The Lockerbie Trial viewed from Three Perspectives:

The Montreal Convention, State Sponsored Terrorism and Human Rights

OMER Y. ELAGAB*

< Contents >

The controversy surrounding the prosecution of the alleged perpetrators of the Lockerbie incident was sparked once again by President Nelson Mandela during his visit last spring to Britain. Mandela announced that Colonel Gadaafi had made a public commit ment to him that the Libyan government would place "no obstacles in the path of surrender by the accused for trial in a neutral venue." This revival has generated interesting debates, the most important of which was reflected in two articles respectively by Professor Robert Black, QC of Edinburgh University and

* D.Phil (Oxon) Reader in Law, London City University, England.

The Lord Hardie, Lord Advocate of Scotland. For the sake of completeness, it should be stated that the decision handed down by the International Court of Justice on 27 February 1998, regarding Preliminary Objections in the Lockerbie Case, is not directly relevant to this article.

The focus of this article is three fold : first to examine the question of conflict of jurisdiction, in view of the fact that three States are concurrently claiming jurisdiction over the two accused. This will be followed by an examination of extradition arrangements under the Montreal Convention, with special reference to Article 8. Next, we shall address the question of whether the option of prosecution should be denied to a complicitious state. Finally, the impact of fundamental human rights on the question of extradition will be examined.

A. Factual Elements of the Incident

On 21 December 1988 a Pan Am Boeing 747 aircraft exploded inflight over the Scottish village of Lockerbie, killing all 259 passengers and crew, along with eleven people from the village. The normal route of the aircraft would have been westwards on take-off, but due to strong westerly winds that evening, the aircraft proceeded in a northerly direction over England and part of Scotland where the explosion occurred. Had the aircraft taken the normal route the explosion would, probably have occurred over the Atlantic Ocean.

Early suspicions pointed towards Syria and Iran as being behind the Lockerbie incident by way of reprisal for the death of the 290 persons when an Iran Air aircraft was destroyed by rockets fired from a US naval ship in July 1988. Subsequently, however, investigations in the United Kingdom and the United States led, in November 1991, to allegations that two Libyan nationals, reportedly members of the Libyan intelligence

service, were responsible for the explosion by placing a bomb aboard the Pan Am aircraft.

On 14 November 1991, the Lord Advocate issued warrants for the arrest of the Libyan nationals: Messrs Fahimah and Meighrahi, for conspiracy to murder, and various offenses under the Aviation Security Act 1982. At the same time, the United States Attorney-General issued similar warrants for the arrest of the two men. Thus, on 14 November 1991, Fahimah and Meighrahi were indicted by a grand jury of the United States District Court of Columbia. They were both charged with conspiring to destroy an air craft by means of an explosive device, placing an explosive device on an aircraft resulting in death; destruction of an aircraft by means of an explosion; destruction of a vehicle used in foreign commerce, and 188 counts of murder. Meanwhile, the French Government called for the arrest of four other Libyan nationals in connection with the destruction of a UTA Aircraft over Niger in September 1989, in which 171 people were killed.

On 18 November 1991, Libyan authorities issued a statement acknowledging receipt of the bill of indictment, and stating that a senior Libyan judge had already been assigned to investigate the charges. The statement asserted Libyan readiness to co-operate fully with the pertinent legal authorities in the United Kingdom and the United States.

The demand for the surrender of the two suspects

On 27 November 1991, only two weeks after the indictments were issued, the British and American Governments issued a demand for Libya to carry out the following instructions:-

- surrender for trial all those charged with the crime, and accept complete responsibility for the actions of Libyan officials;

- disclose all it knows of this 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;

- pay appropriate compensation.

The day after the Joint Declaration (i.e. 28 November 1991) Libyan authorities issued a second statement reiterating that the claim made by the United States and the United Kingdom would be investigated by the competent Libyan authorities in a manner that would respect the principles of international legality.

On 17 January 1992, the Libyan Minister of Foreign Affairs requested resort to arbitration under Article 14(1) of the Montreal Convention of 1971 to resolve the dispute between the parties, which Libya characterised as one of interpretation of the rights and obligations arising under the Montreal Convention. His request, however, found no favour with the three Governments.

On 21 January 1992, UK, USA and France took the matter to the Security Council, which adopted Resolution 731, urging Libya to "provide a full and effective response to those requests so as to contribute to the elimination of international terrorism."

