

INTERNATIONAL AVIATION TERRORISM.
THE LOCKERBIE AFFAIR BETWEEN LAW AND POLITICS.

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Abstract

On 21 December 1988 a civil airliner, Pan Am 103, blew apart over the town of Lockerbie, Scotland. This was a major terrorist attack against civil aviation, which shocked billions of people and gained worldwide media attention. This thesis examines the Lockerbie case in its political and legal dimension as a heinous and spectacular example of international aviation terrorism. First, it discusses the very idea of terrorism and the inherent definitional problems. Then, it focuses on the disaster and its aftermath. The thesis approaches the numerous issues this complex case raised as years went by. In particular, it portrays the long-standing diplomatic and political wrangle between the United Kingdom and the United States on one side and Libya on the other side.

The International Court of Justice and the United Nations Security Council were both involved in this case. The thesis tries to depict the inextricable link between law and politics within the United Nations framework and the difficult balance the judicial and the political powers need striking for a correct and fruitful functioning of the whole system. The Lockerbie case turned out to be a testing-gown for the inherent consistency of the United Nations set-up. Extradition of the alleged perpetrators of the bombing was the issue at stake. For the first time ever, the Security Council imposed sanctions on a sovereign state in order to secure to justice the alleged perpetrators of a terrorist attack. And this raised another pivotal issue that this thesis explores: the adequacy of sanctions as a means for inducing a country's leadership to adopt a certain course of action.

The Lockerbie case is also a story of unofficial diplomacy where mediation of enlightened leaders such as Nelson Mandela proved pivotal. The stance that so-called emerging powers took was also crucial to determine the course of the following events. Ultimately, a criminal trial took place and somebody was convicted for the heinous onslaught. This thesis tries to analyse the Lockerbie trial in its peculiarity: for the first time ever, a national Court sat in a foreign country in order to deal with a criminal case. If the parties to the dispute had not compromised on the idea of a neutral venue where to stage the trial, the latter would have probably never come about.

Yet, the criminal trial was not the closing chapter of the lengthy Lockerbie saga. Of course, for the grieving families of the victims, the fact that somebody was held accountable was better than nothing. Yet, the said families also tried to advocate their own cause and get something more than a criminal verdict convicting one single person. Restitution being impossible, there was still room for monetary compensation. This thesis focuses on the lengthy and painful battle the families of the Lockerbie victims engaged in. It was a double battle, actually: one against the airline

that had somehow let one of its aircraft crash and one against the Libyan Government, which might be held responsible for the deeds of its agents. None of the two was an easy battle to win and yet it was pivotal to fight both, if justice was to be achieved.

In the event, the Lockerbie case came to an end. Somebody was convicted for Pan Am 103 bombing and the families of the victims got some money in compensation, both from the airline and the Libyan Government. In the meantime, the world geopolitics has been changing. The relationship between the West and Libya is no longer as tense as it was. The African state is back to the international fold. This took a long time to be achieved but it happened through the use of legal tools. In the aftermath of the disaster, striking back by military means might have been an option but it was ruled out. In this respect, this thesis tries to show that law and politics can interact in a fruitful way, thus preventing escalations of violence. Whether they also achieve substantial justice might however be questionable.

Declaration

I declare that this thesis is my own unaided work. It is submitted for the degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

(Maria Rosaria Brizi)

This day of January 2006.

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INTRODUCTION

One of the global challenges for the 21st century seems to be aviation security. It is unquestionable that aviation terrorism is a frightening feature of the world of today and a major concern for governments worldwide. As a matter of fact, the international community has been experiencing an epidemic growth of unlawful acts of interference with civil aviation, which began in the late sixties and early seventies and still threatens to this day the safety of billions passengers. Undeniably, civil aviation provides terrorists with highly visibility targets and, due to the great media attention paid to attacks on aviation targets, provides terrorists with great propaganda opportunities as well as a noteworthy leverage in the achievement of their aims. This is why civil aviation is often an optimal target for terrorists. Air transport is certainly a vital factor for global economic growth, communication and social development. Blowing up an aircraft and killing all passengers and crew on the spot is something dramatically spectacular and an effective way to spread fear and uncertainty.

Without a shred of doubt, this is an “easy” manner to grab the media’s attention and therefore prompt an immediate reaction all over the world. For one crash, billions passengers feel threatened. Thus, there is no need to stress that one of the imperative tasks, faced by the international community, is the safeguarding of air transport against acts of unlawful interference. A 100% risk free environment seems quite unrealistic though, as today’s action is just the reply to yesterday’s threat, whereas what might happen tomorrow is no more than the subject matter of mere speculation. Nevertheless, a few elements seem indispensable, whatever the possible forthcoming threat, if terrorism is to be effectively fought: states’ willingness to co-operate, adequate rules, implementation of the said rules.

Unfortunately, none of these elements is easy to ensure. It is sometimes extremely difficult to reconcile law and politics, implementation of rules and willingness of states to abide by internationally acknowledged legal standards. What is terrorism for somebody may be interpreted as heroism for others. Points of views and interpretations about the same phenomenon may differ widely and elaborating a clear and concise definition of terrorism is almost impossible. The word terrorism is *per se* a highly emotional and derogatory term that inevitably evokes deep-seated political beliefs. Thus, it is extremely difficult to study terrorism objectively. A major obstacle to a definition that commands broad acceptability is that, in many contexts, terrorism involves an issue of morality. Moral judgements may be made on the assumption that some forms of violence are justifiable whereas others are not. The one who is labelled a terrorist from a certain angle may also be considered a “freedom fighter,” if re-thought in a different perspective. Yet, all terrorists claim to be freedom fighters since they do need to justify their endeavours, at least to their own satisfaction. Every warrior for every cause must be able to substantiate the use of violence and terrorists are no exception.

It is therefore difficult to stick to a neutral perspective. This is why so much literature on terrorism tends to get lost in ideology, which is of very little help when it comes to promote safety and curb international aviation terrorism by working out effective and sensible responses. Ideological assumptions always bear a strong emotional charge and tend to prompt heated political debates. Thus, the meaning of the word terrorism is rarely agreed upon, although analysts have produced a variety of definitions and developed a number of typologies. Yet, trying to understand the phenomenon as it is and possibly frame it into a definition, which is likely to be agreed upon, seems important if a successful reaction to terrorist attacks is to be fashioned. If a major concern is to be seriously addressed through international co-operation, the problem in itself has to be understood and somehow framed in a way that may bring about the maximum consensus

ever. No effective way of coming to grips with terrorism may be worked out if there is no homogeneous understanding of the problem. However, the outburst of terrorist attacks on civil aviation since the 1970s has attained a substantial response from the international community that has started co-operating in order to achieve an unequivocal condemnation of terrorism.

This endeavour has generated several international conventions that have been providing a common ground for fighting terrorism and internationalising those offences consisting of unlawful acts against civil aviation. Interestingly, what is stigmatised is not terrorism *per se*, but specific unlawful activities, which are labelled as criminal. Yet, international aviation terrorism is a complex phenomenon, in constant state of change. What has been done hitherto is certainly insufficient, since major terrorist threats still lie ahead. Besides, international terrorism, whenever groups or individuals are somehow under the direction of a sovereign state, may also sound like an act of war, or at least a surrogate of conventional warfare. It may look like a cost-effective act of war, which smaller states may also afford. Or maybe the only act of war that makes the wealthiest and most powerful nations also vulnerable. There are states which cannot easily be affected from a military or economic point of view. Yet, those states can be shattered and severely hurt through terrorist attacks.

This is why the world of today is experiencing a dreadful escalation of terrorist attacks. The selective atrocity of terrorism, which aims at specific targets, seems to be replacing the impartial brutality of traditional warfare, where the enemy is properly identified and altogether addressed. Terrorism singles out its victims amongst innocent bystanders: the passengers flying on a specific aircraft, for example, or unaware people circulating in an airport at a certain time, on a specific date. The fact that the victims of terrorism are innocent civilians seems to be a major feature of terrorism, whatever definition one wants to choose for this complex phenomenon. This is why terrorism can certainly be viewed as a type of criminal behaviour, pure violence aiming at guiltless targets, whatever motivation this violence

underlines. Obviously, if terrorism is seen as a form of criminal behaviour, counter-terrorism is a matter of law enforcement. Nonetheless, setting rules and implementing them in the international arena largely rely upon the willingness of states of co-operating and addressing the same problem on a common ground.

Both political efforts and legal endeavours seem to be necessary in order to promote safety and curb international aviation terrorism, both seem to have equal “dignity” in the set-up of the global order. Political action may prove pivotal in securing the interests of justice, whereas a juxtaposition of law and politics may undermine the global struggle against terrorism and give terrorists more power. Unfortunately, reconciling law and politics can prove difficult. Politics may allow for shared advantages, whereas law creates winners and losers. One of the cases that highlights how complex and arduous reconciliation between law and politics may happen to be is the Lockerbie affair, which nonetheless shows the inextricable link between the two and the necessity for both to contribute whenever international terrorism has to be dealt with.

On December 21, 1988, a bomb exploded in the cargo hold of Pan Am flight 103 killing all 259 passengers and crew, as well as 11 residents of the town of Lockerbie, Scotland, where the wreckage of the aircraft crashed. This was one of the major challenges civil aviation had ever faced hitherto inasmuch as a spectacular act of aviation terrorism, which was paid enormous attention by the media all over the world. It took years of negotiations and diplomatic activity for those who were accused for the disaster to be surrendered for trial, which began on 3 May, 2000 and came to an end on 14 March, 2002, when the appeal judgment was delivered. This trial may certainly be considered one of the most fascinating in recent history, since politics and diplomacy were necessarily interwoven in this case from start. In the Lockerbie case, there has been a place for political action in securing the interests of justice, whereas diplomacy was absolutely crucial in paving the way for both the investigation and the prosecution and

in securing international co-operation. Yet, there were moments when the interaction between law and politics was far from being fruitful and looked more like a form of nasty juxtaposition than an example of productive coalition. In those times, it seemed that a legal understanding of the case as well as a legal response were bound to form an antithetical pair with political reasoning and tools. And that was the time when both political and legal efforts led to a dead end. It was only when the realm of law and that of politics were somehow reconciled that the investigation started being successful and the case was brought to an end.

Thus, the entire story is to be told, since the investigation is finished and the trial is over, before they are both “filed away” in the public conscience. It is through the lesson of the past that the future becomes less nebulous and frightening, after all. Why choosing Lockerbie as a case study though, amongst the many aviation disasters which may also be labelled as “terrorist deeds”? Mainly, because the Lockerbie affair is a very fascinating intrigue, which encompasses a number of remarkable issues: this is why it seems worthy to tell it all. Universal jurisdiction is certainly one of those issues. The transformation in the nature, pattern and extent of crime in the post World War II years, coupled with a recognition that some such activity is injurious to the international community as a whole, has produced a corresponding transformation in legal attitudes and approaches. The prevention and control of crime and the development of the criminal justice system are increasingly perceived as global exercises. The Lockerbie trial certainly shows how far criminal law has come, in responding to the world of today, by advancing from its old limitation to the jurisdiction of the place where the criminal acts occurred to a trans-national dimension. With Lockerbie in particular, something crucial to international relations seems to have been established: that, where countries are prepared to be flexible in their criminal justice system and where there is international co-operation, justice can be achieved. Quite a lesson to be inferred for the development of more productive international relations!

In Lockerbie, there was also a new, different way of dealing with extradition. It is undeniable that the well-established principle of *aut dedere aut iudicare* may serve for the purpose of shielding the person concerned from criminal responsibility. Domestic amnesties and sham trials might be designed to avoid the prosecution of those responsible for serious crimes, which may be of political expedience. Hereby, extradition, which is a topical legal matter, may turn out to be a political concern. This is exactly what happened in Lockerbie, where extradition was considered a legal issue by Libya, whereas it became a matter of political concern for the United Kingdom and the United States and an issue for the United Nations political organ *par excellence*, the Security Council. The Lockerbie affair also raised the political question of international security and became a case of two states against another, paving the way for the use of the United Nations Charter. It also turned out to be a testing-gown for the inherent consistency of the United Nations system and thereby raised the issue of the importance of checks and balances for the functioning of that system, since both the political and the judicial organs of the United Nations were involved and problems of overlapping jurisdictions between the two seemed to arise.

