The Hague as the Seat of the Lockerbie Trial: Some Constraints

DR. OMER Y. ELAGAB*

I. The Purpose

Seven years have passed since warrants were issued for the arrest of the two Libyan nationals accused of the Lockerbie bombing. Since that date, the parties concerned have not been able to agree on a venue for conducting the trial. By all accounts, there has never been any reasonable prospect of the two accused being handed over for trial in Scotland or the United States.1

British and American authorities agreed in August 1998 to hold the trial in the Netherlands, bearing in mind that such a proposal has, at all times, been suggested by Libyan authorities. Saudi Arabian and South African mediators issued statements on February 15, 1998, suggesting that a deal to hand over the accused for trial in the Netherlands is imminent.

This article traces the factual background to the Lockerbie case. It then proceeds to set out the respective Libyan and British initiatives pertaining to the choice of venue. This discussion is followed by an appraisal of extraditing the accused under the Montreal Convention of 1971. The article then explores the possibility of forfeiting the option not to extradite due to the complicity of the state in the terrorists' acts. Finally, it examines whether human rights norms create an independent bar to the extradition. This article will not examine the legality of the Security Council Resolutions as pertains to the extradition of the two accused, nor will it analyze the wrongfulness otherwise of the sanctions imposed against Libya.2

*Dr. Omer Y. Elagab, is D. Phil (Oxon), Reader in Law, City University, London.


II. Factual Background

On December 21, 1988, at about three minutes past 7:00 P.M., a bomb hidden in a Toshiba radio-cassette player exploded in the New York-bound Pan Am Flight 103, some 31,000 feet over Lockerbie, Scotland. It took four minutes for the broken aircraft to hit the ground, spreading wreckage across the rolling farmland that surrounds Lockerbie. All 259 passengers and crew were killed, as were eleven residents of Lockerbie. Two-thirds of the victims were Americans, and forty-four were British. In addition, nationals of twenty other countries were killed. Twenty of the victims were children.1

After considering evidence allegedly gathered during the largest criminal investigation in the history of Britain, the Lord Advocate, Scotland's Chief Law Officer, issued on November 14, 1991, warrants for the arrest of two Libyan nationals: Abdel Basset Ali al-Megrahi and Lamen Khalifa Fhimah. These men were accused of having placed, or having caused to be placed, a bomb on board the aircraft, conspiracy to murder and other various offenses under the Aviation and Security Act of 1982.4

At the same time, the United States' Acting Attorney General issued warrants for the arrest of the two Libyan suspects. Thus, indictments were preferred before a grand jury of the District Court for the District of Columbia, charging the two men with the murder of 188 U.S. nationals and several other offenses relating to the destruction of aircraft by means of an explosive device.5

On November 27, 1991, the British and U.S. governments issued a joint statement calling upon the Libyan government not only to surrender the two accused for trial, but also to accept complete responsibility for the actions of Libyan officials, disclose all it knew of the crime, including the names of all those responsible, allow full access to all witnesses, documents and other material evidence, including all the remaining timers, and pay appropriate compensation.6

On the same day, the U.K., U.S. and French governments issued another joint statement recalling the British and American demands related to the Lockerbie incident and adding separate demands by France in connection with the bombing of a UTA aircraft on September 19, 1989, which claimed 171 lives.7 This latter statement called on Libya to cease all forms of terrorism and all assistance to terrorist groups, and, by concrete actions, to prove its renunciation of terrorism.

Although Libyan authorities issued a statement asserting readiness to cooperate fully with competent British and American authorities, both the U.K. and U.S. governments were of the view that the Libyan action was not an adequate response to the two joint statements.8

---

5. U.K. Letter, supra note 4.
In a similar vein, little attention was given to another Libyan move that called for resort to arbitration under article 14(1) of the Montreal Convention of 1971.

On January 21, 1992, the three European powers concerned took the matter to the Security Council. The latter adopted Resolution 731, calling upon Libya to provide a full and effective response to the requests made earlier in the joint declarations.

Meanwhile, on March 3, 1992, Libya took the dispute to the International Court of Justice (ICJ), requesting provisional measures to prevent action by the Security Council compelling it to surrender the accused for trial in British or American courts. The court, however, did not accede to their request.

