LOCKERBIE: THE OTHER CASE

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To public international lawyers "Lockerbie" is more than likely to evoke the cases which Libya brought in the International Court of Justice in 1992 against the United Kingdom[1] and the United States under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971.[2] The issues raised by the cases have spawned a huge literature. But, in truth, the ICJ proceedings have never been at the centre of, what might be called, the Lockerbie affair. Although they raise important constitutional issues for the United Nations, in terms of the crime committed—the sabotage of the Boeing 747 airliner on flight PA103 which exploded over Lockerbie in Scotland on 21 December 1988 killing 270 people—the ICJ proceedings have never been more than a sideshow; or as that word was once, aptly for the present case, defined in *The Times* crossword, an incidental skirmish. The real story is how international action, and in particular the ingenious use of international law, was successful in achieving the appearance of the accused for trial before a Scottish court sitting in the Netherlands. This example of what can be achieved in the cause of justice by legal inventiveness, imaginative diplomacy and sheer persistence, should be properly recorded.

The facts of the crime, at least in outline, are by now well-known.[3] On 13 November 1991 the Sheriff (i.e. judge) at Dumfries, Scotland granted a warrant for the arrest of two Libyan nationals, Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, on charges of murder, conspiracy to murder and contravention of section 2(1) and (5) of the

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1. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*. For the Order on the Libyan Request for Provisional Measures, see ICJ Rep. 1992, 3, and F. Beveridge, "The Lockerbie Affair" (1992) I.C.L.Q. 907. For the judgment of the ICJ on the United Kingdom's Preliminary Objections (UKPOs), see ICJ Rep. 1998, 9, and F. Beveridge, "The Lockerbie Cases", (1999) I.C.L.Q. 658. The judgment and pleadings are available on the ICJ's Website (http://www.icj-cij.org). The counter-memorial was submitted in Mar. 1999 and the reply by Libya is due by 29 Jun. 2000. The court has not decided on the subsequent procedure.

2. 974 UNTS 177 (Reg. No.14118); UKTS (1974) 10.

3. A summary is in the UKPOs at paras.2.36–2.42.

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Aviation Security Act 1982. In the United States a grand jury handed down an indictment of the two the same day. The next day copies of the Scottish charges and the warrant were supplied to Libya with a demand that it surrender the accused for trial in Scotland. At the same time a fairly detailed statement of the facts alleged, the position within the Libyan intelligence services of the accused and their involvement in the commission of the crime, was given to Libya.[4]

In order to understand why the decision was taken to hold the trial in the Netherlands before a specially constituted Scottish court, it is necessary to describe some of the diplomatic moves.

I. INITIAL DIPLOMATIC ACTION

IRONICALLY, given the later history of the affair, Libya's immediate reaction to the demand for the surrender of the accused was to approach the United Nations. On the day the charges, statement of facts and demand for surrender were conveyed to Libya, its Permanent Mission to the United Nations in New York issued a press release denying all knowledge of the crime, the denial being repeated the next day in a letter to the Security Council,[5] and in a letter to the UN Secretary-General on 17 November 1991.[6] Since these responses were unsatisfactory, on 27 November 1991 the UK and US Governments issued a joint declaration stating that Libya must:

> —surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
> —disclose all it knows of the crime, including the names of all those responsible, and allow for full access to all witnesses, documents and other material evidence, including all the remaining timers;
> —pay appropriate compensation.[7]

On 20 December 1991, France issued a communiqué announcing that the judicial inquiry into the sabotage of a DC10 aircraft on UTA flight 772 on 19 September 1989, causing 171 deaths, had implicated several Libyan nationals, and called upon Libya to produce all material evidence, facilitate access to documents and respond to requests made by the examining magistrate.[8] France did not seek extradition of the six Libyan nationals against whom charges were later made, but was to try them *in absentia*.[9]

4. The statement was before the ICJ for the Provisional Measures and Preliminary Objections hearings but, at the request of the United Kingdom, the ICJ has decided that, in order to avoid any risk of prejudicing the trial of the accused, it should remain confidential for the time being.
5. S/23221.
6. S/23226.
7. S/23308.
8. S/23306.
9. S/1999/726, para.18. And see p.296 below.

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II. ACTION IN THE SECURITY COUNCIL

FROM the beginning, the UK, US and French Governments also were determined to involve the UN Security Council if the demands made on Libya through the diplomatic channels were not met. The United Nations had previously shown itself to be greatly concerned with the threat which terrorism poses to international peace and security.[10] In the 1970s and 1980s the Security Council had on many occasions condemned terrorism, in particular kidnapping and aircraft hijacking.[11] Seven days after the Lockerbie crime was committed, the Security Council condemned it.[12] This was followed in 1989 by the adoption, following a joint initiative by Czechoslovakia and the United Kingdom, of Resolution 635 which urged the International Civil Aviation Organisation to intensify its work on, what was to become, the Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1991.[13] The UN General Assembly had since 1969 also expressed concern about terrorism, most notably and pertinently, in the so-called Friendly Relations Declaration of 24 October 1970, in which it emphasised that "[e]very State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife *or terrorist acts* in another State".[14]