Besides, state-sponsored terrorism became one of the key concepts to the Lockerbie case and the scope of the latter reached far beyond the mere question of treaty-based extradition. In a way, Lockerbie implicated a totally new dimension into international criminal law, which has been transformed into political international criminal law. Before the events at Lockerbie, political crime in context with international connections had been treated in terms of criminal procedures. From the Lockerbie disaster on, there is a situation where international law is considered inextricably linked with political reasoning, although the Lockerbie affair shows how difficult it is to draw a line between law and politics. This case provides a number of useful hints for an analysis of the said issue and also allows a possible comparison between traditional warfare and terrorism. Undeniably, war is

quintessential terror, yet, it is not criminal in pure legal terms. Killing in war is deemed justifiable or at least acceptable. Nonetheless, some conducts such as manslaughter of non-combatants, even within war, and, *a fortiori*, during times of relative peace, are neither justifiable nor acceptable. Terrorism, instead, may be deemed criminal because its victims are innocent individuals. *Quid iuris*, then?

Obviously, the Lockerbie case not only drew the attention of diplomacy and politics but also of the media, which gave it unprecedented publicity, including widespread dissemination of photographs of the accused even before the trial started. The question, then, is whether it is possible to achieve justice notwithstanding the emotional response that pre-trial publicity may generate. It is actually difficult to find another international case where the concept of due and fair process might have been more at stake. The presumption of innocence as the cornerstone of a fair trial and the freedom of press as one of the fundamental ingredients for the maintenance of democracy need sometimes being reconciled. Media portrayals may actually serve as projective devices that isolate acts and people from meaningful contexts and set them up to be victimized or stigmatised, while providing terrorists with a huge audience and enormous attention. The Lockerbie affair certainly raised this sort of issues and the story of the trial highlights major theoretical concerns, such as the “spectacularization” of crime and the necessity of feeding the audience with immediate answers, which might prove groundless or simply insufficient, as if the right of getting to know might overwhelm the duty of duly inform.

In Lockerbie, it seemed almost impossible to ensure an acceptable degree of fairness and impartiality if the trial was to be held in the country where the atrocity had occurred. Yet, that degree of fairness and impartiality seemed also hard to achieve in the country where the accused belong. There it came the idea of a trial to be held in a third country. The Netherlands was agreed upon as the best possible option. This is quite unique in international jurisprudence: courts have of course sat in foreign countries

for the purpose of taking evidence. The Lockerbie trial was the first one, though, where the court sat wholly within the territory of another state and exercised jurisdiction within it. Obviously, the decision to go for a trial in the Netherlands was not without its critics: for some, politics had interfered with the due process of law. Two people accused of the most serious of crimes had been protected by their government to the point their fears about inability to receive a fair trial needed being accommodated. Otherwise, there would have been no trial at all. Despite the apparent success of the trial, this remains on the face of it a potent criticism and deserves an answer. Once again, politics and law turned out to be inextricable and law was ostensibly submitted to political reasons.

For all the above mentioned, the Lockerbie affair seems worth being explored in its multifaceted nature. Besides, this case seems particularly up-to-date, given the current interest for state-sponsored terrorism and aviation disasters. After the atrocities which took place in the United States in September 2001, the interest in the Lockerbie affair seems more alive than ever before, even though any comparison between the two kinds of attacks seem inappropriate, at least because of the magnitude of the attack against the World Trade Center. Nonetheless, the topical question “what lesson from Lockerbie” is still unanswered and sounds particularly up-to-date. Undeniably, the international infrastructure of terrorism is becoming better organized and more efficient. The terrorists own sights seem being raised by their success. That power can only be destroyed when there is international recognition of its immense gravity and effective international action by the united forces of civilization to bring it under control.

More willingness to co-operate is certainly fostered by a wider knowledge of the past. Major events do not come about overnight. Aviation terrorism is a chain of frightful happenings. Hence, the only way of addressing the problem of security in the sky is looking at the “big picture” and trying to understand it thoroughly. Pan Am 103 crash is one event. Civil aviation security is the global challenge. If one element all the terrorist attacks

against civil aviation do have in common, that is the fact that they bring about, together with fear, grief and outrage, more willingness to co-operate and some determination not to be intimidated. Thus, what major crisis can bring forward is more “teamwork.” Nothing perhaps activates more international co-operation than a universally shared sense of danger.

In a way, what happened at Lockerbie can be deemed a precedent for the more recent terrorist attacks. Time has gone by, but the world is still facing the same sense of fear and insecurity that arose in the aftermath of the Pan Am 103 bombing and even more. Civil aviation is still proving an optimal target for terrorists and security in the sky is far from being accomplished. Obviously, there is no need to emphasize the enormity of the task that lies ahead when it comes to safeguarding air transport against possible acts of unlawful interference. Legal rules in themselves cannot possibly suffice in curbing the wave of violence that has been unleashed against civil aviation in the last decades and maybe will not be capable of doing more than they have already done: providing the legal tools to cope with terrorism. Certainly, the legal solution is never likely to eliminate terrorism, which, by its very nature, disdains the rules of a law-abiding international game. However, law may help the international community overcome a number of dangerous conceptual controversies pertaining to the idea of justifiable violence. Assessing that terrorism is criminal *per se* and must be condemned as such may prove important, if the international community does not want terrorist activities to remain not only un-punished but also un-punishable. International relations cannot be left free of any trammel whatsoever. Legal rules, however weak and ineffective, do introduce a bit of humanity and order into a world of chaos where utterly inhuman conduct is quite likely to come true. As the great French philosopher Jean-Jacques Rousseau wrote in “The Social Contract,” “nothing that is lawful has any force when the laws cease to have any.”

Unfortunately, international law has not been particularly successful in addressing terrorism. The international community has hitherto failed to

respond adequately to the terrorist threat. Politics and diplomacy have not proved very effective either. Still, they all have a crucial role to play in the struggle against aviation terrorism. Law, politics and diplomacy may all be used as weapons in the arsenal to be set up in order to fight terrorist attacks on civil aviation worldwide. However, the ultimate defence against the continuing threat of man-made acts of unlawful interference with civil aviation seems to rest in the collective political will and effective co-operation in the community of states. Terrorism not only violates the law since it consists of conducts that in no civilized legal system whatsoever may be deemed lawful, but also challenges politics. Better, it seems to embody the rejection of politics as a civilized means of addressing problems or solving conflicts. It appears cold-blooded exaltation of violence over all forms of political activity since terrorists seem to use violence as a desirable form of action. Politics, instead, is exactly what makes violence both unnecessary and unnatural to civilized men. This is why it is an essential part of the basic machinery of civilization. In defeating the rule of law and rejecting politics, terrorism seeks to make civilization unworkable. It is therefore the fruitful interaction between law and politics that may turn out to be the decisive factor in the struggle against international terrorism and an overriding element in the promotion of justice.

Further terrorist attacks on civil aviation are likely to lie ahead and have to be prevented, not only because of the innocent blood they can shed but also because of the escalation of violence and terror they may prompt. A single act of terrorism may lead to military actions, which, in turn, could lead to general war. The more the terrorist threat seems likely to come true, the more the possibility to strike back hard seems unavoidable. Yet, violence only seems to lead to more violence. Undeniably, military operations may bring short-range results and satisfaction to public expectations and internal political pressures. But, in addition to being ineffective in the long-term, they have the tendency to degenerate into an uncivilized response. Addressing the symptoms of a malady may bring temporary relief, but the

cause of sickness would not be eradicated and remains intact. This is why re-thinking what happened in the recent past may prove of some help for the forthcoming future. The more the combination of legal, political and diplomatic tools proves effective, the less the idea of striking back through violent means sounds tempting and viable.

Terrorism can transform our world into a nightmare of fear and violence. If, in meeting the terrorist threat, a society must arm itself, this society gives up all of those standards and decencies that have made it civilized. It is instead through the triumph of law that terrorism may be banned and through the re-establishment of the primacy of politics, as the only viable means of addressing conflicts, that it may become unnecessary once and forever. Fortunately, there is unanimity in the necessity of combating terrorism. Ostensibly, there is not one single country to dispute this necessity. Terrorism is widely considered as a method that law-abiding people and law-abiding countries in the world deem unacceptable since it is a massive violation of basic human rights, such as life, physical integrity and freedom of movement. The problem is to understand what conduct amounts to terrorism and may be deemed as a crime that needs being sanctioned. Here, opinions may differ. However, there is a big fault line between those who believe that terrorism is a legitimate and acceptable means of fighting and those who argue that it is unacceptable as a method and must be eradicated, since it is no less than a major threat or brutal violation of fundamental human rights. Besides, the question that also needs being answered is what sort of means may counter terrorism in an effective and civilized way.

In Lockerbie, justice was achieved through lawful means and without further blood being shed. Both politics and law contributed to bringing the case to a successful end and both helped the course of justice. All of the terrorist threats against civil aviation should be dealt with in the same way. The triumph of law and politics over crazed violence against innocents is the only civilized response that a civilized world can produce as a reaction

against the unacceptable consequences terrorism entails. If the events at Lockerbie may help understand the importance of fighting terrorism through peaceful means and of re-establishing the rule of law as the supreme value, it seems worthwhile to tell the entire story even though the case has come to an end and time has gone by since 21 December 1988. Trying to understand the past means getting ready and well equipped for challenges that still lie ahead and might need being addressed in the forthcoming future. As Sun-Tzu said in "The Art of war," "Being prepared and awaiting the unprepared is victory."

Chapter 1

TERRORISM AND DEFINITIONAL ISSUES

1.1 The importance of a “neutral” approach

The meaning of the word terrorism is rarely agreed upon, although analysts have produced a variety of definitions and elaborated a number of possible typologies. Some believe that terrorism should be tackled as a military problem whereas others see it as an issue for criminal justice. Many have argued for a legal definition of terrorism while others have been stressing the sociological aspect, by assuming that terrorism is some sort of socially unacceptable violence aimed at innocent, symbolic targets in order to achieve a psychological effect. Ostensibly, there are almost as many definitions of the subject as there are opinions on it.¹ Whatever the answer, a single definition cannot possibly account for all of the potential uses of the term and the complexity of the subject. Sometimes, it seems more useful to talk about single acts of terrorism than to offer one definition that supposedly encompasses all of its possible guises. As a matter of fact, terrorism is not a specific and singly defined action, but rather it comprises a variety of violent activities, which are somehow designed to influence the behaviour of a potential audience through the use of violence. Terrorism actually ranges from individual acts of wild criminality to sophisticated operations enjoying support from highly organized political systems. Besides, the process of terrorism seems to be in a continuous state of development and fluctuates according to cultural and geographic variables.

Thus, there is no true or correct definition, because terrorism appears as an abstract concept with no real essence. Models and typologies are only capable of describing patterns among events and serve as mere generalizations, whereas each terrorist act must be understood in its

specific social, historical and political circumstances. Still, there are a number of elements common to the leading definitions and most definitions seem to involve two pivotal points: someone is terrorized and the act's meaning is derived from its targets and victims. Most authors appear to agree that terrorism involves the use or threat of violence as a method or strategy to achieve certain goals and that, as a major part of this coercive process, terrorism seeks to induce fear in its victims, which are innocent. Roughly speaking, terrorism may be considered as the instrumental use of violence against inoffensive sufferers in order to create fear and therefore achieve political ends. Justice Albie Sachs, for example, says that terrorism can be defined – not in legal but in political terms – as “forms of violence intended to create terror and alarm directed at non-military and non-political targets.”²

Yet, a broadly accepted definition of terrorism is difficult to work out also because the term, *per se*, is extremely pejorative. What is terrorism for somebody may be deemed as heroism by somebody else. Justice Sachs, for instance, points out the freedom with which those in authority and power may use the term terrorism in order to denounce and quash those struggling against them and actually recalls the times when the ANC was considered a terrorist organization and even those ANC members which were very close to be pacifists, like himself, were denied access to the United States because they were called terrorists. As Jan Van Eck says, “it mainly depends on whose side you are on.”³ Different countries, according to Van Eck, may actually have a “vested and biased interest in having their perceived enemies or opponents declared as terrorists since they then feel they can ignore the grievances and complaints of terrorists.” Van Eck feels strongly about this and depicts the said mechanism in the following terms: “If you do not want to deal with something you are doing wrong, you merely define those who demand changes to be terrorists, i.e. deligitimise the grievance by deligitimising the people.”

