THE LOCKERBIE AFFAIR: WHEN EXTRADITION FAILS ARE THE UNITED NATIONS' SANCTIONS A SOLUTION? (THE ROLE OF THE SECURITY COUNCIL IN THE ENFORCING OF THE RULE *AUT DEDERE AUT JUDICARE*)

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I. STATEMENT OF FACTS

On December 21, 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 meters, 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 Pan Am Flight 103 exploded in midair. Her fiery skeleton, laden with the bodies of passengers and crew, rained down on the people of Lockerbie, Scotland. Within the hour, 243 passengers, 16 crew members, and 11 townspeople were dead.

Between January 1989 and November 1991, a joint USA-Scottish team tracked down leads in fifty countries, questioned 14,000 people, and combed some 845 square miles 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, Abbel Basset Ali al-Megrahi and Lamen Khalifa Fhimah. That country'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 explosives) 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, D.C. 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 November 14, 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.

II. LEGAL ACTION AND LIBYA'S RESPONSE

Although neither formal diplomatic relations nor a bilateral treaty existed between the United States and 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 Libya to:

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

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- 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 [1]."

Libya's response to these demands has evolved since November 1991, taking the following forms:

1. The first reaction was predictable: the Libyan government refused to grant extradition, asserting that such an act constituted direct interference in Libya's internal affairs. At times, Colonel Qadhafi was trying to laugh out the whole matter.
2. After a while, Libya started its own judicial investigation. The competent authorities officially instituted criminal proceedings in this case. The Libyan examining magistrate ordered the two suspects to be taken into custody.
3. Later on, Libya went even a step further by offering to admit both the British and American observers to the Libyan trial, or, in the alternative, to have the International Court of Justice determine which nation has the proper jurisdiction.
4. The Libyan government has also indicated, at various times, that it might surrender the suspects for trial in a "neutral" forum.
5. Finally, that government suggested that it would not object if the two suspects voluntarily surrender for trial in Scotland. (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 Montreal Convention of 1971, this matter warrants a closer look and a more detailed elaboration.

On November 18, 1991, the Libyan authorities issued a statement indicating that the indictment documents had been received from the United States and the United Kingdom and that, in accordance with the applicable rules, a Libyan Supreme Court Justice had already been assigned to investigate the charges. The statement also, *inter alia*, asserted that Libyan judiciary's readiness to cooperate with all legal authorities concerned in the United Kingdom and the United States.

Ten days later, the Libyan government issued a communiqué in which it was stated that the application made by the United States and the United Kingdom would be investigated by the competent Libyan authorities who would deal with it seriously and in a manner that would respect the principles of international legality, 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 United Kingdom and the United States, offering to travel to these countries in order to review the evidence and cooperate with his American and British counterparts.

Since these offers were either explicitly rejected in public (parliamentary debates) or ignored, remaining without response, two identical letter were addressed in January 1992, to the United States Secretary of States and the British Secretary of States for Foreign Affairs by their Libyan counterpart in which he

[1] Statement Issued by the Government of the United States on November 27, 1991, Regarding the Bombing of Pan Am 103, U.N. Doc. S/23308 (1991).

pointed out that Libya, the United states, and the United Kingdom were all parties to the 1971 Montreal Convention[2]. He then indicated that as soon as the charges had been made against the two accused, Libya had exercised its jurisdiction over them in accordance with Libyan national law and Article 5(2) of that Convention which obligates 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 letter 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 stipulation adopted in Article 7 of the Convention (*aut dedere aut judicare*), 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 observed that the judicial authorities of the United States and the United Kingdom had been requested to cooperate in the matter but instead, had threatened Libya while not ruling out the use of armed force.

III. A STALEMATE: WHERE TO GO FROM HERE?

Typically, under normal circumstances, the vast majority of cases in which extradition was denied for whatever reasons, ends here - in a stalemate. Chances for it being resolved to the satisfaction of both (or all) of the parties involved are close to null. This reality makes some countries think twice before authorizing their competent authorities to submit the extradition request to another state. Some sort of practical wisdom (or pragmatic approach) suggests that this is a situation to which the popular saying "*it doesn't hurt to ask*" simply does not apply. Instead, there is so much to loose and so little to win. Both experience and knowledge of even the basic rules and principles of extradition clearly indicate that once this mechanism is formally set in motion it will take its own course which represents an uneasy marriage between law and politics. Consequently, some states rather try to find a way around the extradition while others ignore it altogether and resort to *fait accompli* instead.