Libya's involvement in terrorism had been long-standing and well-documented.[15] There had been the murder abroad of Libyan dissidents; the murder in London in 1984 of WPC Fletcher by shots fired from the Libyan diplomatic mission;[16] and the supply of arms and explosives to the Provisional IRA. The latter activity was admitted by the Libyan Foreign Minister in May 1992,[17] and information about it was later given by Libyan officials to British officials at meetings between 1992 and 1995.[18]

III. RESOLUTIONS 731, 748 AND 883

IN the weeks following the original demand on 14 November 1991, Libya showed no willingness to make the accused available for trial or to

10. See G. Guillaume, "Terrorisme et Droit", *Recueil des Cours* (1989) Vol.215, pp.287–416.

11. See, e.g., Resolutions 286(1970) and 579(1985) and the statements in S/17554, S/17702 and S/18641.

12. UN press release SC/5057.

13. ILM (1991), p.726.

14. Resolution 2625 (XXV); ILM (1970), p.1292. Emphasis added. See also the statement of the President of the Security Council on 31 Jan. 1992 at the conclusion of the meeting of the Council held at the level of Heads of State and Government (S/23500).

15. For details, see UKPOs, paras.2.15–2.27.

16. In 1991 the Libyan Police Syndicate sent a cheque for £250,000 to the United Kingdom Police Dependants Trust, which the latter declined. See also p.296 below.

17. S/23918.

18. UKPOs, para.2.25.

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acknowledge its involvement in terrorism.[19] Consequently, on 31 December 1991, the United Kingdom, the United States and France circulated the details of the Scottish and US charges, the UK/US demands and the French communiqué, as Security Council documents.[20] As from 2 January 1992, the three States sought the support of other States for a Security Council resolution calling on Libya to comply with their demands. Libya then sought by various means to prevent any action by the Security Council in support of the demand for the surrender of the accused for trial, or at least for trial in Scotland or the United States. In January, Libya unsuccessfully sought a special session of the General Assembly;[21] denied the competence of the Security Council in the matter;[22] and, shortly before the adoption of Resolution 731 on 21 January 1992, invoked the dispute settlement provisions in Article 14 of the Montreal Convention. In Resolution 731, adopted unanimously, the Council expressed in the preambular paragraphs its concern about international terrorism, including terrorist acts in which states are involved; voiced its deep concern that the results of the criminal investigation implicated officials of the Libyan Government; and referred to the Security Council documents containing details of the charges and the "requests" of the three Governments. As might be expected of the Security Council, this more diplomatic word was used instead of "demands", and the substance of the demands was referred to by reference to the Security Council documents. The operative paragraphs of the resolution, which was not adopted under Chapter VII of the UN Charter, strongly deplored Libyan failure to respond effectively to these requests, and urged it to provide "a full and effective response" to them.

Resolution 731 also requested the UN Secretary-General to seek the co-operation of Libya. He twice sent a representative to Tripoli, and reported to the Council on 11 February and 3 March 1992[23] that Libya had shown no intention to comply with the terms of the resolution. On the day his second report was published, 3 March 1992, Libya filed its applications against the United Kingdom and the United States at the International Court of Justice, invoking Article 14 of the Montreal Convention as the basis for jurisdiction, together with requests for the indication of provisional measures of protection. Libya claimed that the respondents were trying to bypass the Montreal Convention by, *inter alia*, seeking sanctions against Libya. Three days after the completion of the oral hearings on the Libyan requests for provisional measures, the Security

19. S/23226.
20. S/23306, S/23307 and S/23308.
21. A/46/840 and A/46/840 Corr.1.
22. S/23396.
23. S/23574 and S/23672.

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Council adopted, on 31 March 1992, Resolution 748. The vote was 10 in favour, with five abstentions (Cape Verde, China, India, Morocco and Zimbabwe).

The resolution was adopted under Chapter VII of the UN Charter and expressed in mandatory terms. The preamble again recited the concern of the Council at international terrorism, and referred to the duty of states not to aid terrorism. The determination, for the purposes of Article 39 of the Charter, that there existed a threat to international peace and security, was based not only on Libya's failure to respond to the requests referred to in the previous resolution, but also on its failure to demonstrate "by concrete actions" its renunciation of terrorism. The Council decided that Libya must comply with the requests of the three States and promptly, by concrete actions, demonstrate its renunciation of terrorism. The resolution imposed a ban on flights to and from Libya, an arms embargo, a reduction in the size of Libyan diplomatic missions and the closure of all offices of Libyan Arab Airlines abroad. It was followed—over a year and a half later—on 1 November 1993 by Resolution 883, which extended the sanctions to include a partial freeze on Libyan public assets, an embargo on certain oil industry equipment and the tightening of existing measures. Paragraph 16 envisaged the suspension of sanctions if Libya ensured, *inter alia*, the appearance of the accused for trial before the "appropriate United Kingdom or United States court".

On 14 April 1992, in rejecting the Libyan request for provisional measures, the International Court of Justice found that prima facie the obligations of Libya and the United Kingdom under Resolution 748 prevailed over their obligations under the Montreal Convention.[24] Libya then embarked on a further diplomatic campaign with the aim of avoiding a trial in Scotland or the United States.

IV. TRIAL IN A THIRD COUNTRY

BETWEEN 1992 and 1994 Libya made various suggestions for ways by which the accused might be tried: by a seven-man committee established by the League of Arab States,[25] in France,[26] in Libya or in another Arab state.[27]

Throughout, the objective of the British Government has been for a domestic criminal trial to establish the guilt or innocence of the accused. Terrorist crimes are among the most serious, but nevertheless should be investigated and prosecuted in the same way as other serious crimes.