When the three European powers decided that Libya had not cooperated fully in their investigations regarding the Lockerbie and UTA bombings, as required by Resolution 731, they took the matter back to the Security Council. This move led to the imposition of sanctions against Libya under Resolution 748 on March 31, 1992. The sanctions were subsequently strengthened by Security Council Resolution 833 of November 11, 1993. The key elements of these sanctions are:

- an arms embargo and prohibition of any military assistance;
- a reduction in the level of diplomatic relations;
- prohibition of the operations of the Libyan Arab Airlines;
- prohibition of flights to and from Libya;
- an embargo on aircraft parts and services;
- freezing of Libyan assets (except those arising from oil sales); and
- an embargo on certain types of equipment for the oil sector (equipment that would allow expansion).

In order for these sanctions to be lifted, Libya is obliged to cooperate with the Lockerbie and UTA investigations (which in the case of Lockerbie specifically includes the surrender of the accused to the United Kingdom or the United States) and the renunciation of terrorism.

For its part, Libya has responded by providing some cooperation with the French investigation into the UTA bombing. Consequently, France has declared itself broadly satisfied with that cooperation, and the trial in absentia of the six Libyans accused that was scheduled to take place before the end of last year has not taken place.9

Libya has also provided some information about the significant material and financial help that it had given to the Provisional Irish Republican Army. The British government stated, on November 20, 1995, that while gaps and omissions remained in that information, Britain was satisfied that they largely met its expectations and acknowledged this as a step towards renunciation by Libya of terrorism.10

Be that as it may, Britain and the United States continue to believe that the most convincing way in which Libya could show that it has renounced terrorism would be to deliver for trial those accused in the Lockerbie bombing.

On March 3, 1992, Libya took the case to the ICJ, where it argued that there was no extradition treaty between itself and the United Kingdom and the United States. It further asserted that it was entitled under the Montreal Convention to assume criminal jurisdiction

---

10. Id.
and to prosecute the accused. A request by Libya for provisional measures to prevent further action by the U.K. and U.S. governments, including action in the Security Council to compel it to surrender the accused, was not ordered by the court.

III. The Seat of the Trial

A. The Libyan Initiatives

As has been mentioned, Libya wanted to conduct the trial on Libyan soil, but that was summarily dismissed by both the U.K. and U.S. governments.11

After that, Libya took several initiatives, directly or indirectly or in consultation with other states, in its endeavors to find a solution that would meet the requirements of Security Council Resolution 731. Thus, in consultation with Libya, Tunisia proposed, albeit unsuccessfully, that the two suspects be interrogated and tried in France, on the basis that France was one of the sponsors of the three main Security Council Resolutions regarding the Lockerbie case. A further proposal was made by Egypt, in consultation with Libya, for the trial to be held in a third country or at the headquarters of the ICJ in The Hague by a Scottish court applying Scottish law. The three European powers did not bother to reply to that proposal.12

Libya has subsequently subscribed to a proposal of the League of Arab States that the two suspects should be tried in the Netherlands by Scottish judges and in accordance with Scottish law. This was in line with one of the three formulae submitted jointly by the League of Arab States and the Organization of African Unity. It is noteworthy that this proposal was endorsed by the Organization of the Islamic Conference and the Movement of Non-Aligned Countries.13

Although Libya has repeatedly accepted trial of the suspects according to Scottish law, it balked at the prospect that the accused, if convicted, would be imprisoned in Scotland. According to media reports following Saudi Arabian and South African mediation, that issue has been resolved to the satisfaction of all the parties concerned. The hand-over of the accused for trial in the Netherlands seems closer than ever.14

B. The British Initiative

Since early 1998, Britain has been in close contact with the United States and the Netherlands in order to bring the two accused for trial in the Netherlands. Prior to that, the U.K. government discussed with the U.S. government whether they could break the stale-

12. Id.
mate by arranging a trial in a third country. This section explains how the United States, the United Kingdom and the Netherlands have proceeded in that direction.