Thus, it seems always very difficult to study terrorism objectively. However, it is extremely important to stick to some sort of neutral approach, one that might be applicable to every group or nation, regardless of ideology. This seems to be the only way not to lace the analysis to one's political opinions. It seems also indispensable if a consistent global policy towards terrorism is to be worked out and maintained on the global scale. Otherwise, no policy is likely to meet with overall political consensus and the endeavours aimed at curbing this phenomenon are bound to fail. It is therefore important to acknowledge the existence of a common core of values that condemns some forms of readily identifiable violence.⁴ A consistent policy that condemns this common core of violence seems what the international community should look for, as the only ground where international co-operation is likely to be achieved, although, as Justice Sachs says, "any regime of international law has to have an even-ended approach and has to have principles that are powerful and resilient and concrete" in order to deal fairly with all different situations.

Justice Sachs actually acknowledges that there is no universal moral order, if the term "universal" is supposed to include everybody, but he also suggests that there is something that has to be acknowledged as "overwhelming," since it is what the majority of organised humanity supports and shares as a common core of moral values. Obviously, "it is something that is always in struggle, it is not something that is just there and under the given. But, it is more than an aspiration, is a working hypothesis, it is a guide to the functioning of this society."⁵ As David Hume wrote, "morality is something more easily felt than judged of."⁶ Hereby, the question that rises is whether terrorism may be considered as a condemnable activity "as such," by excluding that it might somehow be justified or if sometimes terrorist violence may be accepted because there are justifications that explain it. According to Justice Sachs, the fundamental question then pertains to "the circumstances in which the use of force can be regarded as legitimate and if every kind of violence can be

simply repudiated or denounced as terrorism.” Van Eck also suggests that the main question is whether people who resort to the use of force “have had any substantive ability to raise their concerns through peaceful means. If not, the use of force is justified.”⁷

Be it as it may, the debate is particularly heated and the issue extremely sensitive. Nonetheless, one thing seems undeniable: terrorist activities generally violate or at least endanger the most basic human rights, such as life, physical integrity and freedom of movement. Analysts seem to agree upon the fact that the victims of terrorist attacks are innocent bystanders and this is the one trait that those attacks all feature. Peace, tolerance, mutual respect and the rule of law are also amongst the casualties of terrorist deeds. The theoretical conflict, then, arises between those who consider terrorism in general and aviation terrorism in particular as a legitimate means of fighting in order to achieve political or otherwise ideological ends and those who would argue that it is totally unacceptable and certainly criminal as a method, since it threatens and violates the most fundamental human rights of guiltless targets. Obviously, the former try to address the motives, which the specific terrorist activity may underline, whereas the latter focus on the activity for what it turns out to be, notwithstanding its inherent reasons. Nonetheless, even those who take motives into consideration generally disagree about terrorism as a means of struggle, since it basically creates victims and perpetuates the cycle of victimization, if any, by hitting ordinary and innocent people.⁸

As far as the domestic level is concerned, national legislators can as well define terrorism in different ways for the specific purposes of the municipal legal orders in which they have authority. Yet, the problem is with cases that cross national boundaries, cases in which separate municipal legal orders must be coordinated if the criminals defined in one legal order are to be apprehended or punished by the others. If terrorism is not even defined, it may prove very difficult, both at domestic and international level, to outlaw it as such. The focus is definitely less nebulous if one tries to address

specific acts of terrorism. The question, then, becomes one of finding whether certain acts in certain circumstances are “criminal” regardless of human discretion and should be punished as such, or whether all crimes are crimes only because defined so by human institutions empowered with appropriate authority. The scenario is quite complex and a proper definition of the word “terrorism” is still to come. As Justice Goldstone says, however, it is not really necessary to accomplish it.⁹ One can do without and address terrorist deeds that amount to specific crimes anyway. This is certainly one way not to mix up a political concept with legal concepts and to prevent political opinions from hindering a neutral analysis to come about.

The only way to stick to a neutral framework and avoid possible political biases is then to focus on the illegality of the specific actions terrorism may consist of and treat them as specific criminal acts, notwithstanding their underlying political motivation. In other words, one way of overcoming the impasse is addressing specific actions and considering them as criminal. As Justice Richard Goldstone says, “terrorists commit criminal offences. There is no such things as a terrorist act that is not a crime under international law or under the domestic law of virtually every country.” Hereby, Justice Goldstone thinks that adding a self-standing offence of terrorism does not add anything, since what terrorists do – murdering, hijacking, kidnapping and so forth – are all criminal offences under international and domestic law. In fact, he considers the word “terrorism” as the “political description of crime under the domestic law of most countries.”

If the said premise is accepted, that terrorism does not need to amount to a self-standing offence whereas single activities it consists of may amount to specific crimes, then the logical conclusion is that the appropriate means to curb terrorism is countering those activities through the criminal process. What then needs being assessed is whether those conducts terrorism consists of are both a domestic offence in virtually all nations as well as international crimes. It can be easily ascertained that, whatever the means and however employed, acts of terror-violence, such as murder, serious

bodily harm, reckless endangerment, kidnapping, hijacking of aircraft, are common crimes in every civilized society on earth and are perceived as evil and condemnable. Or at least, all decent people seem to deem them as such. Nonetheless, the fact that the legal process is the natural ground where to fight and sanction terrorist activities, which sounds quite obvious on the domestic level, is not all that obvious in the international playground. Undeniably, all states would rely on criminal law and use legal tools to suppress domestic terrorism, whereas they may not agree to label as criminal a certain action when it does not affect their own interests and may even serve their own cause. As above stressed, one man's terrorist is often deemed another man's freedom fighter, which makes a generalized condemnation of the same behaviour quite unlikely.

"Moral qualities lack a precise mode of measurement," as Jean Jacques Rousseau wrote in "The social contract,"¹⁰ and what is utterly immoral and despicable for somebody can be acceptable for others. Nonetheless, the fact remains that some freedom fighters may be deemed terrorists whereas others don't. Be it as it may, focusing on a legal definition is quite popular amongst governments, since specific actions can be taken against a terrorist inasmuch as against anyone who violates the law,¹¹ his reasons being utterly immaterial. Obviously, a legal approach does not account for the political and sociological meaning of this complex phenomenon but it provides a functional framework to be used in an investigation. A legal approach tends by definition to be neutral, whereas other approaches seem far more questionable from the outset. The reason why, at first glance, it appears that a legal approach to terrorism would not be too controversial is that laws are generally passed in legislative assemblies in keeping with democratic traditions. For the most part, concepts of constitutional rights and basic freedoms can be emphasized if terrorism is to be considered as a threat or violation thereof.

Hence, terrorism treated as a criminal act rather than a political behaviour seems compatible with the democratic process, or at least less

incompatible. This is why the present work will be discussed in terms of the conceptual scaffolding that legal reasoning provides. A legal perspective certainly has its inherent limitations, but at least it tends to be free of emotional charges and political biases. Thus, aviation terrorism will be considered as a criminal phenomenon whose inherent nature does not change simply because of the addition of ideology it is supposed to bear. This is in keep with what Justice Goldstone suggests when he says that it is not utterly necessary to think of terrorism as a self-standing crime. Focusing on the single activities it consists of is actually sufficient to prosecute them on a legal basis and try to counter them through legal tools. If this also suffices to address terrorism as a political phenomenon, it is obviously a different question, which will be raised in due course.

1.2 Terrorism and warfare

If terrorism is to be seen as a form of criminal behaviour, counter-terrorism seems to be a matter of law enforcement, in the first place. Yet, dealing with international terrorism and fashioning an effective response is not always that simple, especially when it is necessary to come to grips with the so-called state-sponsored type. The latter seems to call for different responses from those that law enforcement authorities use in handling criminal offenders, since it might as well resemble an act of war. That is the case whenever international terrorists are somehow under the direction of a state. This is quite a complicated situation, since terrorist organizations are not officially part of the state apparatus but the sponsoring state may use them to achieve its own objectives. Does this sort of situation amount to a method of warfare if the sponsoring sovereign state uses “surrogates” to disrupt and create political and economic instability in another country? Is it to be seen as an enemy policy designed to attack one or more states by means of terror?

Obviously, the use of surrogates to fight wars is nothing new. Yet, the idea of terrorism as a cost-effective sort of war that smaller or weaker states may also afford seems quite interesting and certainly worth exploring. If compared to traditional warfare, terrorism can be immensely cheaper and may prove far more effective: undeniably, it is capable of harming even those states that cannot be easily affected by military or economic aggression. The “great advantage” terrorism also brings about is that the sponsoring state can remain anonymous, since evidence of state-sponsored terrorism is usually only circumstantial and therefore can be easily hidden or denied. Thus, considering terrorism as an expression of the changing nature of warfare or even a new form of warfare does not seem to be totally groundless. Nonetheless, labelling terrorism as a form of warfare is not all that easy. The word “war” may lend itself to numerous uses but, once again, it is to be understood in pure legal terms if moral and political biases are to be kept at bay. Besides, there is no binding definition of war. What one may find instead is a number of scholarly attempts to depict the practice of states in order to encompass a very nebulous and complex idea in a few words. However, scholars do generally agree about some basic requirements that need being fulfilled for a certain course of action to be labelled as war.

In all definitions pertaining to international law, war is seen as a contest between states. Also intra-state wars are acknowledged but they are basically a matter for domestic legislation.¹² As Carl von Clausewitz wrote in “On war,” “war is nothing else but a mutual process of destruction,”¹³ whereas terrorism is normally seen as unilateral attack which stands by itself and totally lacks the feature of mutuality. As Justice Goldstone says, “it is a fundamental mistake to regard terrorism as war” and anyway, “legally speaking, it is not correct. Wars happen between nations, not private groups.”¹⁴ Words can often be misleading. According to Justice Goldstone, talking about “war on terrorism” is pretty much the same than talking in terms of war on drugs. It is no more than a metaphorical use of the said word.

Be that as it may, the fact remains that terrorism appears as a very complex and multifaceted phenomenon, and one of difficult definition. War, in the technical sense, begins with a declaration of war and is terminated with a peace treaty or some other formal steps indicating it being over. *De facto*, the armed forces of the parties may not engage in fighting even once in the interval. A state of war may nonetheless exist without acts of hostilities inasmuch as hostilities may occur without a state of war. In other circumstances, actually, it is the *de facto* situation that matters. In any such case, war in the material sense unfolds regardless of any formal steps. The overriding factor is therefore deeds rather than declarations. However, the employment of an armed force seems to be necessary. Whenever the use of force occurs, it is important to establish whether it is comprehensive enough for the fighting to qualify as war. Incidents involving the use of force, without reaching the threshold of war, occur quite often in relations between states.¹⁵ For war to be established, a use of force must be comprehensive, spatially, temporally, quantitatively, even qualitatively, for the destruction it inflicts. Besides, hostilities must be launched with *animus belligerandi*, that is to say a specific intention of waging war.