24. ICJ Rep. 1992, 3; ILM (1992), p.662. In *Lockerbie (Libya* v. *United Kingdom) (Preliminary Objections)*, ICJ Rep. 1998, 9, the court found that it had jurisdiction.
25. S/24209.
26. S/26859.
27. S/1994/900.

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Crimes are normally investigated by the authorities of the country where they were committed, the prosecution case being put together for the purpose of trial in the courts of that country. An international criminal tribunal is usually only necessary when a domestic trial is not feasible because, for example, the crimes were committed in a State during an internal armed conflict and it is therefore difficult to hold a fair trial in the courts of that State. The fact that terrorist crimes do not usually require special treatment is tacitly acknowledged in the Statute of the International Criminal Court, which does not give that Court jurisdiction over such crimes.[28]

V. A SCOTTISH TRIAL IN THE NETHERLANDS?

THE proposal which was pursued by Libya with most vigour was the seemingly extraordinary one of a trial under Scots law before a Scottish court sitting at The Hague. This was put by Libya to the UN Secretary-General on 8 December 1993, following the adoption of Resolution 883.[29] It was clear from the start that any proposal to "export" the Scottish trial to the Netherlands would have to surmount many legal, technical and logistic obstacles. Since the holding of a criminal trial is a sovereign act, the consent of the Netherlands would be needed. This would require a treaty with the Netherlands and legislation there and in the United Kingdom. There would be need for another Security Council resolution to endorse the proposal; paragraph 16 of Resolution 883 spoke only of the appearance of the accused before "the appropriate United Kingdom or United States court" and, by implication, that the court would sit in Scotland or the United States. Politically, acceptance of the proposal might appear to some to give to those accused of terrorism a choice as to where and how they should be tried. It might also be seen as acknowledgement that the accused would not get a fair trial *in* Scotland. From 1994 to 1997, the UK and US Governments consistently rejected any proposal which was not consistent with the Security Council resolutions.

But by the end of 1997 sanctions had been in place over five years and there were signs that they, and in particular the prohibition on flights, were being increasingly flouted. Wild accusations had been made of a UK/US cover-up. The evidence could not of course be disclosed before the trial and, in the absence of a public airing of the evidence, conspiracy theories inevitably proliferated. After such a long time (long, that is, in terms of modern international relations) there were indications that the resolve of other States, including even some members of the Security Council, might be weakening; and there was still no sign that Libya would

28. See PCNICC/1999/INF/3; ILM (1998), p.999.
29. S/26859.

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surrender the accused for trial in Scotland or the United States. Yet Libya's suggestions over that period for resolving the impasse had been noted by other States, and the position of the United Kingdom and the United States was beginning to look, albeit unfairly, as intransigent. Moreover, the tenth anniversary of the crime (21 December 1998) was only a year away.

Although unprecedented, of all the options, a trial before a Scottish court in the Netherlands appeared to be the most viable. And there were three new factors. First, Libya had accepted that a Scottish trial would be fair. In September 1993, the UN Secretary-General received a list of detailed questions from Libya about the procedure which would be followed if the trial was held in Scotland.[30] The answers were quickly supplied,[31] and Libya confirmed that it was satisfied with them,[32] and repeated this in March 1995.[33] Nevertheless, Libya said it was still concerned that a Scottish jury might be prejudiced against the accused because of the amount of publicity which the case had been given in the Scottish media; though this ignored the media speculation that the case was politically motivated and the evidence weak.

Secondly, in October 1997, the British Government invited UN representatives to visit Scotland to study the Scottish judicial system, which differs somewhat from that in England and Wales. The Secretary-General, after consulting the Security Council, asked the former Chief Justice of Zimbabwe, Dr Dumbutshena, and Professor Schermers of Leiden University to undertake the task. In December 1997, they submitted their report.[34] They went into all aspects of the trial process and concluded that the accused would receive a fair trial, and at all stages their rights would be protected in accordance with international standards. The presence of UN and other international observers could be easily accommodated. The report ended by suggesting that, although trial by jury would not prejudice the accused, if the accused could reasonably establish that a jury trial would prejudice their right to a free trial, the British Government should consider dispensing with the jury.

Thirdly, and most importantly, the idea of a Scottish trial "at The Hague" had been given formal endorsement by the Organisation of African Unity, the League of Arab States, the Non-Aligned Movement and the Organisation of the Islamic Conference. During the period 1994 to 1997, these organisations sent formal communications, similar in content, to the United Nations supporting the idea.[35]

30. S/26500.
31. But not published.
32. S/26523 and S/26629.
33. S/1995/226.
34. S/1997/1991.
35. S/1994/373, S/1995/834, S/1997/35, S/1997/273, S/1997/406, S/1997/497 and S/1997/529.

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But, there remained the big question: would it be possible to hold a Scottish trial in the Netherlands? There was never any question of launching the initiative only in order to call Libya's bluff. The proposal would have to be made on the assumption that it would be accepted, even though there could be no certainty of this. Every detail had therefore to be settled in advance.