When Libya did not respond effectively to the requests made by France, the UK and US which had been incorporated in Resolution 731, the UN Security Council adopted two further resolutions (748 and 883) reiterating the demands made in Resolution 731, and at the same time imposing economic sanctions against Libya. Meanwhile, Libya took the case on 3 March 1992 to the ICJ, asserting that it was entitled under the Montreal Convention to assume criminal jurisdiction and to prosecute the accused. A request by Libya for provisional measures to prevent further action by

UK and US governments including action in the Security Council, to compel it to surrender the accused was not accepted by the Court.

On 26 July 1994, Libya's Foreign Minister sent a letter to the UN Secretary-General suggesting three alternatives for resolving the dispute: first, the accused to be immediately brought to trial in Libya in the presence of international observers; second, the trial to be held in an Arab country to be agreed upon; and thirdly, to hold the trial at The Hague or at any UN building in Europe, in which the jury would be replaced by a panel of Scottish judges applying Scottish Law and procedures. This offer however, was immediately rejected by the UK, USA and France.

B. Extradition under The Montreal Convention 1971

(i) Conflict of Jurisdiction

There is a wide array of conventions the aim of which is the suppression of certain types of offences that are generally condemned by the international community, such as war crimes, human rights abuses, drug trafficking and terrorism. These conventions have modified the relationships between the Contracting Parties, by incorporating the principle of dedere aut judicare which imposes a duty on the Contracting State in the territory of which a fugitive offender is found either to extradite or prosecute that person.

Article 7 of the Hague Convention For the Suppression of Unlawful Seizure of Aircraft 1970, which is repeated verbatim in Article 7 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, is a good illustration. It pertinently reads as follows:-

"The Contracting State in the territory of which the alleged offender is

found shall, if it does not extradite him, be obliged to submit the case to its competent authorities for the purpose of prosecution."

The above provision is evidently intended to ensure that any person or persons charged with the offence of aircraft sabotage should be brought to justice. The accused persons in the Lockerbie case have neither been prosecuted in Libya, nor extradited to the United States or the United Kingdom, So far, all attempts to resolve this impasse have proved to be in vain. There are of course a number of factors which led to that, chief among which, however, is the apparent conflict of jurisdiction which arises from Article 5 of the Montreal Convention. Under that provision the right to exercise jurisdiction is accorded to the UK on the basis that it is the country of the locus of the offence (Article 5(1)(a)). Jurisdiction is also granted to the United States, as the offence was committed against or aboard the Boeing 747 aircraft which was registered in that country (Article (5)(1)(b)). Finally, jurisdiction to prosecute is also bestowed upon Libya because the alleged offenders are present in its territory, and it has elected to prosecute, rather than to extradite them to the United States or the United Kingdom (Article (5)(2)).

Since all three parties to the dispute have claimed jurisdiction over the accused, this produces a rather problematic situation. Article 5(3) of the Montreal Convention does not establish a hierarchical system of jurisdiction when more than one Contracting Party has a basis for such a claim. An examination of the negotiating history of the Convention reveals that a proposal for giving such a priority to the State of registration of the aircraft was rejected. Moreover, in the course of the oral hearings in the Lockerbie case before the ICJ, all the parties concerned recognised that the Convention is silent on the matter of priority and exclusivity of jurisdiction. A perplexing question to be addressed is whether Libya's discharge of an Article 7 duty by prosecuting rather than extraditing, puts on hold the claims put forward by the UK and US governments for

exercising jurisdiction over the accused. Prima facie, the answer seems to be in the affirmative, as it appears to be a reflection of the law on terrorism as it has been expounded on in the Convention. There is also room for the view that, if it turns out that the holding of the trial is hampered by the refusal of the UK and US governments to make available evidence to the Libyan judge that might absolve Libya from the obligation to prosecute. On the other hand, it is arguable that if Libya is shown to be unwilling or unable to extradite or prosecute the alleged offenders, the claims for jurisdiction by the contending States would be activated. This, it is submitted, will be consonant with the principle of aut dedere aut judicare which is enshrined in the Convention.

At a different level, if Libya reverses its present stance regarding the option of extradition, a question will arise as to which of the two claimant States the accused should be extradited to. Furthermore, does that decision lie with Libya alone, as the custody State? Although the Convention does not address these issues specifically, but it seems that the choice as to trial in Scotland or the United States, in the absence of agreement between the parties, is one which rests solely with the Libyan Government. The Lord Advocate of Scotland stated that:-

"[The] choice causes no difficulty whatsoever to the United Kingdom in view of the fact that both of these countries have jurisdiction in international law and this case has from a very early stage, been investigated, pursued in full co-operation between the United Kingdom and the United States."

(ii) Extradition Arrangements under the Montreal Convention

Article 8 of the Montreal Convention has set up a regime for extraditing persons allegedly guilty of offences relating to aircraft sabotage.