Roughly, war may be considered as the hostile interaction between two or more states, either in a technical or in a material sense. War in a technical sense is a formal status produced by a declaration of war. War in material sense is generated by actual use of force, which must be comprehensive on the part of at least one party to the conflict. Does terrorism meet these conventional requirements? If so, it should be labelled as material war, certainly not involving formal steps. Yet, in most cases, it does not seem to meet the requirements of material war either. Undeniably, terrorist attacks never consist of clashes between two organized and responsible military establishments. Besides, even though terrorists might be controlled by sovereign states, the sponsorship is not all that obvious. Certainly, the alleged sponsor state, for the very fact of choosing “the terrorist way,” will deny its involvement and will never express the so-called *animus*

belligerendi. Moreover, even though terrorist attacks may embody the most appalling examples of cold-blooded violence, they cannot be seen as comprehensive use of force. Undeniably, terrorist attacks aim at specific targets and very seldom strike wide stretches of territory. Nor they last long. They are quick, by definition. Also a massive use of “personnel,” or at least an open massive use, is quite unlikely. Therefore, it is very difficult to assume that terrorism is a form of warfare. Moreover, terrorists do not abide by the law of warfare, which is the standard onto which the lawfulness of insurgencies is to be appraised.

Under international law,¹⁶ it is “just cause” (*jus ad bellum*) and “just means” (*jus in bello*) the ultimate criteria which distinguish permissible from impermissible insurgencies. Thus, if a resort to force is justified by both just cause and just means, the use of force should be recognized as permissible. Hence, from the standpoint of international law, if the use of force lacks just cause or just means, the use of force should be recognized as illegitimate and opposed. The two criteria actually need being applied both, for the *bellum legale* to occur.¹⁷ The reason why it is important to re-call these few basic principles in international law is one of avoiding considering permissible form of insurgencies as terrorism.¹⁸ The law of warfare, therefore, comes into picture. The bulk of traditional law was either restated and codified or developed at the Brussels Conference of 1874 and at The Hague Peace Conference of 1899 and 1907. The first international convention on the laws of war had already been formulated in Geneva in 1864. There were then further conventions that go under the name of law of Geneva.

Realistically, the law of warfare does not even aim at banning violence but at introducing a measure of “fair-play” and a bit of rightfulness on the battleground, by drawing a clear-cut line between lawful and unlawful behaviours. Above all, it is important because it distinguishes between combatants and civilians and tries to shield the latter as much as possible from violence. According to the law of warfare, war is therefore conceived in

terms of clashes between states' armies. The concept of lawful combatants is also legally defined: regular armies, plus militia and volunteer corps, provided the latter are commanded by a person responsible for his subordinates; they wear a fixed distinctive sign recognizable at a distance; they carry arms openly; they conduct their operations in accordance with the law and customs of war. In addition, traditional law of warfare allows the civilian population to take up arms on the approach of the enemy, provided it carries arms openly and respects the laws and customs of war.

There are also international regulations of means and methods of warfare and a few general principles are established: it is forbidden to employ arms, projectiles and material calculated to cause unnecessary suffering, to kill or wound the enemies who have laid down their arms, no longer having means of defence. Besides, belligerents must not attack undefended towns, villages, dwellings or buildings and all necessary steps must be taken to spare, as far as possible, churches, works of arts, hospitals and historic monuments. These rules are meant to introduce a minimum of correctness into the conduct of hostilities and actually serve the interests of all parties in mitigating the most brutal aspects of warfare. Obviously, rules aimed at protecting war victims, namely prisoners of war, the wounded, the sick and the shipwrecked, are also established. In this area in particular, The Hague codification made great headway, for it was clearly in the interest of all states, irrespective of their status and military strength, to lay down rules protecting those who no longer take part in armed hostilities.

Back to terrorism, no doubt it does not abide by the said standards. Nor it has ever been recognised as conventional warfare, not even later on, when some historical development needed being taken into account by the law of warfare. In the period following The Hague codification, a series of events actually occurred which rendered it inadequate or ineffective in many respects. In the first place, new classes of combatants emerged, such as partisans and resistance movements and then the form of guerrilla also spread. Partisans or guerrilla fighters, obviously, would not carry arms

openly or wear distinctive signs recognizable at a distance. They would rather conceal themselves amongst civilians. All these developments prompted states to revise and update the traditional rules on warfare.¹⁹ Hence, all those fighters were upgraded to the status of lawful combatants, if linked to a party to a conflict, if under a responsible command and if behaving in compliance with the laws of war. Instead, terrorists were not, since they do not meet the requirements that are necessary for partisans or guerrilla fighters to be acknowledged as lawful combatants.

The legislative process of reform started in 1949, when four Conventions on war victims²⁰ were adopted by a diplomatic conference in Geneva. In 1977, another diplomatic conference adopted two protocols, one on international armed conflicts, the other on internal armed conflicts.²¹ The above-mentioned four conventions and two protocols go under the name of Law of Geneva. The 1949 conventions are accepted by many states and are generally considered to embody customary international law that relates to war. At present, the laws of warfare still consists of the above-mentioned two sets of international legislation, the so-called Hague Regulations and the Law of Geneva, plus a number of customary rules. It is easy to infer that the new law, which emerged after the Second World War, neither destroyed nor supplanted the old law; rather, it has generally elaborated and supplemented it, or leant it greater precision. To our ends, what matters is that even the new body of rules has not abandoned the basic principle that a distinction must always be drawn between combatants and persons who do not take part (or no longer take part) in hostilities, and also between military and civilian objectives. It is on this basis that killing in war may be deemed lawful or unlawful, depending on whether it is carried out in compliance with the said, well established principles or not.

Terrorists, instead, deliberately violate all of these principles. Terrorists are not linked to a party to a conflict, they are not under a recognizable, responsible command and, above all, they do not behave in compliance with the law of warfare. Quite the opposite, rather! Thus, their conduct cannot be

acknowledged in terms of lawful war. If terrorism is war, a new form of war, with utterly different features from those of traditional warfare, it is above all unlawful. Better, it is criminal. As stressed above, terrorism actually strikes at innocent targets. Thus, it always consists of an act of aggression aiming at impacting on guiltless victims. Therefore, if it has to be considered in terms of the norms and the principles that the international community has established as far as aggression is concerned, aggression can be seen as a crime. Not just a crime, but the supreme crime under international law. No less an institution than the United Nations General Assembly, in 1970, in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations, proclaimed that “war of aggression constitutes a crime against peace, for which there is responsibility under international law.”²² And, in 1974, the General Assembly produced a consensus Definition of Aggression, which prescribes that “war of aggression is a crime against international peace.”²³ Thus, the criminality of the war of aggression is positively established, notwithstanding the fact that the full consequences of this criminality are not always agreed upon. Thus, if terrorism is a new form of war, it is an unlawful one and above all one of a criminal species. It therefore calls for the principles of substantive criminal law to apply.

1.3 Terrorism as a crime

As already stressed, the one feature all analysts seem to agree upon is the fact that the victims of terrorism are innocent bystanders, who are victimized precisely because they are innocent and this sounds like the core of the problem. Whatever legal system is taken into consideration, it cannot possibly tolerate violence against innocents unless a legal justification occurs. All law is actually rooted in natural law and natural law can never consider brutality against guiltless civilians as permissible *per se*. Thus, the

emphasis can be put on the condemnation of the means used by terrorists in order to achieve their goals, no matter what those goals are. In other words, the pursuit of any goal by violence directed against non-combatants or by creating a public danger as well as a state of terror is what international law, inasmuch as the domestic laws of virtually all nations, condemns. Hence, the condemnation of terrorism does not refer to the goals of an activity or an organisation, which might be debatable, but to the means by which those goals are pursued. A neutral approach to terrorism, then, should focus on the *de facto* aspects pertaining to the nature of both the victims and the means being used.

The ends terrorists try to achieve, such as creating a public danger or a state of terror as well as the ultimate goal of influencing an audience and serving ideological ends, must be deemed totally immaterial when it comes to label terrorism as a crime. However, to label it as a crime, a terrorist activity has to be characterized as criminal in terms of substantive law. As a matter of fact, if terrorist acts are to be considered as crimes, they must fit all of the elements of criminal law, that is to say all of these elements that developed and civilized legal systems do require for a crime to be acknowledged as such. The first step to be taken is therefore establishing what conducts amount to criminal terrorism, what mental elements are required for one to be guilty of committing a terrorist act and whether there are possible justifications or excuses.

To be condemnable in criminal law terms, a conduct must include the basic elements of crime, that is to say *actus rea* and *mens rea*, which combine to cause a prescribed social harm. It is actually a general principle of criminal law that a person may not be convicted of a crime unless the prosecution have proved that he has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and that he had a defined state of mind in relation to the causing of the event or the existence of a state of affair. A man is not liable for his conduct unless the prescribed state of mind

is also present: *actus non facit reum nisi mens sit rea*. No justification or excuse must occur.²⁴ Actually, a violent conduct is not *per se* sufficient, because law may allow violence in specific circumstances. Thus, it is very important to draw a clear-cut line between “justifiable” or excusable and “unjustifiable” or inexcusable violence. This is also to be assessed in pure legal terms, as no moral or political judgment can be allowed if the analysis is to be kept objective and neutral.

Thus, when *actus rea* and *mens rea* combine to cause a prohibited result and when there are no justifications or excuses, terrorist acts qualify as crimes, since the conduct fits all of the elements that substantive criminal law requires for a criminal sanction to apply. The basic idea is avoiding the suggestion that some guises of terrorism may be justified and therefore accepted as law-abiding. Political or ideological ends that terrorists pursue do not make any difference. As Justice Sachs suggests, “the fact that it is political does not exempt it. War crimes are political, genocide is political, so the introduction of a political ingredient does not remove it from the scope of prosecution. On the contrary, it intensifies. The political dimension can make it difficult to give appropriate definitions, but law is always dealing with border line cases – some are so clearly spectacular – but they should be dealt with and not removed simply because they are border line cases.”

Nonetheless, political, moral, religious ends certainly characterise terrorism as important features. In fact, they make the activities it consists of somehow diverge from common crimes. Not all violence against innocent victims is terrorist violence and distinctions must be made between terrorism and different phenomena, such as common crimes. Murder, for example, cannot always be labelled as a form of terrorism. Generally, it is a common crime and it has nothing to do with terrorism. The latter is therefore characterized by the goals violence is instrumental to. These goals, though, do not change the inherent criminal nature of terrorism in the sense that a political, military, religious or ideological motive is not needed for rendering the conduct criminal. On the contrary, terrorist means may

undermine the legitimacy and rightfulness of any struggle. As Justice Sachs suggests, terrorism “is to be condemned because it undermines the basic morality of the struggle and the legitimacy of the struggle itself, if it is a struggle for freedom, for dignity, for human rights, for respect of personality, for cultural rights, then it is destroying itself from within by the randomness of the targets, by the inhumanity of the means that are being used.”²⁵ He also believes that the aim does not justify the means since “if you have a virtuous aim, it is all the more important to reflect about and be very disciplined about your means.” He actually stresses that pursuing one’s goals through inappropriate means entails destroying the aims, the hope and eventually the goals themselves. In the event, this leads to what Justice Goldstone underlines: “some people do bad things for good motives and some people do good things for bad motives, but you must judge the act and not the reason that is attached to it.”²⁶

Thus, terrorist activities do result in “pure” crimes, whenever they consist of unjustifiable violence wantonly impacting innocents and violating basic human rights. What makes terrorism special and different from common crimes is the capability of instilling fear for the purpose of coercing or intimidating an enemy or otherwise accomplishing some political or ideological ends. An important feature, which does not alter its inherent criminal nature, is therefore its psychological impact, since terrorists try to create overwhelming fear in a target population larger than the victims directly attacked or threatened. Yet, a conduct, in order to substantiate a crime, needs being depicted by a substantive norm as such. *Nullum poena sine lege*. Does this well-established criterion apply to terrorism as well? Or terrorism can be condemned as such? Not an easy question. The problem is finding a possible legal framework in order to condemn international terrorism on the global scale. The domestic legislation of specific countries does not help, since its scope cannot go beyond the national boundaries of the country it refers to. Thus, it seems useful to have a closer look at the

United Nations system if a common ground for a blank condemnation of international terrorism is to be found.