VI. THE PREPARATION OF THE INITIATIVE

WHEN one sees an important multilateral treaty or Security Council resolution emerge, one sees only the very tip of the iceberg. The final text is the product of weeks or months (sometimes years) of diplomatic negotiations. That was certainly so in this case.

Discussions between the UK and US Governments, and later with the Dutch Government, covered some three dozen topics, all of which needed detailed consideration and eventual translation into treaty and legislative texts. The topics, in no particular order of importance, included: place of trial; composition of the court; guarantees that the accused would not be extradited to another State; scope of the court's jurisdiction; new legislation; detention pending trial; place of imprisonment; observers; witnesses; legal aid; contempt of court; judicial assistance; media coverage; court premises; privileges and immunities; appeals; role of the Security Council; and, finally, the matter of the much greater costs of holding the trial abroad.[36]

After much deliberation it was decided that relevant officials would draft: (1) the necessary amendments to Scottish legislation; (2) a treaty between the Netherlands and the United Kingdom; (3) a UK/US letter to the UN Secretary-General to launch the initiative; and (4) a Security Council resolution. Because of the high legal content, the input of government legal advisers was considerable.

VII. SCOTTISH LEGISLATION

THE Lord Advocate was rightly adamant that there should be no divergence from Scots criminal law and procedure beyond what would be necessary to hold a trial without a jury.

The main changes to Scottish legislation were therefore to enable the competent court, the High Court of Justiciary, to sit in the Netherlands to try the accused on the charges already laid against them and, for this purpose, to provide that the Court would consist of three High Court judges, and no jury. The changes were to be made by Order in Council under the United Nations Act 1946 implementing the Security Council

36. In view of the fact that the initiative was a joint UK–US enterprise, the US Government has agreed to pay a substantial part of the cost of holding the trial in the Netherlands.

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resolution to be adopted under Chapter VII of the UN Charter. Such an Order is not subject to any Parliamentary procedure, apart from the laying before Parliament of a copy of the Order after it has been made. There is no requirement for Parliament to approve it, or even to debate it. The Order would also avoid any possibility of hybridity.[37] Thus the legislative process would be fast.

The changes were something of a leap in the dark. No non-military Scottish criminal court had ever sat outside Scotland (even in England) to hear a case. For several hundred years no serious, non-military offence had been tried in Scotland without a jury. The Order provides for the High Court of Justiciary to sit in the Netherlands for the sole purpose of trying the accused.[38] The Court consists of three High Court judges, with one additional judge in case one of the three dies or is absent for a long time, thus avoiding the need for a retrial in such event. Apart from various consequential changes, Scots law and procedure apply in the same way as if the trial were being held in Scotland. Thus, the Sheriff (the judge with jurisdiction over mostly preliminary matters) and the Procurator Fiscal (the official in charge of the prosecution) have the same powers as in Scotland. Only counsel, or solicitor advocates, with right of audience before the High Court are entitled to address the Court, although they can be assisted by foreign (including English) lawyers as advisers.

When drafting the changes to Scottish legislation it was necessary to keep in mind that the United Kingdom was not free to determine the extent to which the Scottish Court could exercise jurisdiction. The exercise of criminal jurisdiction is pre-eminently a sovereign function. Since the court would be sitting in the territory of another State, the court would only be able to exercise such jurisdiction as that other State would consent to.

VIII. THE NETHERLANDS–UNITED KINGDOM AGREEMENT

THE negotiation of the treaty with the Netherlands was done with impressive speed. After an initial meeting, the negotiations were completed at an intensive three-day meeting in The Hague in late July 1998, between, on the one hand, officials of the Foreign and Commonwealth Office and the Scottish Crown Office (which, under the Lord Advocate, oversees all prosecutions) and, on the other hand, officials of the Dutch Foreign Ministry and the Dutch Ministry of Justice. US officials also attended. The Dutch officials produced a draft which drew in part on

37. If a Bill would affect particular private interests in a manner different from the private interests of other persons of the same category or class, the normal parliamentary process is supplemented by a procedure in which those who might be affected can object to the Bill and bring evidence in support of their objection: see *Erskine May* (1999 Edn), pp.554–560.

38. For the text of the draft, see S/1998/795 (Annex I). For the Order, see S.I. 1998 No.2251 (ILM (1999), p.942).

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the Agreement with the United Nations for the International Criminal Tribunal for the former Yugoslavia (ICTY).[39] Although the two situations were by no means identical, many of the matters which had to be dealt with, such as physical security and privileges and immunities, had already been well covered in the ICTY Agreement. The success of the negotiations was in no small measure due to the fully co-operative approach of the (new) Dutch Government, which addressed the matter as one of the first items of Cabinet business; and was epitomised by the typically sensible suggestion by the Dutch Foreign Ministry that there be no authentic Dutch language text, thereby shortening considerably the process of agreeing final texts.[40]

The Agreement had to deal with three main issues: (1) the process by which the accused were to be transferred from Dutch to Scottish jurisdiction; (2) the legal basis for the holding of the accused by the Scottish authorities for trial; and (3) the limits on the jurisdictional powers of the Scottish Court and Scottish authorities when in the Netherlands for the purpose of the trial.