The Lockerbie case is unique in that it did not stop where it could have stopped, and where, possibly, it was expected to come to the "dead end". Interestingly enough, both sides involved in the conflict contributed to next stages by undertaking further actions in this case.

Clearly, the two parties were on a conflicting course. While Libya relied on the codified rule of *aut dedere aut judicare* (Article 7 of the Montreal Convention), as the governing principle which entitles it to prosecute its own nationals especially in the absence of an extradition treaty, both the American and British governments categorically demanded the surrender of the two suspects, and made it clear that nothing less than an unconditional compliance with their request will satisfy them. While Libya declared that it will try the accused, and invited the United States and the United Kingdom to send their officials and lawyers to observe the trial, arguing that it was thus satisfying its obligations under the Montreal Convention, the two other governments demanded that the suspects be tried in their courts. While Libya contended that its domestic law forbids the extradition of its nationals, the U.S.A. and the U.K.

[2] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 974 U.N.T.S. 177.

denied that this is a valid excuse for not surrendering them.

A. The Case: Security Council and International Court of Justice

Determined not to submit all the evidence that have been gathered as a result of the three-year extensive investigation, the United States and the United Kingdom (joined by France) presented the case before the UN Security Council and the General Assembly.[3] In January and March 1992, the Security Council adopted two resolutions in this matter: the first was urging Libya to respond fully and effectively to the requests of the United States, the United Kingdom and France,[4] while the second imposed economic sanctions on Libya.[5] The sanctions were extended in 1993.[6] Libya brought the case before the International Court of Justice seeking provisional measures to prevent the United States or the United Kingdom from taking any action to coerce Libya into handing over the two suspects or otherwise prejudice the rights claimed by that country.[7] On April 14, 1992, the Court declined (by a vote of 11 to 5) to indicate the provisional measures thereby confirming the validity and binding force of Resolution 748.[8] The following three interpretations of the of the U.N. Security Council involvement in the Lockerbie case are possible:

(a) Libya failed to demonstrate convincingly that it is capable of fulfilling the obligation which it claimed under the Montreal Convention, that is, to make a good faith effort to prosecute the crimes itself.
(b) The resolutions signal a substantial loss of faith in the Montreal Convention's authority and efficacy in bringing the offenders to justice.
(c) 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 seems to be the most persuasive. The Court's ruling means that under Article 103 of the U.N. Charter the Resolution 748 takes precedence over any other international agreement, including the Montreal Convention. In one sense, the genuine choice between extradition and prosecution has been brought down to an alternative: extradite or extradite. On the other hand, given the U.N. 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 the peace, a breach of the 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 International Court of Justice in the Lockerbie case, it was suggested that the international extradition law has not been violated or altered because in exceptional cases, "the law merely operates at a

[3] See UN Doc. A/46/825; S/23306; 31 Dec.1991.

[4] S.C. Res. 731 (1992) 21 Jan. 1992.

[5] S.C. Res. 748 (1992) 31 March 1992

[6] S.C. Res. 883 (1993) 11 Nov. 1993.

[7] *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,* I.C.J. 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,* I.C.J. Reports 1992 at 3.

[8] *Ibidem* para. 39.

different level through the internationally sanctioned ways and means of the United Nations".[9]

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

B. Inquiry Into Other Options

1. JURISDICTIONAL level:

- establishing of the hierarchy of jurisdictional principles (or order of priorities) (apart from obvious advantages that could be gained through this solution it also has some inherent problems; just to mention a few: any proposed hierarchy will be perceived as an arbitrary act - unless agreed upon in an international instrument; if a proposition contains clear-cut rules in an attempt to avoid any ambiguity and eliminate discretion and arbitrariness it may soon prove inefficient as the rules may become too rigid and inflexible, and therefore, unable to accommodate any set of specific circumstances which may appear in a case in hand; if, however, to avoid this problem, the rules would allow some flexibility the question immediately arise as to a body or an organ called upon to decide in these matters by conferring jurisdiction on the particular state, in other words: who would be the "keeper of the rules"?)

  Examples: (Draft) *Convention Benelux concernant l'applicabilité de la loi pénale dans le temps et dans l'espace* (1979); Consultative Assembly of the Council of Europe, *Recommendation 420 (1965) on the settlement of conflicts of jurisdiction in criminal matters*; (Draft) *European Convention on Conflicts of Jurisdiction in Criminal Matters*, id.