A letter dated August 24, 1998, was sent from the Acting Permanent Representative of the United Kingdom and the United States to the Secretary General of the United Nations.\(^ {15}\) Profound concern was expressed in that letter, as Libya had failed to ensure the appearance of the two accused for trial in the appropriate U.K. or U.S. court, in spite of the assurances given to the fairness of a trial in these jurisdictions, the report of the independent legal experts, and the offer made by the U.K. government to accommodate international observers at a Scottish trial.\(^ {16}\)

The two representatives stated that their governments were prepared, as an exceptional measure, to arrange for the two accused to be tried before a Scottish court sitting in the Netherlands. Further, the Dutch government was approached and it responded positively to the Anglo-American request that the Lockerbie trial be held in the Netherlands. It was stressed in the letter that the proposed court would be a Scottish court and would follow normal Scottish law and procedures in every respect except for the replacement of the jury by a panel of three Scottish High Court judges. Furthermore, the Scottish rules of evidence and procedure, and all the guarantees of fair trial provided by the law of Scotland, would apply.

The joint letter goes on to state that international observers would be permitted to attend the trial. Also, that the two accused would have safe passage from Libya to the Netherlands and that while they are there, neither the United Kingdom nor the United States would seek their transfer to any jurisdiction other than the Scottish court sitting in the Netherlands. If found guilty, however, the two accused would serve their sentence in Scotland, but if acquitted, they would have safe passage back to Libya.

More significantly, the joint letter provides that should other crimes committed prior to arriving in the Netherlands become known in the course of the proceedings, neither of the two accused nor any of the witnesses will be detained while in the Netherlands for the purpose of giving evidence at the trial.

Finally, the joint letter refers to the text of an agreement to be entered into by the governments of the United Kingdom and the Netherlands. This article will show that there are serious contradictions between the two documents.

Some of the issues raised in the joint letter will be discussed in the part of this article that deals with the agreement between the United Kingdom and the Netherlands concerning a Scottish trial in the Netherlands. For now, however, we intend to focus on the desirability of replacing the jury by three Scottish High Court judges who will decide questions of fact and law.

A trial before an international panel of jurists (including Scottish judges) has been suggested by the present writer and by Professor Robert Black.\(^ {17}\) This panel could operate under Scottish law and would be able to receive guidance from experts on the relevant

---

\(^ {15}\) See *Black*, supra note 1.


Scottish laws. It is somewhat surprising that the Lord Advocate of Scotland thought that the result of such a scheme would be a travesty of a jury. It is common knowledge that superior British courts time and again apply foreign laws to cases before them that have a foreign element. In so doing, they rely in the first place on evidence given by experts as to the applicable law (or the proper law as is sometimes known). This method could also be invoked in the Lockerbie case.

The writer strongly believes that an exclusively Scottish court will not do, as the judges would be unable to judge the facts because their legal training does not cover that.


Acting under Chapter VII of the Charter of the United Nations, the Security Council passed a resolution ratifying the contents of the letter dated August 24, 1998, from the Acting Permanent Representatives of the United Kingdom and the United States to the Secretary General. The resolution also noted the terms of the agreement between the United Kingdom and the Netherlands regarding the Lockerbie trial in The Hague.

The Security Council reiterated its demands that the Libyan government should comply with Resolutions 731, 738 and 883. In addition, it welcomed the initiative for the trial of the two accused before a Scottish court sitting in the Netherlands. Moreover, it called upon the Dutch and the British governments to conclude an agreement between themselves to facilitate the trial in The Hague.

3. The Agreement Between the U.K. and the Netherlands Governments Concerning a Scottish Trial in the Netherlands

This agreement, consisting of twenty-nine articles, purports to regulate the sitting of the Scottish court in the Netherlands and the matters arising out of the trial and the proper functioning of that court.

In dealing with the jurisdiction of the court, article 3 authorizes the detention of the accused for the purposes of the trial and, in the event of conviction, pending their transfer to the United Kingdom. In a very curious way, the same article empowers the Scottish court to order (a) the temporary detention of witnesses transferred in custody to the premises of the Scottish courts and (b) the temporary detention of witnesses in the course of their evidence.

The writer finds this provision to be inconsistent with article 17(5) of the agreement and the substance of the joint letter of August 24, 1998, which provides:

should other offenses 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 offenses while in The Netherlands for the purpose of the trial.