On landing in the Netherlands the accused would, of course, come within Dutch jurisdiction. There therefore had to be a request for transfer from Dutch jurisdiction to Scottish jurisdiction. Article 16(1) of the Agreement thus provides that the British Government shall in accordance with "the relevant treaties" request the Dutch Government to transfer the accused to the premises of the Scottish Court (which term includes the whole of the site occupied by the Court and the Scottish authorities for the purpose of the trial, including the mini-prison), and detain them pending transfer. The interpretative Exchange of Notes effected at the time of signature of the Agreement[41] listed the relevant treaties as the European Convention on Extradition 1957[42] and the European Convention on the Suppression of Terrorism 1977.[43]

The legal basis for the accused to be detained by the Scottish authorities and held for trial in the Netherlands consisted of two elements. First, Scots law would have to provide for this. We have seen how this was done. Secondly, the Netherlands would have to agree to this exercise of foreign criminal jurisdiction on its territory. Thus, under Article 3(3) of the Agreement the Dutch Government "permits the detention of the accused for the purposes of the trial ... within the premises of the Scottish Court in accordance with Scots law and practice". The Dutch Government did not want the Court to continue in existence

39. S/1994/848 and Corr.1.
40. For the draft text see S/1998/795 (Annex II). For the final text, see UKTS (1999) 43; ILM (1999), p.926.
41. See UKTS (1999) 43, p.18.
42. 359 UNTS 273; UKTS (1991) 97.
43. 1137 UNTS 93; UKTS (1978) 93.

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once it had tried the two accused. That the trial would be a one-off event is emphasised by Article 3(1), by which the Dutch Government undertakes to host the Scottish Court "for the sole purpose of the trial". It was also understood that Libya would be concerned that the Court should not have jurisdiction to try other persons in connection with the crime.

Libya would naturally also be concerned to ensure that, once in the Netherlands, the accused would not be transferred other than to Scotland on conviction, and that, if acquitted, would be free to return to Libya. Article 16(2) therefore provides that an accused shall not be transferred from the premises of the Scottish Court to the United Kingdom, unless he freely chooses to go to Scotland to be tried before a jury (an important right which naturally had to be preserved) or for the purpose of imprisonment in Scotland. The point was reinforced in paragraph 4 of the UK–US letter to the UN Secretary-General of 24 August 1998 which launched the initiative:[44] while the accused are in the Netherlands for the trial neither the UK nor US Governments would seek their transfer to any other jurisdiction; if convicted the sentence would be served in Scotland; if acquitted, there would be safe passage back to Libya.

Article 17(5) deals with a similar matter, in that it prohibits the Dutch authorities from prosecuting, detaining or otherwise restricting the liberty of a witness who enters the Netherlands for the purpose of attending the trial in respect of acts or convictions prior to entry. This is intended to help secure the attendance of witnesses who are abroad.[45]

That left the question of how much jurisdiction the Scottish Court and Scottish authorities would be able to exercise in the Netherlands. Article 3(2) provides that the jurisdiction of the Court "is limited to the trial". Nevertheless, the Court needed to have certain incidental jurisdictional powers to deal effectively with matters which might arise during the course of the trial, such as contempt of court and general order on the premises of the Court. For the trial to be effectively conducted it would therefore be essential for the Court's activities to be "ringfenced", so that it could operate freely without any danger of the accused or anyone else being able to complain to the Dutch courts. It was necessary for this to be expressly acknowledged in the Agreement so that it would be clear that in respect of these matters the Dutch courts would have no jurisdiction. Thus, Article 3(3) provides that the Court shall not deprive persons of their liberty, except for the accused and persons accused of contempt of court or other offences committed within the premises of the Court, or the temporary detention of witnesses in certain circumstances, for example, if a witness is believed to be about to abscond. Article 5(5) gives the Court a

44. S/1998/795.

45. See Art.8 of the European Convention on Mutual Assistance in Criminal Matters 1959 (UKTS (1992) 24).

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general power to expel or exclude persons whose conduct is not conducive to the maintenance of order or the conduct of the trial. But despite the special arrangements made for the trial, these incidental powers are no different to those exercised in Scotland by the High Court.

These provisions are complemented by Article 8, which grants immunity to the Court as a body, and Article 14, which accords the judges and officials of the Court diplomatic-scale immunity. Articles 5 and 6 further strengthen the jurisdictional wall around the Court by granting the premises of the Court inviolability and placing them under the control and legal authority of the Court. Article 7 places responsibility for external security of the premises on the Dutch authorities, and, if requested by the Registrar of the Court, the Dutch police may enter the premises of the Court to preserve law and order or to remove persons.

Most of the rest of the Agreement deals with the according of diplomatic privileges, immunities and facilities for the Court and persons connected with it, and costs. Article 13 neatly side-stepped the delicate question of which flag may fly over the Court: it is the "appropriate" one.

The final clauses may be of some interest to the treaty expert. Article 29(1) provides for entry into force "on a date to be agreed", and pending entry into force the Parties could agree to apply any of the provisions of the Agreement provisionally. Article 29(2) provides for the Agreement to remain in force for one year with the possibility of renewal. These flexible provisions were thought necessary at the time because it was not known when, if ever, the accused would be handed over, yet certain preparatory work, in particular conversion of buildings, might be needed to be done in expectation of handover. These preparations might be delayed if the Agreement had to be submitted to the Dutch Parliament for approval. However, under the Dutch Law on Treaties of 1994, a treaty which is for only one year may not need parliamentary approval, yet the term can be extended.[46] Coupled with these provisions is (the now happily defunct) Article 29(3)(b), which provided for the Agreement to terminate if, after consultations with the UN Secretary-General, the Parties agree, in an exchange of notes, that there is "no reasonable prospect" of the trial taking place.