We propose to examine each of its four paragraphs separately, and see

how each provision relates to the Lockerbie incident.

(a) Issues raised in Article 8 paragraph (1)

1. The offenses shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States. Contracting States undertake to include the offenses as extraditable offenses in every extradition treaty to be concluded between them.

First, it is clear from this provision that aircraft sabotage is an extraditable offence, which is deemed to be automatically incorporated in existing extradition treaties. Secondly, under this provision, the Contracting Parties to the Montreal Convention have undertaken to include the offence of aircraft sabotage in all future extradition treaties to be concluded between them. Article 8 (1) addresses two distinct situations; the first presupposes the existence of extradition treaties between the parties; and the second obligates Contracting States to include the offence of aircraft sabotage in all future extradition treaties to be concluded between them. It follows from this, that little can be gained from invoking the provisions of that paragraph in relation to the jurisdiction question in the Lockerbie case. The reasons being (i) there were no treaties in existence between either of the two claimants and Libya prior to the adoption of the Montreal Convention; and (ii) no such treaties have been concluded between the parties since then. The inescapable conclusion is that, under Article 8(1) Libya is under no obligation whatsoever to extradite the alleged perpetrators. This conclusion apparently has the support of five ICJ judges in the Lockerbie Case. Their views were expressed in a Joint Declaration which pertinently read as follows:-

"Article 8(1) of the Montreal Convention ... did not prohibit Libya from refusing to extradite the accused to the United Kingdom or the United States. It is implied that in the absence of extradition Libya had to submit

the case to its competent authorities for the purpose of prosecution."

(b) Issues raised in Article 8 paragraph (2)

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offenses. Extradition shall be subject to the other conditions provided by the law of the requested State.

As can be seen Article 8, paragraph 2 provides a relatively efficacious means for the extradition of aircraft saboteurs as it minimises the excuses which may be made by States unwilling to extradite in the absence of extradition treaties. This provision attempts to achieve that where the State receiving a request for extraditing an alleged offender requires an extradition·treaty before it can accede to the request.

Article 8(2) has two major weaknesses: (i) it entitles the requested State " ... at its own option to consider the Convention as the legal basis for extradition ..."; and (ii) it subjects extradition to the municipal law of the requested State. As concerns the first weakness, the extremely permissive nature of Article 8(2) makes it possible for the requested State to enjoy a wide margin of discretion as to whether it wishes to accept the Convention as the juridical basis for extradition or not. Regarding the second weakness, by subjecting extradition to the municipal laws of the requested State, the paragraph relegates the Convention to a status which is inferior to the municipal laws of the State in question.

Since Libya requires the existence of extradition treaties between itself and the UK and the USA, it was open to it to regard the Convention as a bilateral treaty between the three parties concerned and to extradite the

accused on that basis. This, of course, did not happen. It seems that Libya exercised the option available to it under that provision by choosing not to regard the Montreal Convention as the legal basis for extradition, inter alia, because the accused were Libyan nationals and that Libyan law did not allow extradition of nationals. Pertinent to this point are the views expressed by Judge Bedjaoui in his Dissenting Opinion in the Lockerbie Case:

"I would point out, that, as is well known, there does not exist in international law any rule that prohibits, or, on the contrary imposes the extradition of nationals."

These remarks seem to be consistent with the preponderance of authorities. It is arguable therefore that Libya cannot insist on refusing to extradite the accused men merely because they are Libyan nationals if all the conditions envisaged in Article 8 are met. In any event, Libya has repeatedly insisted that the nationality of the accused is only one of the factors that militated against their extradition, and that its refusal to extradite is primarily based on the absence of an extradition treaty between itself and the other parties to the dispute.

In a somewhat novel statement, Professor Higgins, for the UK, in the Lockerbie Case, asserted before the ICJ as follows:-

"Article 8(2) ... provides a mechanism by which extradition may be effected, if the State concerned wish to make use of it. The United Kingdom has not, however, sought the extradition of the two accused under Article 8(2) - indeed, it has not sought their extradition (in the technical sense of the term) at all - but has instead maintained that Libya should, for reasons unrelated to the Montreal Convention, surrender the two accused."

Although it is self-evident from the above remarks that Counsel for the UK did not fully develop her arguments, these remarks may nevertheless convey that the UK government had conceded that Libya would not be required under the Montreal Convention to extradite the two accused.

(c) Issues raised in Article 8 paragraph (3)

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognise the offenses as extraditable offenses between themselves subject to the conditions provided by the law of the requested State.