It is not clear whether article 3(9) of the agreement should prevail over article 17(5) and the content of the joint letter cited above. The apparent confusion is likely to cause doubt in the minds of the potential witnesses. As a result, it is almost certain that some key witnesses may refrain from attending the trial for fear of being detained.

More significantly, however, is article 13(2), which considers the possibility of transferring the accused from the premises of the Scottish court in The Hague directly to the territory of the United Kingdom:

(a) for the purpose of trial by jury in Scotland, provided that the accused have given their written agreement, and have confirmed that agreement in person to the High Court of Justiciary in the presence of any counsel instructed by them, or

VOL. 34, NO. 1
(b) for the purpose of serving a custodial sentence imposed by the Scottish court following the conviction of the accused.

Leaving aside the issue of the place where custodial sentence may be served by the accused if found guilty, it is somewhat alarming that article 13(2)(a) of the agreement contemplates the possibility of transferring the trial to Scotland. This is said to take place only when the two accused give their written consent in open court and in the presence of their legal representatives. An examination of the joint letter to the Security Council, in contrast to this, reveals that such option has no place. The Lord Advocate mentioned in a public statement that it would be an absolute requirement for the trial in The Hague that his officials “would not negotiate, directly or indirectly, with the accused persons or the Government which allegedly employed them as to the kind of trial which they would find appropriate.”

It is submitted that the apparent contradiction between the terms of the agreement and the contents of the public statement made by the Lord Advocate needs clarification before the trial proper can begin.

IV. Extradition under the Montreal Convention of 1971

A. Concurrent Jurisdictions

Article 7 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 pertinently provides:

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.

This provision is clearly intended to incorporate the principle of *dedere aut judicare*, which ensures that any person or persons charged with the offense 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 that led to that, chief among them being the apparent conflict of jurisdiction that arises from article 5 of the Montreal Convention. Under that provision, the right to exercise jurisdiction is accorded to the United Kingdom on the basis that it is the country of the locus of the offense (article 5(1)(a)). Jurisdiction is also granted to the United States, as the offense was committed against or aboard the Boeing 747 aircraft that 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)).

The fact that all three parties to the dispute have claimed jurisdiction over the accused produces a rather problematic situation. This is mainly due to the fact that 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. It is interesting to note that in the course of the oral hearings in the Lockerbie case before the ICJ, all the parties concerned recognized 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 raised by the U.K. and U.S. governments for exercising jurisdiction. 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. Moreover, it could not have been the intention of the contracting parties to include a provision in the convention that is blatantly inconsistent with the generally recognized rule against "double jeopardy." There is also room for the view that commencement of the trial is hampered by the refusal of the U.K. and U.S. governments to make evidence available to the Libyan judiciary that should 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 will be consonant with the principle of aut dedere aut judicare, which means either surrender or prosecute, 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. Furthermore, does that decision lie with Libya alone, as the custody state? The convention does not address these issues specifically, but as a matter of common sense the choice as to trial in Scotland or the United States, in the absence of agreement between the parties is one that rests solely with the Libyan Government. The Lord Advocate of Scotland accepts this formula, adding 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."22

B. Extradition Arrangements under the Montreal Convention

Article 8 of the Montreal Convention has set up a regime for extraditing persons allegedly guilty of offenses relating to aircraft sabotage. This next section examines each of its four paragraphs separately and shows how each of them relates to the Lockerbie incident.

1. Issues Raised in Article 8, Paragraph (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."


VOL. 34, NO. 1
First, it is evidently clear from this provision that aircraft sabotage is an extraditable offense, which is deemed to be automatically incorporated in existing extradition treaties. Second, under this provision, the contracting parties to the Montreal Convention have included the offense of aircraft sabotage in all future extradition treaties between them. It can, therefore, be stated that 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 offense of aircraft sabotage in all future extradition treaties between them. It follows, therefore, that little can be gained from invoking the provisions of that paragraph to the jurisdiction question in the Lockerbie case. There are two reasons for this conclusion, namely, that no treaties existed between either or both of the two claimants and Libya prior to the adoption of the Montreal Convention and 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 view is apparently supported by five ICJ judges in the Lockerbie case. Their opinions were expressed in a Joint Declaration, which pertinentely 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.”