1.4 Terrorism and the United Nations

What shows immediately in considering the international legal efforts that have been endured from the Second World War on, is the fact that the international community has been pursuing two different aims: on the one hand, there has been a major attempt aimed at working out a number of specific criminal acts as examples of terrorism, thus drawing an open-ended legal framework to be subsequently expanded with more possible cases. On the other hand, there has been an effort of countering terrorism *per se*,²⁷ and possibly coming to grips with the definitional issue raised above.²⁸ Hence, as far as international aviation terrorism is concerned, it seems worthwhile to have a look at the multilateral instruments that have been concluded in the last 40 years, by means of which a number of acts have been first outlawed and then labelled as criminal. Interestingly, civil aviation is the very domain where the first attempts of addressing criminal acts of terrorism and setting appropriate standards aimed at countering them were made.

For example, the Convention on Offences and Certain other Acts Committed on Board Aircraft, done in Tokyo on 14 September 1963, applies to offences against penal law²⁹ as well as acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board. The main purpose of the Tokyo Convention is therefore to protect the safety of the aircraft and its passengers and to maintain good order and discipline on board. This Convention is mainly concerned with the establishment of the jurisdiction of the state of registry over the offences and other acts which are prejudicial to good order and discipline on board an aircraft, as well as

the granting of important police powers to the aircraft commander. For instance, the aircraft commander may disembark the offender or, if the offence is serious, deliver him to the competent authorities of a contracting state when the aircraft lands. The Convention protects the aircraft commander and any crewmember or passenger assisting him in imposing the measures he finds necessary from any proceedings in respect of actions taken by them.

As far as jurisdiction is concerned, the state of registration of the aircraft is competent to try the alleged perpetrators of offences and acts committed on board. Each contracting state is obliged to take the necessary measures to establish its jurisdiction as the state of registration. The Convention does not eliminate existing or future jurisdiction in states other than the state of registration. A contracting state which is not the state of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in certain cases; for instance, when the offence has been effected in the territory of the state over flown, the offence has been committed by or against a national or permanent resident of that state, and the offence is against the security of that state. Interestingly, this Convention neither mentions the word “terrorism” nor attempts to define the broad range of penal offences to which it applies. It rather makes it clear that it concerns even acts that are not penal offences.

Yet, it does include a specific provision on unlawful seizure of aircraft.³⁰ Article 11 deals specifically with the consequences of an act of unlawful seizure of aircraft and reaffirms the duty of states, under general international law, to restore the control of the aircraft to its lawful commander and to permit the speedy departure of the aircraft, its crew, passengers and cargo. In a nutshell, the Tokyo Convention is the first noteworthy attempt of addressing acts of terrorism - as far as they threaten safety on board an aircraft - and of approaching the complex issue of

jurisdiction, that is to say one of the most controversial topics international aviation terrorism would henceforth involve.

In the 1970s, further steps were taken. The Convention for the Suppression of Unlawful Seizure of Aircraft, was agreed upon in The Hague on 16 December 1970. This Convention defines the act of unlawful seizure of aircraft, and the contracting states have undertaken to make such an offence punishable by severe penalties. It applies to any person who, on board an aircraft in flight, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft or attempts to perform any such act or is an accomplice of a person who performs or attempts to perform any such act. In so doing, this person commits an offence.³¹ Under the provisions of The Hague Convention a state is obliged, whether or not it is the state of registration, to take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him. If there is no extradition treaty between the states concerned and the offender is in the territory of a contracting state and that state refuses to extradite the offender, then it must submit the case to its competent authorities for the purpose of prosecution under its criminal law. The said Convention also requires any contracting state in which the aircraft or its passengers or crew are present to facilitate the continuation of the journey of the passengers and crew as soon as possible and to return the aircraft and its cargo to the persons lawfully entitled to possession without delay.

Hence, this Convention has definitely made the unlawful seizure of an aircraft an international offence, punishable by severe penalties, by establishing essentially universal jurisdiction and providing for either extradition or prosecution of the alleged offender. It has thereby created a legal situation under which the hijacker should not be able to find a safe haven anywhere in the world and thus cannot expect to remain unpunished. The Hague Convention is therefore important because it starts considering

the unlawful interference with international civil aviation as something that hurts the international community as a whole and calls for universal jurisdiction to apply. Thus, aviation terrorism starts being perceived as a global challenge, which reaches far beyond the interests of the state where the targeted aircraft is registered. Besides, The Hague Convention established the “extradite-or-prosecute” requirement that was to become the cornerstone of all further international legal efforts pertaining to various categories of offences. Yet, The Hague Convention is restricted to the single offence of unlawful seizure of aircraft and this is why it was immediately deemed far too narrow if aviation terrorism was to be countered effectively. Even though there was no consensus whatsoever as far as a possible definition of terrorism was concerned, one thing was unquestionable: aviation terrorism could consist of the most varied activities and the unlawful seizure of aircraft was but one of them.

A further major step was therefore taken with the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, completed in Montreal on 23 September 1971, which provides severe penalties for any such acts and contains essentially identical provisions on jurisdiction, extradition or prosecution of the alleged offender as The Hague Convention. Nonetheless, the Montreal Convention deals with acts other than those covered by the Tokyo and The Hague Conventions. It actually defines a wide spectrum of unlawful acts against the safety of civil aviation, labelled as offences that the contracting states have undertaken to make punishable by severe penalties. Inasmuch as the Tokyo and The Hague Conventions, the Montreal Convention does not apply to aircraft used in military, customs or police services. The Hague and the Montreal Conventions deal comprehensively with the subject of unlawful interference with civil aviation.

The Montreal Convention, inasmuch as The Hague Convention, actually defines the offences constituting unlawful interference with civil aviation to the extent that they are included within the Convention; encourages

contracting states to apply severe penalties to the offenders; internationalises the offences included in the Convention by providing for universal jurisdiction of states with a view to facilitating apprehension of the suspected offender; depoliticises the offence by requiring states either to extradite the suspected offender or submit the case to the authorities for the purpose of prosecution, such authorities being required to take their decision in the same manner as in the case of any ordinary offence of a serious nature; enhances the extradition relationships among states; requires states, in accordance with international and national law, to endeavour to take all practicable measures for the purpose of preventing the offences included in the Convention; requires states to facilitate continuation of the journey of the passengers and crew as soon as practicable and to return unlawfully seized aircraft and property thereon to the persons lawfully entitled to possession; requires states to afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences; and requires states to report ICAO³² the circumstances of the offences, the action taken with respect to the aircraft, property and passengers and measures taken against the suspected offender.

With regards to the pivotal question of proper implementation, both The Hague and Montreal Conventions have placed an obligation on the parties to enact the necessary domestic legislation for carrying out their responsibilities hereunder. In particular, all contracting states are called upon to include, in their national criminal laws, provisions for the severe punishment of persons committing unlawful acts. Basically, the main difference between The Hague Convention and the Montreal Convention is to be found in the width of their scope, since the Montreal Convention stipulates that a number of unlawful activities may occur and that interference with civil aviation goes far beyond the single species of unlawful seizure of aircraft. The underlying philosophy is one of outlawing,

both in the domestic and international arena, a certain number of activities, notwithstanding their possible characterization as terrorist acts.

Since the Montreal Convention is crucial as far as the subject matter of the present work is concerned, it seems worthwhile to have a closer look at the acts it outlaws and labels as offences. In accordance to Article 1, paragraph I, of the Montreal Convention, any persons commits an offence if he unlawfully and intentionally: (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which is likely to endanger its safety in flight; or (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Interestingly, this provision neither gives a specific name to the offence, nor it defines the offence and certainly it does not even mention the word terrorism. It merely describes the elements of the offence. The first element to be highlighted is *actus reus*:³³ acts of violence against people on board, destruction of, or causing damage to, an aircraft, endangering the safety of aircraft by giving false information. The second element is that the aircraft must be in flight and however in service. Article 2 of the Montreal Convention defines these concepts as follows: (a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board; (b) an

aircraft is considered to be in service from the beginning of the pre-flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this same article.

The third element is that the acts of violence, the false information, the destruction of an aircraft, or the causing of damage to it, must be intentional and unlawful, in order to fall within the scope of the Montreal Convention. This is the *mens rea* of the offence.³⁴ Besides, the Montreal Convention applies, irrespective of whether the aircraft is engaged in international or domestic flight, only as provided in Article 4(2) of the Convention, namely, if the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the state of registration of the aircraft; or the offence is committed in the territory of a state other than the state of registration of the aircraft. Therefore, what the Montreal Convention deals with is a number of acts – characterised by an international element – that may endanger the safety of aircraft in service, acts which are not labelled as terrorist but certainly identified as offences in pure legal terms.³⁵ This seems to be an important achievement if compared to the structure of the above-mentioned Tokyo Convention. Certain acts of interference with civil aviation are definitely deemed criminal and not only unlawful.

This approach, working from the ground up, has therefore concentrated on achieving international agreement on the designation of various acts as criminal offences of international significance. However, it is not until the 1990s that the word terrorism starts being used in multilateral instruments done within the United Nations framework.³⁶ A comprehensive definition still lacking, yet the concept of terrorism started being less nebulous. That is why it appears in more than one convention, although its ultimate significance is still questionable. For example, the term “terrorism” as well as the expression “terrorist acts” do both appear in the preamble of the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done in Montreal on 1 March 1991.³⁷ In a way, terrorism is

something public opinion is finally, though unfortunately, acquainted to, although no attempt of definition is to be found in the Convention thereof. It is as if the phenomenon of terrorism had become sadly “familiar” and could be understood as such, being implicit or maybe latent in the very fact of a convention pertaining to the marking of plastic explosives being adopted.

The Convention on the Marking of Plastic Explosives for the Purpose of Detection requires each state party to prohibit and prevent the manufacture in its territory of unmarked plastic explosives. Plastic explosives will be marked by introducing, during the manufacturing process, any one of the detection agents defined in the Technical Annex to the Convention. The Convention also requires each state party to prohibit and prevent the movement into or out of its territory of unmarked explosives and to exercise strict and effective control over the possession of any existing stocks of unmarked explosives. Stocks of plastic explosives not held by authorities performing military and police functions are to be destroyed or consumed for purposes not inconsistent with the objectives of the Convention, marked or rendered permanently ineffective, within a period of three years from the entry into force of the Convention in respect of the state concerned. This Convention also establishes an International Explosives Technical Commission, expert in the field of manufacture or detection of, or research in, explosives. The Commission evaluates technical developments relating to the manufacture, marking and detection of explosives, reports its findings, through the Council of ICAO, to all states parties and international organizations concerned, and proposes amendments to the Technical Annex to the Convention, as required. Thus, this multilateral instrument mainly relates to a certain kind of terrorist acts, better to the means of performing those acts and assume as implicit, even latent, the concept of terrorism. Yet, it refrains from defining it.

A certain amount of attention is however paid to terrorist acts consisting of explosions and an appropriate multilateral instrument is therefore agreed upon. The International Convention for the Suppression of Terrorist

Bombings concluded in New York, on 15 January 1997, explicitly refers to the escalation of “acts of terrorism” as well as “terrorist attacks” by means of explosives and other lethal devices in its preamble, but does not make any attempt at defining these concepts. It however stresses the importance of international co-operation between states in devising and adopting effective and practical measures for the prevention of acts of terrorism. This Convention applies to the offence of intentional and unlawful delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss. This Convention does not apply where an act of this nature does not involve any international elements as defined by the Convention.³⁸

States parties are required to establish jurisdiction over and make punishable, under their domestic laws, the offences described, to extradite or submit for prosecution persons accused of committing or aiding in the commission of the offences, and to assist each other in connection with criminal proceedings under the Convention. The offences referred to in the Convention are deemed to be extraditable offences between states parties under existing extradition treaties, and under the Convention itself. Once again, there is no definition whatsoever of the term “terrorism,” but the offence within the meaning of the Convention thereof is identified by depicting a specific *actus reus* and combining it with the indispensable requirement of *mens rea*. The latter occurs if the perpetrator performs the *actus reus* intentionally, either with the purpose to cause death or serious bodily injury or with the intent to cause extensive destruction, where the destruction results in or is likely to result in major economic loss.