2. PROSECUTORIAL and TRIAL level:

A. *Conditional Surrender (Extradition):*

1. the requested state's duty to repatriate the sentenced person, i.e. to send him/her back to his/her home country to serve sentence;
   Example: the Dutch Extradition Law as amended in 1988, Article 4, paragraph 2;

2. Consent of the Extraditee;
   Example: the Swiss Law on Extradition and International Assistance in Criminal Matters of 1981, Article 1, paragraph 1 (the consent must be in writing);

B. *"Neutral" Forum:*

1. third state;
2. international criminal tribunal;
3. a variant: "Secretary General custody" over the two suspects in the Lockerbie case; It was suggested by Libya that the Secretary General should attempt to create some "mechanism" whereby Resolution 731 could be implemented.

C. *Transfer of Criminal Proceedings Combined with Rendering Legal Assistance*

D. *abduction or other illegal or irregular forms of apprehension of the would-be-extraditee*

3. ENFORCEMENT level

- enforcement of foreign criminal sentences

[9] C. C. Joyner & W. P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 Mich. J. Int'l L. 222, 256 (1993).

IV. SETTING THE STAGE: SECURITY COUNCIL RESOLUTION 1192 (1998)

The first breakthrough in bringing the suspects to justice came at a meeting in Tripoli in April 1998 between government officials, lawyers and British representatives of the bombing victims at which the Libyans confirmed that they 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 Scottish 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, British Foreign Secretary, rejected in August 1998 Black's proposal for an international panel and opted for an all-Scottish judges panel.

But an agreement over the venue and make-up of the court was not the final obstacle. A number of issues had to be addressed and resolved before the men would agree to leave Tripoli. These included guarantees about their safe custody from Libya. If they are acquitted there will also have to be guarantees about their safe custody back. Other questions arose: 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 be given to the prosecution evidence? how much time will the defence have in order to get properly prepared?

In an effort to make the trial in Scotland (or by Scottish judges) and under Scottish law more attractive to Libya, on 31 October 1997, the Permanent Representative of the United Kingdom to the United Nations addressed a letter to the President of the Security Council (S/1997/845) in which he invited representatives of the United Nations 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 that the Libyan accused would receive a fair trial in Scotland (S/1997/991, Annex). Their rights during the pre-trial, trial and post-trial proceedings would be protected in accordance with international standards. The presence of United Nations 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 August 24, 1998, the Acting Permanent Representatives of the United Kingdom and the United States proposed an arrangement for a trial in the Netherlands by Scottish judges.[10] 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

[10] 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).

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 United Kingdom. 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 Scottish 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;
   (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 United Kingdom as well as the proposed UK legislation. On the same day, 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".[11]

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 United Nations, 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".[12]

Nonetheless, the Security Council passed a resolution 1192 on the matter on August 27, 1998, in which it fully endorsed the plan and procedure devised and proposed by the United States and the United Kingdom.

Throughout the fall of 1998, Libya reacted ambivalently to the proposal, on the one hand welcoming the "evolution" in the U.S. and UK position, while on the other hand expressing concern about the trial's proposed location in the Netherlands, a former U.S. air base, which was agreed upon by the Dutch and British Governments. The Libyan Government announced that it would need to inspect the location before assenting to holding the trial there.[13] In a speech to the UN General Assembly, Libya's ambassador to the United Nations 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. Although in December 1998, the Libyan parliament reportedly approved the handing over of the two suspects for trial, Libyan leader Col. Muammar el-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."[14]

On September 30, 1998, President

[11] Secretary of State Madeleine K. Albright, Statement on Venue for Trial of Pan Am # 103 Bombing Suspects (Aug. 24, 1998), available in <http://secretary.state.gov/www/statements/1998/980824a.html>.

[12] Letter Dated 25 August 1998 from the Charge d'Affaires A.I. 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).

[13] 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, at 4 (1998).

Clinton authorized the use of approximately $ 8 (USD) million to support the establishment and functioning of the court in the Netherlands.[15]

V. *AUT DEDERE AUT JUDICARE AUT TRANSFERERE*: A NEWLY EMERGING RULE OF INTERNATIONAL LAW OF EXTRADITION?

On 5 April 1999, more than a decade after Pan Am Flight 103 exploded over Scotland, the two Libyans charged with planting the bomb arrived in the Netherlands to face trial for the crime. As a result, the United Nations immediately removed severe sanctions on the Government of Col. Muammar el-Qaddafi of Libya. The end of those sanctions allows international air travel and the sale of vital industrial equipment to resume. The step will also release 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 United States and Britain and decide whether the two Libyans are guilty of planting the suitcase bomb. The judges will then face the fundamental questions of who gave the orders to blow up the plane and why. The British and Americans have outlined the main conclusions of their case, but have withheld the 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 United Nations — 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. He and Mr. Corell even asked Italy to lend the United Nations a Boeing 707 jet on which United Nations 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 insure that the food would not be poisoned. Then Col. Muammar el-Qaddafi, Libya's leader, balked at the deal.