The first thing to note about the above provision is that, unlike paragraph (2) of the same article where permissive language is used, it adopts mandatory language. This is evident from the phrase "shall recognise" as opposed to "may at its option". This apparent difference is blurred by subjecting both provisions to "the conditions provided by the law of the requested State".

As concerns the content of paragraph (3), it addresses the situation in which the requested State does not insist on the existence of a treaty as a prerequisite to extradition. It is with regard to such a State that it imposes an obligation to recognise aircraft sabotage as an extraditable offence. In applying paragraph (3) to the situation arising from the Lockerbie incident, arguably Libya would have been under a legal obligation to surrender the accused, but for the fact that it makes extradition conditional on the existence of a treaty.

(d) Issues raised in Article 8 paragraph (4)

4. Each of the offenses shall be treated for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States

required to establish their jurisdiction in accordance with Article 5, paragraph 1(b), (c) and (d).

Article 8 (4) above deals with the question of which State can be regarded as the place where aircraft sabotage is committed. It provides that the offence to be treated as having occurred not only in the territory of the State in which it is committed, but also in the territories of the States of registration; the State where the aircraft lands with the alleged offender still on board; and the State where the lessee of the aircraft has his principal place of business or his permanent residence.

Inspite of the ease with which this provision extends jurisdiction over the accused to the United States and the United Kingdom, it would not be possible for these two States to rely on it as a basis for extradition in the particular circumstances of the Lockerbie case, as Libya has already claimed jurisdiction over the accused. All that the UK and the USA can do is to continue claiming national jurisdiction over the accused until such time if any when Libya renounces its own claim.

C. Forfeiting the Option to Extradite Due to Complicity of State in Terrorist Acts

We have already stated that the Montreal Convention gives the State of custody the option of extraditing or prosecuting those accused of aircraft sabotage. This formula gives recognition to the principle aut dedere aut judicare. However, there are situations in which the Convention proves completely impotent. An example of this would be where the perpetrator acts on the instructions of a State. That complicitous State would predictably seek to circumvent being exposed by opting not for extraditing, but for prosecuting the perpetrator in its own courts. Obviously, this cannot be a satisfactory solution. In the context of the Lockerbie case, even if Libya's

complicity in the explosion which caused the destruction of Pan Am flight 103 is established, it would seem that Libya could nevertheless hold the trials of the two men in its own courts, without acting in breach of the Montreal Convention. It must however be emphasized that such an absurd result would not and could not affect issues of State responsibility, if the culpability of the Libyan government is established according to normal standards.

In such a situation, Libya might have to offer an apology, make reparation, punish the individuals responsible for the crime and perhaps offer guarantees that it would not repeat the unlawful conduct again.

The question to be addressed is whether there are special circumstances in which the option of prosecution can be denied to a State which is complicitious in acts of terrorism. A proposition relevant to this has been suggested by the governments of the

UK and the US. It provides that where the State of custody is in connivance with the accused vis-a-vis a terrorist act, it forfeits its right to prosecute. As a consequence, the only remaining option, if that be an option, is to extradite the accused.

In specific terms, both the UK and the US governments have consistently alleged that Libya was in league with the accused persons. Furthermore they assert that any trial of the two men in Libyan Courts will not, by the nature of the situation, be genuine nor meet the demands of justice. Leaving issues of state responsibility aside, a significant question which arises from this assertion is whether there are legal means other than through the Montreal Convention which can be invoked for handing over the accused for trial in UK or US courts.

As a starting point, it is a prerequisite of any such attempt that the alleged complicity of Libya in the terrorist act, which led to the destruction of the Pan Am aircraft and the ensuing deaths, must be established. Once that hurdle is passed, then as a matter of international legal policy, the

perpetrators should not go unpunished, simply because there is a gap in the Convention which stands in the way of achieving that result. Accordingly, the focus must shift to other possible rules of international law which can form the legal basis for extraditing the accused for trial in UK or US courts.

Pertinent to this, consideration may first be given to general international law other than treaty law. In so doing, we immediately encounter an unchallenged rule which provides that no State is bound to extradite in the absence of an express treaty obligation. This principle is recognised in the leading authorities in the United Kingdom and the United States. It is also cited with approval in the jurisprudence of the United States Courts.

A 'Joint Declaration' in the Lockerbie case by Judges Evenrsen, Tarassov, Guillaume and Aguilar Mawdsley provides an authoritative statement on extradition under general international law. It reads as follows:-

"In so far as general international law is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out. Moreover, in general international law there is no obligation to prosecute in default of extradition.... This being so, every State is at liberty to request extradition and every State is free to refuse it."