Hereby, acts of terrorism are definitely identified as offences in pure legal terms. Yet, the approach is one of focusing on specific activities without drawing conclusions about the concept of terrorism *per se*. Step by step,

however, a remarkable legal framework has been set up, in the sense that a number of different activities are considered criminal at the United Nations level. Quite an achievement, if compared to the starting point of the present analysis, where infringement of the penal law stood together with other acts that were not even labelled as offences, both categories only sharing the fact that they could threaten the safety in flight or good order and discipline on board.³⁹ This open-ended legal framework seems important because it comes to terms with two of the most noteworthy and delicate issues international aviation terrorism does involve: universal jurisdiction and extradition of the perpetrators. In a way, even though aviation terrorism is capable of coming about in a number of different outlooks, the major question is always the same: how to handle it, when events have already occurred, and how to counter it, in the first place. Thus, as time goes by, the United Nations approaches terrorism in more a straightforward way, which makes it possible to try to come to terms with it, as a global phenomenon.

A multilateral instrument that seems particularly interesting as far as the purpose of the present analysis is concerned, is the International Convention for the Suppression of the Financing of Terrorism, concluded in New York on 9 December 1999. The said Convention applies to the offence of direct involvement or complicity in the intentional and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the offences described in the conventions listed in the Annex,⁴⁰ or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act. The provision or collection of funds therefore is an offence whether or not the funds are actually used to carry out the proscribed acts.

The said Convention does not apply where an act of this nature does not involve any international elements as defined by the Convention.⁴¹ It also requires each state party to take appropriate measures, in accordance with

its domestic legal principles, for the detection and freezing, seizure or forfeiture of any funds used or allocated for the purposes of committing the offences described. The offences referred to in the Convention are deemed to be extraditable offences and states parties have obligations to establish their jurisdiction over the offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings. The offences referred to in the Convention are deemed to be extraditable offences between states parties under existing extradition treaties, and under the Convention itself.

This Convention, which explicitly refers to the “financing of terrorism,” “acts of international terrorism” and “financing that terrorists may obtain,” marks a noteworthy step forward since it provides, although stealthily, a possible definition of terrorism. Art. 2 of this Convention reads as follows: “Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

In art.2 (b), it seems possible to find a current, broad, flexible definition of terrorism. If the acts ruled by those international conventions art. 2 (a) refers to are acts of terrorism, other acts, that are also intended to cause death or serious body injury to a civilian or any non-combatant, whenever their purpose is intimidating a population or forcing a government or an

international organization to do something or to refrain from doing something, are also acts of terrorism. Thus, terrorism is violence aiming at innocent targets for the purpose of intimidation or coercion. This brings back to the beginning of the analysis. As stressed above, there is an appreciatively broad consensus about the fact that terrorism involves the use or threat of violence as a method or strategy to achieve certain goals and that, as a major part of this coercive process, terrorism seeks to induce fear in its victims, which are innocent.⁴² The idea that terrorism wantonly impacts inoffensive bystanders in order to create fear and therefore achieve further ends, which go beyond the physical effect, seems widely accepted. From the International Convention for the Suppression of the Financing of Terrorism on, it seems to be shared by the United Nations too.

Undeniably, this is a remarkable achievement. The step by step process so far described, which consists of identifying specific terrorist acts and labelling them as criminal, has finally led to a conceptual definition that is quite likely to encompass them all as well as many more, even those which have not been performed yet and not even planned. Certainly, this definition needs being inferred from this Convention, which seems to provide it “underhand.” *De facto*, a comprehensive convention about terrorism has not been agreed upon hitherto and the definitional problem is far from solved, at least in an “official” way. However, it is undeniable that the Convention for the Suppression of the Financing of Terrorism provides definitional and conceptual bedrock that can be used in further and more comprehensive multilateral instruments. Does a definitional problem really exist, though?

Basically, the main reason why a definition of terrorism seems important is that a legal framework must be comprehensive enough not to allow safe havens to terrorists that could well exploit the loopholes of the legal system in order to shield themselves and escape responsibilities. Hence, if the concept provided by art. 2 (b) of the International Convention for the Suppression of the Financing of Terrorism is used extensively, not only within but also beyond the scope and the purpose of the said Convention,

part of the problem can be solved. Whatever the connotation of a single act, if it fits this concept, it may be deemed as a terrorist act. And the perpetrator must face the inherent consequences. Then, it comes the problem of identifying those consequences and implementing them, but this is another issue that goes far beyond the definitional dilemma.

This brief overview on the most relevant multilateral instruments somehow pertaining to international aviation terrorism does not account for the entire and huge effort the United Nations have been enduring so far, but allows to draw a first important conclusion. One can certainly infer an explicit condemnation of terrorism, based on a solid framework that portrays terrorism as a set of categories of particularly heinous crimes specified in a number of international conventions. This framework continues to offer remarkable possibilities for further creative development, since it is open-ended and likely to be expanded and adjusted as more terrorist attacks come true or can be predicted. On the domestic level, the conclusion to be inferred is that no government today can credibly claim a lack of legal basis to apprehend, prosecute or extradite those who commit acts of terrorism, if the state it belongs to is a signatory to the above-mentioned conventions. Since the latter have been widely signed, such legal basis is undisputable. At least as far as those categories of international terrorist acts that have been specifically addressed are concerned, governments have a positive duty to apply the appropriate law enforcement measures. Hence, the fact that governments fall sometimes short of this standard is not to be interpreted as a lack of legal tools aimed at addressing terrorist activities, but rather as a failure to use them properly on the domestic level.

1.5 The United Nations and the global approach

In the abstract, the international community has not found it difficult to record a broad consensus on the illegitimacy of terrorism. For instance, the 1970 “United Nations General Assembly’s Declaration on Principle of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations includes the following statement: “Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”⁴³ This statement, in turn, was tied to the fundamental principle stated somewhere else in the Declaration, derived directly from Article 2(4) of the United Nations Charter, that “States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”

Nonetheless, if the principle requiring states to refrain from terrorism was easy enough for the United Nations to agree upon, its exact meaning and application turned out to be a totally different matter. Fair enough, terrorism was deemed wrong and unacceptable; but what was terrorism? It seemed extremely difficult, for example, to describe terrorism without involving national liberation movements. However, in the late seventies, some more steps were taken. United Nations General Assembly Resolution 34/145 (1979) contained a clear condemnation of terrorism *per se*, by appealing to all states to become parties to the existing international conventions relating to international terrorism issues and inviting those states to take appropriate domestic measures in order to pursue the speedy and final elimination of the problem of international terrorism. Harmonization of domestic legislation with international conventions and

the implementation of assumed international obligations are obviously appropriate measures. The United Nations also urged all states to cooperate with one another more closely, especially through the exchange of relevant information concerning the prevention and combating of international terrorism, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular as to the extradition or prosecution of international terrorists.

Thus, the straightforward term “terrorism” was eventually used and the inherent issue was addressed as such, in a global perspective. Nonetheless, the problem of defining terrorism was still far from being solved. However, what seems noteworthy is the fact that, while the international community was busy identifying specific categories of terrorist violence, the United Nations kept also focusing on “the big picture,” in order to deal with terrorism comprehensively and de-legitimising it as such. Everybody was aware of the fact that, given specific terrorist activities, which could be easily condemned by *ad hoc* multilateral instruments, terrorism was also something else, an idea or concept, possibly a state of mind that needed being addressed homogeneously. As stressed above, the inherent limit of those treaties addressing specific acts of terrorism is that they are limited in scope. New acts can always be performed that do not fit in any of the categories existing treaties do depict. Hereby, in a number of United Nations documents, terrorism is addressed *per se* and statements are made with regards to the global phenomenon, notwithstanding the many, varied ways it is likely to come about. It seems therefore worthwhile to have a closer look at some of those documents, in order to highlight the strenuous effort the United Nations have been enduring in order to come to terms with terrorism as a global challenge.

At the 72nd plenary meeting held on 4 December 1989, for example, the General Assembly adopted Resolution 44/29, headed “Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of

those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.” This Resolution is important because it contains an open and blanket condemnation of “all acts, methods and practices of terrorism wherever and by whomever committed,” which are expressly labelled as “criminal and unjustifiable.” Interestingly, the said Resolution stresses the importance of establishing a generally agreed definition of international terrorism in order to enhance the “effectiveness of the struggle against terrorism,” although it unequivocally condemns all acts, methods and practices of terrorism.

Ostensibly, terrorism is perceived as a phenomenon that deserves unequivocal condemnation *per se*, even though there is no overall consensus about its exact meaning. In a way, the United Nations acknowledge the importance of defining international terrorism in order to counter it effectively but not in order to condemn it, for it is perceived as wrong and unacceptable as such. Condemnation comes in the first place, not only chronologically but also logically before the identification of viable counter-measures. Another remarkable statement to be found in the said Resolution is that “effective measures should be taken in accordance with international law” and that “emphasis is placed on the need to pursue efforts aiming at eliminating definitively all acts of terrorism by.... [the] progressive development of international law.” Thus, the more the international community reacts to acts and practices of terrorism, the more it finds it necessary to restore the rule of law and possibly strengthen it. Civilized means versus the anarchy of terror, then, whatever the possible outcome of this major confrontation. The United Nations General Assembly will often stress this concept and in more than an occasion will find the way to express trust in the international legal system.

As far as international law is concerned, the same very concept, in fact the same words, are to be found in Resolution 49/60, headed “Measures to eliminate terrorism,” which was adopted by the General Assembly on 9

December 1994. This Resolution reaffirms the unequivocal condemnation of “all acts, practices and methods of terrorism wherever and by whomever committed, as criminal and unjustifiable” and explicitly label them as “a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among states, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society.” This statement seems to mark an important step forward. Why does the United Nations condemn terrorist acts and practices? Because they constitute a severe violation of its purposes and the principles that inspire the United Nations set-up. In a nutshell, the United Nations *raison d’être* is challenged by international terrorism, which aims at the destruction of basic freedoms, fundamental human rights, peaceful co-existence and cooperation amongst states. This is why terrorism is criminal.

Thus, albeit an agreement on the meaning of the word terrorism is not established yet, the reason why it is perceived as criminal is laid down. It is criminal for the common core of values it violates. What is more important than fundamental human rights such as the one to life or more precious than basic freedoms like the freedom of movement? And what is criminal law for, whatever the legal system, if not for protecting fundamental human rights and freedoms? Hence, the United Nations not only have assessed that specific terrorist acts are more than unlawful, in fact they are criminal if there are legal sources that label them as such. The United Nations have also assessed that terrorism is criminal *per se*, for the nature of the values it violates.

Remarkable seems also the statement that “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.” No excuses, then, in the sense that the underlying motives

do not alter the inherent criminal nature of terrorist acts. Crime is crime, whatever the possible explanations in the realm of politics, religion, or moral. This statement is also important because it highlights the connotation of fear, which is quite a normal feature of terrorist activities. The United Nations starts therefore acknowledging the fact that intimidation is part of the terrorist strategy, actually a connotation to be considered if terrorism is to be addressed as a global phenomenon.

On 17 December 1996, the General Assembly adopted Resolution 51/210 and once again strongly condemned “all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomsoever committed” and stressed the importance of ensuring a “comprehensive legal framework covering all aspects of the matter.” Thus, the United Nations keeps reiterating its unequivocal condemnation of terrorism *per se*, whatever its forms, while relying upon the effectiveness of a legal response as a civilized means of addressing the strategy of violence and terror. Once again, the United Nations stresses that no considerations of “a political, philosophical, ideological, racial, ethnic, religious or other nature” may be used to justify terrorist acts, methods and practices. In a way, the fact of reiterating the same concepts helps strengthening them. Nonetheless, the concepts that need being reiterated as time goes by are those that have not proved very effective and certainly have not been abided by.

In the above-mentioned Resolution, however, there is at least a statement that does not duplicate concepts already laid down before. In re-affirming that the states members deem acts, methods and practices of terrorism contrary to the purposes and principles of the United Nations, it also stipulates “knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.” This is to be considered a remarkable step forward when it comes to assessing responsibilities. Terrorists are not only those who perform specific criminal activities. Apart from the very perpetrators of specific acts and practices, there are a number of hidden supporters, which help the terrorist cause by

devising their schemes or financing them. Even inciting them is a challenge to the United Nations purposes. Terrorism is a complex and multifaceted phenomenon and the inherent responsibility is also multifaceted since it may reach far beyond the perpetrators of the specific acts. It can also involve governments, although this Resolution does not say it. Nevertheless, it does not exclude it either, which sounds quite significant if accountabilities need being assessed.