2. Issues Raised in Article 8, Paragraph (2)

“If a contracting state that 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 with respect to the offenses. Extradition will be subject to the other conditions provided by the law of the requested state.”

Article 8, paragraph (2), provides a relatively efficacious means for the extradition of aircraft saboteurs, as it minimizes the excuses that may be made by states unwilling to extradite in the absence of extradition treaties. This provision seeks to make the extradition possible by creating a bilateral treaty between the parties in the event that the state receiving a request to extradite an alleged offender requires an extradition treaty before it can comply with the request.

It must be pointed out, however, that 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 that is inferior to the municipal laws of the state in question.

Since Libya requires extradition treaties between itself and the United Kingdom and the United States, 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 because the accused were Libyan nationals and because 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."24

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 militates 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.

Interestingly, Professor Higgins, on the United Kingdom's behalf in the Lockerbie case, asserted to the ICJ:

Article 8(2) ... provides a mechanism by which extradition may be affected, 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.1

Although it is self-evident from the above remarks that counsel for the United Kingdom did not fully develop her arguments, these remarks may nevertheless convey that the U.K. government had conceded that Libya would not be required under the Montreal Convention to extradite the two accused.27

3. Issues Raised in Article 8, Paragraph (3)

"Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offenses as extraditable offenses between themselves subject to the conditions provided by the law of the requested State."28

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 recognize" 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."

Paragraph (3) 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 recognize aircraft sabotage as an extraditable offense. 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.

23. See Oral Hearings, supra note 21, at 71.
24. Lockerbie, supra note 6, para. 12, at 148.
27. See Shubber, supra note 2.
4. Issues Raised in Article 8, Paragraph (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) deals with the question of what state is regarded as the place where aircraft sabotage is committed. It provides that the offense is 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 of the aircraft, 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.

Despite 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. All that the United Kingdom and the United States can do is to continue claiming jurisdiction over the accused until such time, if at all, Libya renounces its own claim.

V. Forfeiting the Option Not to Extradite Due to the Complicity of the State in Terrorist Acts

Although the Montreal Convention gives the state of custody the option of extraditing or prosecuting those accused of aircraft sabotage as required by the principle aut dedere aut judicare, this hardly applies where the perpetrator acts on the state’s instructions. One could imagine that the complicitous state would want to circumvent being exposed by opting to prosecute the perpetrator in its own courts rather than hand him over. Obviously, this cannot be a satisfactory solution.

In the context of the Lockerbie case, even if Libya's complicity in the explosion that 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 approach should not absolve Libya of state responsibility if its culpability is established according to normal standards. In such a situation, Libya would have to offer an apology, make reparations, punish the individuals responsible for the crime, and possibly provide guarantees that it would not repeat the unlawful conduct.

The question to be addressed, however, is whether there are exceptional circumstances in which the option of prosecution should be denied to the state that is complicitous in acts of terrorism. A proposition relevant to this has been raised by the governments of the United Kingdom and the United States. It provides that where the state of custody is in connivance with the accused vis-à-vis some terrorist act, it forfeits its right to prosecute. As a consequence, the only option open for that state would be to extradite the accused.
In specific terms, both the U.K. and the U.S. 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 or meet the demands of justice. A significant question that arises from this assertion is whether there are legal means other than the Montreal Convention that can be invoked for handing over the accused for trial in U.K. or U.S. courts.

As a starting point, it is a prerequisite of any such attempt that the alleged complicity of Libya in the terrorists' act, which led to the destruction of the Pan Am aircraft and the ensuing deaths, must be established. Only if 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 that stands in the way of achieving that result. Accordingly, the focus must shift to other possible rules of international law that can form the legal basis for extraditing the accused for trial in U.K. or U.S. courts.

Consideration may first be given to general international law other than treaty law. In doing so, we immediately encounter an unchallenged rule that provides that no state is bound to extradite in the absence of an express treaty obligation. The leading authorities in the United Kingdom and the United States recognize this principle. It is also cited with approval in the jurisprudence of the U.S. courts.