As can be seen from the above passage, Libya is clearly under no obligation whatsoever to extradite or prosecute the accused under general international law.

In the course of the Lockerbie proceedings before the ICJ, Counsel for the UK stated that "the United Kingdom has not, however, sought the extradition of the two accused under Article 8(2) - indeed it has not sought their extradition in the technical sense of the term at all." These

remarks seem to suggest that the legal basis contemplated for handing over the accused is completely outside the ambit of the Montreal Convention. If this be the case, we need to see whether terrorism has been recognised as one of the special categories of criminal offences that are abhorrent to mankind to the extent that they are proscribed by the international community. In short, we need to ascertain whether there is a customary law rule in existence which obligates a complicitous State to extradite rather than to surrender.

Pertinent to the question under review is General Assembly Resolution 49/60 which annexed to it the 'Declaration on Measures to Eliminate International Terrorism'.

The objective of the Declaration is to enhance the struggle against acts of international terrorism, including those in which States are directly or indirectly involved. The Declaration commends all the efforts that have been made so far, and urges States, inter alia to form closer links and exchange information with one another in combating terrorism. More significantly however, it calls upon States to "review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter." And finally, the Declaration calls upon States to discharge the obligations of ensuring "the apprehension and prosecution of terrorist acts in accordance with the relevant provisions of their national law."

As concerns the normative value of Resolution 49/60 and the Declaration annexed to it, resolutions relating to legal questions in the General Assembly of the United Nations are regarded as a material source of custom. However, the legal significance of each resolution will depend on the subsequent state practice relating to it. In any event, there are two alternative routes through which General Assembly Resolutions may attain

the status of 'law making' resolutions: first, whether the resolution in question is declaratory of existing law; and, secondly, whether that resolution formed the basis for progressive development of law. In applying this to Resolution 49/60 and the Declaration annexed thereto, there is hardly any evidence of existing international customary law relating to terrorism which can justify a claim that these instruments have merely reduced it to written form. As concerns the second route, i.e. 'progressive development of law', it needs to be spelt out at the outset that the fact of Resolution 49/60 and the Declaration being adopted without a vote does not give them the force of law. They must comply with the two essential elements of custom namely, state practice and opinio juris. Thus, since the content of the aforesaid Resolutions features in a series of similar instruments this suggests uniformity in the opinions of governments. On the other hand, since Resolution 49/60 and its predecessors are in line with the ten great Conventions concerning the elimination of international terrorism, they may reflect opinio juris supporting a rule against terrorism. In the context of the Lockerbie case, as is always the case, the burden of proof is on the party who seeks to rely on the existence of custom on the basis of a General Assembly Resolution. The UK and US as claimant States would face an uphill task in discharging the burden of proof as there is a dearth of relevant State practice.

D. Limitations on Extradition Derived from Fundamental Human Rights

The fascinating question of whether human rights considerations preclude surrender of the accused, even if an obligation to do so exists in principle, will be addressed in this part of the paper. This will entail an assessment of whether a fair trial is virtually impossible due to the fact that the British and American governments have prejudged the guilt of the accused.

(a) The nature of the limitations

The last five decades in this century have witnessed a significant development in human rights in the international arena. Issues of liberty which used to be within the exclusive domain of the State as a matter of sovereignty are now regulated by international rules. In the context of extradition, the surrender of a fugitive is no longer a matter to be exclusively determined by the relation between the requesting and the requested States alone as principles of fundamental human rights which form a part of general international law dictate that it should be allowed subject to certain limitations. Pertinent to the issue under review is the stance taken by the Institut de Droit International in its Resolution on new problems of extradition at the Cambridge session in 1983. The Rapporteur of the Commission dealing with extradition, suggests that if extradition would result in "the violation of human rights even though the individual was himself accused of violating human rights then [it] should not be granted." Moreover, Judge Mosler took the view that it would not be an exaggeration to state that the protection that this basic human position justified might prevail over treaties as a norm of jus cogens. Be that as it may, Article IV of the Resolution adopted by the Institut de Droit International deals with the question under review in the following manner:-

The Protection of the Fundamental Rights of the Human Person

In cases where there is a well-founded fear of the violation of the fundamental human rights of an accused in the territory of the requesting State, extradition may be refused, whosoever the individual whose extradition is requested and whatever the nature of the offence of which he is accused.

The Resolution shows clearly the importance the members of the Institute attach to the protection of the human rights of the person whose extradition is being sought, irrespective of the gravity of the offence

committed by that person. Although the term "jus cogens" was not adopted in the text of Article IV, it seems to be implicitly included.