In fact, the United Nations soon assesses this principle too. In Resolution 53/108, adopted by the General Assembly on 26 January 1999, also headed “Measures to eliminate international terrorism,” the General Assembly calls upon states “to refrain from financing, encouraging, providing training for or otherwise supporting terrorist activities.” Thus, terrorists are not only those who perpetrate specific terrorist acts or practices but also those who help them in any possible way. And states can well appear amongst the possible, though hidden, sponsors. In a way, the United Nations acknowledge the fact that behind a terrorist enterprise may stand a governmental policy and that terrorism may well be conceived as a substitute of politics in the international scenario. Nonetheless, the response must be one of legal nature. The above-mentioned Resolution clearly states “international cooperation as well as actions by States to combat terrorism should be conducted in conformity with the principles of the Charter of the United Nations, international law and relevant international Conventions.” This means that the United Nations, though concerned because of the escalation of terrorist activities, are also worried that violence may lead to some more violence.

What is brutal and uncivilized in its inherent nature must be countered through the means that have made the international community civilized and developed: law and politics, as viable alternatives to any violent confrontation whatsoever. Hence, many statements pertaining to terrorism have been made hitherto and undeniable conceptual progress has been accomplished, but what the word terrorism means the United Nations has

not explicitly and officially established yet. However, whenever the General Assembly deals with this subject matter, it drops a few hints that could well be used if the definitional issue is to be addressed once and forever.

Resolution 54/164, headed “Human rights and terrorism,” which was adopted by the General Assembly on 24 February 2000, does provide a few clues that can be used in order to devise a comprehensive definition of terrorism. The said Resolution stipulates “terrorism creates an environment that destroys the right of people to live in freedom from fear.” Besides, it reiterates an unequivocal condemnation of the “acts, methods and practices of terrorism in all its forms and manifestations, as activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of states, destabilizing legitimately constituted governments, undermining pluralistic civil society and having adverse consequences for the economic and social development of States.” Interestingly, this Resolution also underlines that “the essential and most basic human right is the right to life” and that “all States have an obligation to promote and protect all human rights and fundamental freedoms.” It also stipulates “every individual should strive to secure their universal and effective recognition and observance.”

Besides, the Resolution stresses “the need to protect the human rights of and guarantees for the individual in accordance with the relevant human rights principles and instruments, in particular the right to life” and therefore includes an explicit condemnation of “the violations of the right to live free from fear and of the right to life, liberty and security.” Thus, what this Resolution seems to suggest is that terrorism always involve a certain degree of fear, meaning that its strategy normally rely upon the power of intimidation. Thus, the element of fear to be induced in the victims is certainly a major feature that might be included in a definition of terrorism, if the United Nations were finally to establish one. The said Resolution also stresses that the reason why terrorism is unlawful and criminal, whatever its forms and underlying reasons, is that it violates basic human rights: life,

freedom and security, that is to say those rights that are perceived as inherent to mankind by law of nature, at least in the United Nations perspective.

Hence, the efforts that the United Nations has been making in order to approach terrorism as a global phenomenon, are certainly remarkable.⁴⁴ An unequivocal and blanket condemnation of terrorism *per se* has definitely been achieved and enough light has been shed on what the phenomenon of terrorism entails. Besides, the fact that terrorism is labelled as criminal at the United Nations level is extremely relevant because it means that this sort of legal frame is accepted and acknowledged at the broadest international level ever. Moreover, the fact that terrorism underlying motives, whatever their inherent nature, are not accepted as justifications is also an important step forward. The United Nations, by stressing the fact that those motivations are totally immaterial, have highlighted that, even though terrorism might be deemed different from ordinary crimes because of its ideological connotation, it is still crime. Thus, it has to be countered as such. In the United Nations framework, therefore, there is no room for the concept of acceptable or justifiable terrorist violence. Terrorism is criminal *per se* and utterly unacceptable, whatever its ideological foundation.

1.6 International terrorism and customary law

The question, then, becomes one of finding whether some acts in certain circumstances are “criminal” even in the absence of a treaty labelling them as such, or whether all crimes are crimes only because defined so by human institutions empowered with specific authority.⁴⁵ As shown above, there is a number of terrorist acts and practices that have been individually addressed in multilateral instruments but also sources which condemn terrorism *per se*, whatever the specific activities it may consist of. Therefore, a general principle condemning terrorism seems to exist and it is one of pivotal

importance when acts may occur that have not been specifically ruled yet. As shown above, the international legal framework that multilateral instruments do set up is open-ended. It cannot possibly account for all of the terrorist initiatives, especially the ones which have never been performed hitherto. Nonetheless, if a general principle condemning terrorism *per se* exists, and it actually seems to exist, it is more difficult for terrorists to find safe havens and for states to claim that they lack a legal basis to secure terrorists to justice.

The fact that here and there terrorism is addressed and condemned as such, however, does not automatically mean that terrorism has entirely turned into a crime under international customary law (in the sense of *crimina juris gentium*).⁴⁶ Nevertheless, it may be suggested that, although not all acts that may amount to a crime of terrorism under national or treaty law are also covered by customary norms, at least some of them may have turned into customary law. For example, it seems that, because of their inherent magnitude and their dreadful consequences for the life and assets of innocent civilians, such acts as aircraft bombing or aircraft hijacking may be seen as crimes covered by customary law, particularly when they take on large-scale proportions. Such terrorist acts have actually prompted strong condemnation by the international community as a whole, as it may be inferred by a number of resolutions from both the United Nations General Assembly and the Security Council. But what is customary international law? In a nutshell, custom as a source of law needs meeting two requirements: state practice and *opinio juris*. The Statute of the International Court of Justice describes custom as “evidence of a general practice accepted as law.”⁴⁷ State practice refers to general and consistent practice by states.⁴⁸ If this practice is followed out of a belief of a legal obligation, then there is *opinio juris* as well.

Obviously, *opinio juris* concerns statements of belief rather than actual beliefs, since it seems far too difficult to determine what states believe as opposed to what they say. The reduced focus on state practice seems

unavoidable because it is almost impossible to analyse the practice of nearly two hundred states. Besides, reliance on statements accelerates the formation of custom, which allows it to approach global, as opposed to regional or national, issues in a timely manner. Thus, custom nowadays seems more the outcome of statements of rule than actions, which allows considering *opinio juris* more an overriding factor than practice when it comes to establish what custom is. Modern custom actually seems a new species of universal declaratory law because it is based on authoritative statements about practice rather than recognizable regularities of behaviour. This is why the official documents adopted by the General Assembly and the Security Council are so important: they actually declare existing costumes or generate new ones. As far as terrorism is concerned, the said United Nations organs have often highlighted the fact that it is a crime of concern for the international community as a whole, which endangers international peace and security;⁴⁹ besides, they have also insisted on the persistent need for international co-operation to effectively fight against it.

Thus, it does not seem groundless to assess that single terrorist acts and practices are crimes by law of treaty whereas terrorism *per se* can be considered criminal under international customary law. But what sort of crime is it? This is a complex question to handle, since a comprehensive definition of terrorism has not been agreed upon yet, although it is indisputable that terrorism is broadly perceived as a major offence that threatens the peace of nations and causes mass killing and suffering of human beings. This is why it has to be assessed whether it is possible to place terrorism within the category of crimes against humanity or *crimes erga omnes*. Roughly speaking, we can identify those crimes as they consist of gross abuses of the rights of human beings. The focus can be put on the sort of rights they do threaten or violate. Such are the right to life, to physical integrity, to freedom and safety of movement, that is to say basic and fundamental human rights, and, above all, inalienable ones, which

reach far beyond the “social contract” between the individual and the state since they are nature-endowed ones. The rights and freedoms thereof substantiate an entire body of laws, which is called *jus cogens*,⁵⁰ that is to say the peremptory norms from which no derogation is allowed. Hence, *jus cogens* cannot be undermined by treaty arrangement or inconsistent state practice. There are those who assess that custom is a suitable source for peremptory norms, because it serves as a vehicle for generally binding international law on important moral issues. Thus, peremptory norms are part of customary international law.

But if terrorism affects basic human rights, is it possible to define it as a crime against humanity? So far, it is not even mentioned in the Statute of the International Criminal Court, the judicial permanent institution, which has been established in order to try people allegedly responsible for the most serious crimes of international concern, as referred to in the Statute itself. According to the Statute, the jurisdiction of the International Criminal Court is limited to the most serious crimes of concern to the international community as a whole, that is to say: genocide, crimes against humanity, war crimes and the crime of aggression.⁵¹ Terrorism is not even mentioned and can hardly fall within the definition of “crimes against humanity” that article 7 sets out.

The said article reads as follows: "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that

are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

Thus, terrorism is not even there, although many states insisted for empowering the International Criminal Court with jurisdiction over terrorist acts as well. Yet, many other states opposed this stance on the basis that the offence is not even defined properly and including it would have “politicized” the Court. Besides, they suggested that not every possible act of terrorism was to consider as heinous as to shock the conscience of mankind. Some states also insisted on the fact that terrorism must be defined and distinguished by national liberation movements before empowering any institution whatsoever with jurisdiction. On top of that, many states are prone to consider domestic tribunals far more effective than international courts and this is also why the International Criminal Court has met with limited success hitherto. However, given, amongst others, the atrocities that took place in the United States on 11 September 2001, considering terrorism as a crime against humanity does not seem as far-reaching any more. Those atrocities seem to show all of the hallmarks of crimes against humanity, such as the magnitude and extreme gravity of the attack as well as the fact that the victims were civilians and the possibility that the initiative was part of a widespread or systematic practice.

Justice Goldstone actually says that many international lawyers have labeled the attack on the World Trade Center as “crime against humanity,” although he does not think this is really an issue, since crime is such under the domestic law of most countries and international law can certainly cope with it.⁵² In this respect, William Schabas⁵³ also thinks that terrorism can be addressed as simple murder, or specific crime, which makes it even easier to prosecute those who are responsible for the atrocities. Whether the

latter fit in the general concept of international terrorism or not does not really make any difference. Even in cases of so-called state sponsored terrorist acts, it is necessary to get hold of those who have ordered the acts inasmuch as those who have committed them and prosecute them all accordingly, although a question of immunity for the Head of State may arise. Yet, immunity does not have to entail impunity. In Schabas' view, though, terrorism does not fit in the category of crimes against humanity because such category is necessary to prosecute internationally those crimes that happen in the territory of one state and the government of that state condones. In his opinion, all mankind has to do is prosecuting at domestic level those who are responsible for specific crimes. In this respect, there are enough legal tools. It is all about using them.