A "Joint Declaration" in the Lockerbie case by Judges Evensen, 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. Although since the days of Covarruvias and Grotius such a formula has been advocated by some legal scholars, it has never been part of positive law. 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 United Kingdom 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 at all." These remarks suggest that the legal basis contemplated for handing over the accused is completely outside the ambit of the Montreal Convention. If this is the case, we need to see whether the international community has recognized terrorism as one of the special categories of criminal offenses that are abhorrent to mankind. In short,
we need to ascertain whether a customary law rule exists that 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 that directly or indirectly involve states. The declaration seeks to commend all the efforts that have been made so far, and urges states 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. The legal significance of each resolution, however, 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, second, whether that resolution formed the basis for progressive development of law. In applying this to Resolution 49/60 and the declaration annexed thereto, hardly any evidence of existing international customary law relating to terrorism exists that 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 spelled out at the outset that the adoption of Resolution 49/60 and the declaration without a vote does not give them the force of law. They must comply with the two essential elements of custom stated in article 38(1)(b) of the Statute of the ICJ, namely, state practice and opinio juris. Thus, by being part of a series of similar instruments, this suggests uniformity in the opinions of governments. Moreover, 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, since the United Kingdom and the United States are the claimant states, they bear the burden of proof with regard to the existence of a customary law rule against terrorism on the basis of General Assembly Resolutions. The United Kingdom and the United States as claimant states would face an uphill task in discharging the burden of proof as there is no state practice to be relied on.

VI. 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.

39. Id. at 7.
40. Id.
42. See the Asylum Case, 1950 I.C.J. 266; the North Sea Continental Shelf Cases, 1969 I.C.J. 44.
of the article. 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; 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, the rapporteur 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 Institut attach to the protection of the human rights of the person whose extradition is being sought, irrespective of the gravity of the offense 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. The European Court of Human Rights recognized this in the Soering Case. Similarly, the “Declaration of Principles Guiding Relations between Participating States” to the Final Act of the Helsinki Conference of 1975 provided that in the field of human rights and fundamental freedoms the participating states should fulfill their obligations as set forth in the international declarations and agreements in this field, including the Inter-

---

43. See Ivan A. Shearer, Extradition in International Law 86 (1971); J.H.W. Verzijl, International Law in Historical Perspective (1972); Guillaume, 215 Hague Recueil 363-64.
45. Id.
46. Id.
national 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."\(^48\) Moreover, "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."\(^49\) In addition, basic human rights standards are the subject of *erga omnes* obligation as indicated by the ICJ in the Barcelona Traction Case.\(^50\)

Emerging is the requirement of a fair trial as a fundamental human right that 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, the United Kingdom or the Netherlands. Libya pleaded before the ICJ that in the circumstances of the case, there was no possibility of a fair trial for at least three reasons:

First, the resort to extensive propaganda and news management which characterized 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 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.\(^51\)

Judge Shahabuddeen noted in his separate opinion that the formal demand of the United States and the United Kingdom on November 27, 1991, asking Libya to pay appropriate compensation promptly (and, therefore, prior to conducting any trial) would inevitably lead to an impartial trial. In his view, such a demand constituted a public and widely publicized announcement by the United States and the United Kingdom as states that the two accused were in fact guilty of the offenses charged.\(^52\)

Judge Ajibola expressed similar concerns in his dissenting judgment with reference to the demands made of Libya to pay compensation prior to a finding of guilt 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."\(^53\)

Judge Bedjaoui maintained that Libya had the right to protect the accused from any "hasty judgments of public opinion or the mass media."\(^54\)

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. It should be recalled that the

\(^{49}\) Id. para. 2.
\(^{50}\) 1970 I.C.J. 32 (Feb. 5).
\(^{52}\) Id. at 141, para. (ii).
\(^{53}\) Id. at 191.
\(^{54}\) Id. at 148, para. 11.
Irish Attorney-General refused to extradite Ryan because there was such an outcry in the United Kingdom 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 because British and American governments have prejudiced the guilt of the two Libyans. This is probably true in the trivial sense that the British and American governments are clearly acting in the interest of the prosecution process. But the important question is whether courts in the United States and Britain (including a Scottish court in the Netherlands) have prejudged the guilt of the accused, rather than whether the governments in question have. This is precisely what the Solicitor-General for Scotland submitted in the course of the Lockerbie hearing before the International Court of Justice. But the issue needs to be confronted more squarely in order to determine the situation one way or the other. To begin with, the British and American governments made certain statements, 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 issued by Scottish and American courts. Furthermore, the media widely and fully reported aforesaid statements over a protracted period. The big question is whether this escalation elevated the case to a unique status that could only have intensified the impact and lasting effect on members of the public of what had been disseminated by the media.