So Kofi Annan orchestrated a discreet but relentless political campaign to persuade Colonel Qaddafi, including a hitherto secret appeal by Prime Minister Yevgeny M. Primakov of Russia. As part of this appeal, the United States assured Libya that the trial would not be used to undermine the colonel's rule. One of the reasons why the high officials of the United Nations were involved in this case was their growing awareness and concern that the sanctions imposed on Libya do not work. Libya was slowly persuading the Organization of African Unity, the Arab League and other countries that the two Libyan suspects, Abdel Basset al-Megrahi and Al-Amin Khalifa Fahima, would never get a fair trial in Britain or the United States. Chad, Niger and Gambia, among other African states, began flouting the United Nations 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 United States and Britain had found themselves in a situation of being the stubborn negative

[14] Barbara Crossette, 10 Years After Lockerbie, Still No Trial, N.Y. TIMES, Dec. 22, 1998, at A14.

[15] Memorandum on Funding for the Court to Try Accused Perpetrators of the Pan Am 103 Bombing, 34 WEEKLY COMP. PRES. DOC. 1939 (Sept. 30, 1998).

ones.

In December, Kofi Annan flew to Libya to meet with Colonel Qaddafi. After several hours of one-on-one discussions in the leader's tent outside Sirte, his desert capital, he left convinced that the colonel had realized that a deal "had to be done". The chance that Colonel Qaddafi would surrender the suspects as promised increased substantially only after President Mandela announced it on March 19, 1999, in a speech at Colonel Qaddafi's side in Tripoli.

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 this afternoon but hours later formally extradited them to Britain - on paper, that is - so the Scottish police could take over. Dutch military helicopters then took the Libyans to Camp Zeist, a former military base a few miles outside Utrecht. Some of the camp's buildings are being converted to include a detention unit for the suspects and a room for the Scottish court that will be sitting here.The camp, once used by American 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 Scottish judges under Scottish 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 trial will be held before three Scottish judges. But the start may be postponed for several more months because defense lawyers have asked for extra time to prepare their case. The trial has, in fact, been postponed.

The cost of converting the base and holding the trial has been estimated at close to $200 million, which will be shared by Britain and the United States. 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, an estimated cost of the trial will be rather high - the cost can go over £10 million. 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 legislation.

Roadmap: from Lockerbie through Tripoli to Zeist - key dates in the efforts to bring two Libyans to trial in the bombing of the Pan Am flight near Lockerbie, Scotland:

DEC. 21, 1988 — Pan Am flight 103 from London to New York is blown up over Lockerbie, Scotland.

NOV. 14, 1991 — United States and Britain accuse Abdel Basset al-Megrahi and Al-Amin Khalifa Fahima of Libya of involvement. Libya denies any involvement.

MARCH 23, 1992 — Libya's United Nations delegate says the suspects will be handed over to the Arab League, but the West rejects Libya's conditions.

MARCH 31 — Security Council Resolution 748 tells Libya to surrender the suspects by April 15 or face a worldwide ban on air travel and arms sales.

APRIL 30 — The Libyan leader, Muammar el-Qaddafi, says that Libya will not hand over the two suspects.

NOV. 11, 1993 — The Security Council tightens sanctions.

MARCH 23, 1995 — The F.B.I. offers a record $4 million reward for information leading to the arrest of the two Libyan suspects.

APRIL 19 — Libya sends a flight of Muslim pilgrims to Saudi Arabia despite the air embargo.

JUNE 11, 1997 — Libya says in a letter to the United Nations Secretary General that sanctions had caused losses to Libya of $23.5 billion.

MARCH 20, 1998 — The Security Council debates the Lockerbie issue, with widespread support for a trial in a neutral country.

APRIL 22— After a visit to Libya, representatives of victims' families say the Government has agreed to a trial in the Netherlands under Scottish law.

AUG. 24 — Britain and United States agree two suspects can be tried in The Hague under Scottish law.

AUG. 27 — The Security Council unanimously endorses the plan.