IX. THE UK/US LETTER TO THE UN SECRETARY-GENERAL

GIVEN the close involvement of the Security Council in attempts to resolve the Lockerbie question, the UK/US initiative needed to be endorsed by the Council. Apart from the need to adjust the previous decisions of the Council with the terms of the initiative,[47] several years

46. See J. Klabbers, "The New Dutch Law on the Approval of Treaties" (1995) I.C.L.Q. 629, at p.632.

47. See p.283 above.

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had passed since the Council first imposed sanctions on Libya in 1992, and some of the membership (one third of which changes every year) may have been less convinced of the point of continuing them. Outside the Council, it seemed that the OAU was contemplating recommending its membership not to enforce certain of the sanctions.[48] The Council needed to give a clear and unequivocal message that sanctions would remain until the accused had been handed over.

The letter to the Secretary-General from the UK and US Acting Permanent Representatives launching the initiative was sent on 24 August 1998,[49] and Resolution 1192 was adopted on 27 August.[50] The letter referred to the failure of Libya to ensure the appearance of the accused before a Scottish Court, despite the comprehensive assurances received by Libya as to the fairness of a trial, the report of the UN legal experts on the Scottish judicial system and the offer of international observers at the trial. In the interests of resolving the situation, the two Governments were prepared "as an exceptional measure" to arrange for the accused to be tried before a Scottish Court sitting in the Netherlands. The letter confirmed that the accused would not be transferred from the Netherlands to another jurisdiction and would have safe passage back to Libya if acquitted. They would be free to choose Scottish advocates and solicitors to represent them. They could, if they so wished, be visited in custody by international observers. The letter referred to the fact that the initiative followed the approach taken by the NAM, OAU, Arab League and the OIC. It made it clear that the two Governments were only willing to proceed in this exceptional way on the terms set out in the letter and its annexes (the draft Order and Agreement); and would support a resolution which provided for sanctions to be suspended upon the appearance of the accused in the Netherlands for the purpose of trial before the Scottish Court.

The drafts of the Order and the Agreement were attached to the letter sent to the Council. Given the unwillingness of the UK and US Governments to change the terms of the initiative, it was crucial that all the details should be laid before the Council. This would also help in rebutting any unfounded claims that the initiative was just a ruse in order to extend sanctions. By showing that, apart from actually building the courtroom, all the necessary preparations had been made, no one would be able honestly to suggest that the initiative was not serious. Annexing the two documents also brought a bonus in that they were translated into the other five official UN languages. Although something may be lost in

48. See S/1997/529, para.6.
49. S/1998/795.
50. The text of the resolution, and of the letter, is annexed to the signed Agreement: see UKTS (1999) 43, at pp.14 and 16.

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translating Scots law into such very different languages as Arabic and Chinese, nevertheless it did enable the other members of the Council better to judge the important question of whether the proposers were in earnest. When negotiating the resolution it was also very helpful to be able to refer to the details in the annexes, and especially when they were in another member's language.

X. RESOLUTION 1192

WHILE Council members were considering these matters, the two governments circulated a draft resolution.[51] This differed very little from the resolution which was adopted on 27 August 1998 as Resolution 1192. The vote was unanimous, the first such vote on a Lockerbie resolution since the initial one, Resolution 731, in January 1992. The preamble noted the report of the UN legal experts, the "contents" (i.e. the substance) of the UK/US letter of 24 August, and the statements made by the OAU and other organisations supporting the idea of a Scottish trial in the Netherlands. The preamble ended with the statement that the Council was acting under Chapter VII. There was no need to include a determination under Article 39 of the Charter that there was a threat to international peace and security, since that had been done in Resolution 748 and confirmed in Resolution 883, and the preamble to the new resolution "recall[ed]" the previous resolutions.

Operative paragraph 1 repeated the demand that Libya comply with the previous resolutions. This was necessary in case Libya did not comply with the new one. Paragraphs 2 and 3 welcomed the initiative as contained in the letter "and its attachments", and "[called] upon" the Dutch and British Governments to implement the initiative. The latter quoted term is derived from Article 41 of the Charter, and is an indication that the Council was placing a binding obligation on the States concerned, not merely making a request. Paragraph 4 decided that Libya shall ensure the appearance in the Netherlands of the accused for the purpose of trial before the Scottish Court. Paragraph 5 requested the Secretary-General to assist the Libyan Government with the "physical" arrangements for the safe transfer of the accused "from Libya direct to the Netherlands". This provision was most important. The Council was not asking the Secretary-General to act as an intermediary in negotiations with Libya over the terms of the initiative. Furthermore, the transfer of the accused had to be direct. There had in the past been various suggestions that the

51. For a brief account of how the Security Council actually works, see A. Aust, "The Procedure and Practice of the Security Council Today", in *Development of the Role of the Security Council* (Hague Academy Workshop 1992); M. Wood, "The Interpretation of Security Council Resolutions", in *Max Planck Yearbook of United Nations Law* (1998), pp.73–95.

