin Laden. If they failed to do so within that period, the sanctions would take effect. Those sanctions would restrict foreign landing rights for aircraft operated by the Taliban, freeze Taliban accounts around the world and prohibit investment in any undertaking owned or controlled by the Taliban. The resolution also established a committee to monitor the implementation of sanctions.

Shortly after the adoption of the resolution, the Taliban representatives expressed their willingness to discuss the most contentious issue with the US, that is, the handover of bin Laden.<sup>35</sup> He himself made the offer in a letter to the Taliban chief mullah, Omar, on condition that the Taliban ensure his safe and secret passage to a third, unidentified country.<sup>36</sup> It is unlikely, however, that the US will find this move satisfactory, as the pertinent operative paragraph of the resolution makes it clear that the main point is that bin Laden be brought to justice, not necessarily in the US.

<sup>34</sup> UN Doc. S/PV.4051 (1999).

<sup>35</sup> 'Taliban Willing to Talk', *New York Times*, 24 October 1999, A8; Crossette, 'US Steps Up Pressure on Taliban to Deliver Osama bin Laden', *New York Times*, 19 October 1999, A7.

<sup>36</sup> 'Taliban Ponder bin Laden Offer', *New York Times*, 31 October 1999, A10.