(b) The right to a fair trial as a limitation on surrender

The circumstances under which extradition takes place must conform to fundamental human rights. This was recognised by the European Court of Human Rights in the Soering Case. Similarly, the 'Declaration of Principles Guiding Relations between Participating States' in the Final Act of the Helsinki Conference of 1975 provided that in the field of human rights and fundamental freedoms the participating States should fulfil their obligations as set forth in the international declarations and agreements in this field, including, inter alia the International Covenants on Human Rights. It may be mentioned briefly, for the sake of clarity, that Article 14 of the International Covenant on Civil and Political Rights stipulates that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Moreover, "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." In addition, basic human rights standards are the subject of erga omnes obligation as indicated by the International Court of Justice in the Barcelona Traction Case.

Whar emerges is that, the requirement of a fair trial is a fundamental human right which must be a prerequisite of extradition. As concerns the Lockerbie Case, a serious question to be addressed is whether the two accused would be able to receive a fair trial, either in the United States or in the United Kingdom. Libya pleaded before the International Court of Justice that in the circumstances of the case there was no possibility of that for at least three reasons:-

"First, the resort to extensive propaganda and news management which characterised the publication of the indictment and developments thereafter;

Secondly, particularly in the American context, the pervasive anti-Arab propaganda and attitudes of the media towards Arabs and Arab States.

Thirdly, the persistent use of language in official statement which involves assumptions of the guilt of the accused persons and which asserts that "Libyan officials" were responsible for the destruction of the Pan Am aircraft."

These remarks were well received by Judge Ad Hoc El-Kosheri who expressed a similar sentiment in his dissenting judgment in the Lockerbie Case. In his view, the extraordinary impact of the mass media and the role it played would render it impossible for the two Libyan suspects to receive a fair trial by jury either in the United States or in the United Kingdom.

Judge Shahabuddeen noted in his separate opinion that the formal demand of the US and the UK on 27 November asking Libya to pay appropriate compensation promptly (and therefore prior to conducting any trial) would inevitably lead to apartial trial. In his view, such a demand constituted a public and widely publicised announcement by the US and UK as States, that the two accused were in fact guilty of the offences charged. Finally, he concluded that "a jury would more likely be swayed by such prejudicial publicity".

Similar concerns were expressed by Judge Ajibola in his dissenting judgment with reference to the demands made of Libya to pay compensation prior to the suspects being found guilty by a competent court. He remarked that, "The presumption of innocence until guilt is established is still an integral part of the due administration of criminal justice the world over."

Judge Bedjaoui for his part maintained that Libya had the right to protect the accused from any hasty judgments by public opinion or the mass media.

The case of Patrick Ryan serves as a reminder that outright condemnation of the accused by senior officers and the media will militate against extraditing that person as an impartial trial can no longer be guaranteed under such circumstances. The Irish Attorney-General refused to extradite Ryan, because there was such an outcry in the UK that it was impossible to guarantee a fair trial. There appears to be some analogy between Ryan's case and the case at hand.

As hitherto mentioned, a proposition has been put forward to the effect that a fair trial is precluded by the fact that British and American governments have prejudged the guilt of the two Libyans. To begin with, certain statements were made by the British and American governments, respectively in the House of Commons and Congress, and in the United Nations Security Council. These statements carried with them an assumption of inference of guilt on the part of the two Libyans named in the warrants is sued by Scottish and American courts. Furthermore, the aforesaid statements were widely and fully reported in the media over a protracted period. The big question is whether this escalation elevated the case to a unique status which could only have intensified the impact and lasting effect on members of the public of what had been disseminated by the media. The present writer is of the opinion that, by prejudicing the guilt of the accused, the British and American governments have significantly diminished the prospect of a fair trial.

Pertinent to the question under review there are two observations to be made: first, Article 11(1) of the Montreal Convention stipulates that "Contracting States shall afford one another the greatest measure of assistance in connection with Criminal proceedings brought in respect of the offence." Libya asserts that pursuant to this provision it requested British and American prosecuting authorities to supply copies of the evidence at their disposal, but they refused to do so. The ground for this refusal was said to be that Article 11 (1) would apply only when the

venue of the trial had been settled. Such a refusal could very well impair the defence case, and thus constitutes an impediment to a fair trial in British or American Courts. What is more serious however is the stream of adverse remarks made by successive Lord Advocates vis-a-vis Libyan authorities. For example, in a recently published article, the Lord Advocate, described the commitment made by the Libyan leader to President Nelson Mandela that Libya would put no obstacles in the path of surrendering the accused for trial in a neutral country, as representing "a continuous and patent prevarication by Libya." It is submitted that the form in which such remarks are made could conceivably lead the public to believe that the official source from which they directly come, would have in its possession irrefutable evidence which could conclusively establish the guilt of the accused. Such views will undoubtedly put constraints on a fair trial whether in British or American Courts.