It must be emphasized that any answer to this question must essentially be one of speculation. After careful assessment, however, the 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.

Similar concerns may be expressed with respect to whether the British and American prosecutors have precluded a fair trial because they may be said to have prejudged the guilt of the two Libyans they have indicted. But it would be very naive to draw any inference from the fact that American and British prosecutors are acting "nonimpartially" in the trivial sense of insisting on bringing the two men to trial either in U.S. or Scottish courts. For any concerns to be justified, however, it would have to be established that prosecution agencies in the claimant states are not impartial in a very significant way that is likely to result in a miscarriage of justice.

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. The writer believes that such a refusal could constitute an impediment to a fair trial in British or American courts wherever constituted. What is more serious, however, is the stream of adverse remarks made by successive Lord Advocates vis-à-vis Libyan authorities. For example, the Lord Advocate recently described the commitment made by

56. Montreal Convention, supra note 28, art. 11, para. 1.
57. Id. at 50, 52 and 71.
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 their official source would possess irrefutable evidence that could conclusively establish the guilt of the accused. Such views will undoubtedly put constraints on a fair trial, whether in British or American courts. This is also bound to influence the minds of the Scottish judges who sit in the proposed court in the Netherlands. This is likely to be the case as these judges, in the absence of a jury, will assume the role of the jury, a task for which they are neither prepared, nor received any form of training. Thus, all of a sudden and completely on an experimental basis, the judges will be required to assume the dual roles of judges and jurors.

To conclude, there is overwhelming evidence that the American and British governments, along with their respective prosecution services, have prejudged the guilt of the accused in a significant way. Additionally, the case has already received unprecedented publicity in the media and would undoubtedly generate further publicity if the proposed trial begins in The Hague. Under the circumstances, it would be impossible to find a panel of Scottish judges who would be unaffected or uninfluenced by the pre-trial publicity. It must be emphasized that the legal training of the Scottish judges, sitting in The Hague without a jury, no matter how properly trained, can never make them eminently qualified to be arbiters of facts in the case against the accused. That being so, it is submitted that the right to a fair trial, which is a fundamental principle of human rights, would be compromised if the accused were to be tried in U.S. or U.K. courts (including a Scottish court sitting in The Hague).

VIII. Conclusion

There are serious contradictions in the documents that the U.K. and U.S. governments submitted to the Security Council with regard to the guarantees offered to the accused and the witnesses should the trial go ahead in The Hague. They should be ironed out at once; otherwise, there is a serious risk of the trial not being held in the Netherlands.

The jurisdictional regime created by the 1971 Montreal Convention provides for several jurisdictions, but does not specify a hierarchical order as to which jurisdiction prevails in case of conflict. This apparent conflict has led the United Kingdom, the United States and Libya to lodge concurrent claims with respect to jurisdiction over the alleged perpetrators in the Lockerbie incident.

Nevertheless, 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 United Kingdom and the United States to hold their respective claims for jurisdiction in abeyance. This state of affairs will persist until Libya is shown to be unwilling or unable to conduct the trials.

If Libya's failure to hold the trials in its own courts is primarily attributable to the recalcitrance on the part of the United Kingdom and the United States to release the evidence necessary for the prosecution that is allegedly in their possession, arguably, Libya can be said to have discharged its obligation under the convention.

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.

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.

Efforts in the General Assembly to eliminate terrorism (including state-sponsored terrorism) have not crystallized 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 does not violate customary international law. This is a reflection of the fact that there is presently no customary law on terrorism.

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.

It is self-evident from these conclusions that the regime established by the convention is suffering from serious defects that 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;
(ii) whether a state that is complicitous in a terrorist act should be denied the right to prosecute; and
(iii) how to resolve the issue when a fair trial within any given jurisdiction is not possible.