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accused could be sent to a third country prior to arrival in the trial country. Any such arrangement would have been fraught with danger, since, once out of Libya, the accused might seek asylum or deploy other delaying or obstructive tactics. Paragraph 6 invited the Secretary-General to nominate international observers to attend the trial. Paragraph 7 decided that on the arrival of the accused in the Netherlands, the Dutch Government "shall detain" them pending their transfer to the Scottish Court. This provision was the basis for the Dutch authorities to take what would otherwise be an exceptional step. It also avoided any question whether they would have to apply the "extradite or prosecute" provisions of the Montreal Convention. Paragraph 8 contained a reminder that the sanctions would remain in force, but decided that they would be "suspended immediately if the Secretary-General reports to the Council that the two accused have arrived in the Netherlands for the purposes of trial before [the Scottish Court]" and that "the Libyan Government has satisfied the French judicial authorities with regard to the bombing of UTA 772". The latter provision was a necessary and important reminder that the previous resolutions were not only about Lockerbie. Lastly, the Council expressed its intention to "consider" further sanctions if the accused did not arrive promptly for trial. Although this was a necessary provision, the use of "consider" indicated that even if Libya did not comply with the resolution, the imposition of further sanctions would not be automatic.

XI. IMPLEMENTATION OF RESOLUTION 1192

THE Queen in Council made the Order on 16 September 1998, "At the Court at Heathrow". This venue—though rather fitting—was not chosen deliberately; Her Majesty just happened to be en route from Scotland to the Far East. The Agreement was signed on 18 September 1998 and entered into force on 8 January 1999.[52] Given the amount of preparatory work then being done, such as conversion of buildings, the Dutch Government preferred that the Agreement be brought into force at an earlier stage than had been originally envisaged.

In the seven months between the adoption of the resolution on 27 August 1998 and the handover of the accused in the Netherlands on 5 April 1999, two main things happened: detailed preparations for the reception of the accused and the trial, and intense diplomatic efforts to secure the handover. The two were, however, linked in that the more that one could demonstrate to other States the seriousness of the initiative, the more inclined were their governments to make efforts to persuade Libya to hand over the accused.

52. The initial term of one year (see n.46 above) has been extended.

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The Lord Advocate announced on 22 September 1998 the composition of the prosecution's legal team, which would be led by him and would include the Solicitor-General for Scotland and two other QCs. The team at once began detailed preparations for the trial. Although the groundwork had of course been done over the preceding years, once the arrest of an accused person is anticipated the prosecution has to shift into a higher gear. Also, since the case is complex and involves numerous witnesses and a mass of documentary and other evidence, and under Scots law the trial should begin within 110 days of the Sheriff committing the accused,[53] there was no time to lose. In September detailed discussions began with the Dutch authorities about choosing a suitable site for the Court, the building works which would be needed, the costs and various logistical matters. A site for the Court was chosen at Camp Zeist, a Dutch military establishment near Utrecht. Alterations were made to provide a mini-prison to accommodate the accused, and a temporary courtroom where preliminary hearings could be held. Although plans for the trial courtroom and associated facilities were drawn up, work on them was postponed until the accused had arrived. Scottish police and prison officers were stationed at Camp Zeist to ensure its internal security.

On the diplomatic front one of the essential players was the UN Secretary-General, though his tasks were carried out largely by the UN Legal Counsel, Hans Corell, and his staff. Libya raised with the Legal Counsel a large number of detailed legal and practical points. These he conveyed to the relevant governments (British, Dutch, French or US). Their responses, which were mostly confirmation of points already contained in the UK/US letter of 24 August 1998, or provisions of the Order or the Agreement, were then relayed by the Secretary-General to Libya. In all this the Secretary-General was at pains not to get involved in a negotiation; he merely passed on questions and answers. He did, however, make the detailed arrangements for flying the accused from Tripoli to the Netherlands.[54]

On 7 December 1998, the Secretary-General travelled to Libya to seek a response to the demands in the resolution. There followed further diplomatic efforts, particularly by Saudi Arabia and South Africa, to persuade Libya to hand over the accused.[55] On 2 March 1999, the Secretary-General announced that he had provided Libya with all the answers, clarifications and explanations that they had sought.[56] On 19

53. S.65 of the Criminal Procedure (Scotland) Act 1995.

54. The aircraft was provided to the UN by the Government of Italy. Since the UN Secretariat had to be ready to carry out the transfer at short notice, the arrangements had to be made in good time. Mr Corell visited Italy and The Netherlands in early Nov. 1998, and the necessary arrangements were in place by mid-November.

55. See S/PRST/1999/10.

56. SG/SM 6913.

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March, the Libyan Foreign Minister, Mr Muntasser, told the Secretary-General that the accused would be handed over on or before 6 April.[57] On 5 April the Secretary-General informed the Security Council that the accused had that day arrived in the Netherlands, where they had been detained by the Dutch authorities.[58] He added that the French Government had informed him that the Libyan Government had satisfied the French judicial authorities with regard to UTA flight 772; in short, all the conditions for the suspension of sanctions had been met, and they were suspended that day in accordance with Resolution 1192.[59]

An extradition hearing was held on 5 April. The accused did not challenge their extradition to Scottish jurisdiction, and they were transferred at Camp Zeist to the Scottish authorities. There they were arrested by Scottish police officers, and on 6 April the charges against them of murdering 270 people were read to them and they were brought before the Sheriff Principal of South Strathclyde, Dumfries and Galloway, Graham Cox, the judge with jurisdiction for the Lockerbie area. He remanded them in custody within the premises of the Court. On 14 April the judge committed the accused for trial. On 7 June the High Court, sitting in Edinburgh, on the application of the Defence extended the ordinary 110 day time-limit so as to allow the Defence more time to prepare for trial, and decided that the trial should begin on or before 4 February 2000 (subsequently further postponed). The indictment, in essentially the same terms as the original charges, was served on the accused on 29 October 1999.