FEB. 13, 1999 — A South African envoy meets with Colonel Qaddafi and says there is an accord.

MARCH 19 — President Nelson Mandela of South Africa goes to Libya and, with Colonel Qaddafi, announces that the two suspects will be handed over by April 6.

APRIL 5 — The suspects are handed over to the United Nations, and the sanctions are suspended.

With the two accused Libyans awaiting trial in the Netherlands, the question arises as to whether the Lockerbie case has modified the law governing the international cooperation in criminal matters. Specifically, has the "third alternative" been added to the traditional rule *aut dedere aut judicare - 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 person to the authorities of the requesting state. Since Lockerbie, has the discretionary power of the requested country increased and broadened by encompassing also the "middle path": neither extradition, nor prosecution, but "delivery" of the accused to a third state? Or, maybe, one could argue that the "delivery" (or whatever other names are used for that purpose) 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 an argument, that "delivery" is a substantially new element then one would be compelled to acknowledge that the Security Council started playing a new role of an "enforcer" of the principle *aut dedere aut judicare*. Such realization 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 terrorism, terrorists and terrorist acts.

VI. OSAMA BIN LADEN: AN AFTERMATH OF LOCKERBIE OR THE LOCKERBIE RULE, CONTINUED?

Encouraged by a clear success of a strategy employed in the Lockerbie case, the Government of the United States 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 American 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 U.S. embassies in Kenya and Tanzania last year. Bin Laden, the messianic heir to a Saudi Arabian construction fortune, wants to eliminate

the U.S. presence in Islamic lands. He is on the FBI's most wanted list and has a $5 million bounty on his head. He is under federal indictment in New York, and Afghanistan's Islamic fundamentalist Taliban government is the target of U.S. economic sanctions for harboring him. The United States remains publicly committed to his capture. In secret meetings in 1999 in Washington, New York and Pakistan, U.S. 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 Osama bin Laden to a Saudi prison, nearly two months before deadly bombs devastated two American embassies and put the suspected terror mastermind on the FBI's 10 most wanted list. But the deal crumbled as the US embassies in Kenya and Tanzania were bombed and was dead by the time U.S. 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 custody 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 has 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," according to Turki. The key to that initial deal, Turki said, 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 U.S. prosecution. Final terms for the bin Laden hand-over were being hammered out between Taliban and Saudi envoys, according to Turki, during the same period that authorities now believe 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 U.S. missile attacks on bin Laden's Afghan training camps only hardened that support.

In Summer 1999, a Taliban spokesman told that bin Laden will never be forced out of Afghanistan against his will. The spokesman specifically ruled out any future surrender deals with the U.S. 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 international group of Islamic scholars to look into the case and perhaps find a way to meet the American request. But they have always stopped short of actually agreeing to place Osama in American custody.

On July 6, 1999, President Clinton banned all commercial and financial dealings between the United States and Afghanistan's ruling Taliban militia, accusing the Taliban of continuing to provide refuge to Osama bin Laden. Clinton's executive order freezes all Taliban assets in the United States, bars the import of products from Afghanistan and makes it illegal for U.S. companies to sell goods and services to the Taliban, whose militant Islamic fighters control about 85 percent of the mountainous, war-torn country. U.S. officials said the measure is intended to put

pressure on the Taliban to surrender bin Laden.[16] In a letter to Congress explaining his order, Clinton said: "The Taliban continues to provide safe haven to Osama bin Laden allowing him and the [al Qaeda] 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 United States". Clinton's order does not address trade between Afghanistan and other countries, and its immediate effect is likely to be modest. Moreover, on August 20, 1998, an executive order froze U.S. assets of bin Laden and forbade any financial transactions between U.S. companies and his entities.[17]

U.S. government officials argue that nabbing bin Laden is feasible and morally necessary. They point to Libya's surrender last April, after years of political and economic pressure, of two suspects in the bombing of a Pan Am airliner over Lockerbie. 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 U.S. military personnel in Saudi Arabia and Somalia.[18] Specifically, he is charged with conspiracy, bombing of U.S. embassies, and 224 counts of murder. Bin Laden was said to be the leader or emir of a group called "al Qaeda" or "the Base," a terrorist group "dedicated to opposing non-Islamic governments with force and violence."