To conclude, there is overwhelming evidence that American and British governments, along with their respective prosecution services have pre-judged the guilt of the accused in a very significant way. Additionally, the case has already received unprecedented publicity in the media, and would undoubtedly generate further publicity if and when the trial begins. Under the circumstances, it would be impossible to find a jury of 15 men and women who would be unaffected or uninfluenced by the pre-trial publicity. As a result, no matter how properly directed by the trial judge, the jury will never be eminently qualified to assess the evidence against the accused. That being so, it is submitted that the right to a fair trial which is a fundamental principle would be compromised, if the accused were to be extradited to the US or UK.

E. Conclusions

(1) The jurisdictional regime created by the 1971 Montreal Convention

provides for several jurisdictions, but without specifying a hierarchial order as to which jurisdiction prevails in case of conflict. This apparent conflict has led to concurrent claims being lodged by the UK, US and Libya with respect to jurisdiction over the alleged perpetrators in the Lockerbie incident.

(2) Notwithstanding, once Libya has asserted jurisdiction as the Contracting State where the alleged perpetrators are found, it is not inconsistent with the purpose and object of the Montreal Convention for the UK and US to hold their respective claims for jurisdiction in abeyance. This state of affairs shall persist until such time when Libya is shown to be unwilling or unable to conduct the trials.

(3) If Libya's failure to hold the trials in its own courts is primarily attributable to the recalcitrance on the part of the UK and US to release the evidence necessary for the prosecution which is allegedly in their possession, arguably Libya can be said to have discharged its obligation under the Convention.

(4) As the extradition arrangements under the Montreal Convention are not obligatory, and subject to numerous qualifications, Libya's persistence not to extradite its accused nationals is defensible under that Convention.

(5) Neither the Montreal Convention, nor general international law divest a Contracting State of exercising the option to prosecute rather than to extradite persons accused of committing terrorist acts, even if that State was complicitous in the terrorist acts.

(6) Efforts in the General Assembly to eliminate terrorism (including State Sponsored terrorism) have not crystallised into customary international law. Thus, even if Libya's complicity in the terrorist act in question is established, its failure to surrender the two men

to the claimant States is not in violation of customary international law. This is a reflection of the fact that there is no customary law on terrorism to the present day.

(7) Furthermore, since it is unlikely that the accused will have the assurance of a fair trial due to the media coverage, this creates an independent bar to extradition.

(8) It is self-evident from these conclusions that the regime established by the Convention is suffering from serious defects which were not apparent when it was concluded some twenty seven years ago. The Lockerbie incident is unfortunately a timely reminder that the Convention is in need of some repairs by way of an additional protocol. Among the issues that need special focus are:-

(i) priority and exclusivity of jurisdiction; and
(ii) whether a State which is complicitous in a terrorist act should be denied the right to prosecute;
(iii) how to resolve the issue when a fair trial within a given jurisdiction is not possible.

F. Footnotes

1. Robert Black, "The Lockerbie Proposal", Scots Law Times (37) 21-11-1997, pp.304-306, The Lord Hardie, Lord Advocate of Scotland, "The Lockerbie Trial", ibid (2) 16-1-1998, pp9-10.
2. See generally, S Shubber, "The destruction of aircraft in flight over Scotland and Niger: The questions of jurisdiction and extradition under international law", British Yearbook of International Law, 1996, p.239; F.Beveridge, "The Lockerbie Affair", International and Comparative Law Quarterly, vol. 41, 1992, p.907, M Weller, "The Lockerbie Case:

A Premature end to the 'New World Order', Journal of the African Society of International and Comparative Law, (4), 1992 p.302.