Paragraph 4 of Resolution 1192 requires "all States" (which therefore includes Libya) to co-operate in enabling the Scottish Court to exercise its jurisdiction, such as facilitating access to witnesses, relevant evidence and other material evidence, and Libya gave assurances that it would so co-operate.[60] In response to a Letter of Request issued by the High Court, the Libyan judicial authorities agreed to a visit by a police team from Dumfries and Galloway from 12 October to 4 November 1999 to carry out further investigations.[61]

Some preliminary hearings have been held by the High Court in Edinburgh in the absence of the accused. If, however, the accused wish to be present at any sitting of the High Court, even if it is only to hear legal submissions, the Court will meet at Camp Zeist. Thus, on 7 and 8 December 1999, the presiding judge, Lord Sutherland, sitting alone, sat in public for the first time at Camp Zeist. Because the trial courtroom was

57. S/1999/311.
58. S/1999/378 (ILM (1999), p.939).
59. See S/PRST/1999/10 confirming the suspension of sanctions as from 5 Apr. 1999.
60. S/1999/726, paras.25–6.
61. S/1999/1183.

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not yet ready, the hearing was held in what used to be a gymnasium. The Court rejected the Defence argument that the charge of conspiracy to murder should be dropped. Lord Sutherland accepted the prosecution argument that a successful conspiracy was a crime which continued up to when it was executed. He also turned down the Defence request that the indictment should not include the allegation that the accused were members of the Libyan intelligence services. Lord Sutherland gave leave for the Defence to appeal against these two rulings to the High Court sitting in an appellate capacity (i.e. three High Court judges who will not be trying the case). It did not appeal. The Defence, not unreasonably, requested more time to prepare their case, and Lord Sutherland further postponed the opening of the trial until 3 May 2000. At a further hearing on 2 February it was agreed that some prosecution witnesses would be able to give evidence behind a screen with their voices distorted.

Unlike in England, it has been possible since 1992 to film a Scottish trial. But this is very rarely done. There will be a closed-circuit television link to another building on the site for the Press and similar overflow facilities for the public in case there is no room in court. There will also be links, but for the victims' families only, to Dumfries, London, New York and Washington. It may be possible to follow the trial, in outline at least, on the Internet.[62]

XII. LIFTING OF SANCTIONS AND COMPENSATION

THE day that the accused were handed over, the Secretary-General sent a letter to the President of the Security Council confirming that the requirements of paragraph 8 of Resolution 1192 had been met.[63] The sanctions were thereupon immediately and automatically *suspended* without any further action by the Council. But paragraph 8 also reaffirmed paragraph 16 of Resolution 883, under which the *lifting* of sanctions requires a decision of the Security Council that Libya has complied fully with the requests and decisions in Resolutions 748 and 883. These require Libya to do more than just hand over the accused, and include accepting responsibility for the actions of Libyan officials; allowing full access to witnesses and evidence; and paying "appropriate compensation".[64] Libya has undertaken to pay compensation, most recently in the letter of the Foreign Minister, Mr Muntasser, to the UN Secretary-General of 19 March 1999, if the accused are found guilty. (There are also civil cases pending in Scotland and the United States against the accused, Libyan Arab Airlines and the Government of Libya.) Although sanctions have not yet been lifted, in practice they are no longer

62. http://www.law.gla.ac.uk/lockerbie/headline.htm.
63. S/1999/378; UN press release SC/6662.
64. See para.1 of Resolution 748 and document S/23308.

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in effect and to re-impose them (i.e. to lift the suspension) would require a new Security Council resolution.

On 10 March 1999, six Libyan nationals were convicted *in absentia* by a French court of the sabotage in 1989 of the DC10 aircraft on UTA flight 772, and international arrest warrants were issued for the six.[65] On 31 March the same court awarded damages totalling FF211 million (roughly $US30m) to the *parties civiles* (the families of the 170 victims), and on 16 July 1999 the French Foreign Ministry announced that Libya had paid over that amount. In November 1999 Libya, having expressed its regret at the killing of WPC Fletcher,[66] paid an undisclosed sum to her parents.

XIII. CONCLUSION

THIS article is written some months before the trial is due to begin. Its purpose has been to demonstrate how the use of international law (using that term in its broadest sense), together with diligent and creative diplomacy, played a crucial role in resolving what had seemed to most people to be an intractable problem. This success required a close partnership between ministers, officials and their legal advisers, and between the various governmental teams, not forgetting the UN Secretary-General's officials. More than anything it required those concerned to maintain the belief that in diplomacy nothing is impossible given stubbornness, imagination, political will—and the right timing.

65. S/1999/726, para.18. Under French law if a person convicted *in absentia* is later apprehended, a full trial must be held.

66. See n.16 above.

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