The Southern District 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. U.S. support for the governments of Saudi Arabia, Egypt, and Israel, and the United Nations and U.S. 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 Hezbullah, issuing fatwas (orders) to other members of al Qaeda that U.S. forces in Saudi Arabia, Yemen, and Somalia should be attacked, as well as a general fatwa in May 1998 warning that all U.S. citizens were targets. The indictment also charged that bin Laden sought to obtain chemical and nuclear weapons and their components.[19]

It is argued that there are four strategies that are being used by the United States 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; (4) the prudent use of military force to prevent terrorist attacks and to degrade terrorist infrastructures.[20] It should be noted, however, that,

[16] John Lancaster, Afghanistan Rulers Accused Of Giving Terrorist Refuge; Clinton Bans Trading With Taliban Militia, THE WASHINGTON POST, July 7, 1999, A15.

[17] See Exec. 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).

[18] Indictment, United States v. Osama bin Laden, S(2) 98 Cr. 1023 (LBS), (S.D.N.Y. Nov. 4, 1998), available in http://www.feroes.net/pub/heroes/indictments.html.

[19] See also US Indicts Osama bin Laden on Embassy Bombing Charges, Agence Fr.-Presse, Nov. 4, 1998, available in LEXIS, News Library, Wire Service Stories File.

particularly in the nineties, the US Government tried, with success, another method, that is, to engage the Security Council in the law enforcement operations. The Osama case illustrates this strategy.

In its resolution 1214, adopted at the 3952nd meeting, on 9 December 1998, the Security Council stated, *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 reiterating that the suppression of international terrorism is essential for the maintenance of international peace and security,

13. 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 United States asked the Security Council to impose economic sanctions on the Islamic Taliban Government in Afghanistan, demanding that the Afghans turn over Osama bin Laden.[21] In the operative part of the resolution 1267 (1999), adopted at its 405lst meeting, on 15 October 1999, the Security Council, among other things,

"2. Demands that the Taliban turn over Osama 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 United Nations Security Council often has trouble reaching agreement on whether one crisis or another constitutes a threat to international peace, the 15-member panel has been able to coalesce solidly on the growing dangers of international terrorism. The council voted unanimously to wage a common fight against terrorists everywhere.[22] Remarkable is not only an accord in this matter, but also the fact that two Islamic countries voted in favor. As pointed out by the US representative during the debate, the resolution will send a direct message to Osama bin Laden and terrorists everywhere: "You can run, you can hide, but you will be brought to justice".[23] He added that this action will bring new pressure on the Taliban to turn over Osama bin Laden to authorities in a country where he will be brought to justice. The Taliban in Afghanistan continue to provide bin Laden with safe haven and security, allowing him the necessary freedom to operate, despite repeated efforts by the United States to persuade the Taliban to turn over or expel him and his principal associates to responsible authorities in a country where he can be brought to justice.

The resolution gives the Taliban a clear choice. It has 30 days to turn over bin Laden. If the Taliban do not turn him over within that period, the sanctions will take effect. Those sanctions will restrict foreign landing rights on aircraft operated by the Taliban, freeze Taliban accounts around the world and prohibit investment in any undertaking owned or controlled by the

[20] Ruth Wedgwood, Responding to Terrorism: The Strikes Against bin Laden, 24 Yale Journal of International Law 559 (1999).

[21] Barbara Crossette, U.S. Presses Security Council for Sanctions against the Taliban, N.Y. TIMES, 7 October 1999, A9.

[22] Barbara Crossette, U.N. Council in Rare Accord: Fight Terrorism, N.Y. TIMES, 20 October 1999, A8.

[23] S/PV.4051 (1999).

Taliban. The draft resolution also establishes a Committee to monitor the implementation of sanctions.

Shortly after the adoption of the resolution 1267 (1999), the Taliban representatives expressed their willingness to discuss the most contentious issue with the Americans, that is, the hand-over of Osama.[24] He himself made the offer in a letter to the Taliban chief Mullah, Omar, on condition that the Taliban insure safe and secret passage to a third, unidentified country.[25] It is unlikely, however, that the United States will find this move satisfactory as the pertinent operative paragraph in the resolution makes it clear that the main point is that Osama be brought to justice, not necessarily in the United States.

Let me end by asking a provocative question (before anyone else addresses it to me): after the Lockerbie and bin Laden cases, do other countries have a reason to fear an intervention of the Security Council in their extradition relations?

[24] Taliban Willing to Talk, N.Y. TIMES, 24 October 1999, A8; Barbara Crossette, U.S. Steps Up Pressure on Taliban to Deliver Osama bin Laden, N.Y. TIMES, 19 October 1999, A7.

[25] Taliban Ponder Bin Laden Offer, N.Y. TIMES, 31 October 1999, A10.