3. The Department of Transport, Air Accidents Investigation Branch, Report on the accident to Boeing 747-121, N739 PA at Lockerbie Dumfrieshire, Scotland on 21 December 1988, London HMSO, 1990,p.3., see also Determination by Sheriff Principal J S Mowat QC in the Fatal Accident Inquiry Relating to the Lockerbie Air Disaster (1 October 1990 to 13 February 1991), pp14-16.
4. G. Joffe, 'Sanctions in the Mediterranean with Special Reference to Libya' Conference Paper on Politics of Sanctions, Institute of World Affairs, 1995, p.4; see also the document released by the US Department of the Air Force, (Air Intelligence Agency) dated 17 November 1994.
5. UN Doc. S/23307 31 December 1991 Annex 1.
6. Ibid.
7. UN Doc S/23306, 31 December 1991, Annex.
8. Ibid.
9. British Document No. 3, International Court of Justice, Verbatim Record CR5, 1992, p.20.
10. Security Council Document No. S/23308.
11. The Lockerbie Case, British Document No. 3, International Court of Justice, Verbatim Record, CR5, 1992, p.22.
12. Security Council Document No: S/1GG4/900.
13. E.g. the Genocide convention 1948, UNTS, 78, p.277; the former Geneva Conventions on Humanitarian Law 1948, UNTS, 75, pp.31, 85, 135, 287; the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft 1963, UNTS, 704, p.219; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, UNTS, 860, p.105; the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, I.L.M., 10 (1971) p.1151; the European Convention for the Suppression of Terrorism 1979, Elagab, International Law Documents Relating to

Terrorism, 1995, p.104.

14. International Conference on Air Law, Montreal, September 1971, ICAO Document 9081 - LC/170-1, p.58, para 49.
15. The Lockerbie Case, Oral Hearings, CR92/4 (27 March 1992) pp 60-1; Ibid, CR92/5 (28 March 1992) p.41, Ibid. CR92/3/6 p.46; and CR92/6, p.19.
16. The Lord Hardie, Ibid. (Footnote 1).
17. See remarks by Counsel for Libya making this assertion. The Lockerbie Case, Oral Hearing, CR92/2 (26 March 1992) p.71.
18. The Lockerbie Case, ICJ Reports 1992, p.148, para 12.
19. See for example, Oppenheim, International Law, vol. 1 (9th ed. edited by Sir Robert Jennings and Sir Arthur Watts), 1992, pp. 955-6; American Law Institute, Restatement of the Law Third, vol.1, pp 561-558.
20. Lockerbie Case, Oral Hearing, CR92/3. p.17.
21. See S. Shubber, Ibid, at Footnote No. 2.
22. A discussion of State responsibility as pertains to the Lockerbie dispute will be pursued in a subsequent article by the present author.
23. The Lockerbie Case, for remarks by Counsel for the UK see Oral Hearing, CR92/3 (26 March 1991) p.22; for remarks by Counsel for US see Ibid, CR92/4. (27 March 1991) pp61-62.
24. See GA Doc. A/46/826, 20 December 1991, See UN Doc A/46/825; S/23306, 31 December 1991; UN Doc A/46/826; S/23307; 31 December 1991.
25. Oppenheim's International Law, vol. 1, 9th ed. by Jennings and Watts, 1992, pp 948-50; Whiteman, Digest of International Law, Department of State Publication, 1968, pp732-33.
26. Factor v Laubenheimer (1993) 290 US 276; Ramos v Diaz 179 F. Sup. 459.
27. Joint Declaration of Judges Evensen, Tarassou, Guillaume and Aguilar Mawdsley, ICJ Reports, 1992, p.136, para. 2.

28. Lockerbie Case, Oral Hearings, CR92/3 (26 March 1992) p.48.
29. See S Shubber, op. cit, p.262, note 89.
30. Adopted on 9 December 1994 (A/49/743).
31. I Brownlie, Principles of Public International Law; 4th ed; 1990, p.14.
32. See the Asylum Case, ICJ Reports, 1950, p.266; the North Sea Continental Shelf Cases, Ibid., 1969, p.44.
33. See Shearer, Extradition in International Law, 1971, p.86; Verzil, International Law in Historical Perspective, 1972; Guillaume, Hague Recueil, vol.215, 1989, III, pp.363-4.
34. Yearbook of the Institut de Droit International, vol.60, Part 2, p.219.
35. Ibid.
36. Ibid.
37. Soering v UK, EHRR, Series A 161, 1989, P439.
38. See Article 14 of the Covenant on Civil and Political Rights.
39. ICJ Reports, 1970, p.32.
40. ICJ Reports, 1992, p.216, paras 61.
41. Ibid. para 62.
42. Ibid, p.141, para. (ii).
43. Ibid, p.191.
44. Ibid, p.148, para 11.
45. Lockerbie Case, Oral Hearings, CR92/3 I.C.J. Oral Hearing, (26 March 1992), pp.14-15.
46. Lockerbie Case, Oral Hearings, CR92/2 (26 March 1992) pp50, 52 and 71.
47. Lord Advocate of Scotland, 'The Lockerbie Trial', Scots Law Times, issue 2, 16.1.1998, p.10.