Thus, the question whether terrorism may fit in the category of crimes against humanity or not is still unanswered. Opinions, in this respect, may vary. In the long run, though, it may happen that states no longer object to the characterization of terrorism or at least its most atrocious incarnations in terms of crimes against humanity, under the subcategories of murder or extermination or other inhuman acts. And eventually one or more judicial institutions can be empowered with jurisdiction over acts of international terrorism. This would prove a remarkable step forward. Nonetheless, judiciary institutions empowered with jurisdiction over terrorist activities would bear an enormous responsibility. They should have maximum international legitimacy if they are to be deemed credible, which means, as Justice Sachs says, that "they are not to be seen as the instrument of this power or that power, this group or that group and they are not there to simply extend the hegemony or domination or control of any particular power or to be seen as doing that. Perceptions, in these areas, are extremely important and any international body functioning in these areas has to have the maximum across the board legitimacy."⁵⁴

Once again, the issue is one of remarkable sensitivity. Problems of prosecution and implementation of laws also fall into picture. Nonetheless,

the idea of considering terrorist activities as crimes against humanity and have them prosecuted by a specific and specialized body seems fascinating and worth exploring. It may actually help to counter international terrorism because its perpetrators might be isolated. Religion, politics, philosophy, ethics cannot possibly justify something that shocks the conscience of mankind. Besides, empowering an international court with jurisdiction may foster a cohesive global response – mankind versus those venturous few who dare challenging it whole – instead of prompting unilateral actions that could lead to more violence. If terrorism challenges humanity by threatening the core values of its civilization, then humanity must stand united against it in order to ensure that the global neighborhood of the future is going to be characterized by law and not by anarchy. The rule of law has been a critical civilizing influence in every free society, after all. It actually distinguishes a democratic from a tyrannical society and secures freedom and justice against repression; it ranks equality above the brutal logic of power and empowers the weak against the unjust claims of the strong. Its restraints, no less than the moral precepts it highlights, are essential to the well being of a society, both collectively and to individuals within it. Respect for the rule of law is thus a basic neighbourhood value. And one that is certainly needed in the emerging global neighbourhood. That is why considering terrorism as a crime against humanity and empowering an international institution with jurisdiction over it seems tempting. Or, at least, worth trying. It would be a way of strengthening the rule of law and finding a legal response to the inherent unlawfulness of terrorism. And an attempt to work together against something that affects mankind as a whole.

1.7 Conclusion

Summing-up the present chapter, a few conclusions may be inferred that are likely to prove helpful in the following analysis. The one thing that seems undeniable is the immense difficulty that the international community meets with, when it tries to define terrorism once and forever. Roughly speaking, terrorism may be considered as the instrumental use of violence against inoffensive bystanders in order to spread fear and achieve some political, ideological or religious ends. Those seem to be the few general features everybody agrees upon. Then, any attempt to depict terrorism in more a specific way does not appear to have met with any success whatsoever. The main reason is to be found in the emotional and political burden the very idea of terrorism inevitably evokes. Those who are labelled as terrorists may as well be considered as heroes, which inevitably trigger deep-seated political, ideological, moral or religious beliefs. Yet, any practical analysis seems to require some degree of objectivity and neutrality. One way to ensure them both consists of embracing a legal perspective. The latter is certainly limited, for it cannot possibly account for all the many facets terrorism entails, but at least it ensures some acceptable degree of neutrality and objectivity and helps keeping political bias at bay. Besides, it seems to be free of emotional burdens.

Thus, aviation terrorism can be approached as a criminal phenomenon, whose inherent criminal nature does not change simply because of the ideological trait it normally features. Nonetheless, terrorism as such is not a self-standing crime. What most laws do address, both at domestic and international level, are specific acts, which amount to specific crimes. Whether they are terrorist or not, they are prosecuted anyway. The fact that they bear an ideological or political trait does not make any real difference as far as prosecution is concerned. Specific terrorist activities are widely outlawed and prosecuted. The inherent series of crime species makes an open-ended framework, which can include more cases, if any. To this extent,

the existing legal scaffolding can cope. Yet, those specific acts that are ruled as crimes somehow differ from common crimes. The behavioural aspect may be the same – murder is murder, hijacking is hijacking – but the difference lies in the underlying motives. The latter certainly need being addressed, although they do not make any real difference as far as prosecution is concerned. And they certainly do not exempt the deeds they characterise from being criminal. Yet, causes are important and this is where politics come into picture. A successful fight against terrorism should be coupled with the search for sustainable solutions for human and political dramas that constitutes factors of instability and feed extremism as well as terrorists groups.

So far, the international community has also been trying to address terrorism as a whole, whatever shapes it may embody. This has proved a noteworthy effort that has led to the blanket condemnation of terrorism as a global phenomenon. Thus, a general principle condemning terrorism *per se* now seems to exist, which makes it more difficult for terrorists to find safe havens and for states to claim that they do not have a legal foundation to secure terrorists to justice. As a matter of fact, the international conventions outlawing specific categories of activities inasmuch as those addressing and condemning terrorism *per se* have been widely signed and ratified. Therefore, most governments cannot possibly claim a lack of legal basis to apprehend, prosecute or extradite those who have allegedly perpetrated terrorist activities. Obviously, universal accession to those multilateral instruments is essential but is still far from being accomplished. Nonetheless, terrorism is now perceived as a major global threat and one that keeps the entire international community well aware of the danger that lies ahead.

There is a shared feeling of danger that prompts the will for a global response. This is why so much effort is being put both at domestic and international level in order to counter terrorism, even though it is sometimes a controversial topic, especially when it comes to defining it. Yet,

everybody seems to agree about the fact that there is no sustainable development without peace and security. And everybody seems to agree that freedom from fear is a fundamental human right that needs being secured in a sustainable world of development. Hence, the struggle against terrorism in general and aviation terrorism in particular is one that may bring all law-abiding nations together. Obviously, no healthy partnership is without strain and headways may prove slow and erratic. Yet, a concerted international action can make the tasks of terrorists much more difficult to accomplish. A global response is needed to root out this major scourge, which anyway will take time and cannot do without universal commitment to the fight. Many forms of across the boundary cooperation already exist and can be strengthened: judicial cooperation, preventive measures, exchange of information, to name just but a few. Yet, the most important thing seems to consist of the integration of all countries into a fair world system of security, prosperity and improved development. The struggle against terrorism will be all the more effective if it is based on an in-depth political dialogue with all countries of the world. No co-operation can prove utterly successful if it does not filter out unilateralism and prejudices.

It is clearly far beyond the scope of the present work to investigate what can be possibly done in order to fight terrorism in general and aviation terrorism in particular. It is also beyond this work's reach to explore such a complex phenomenon as terrorism in its very many facets and implications. Nonetheless, a few general points about terrorism have been made hitherto in order to provide the case study which is the subject matter of the present work with some conceptual scaffolding. The Lockerbie affair is an example of international aviation terrorism and a complex one, that entails a number of different aspects and raises numerous remarkable questions. Above all, it is a story of successful international co-operation where a cold-blooded terrorist onslaught has been countered through civilized and peaceful means. In the event, the interaction of law, politics and diplomacy has proved successful. The possibility of striking back hard has not been an

option, as it is going to be shown in the following chapters. It is therefore about time to try to investigate the Lockerbie affair as one of those stories from the recent past that can offer a good lesson for the forthcoming future. Looking backward seems the right way to move forward, if the challenges that still lie ahead are to be properly and successfully addressed inasmuch as the events at Lockerbie have been.

Notes

¹ *Ex multis*, see Vetter, H.J. and Perlstein, G.R., "Perspectives on terrorism," Brooks/Cole Publishing Company, Pacific Grove, California, 1991. See also White, J.R., "Terrorism: an introduction," Brooks/Cole Publishing Company, Pacific Grove, California, 1991. For an analysis of jurisprudential elaborations pertaining to terrorism, see Beres, L.R., "The meaning of terrorism – Jurisprudential and definitional clarifications," 28, *Vanderbilt Journal of Transnational Law*, 239-249, 1995. For a thorough analysis of the notion of terrorism, its development and the problems it raises, see Chaliand, G. and Blin, A. (eds.), "Histoire de terrorisme. De l'antiquité à Al Qaida," Bayard, Paris, 2004, especially at pp. 23-55.

² I had the privilege of interviewing Albie Sachs, Justice of the Constitutional Court of South Africa, in Johannesburg, on 8 April 2003. Justice Albie Sachs has been a prominent leader in the struggle to end apartheid in South Africa and a member of the African National Congress.

³ I interviewed Jan Van Eck via e-mail and he kindly sent me his reply on 13 March 2003. Van Eck is an internationally respected analyst from the South Africa based Centre for Conflict Resolution (University of Pretoria) and a former backbencher for the African National Congress.

⁴ See Blakesley, C.L., "Terrorism, law and our constitutional order," 60, *University of Colorado Law Review*, 471-531, 1989.

⁵ See *supra*, note 2.

⁶ Hume, D., "A treatise on human nature," Penguin Classics, London, 1985, p.522.

⁷ See *supra*, note 3.

⁸ See Sachs, A., "The South African Truth Commission," 63, 1, *Montana Law review*, 25-37, (2002), especially at 27.

⁹ I had the privilege of interviewing Richard Goldstone, Justice of the Constitutional Court of South Africa, at the Constitutional Court in Johannesburg, on 5 March 2003. Justice Goldstone has also served as Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda and as Chairperson of the Independent International Inquiry in Kosovo. Since December 2001, he has been appointed as the Chairperson of the International Task Force on Terrorism established by the International Bar Association. He also holds the chair of Chancellor at the University of the Witwatersrand, Johannesburg.

¹⁰ Rousseau, J. J., "The social contract," Wordsworth Ed. Ltd., Ware, Hertfordshire, 1998, p.84.

¹¹ For instance, in the British Prevention of Terrorism Act, section 20(1), terrorism is defined as follows: "The use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." According to US Law 100-204 of 1987, section 901, "The term terrorist activity means the organizing or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities." Additionally, according to US Law 104 302 of 1996, a "federal crime of

terrorism” is a crime “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” and to other crimes mentioned in US law, such as unlawful acts against the safety of civil aviation, crimes against internationally protected persons, etc. According to the French Law of 1986, terrorist acts are crimes “en relation avec une entreprise individuelle ou collective ayant pour but de troubler l'ordre public par l'intimidation ou la terreur.” See Walker, C., “The prevention of terrorism in British law,” Manchester University Press, Manchester, 1992, pp. 1-46. The Iran and Libya Sanctions Act of 1996, (US Public Law 104-172; 104th Congress), section 14, defines an Act of international terrorism as such: “As used in this Act: (1) Act of international terrorism. The term “act of international terrorism” means an act (A) which is violent or dangerous to human life and that is a violation of the criminal laws of the United States or of any State or that would be a criminal violation if committed within the jurisdiction of the United States or any State; and (B) which appears to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping.”

¹² See Dinstein, Y., “War, aggression and self-defence,” Cambridge University Press, New York, 1994, pp. 3-172.

¹³ See Von Clausewitz, C., “On war,” Wordsworth Editions Ltd., Ware Hertfordshire, 1997, p.216.

¹⁴ I had the great privilege of interviewing Justice Richard Goldstone for the second time at the Constitutional Court in Johannesburg on 6 May 2003.

¹⁵ For example: border patrols of neighbouring countries may exchange fire; interceptor planes may shoot down aircrafts belonging to another state; and so forth.

¹⁶ In view of the supremacy of international law over national domestic law, these elements are relevant whichever realm of law is under consideration.

¹⁷ For example, if the use of force is indiscriminate, disproportionate or beyond the codified boundary of military necessity, the insurgency is unlawful, whatever the cause. Just means needs co-existing with just cause if an insurgency is to be deemed lawful.

¹⁸ See Cassese, A., “International law in a divided world,” Clarendon Press, Oxford, 1986, pp. 253-286.

¹⁹ See Cassese, A., “International criminal law,” Oxford University Press, New York, 2003, pp.47-48 and pp.325-348.

²⁰ Conventions on the wounded and sick in the field; on the wounded, sick and shipwrecked at sea; on prisoners of war; on civilians.

²¹ The First Protocol of 1977 supplements the 1949 Conventions, extending protection to wider groups of civilians, regulating the law of bombing, and enlarging the category of wars subject to the 1949 Conventions (to include, for example, civil wars). They extensively revised and updated both The Hague Regulations and the Geneva Conventions.

²² General Assembly Resolution No. 2625 (1970).

²³ General Assembly Resolution No. 3314 (1974).

²⁴ An act is “justified” when the legal system approves of it. It is merely excused when it disapproves of it but think it is not right to treat it as a crime. Justifications may occur that make violence lawful and therefore acceptable. This is the case, for instance, of the public hangman who carries out a sentence of the court, in those legal systems where death penalty still exists. Sometimes, violence against innocents is not justified but certainly excused; that is the case, for instance, of killing by misadventure without culpable negligence. For the “positive” and “negative” elements of a crime, see, *ex multis*, Smith, J. and Hogan, B., “Criminal law,” Butterworths, London 1996, pp.16-21; pp.31-93.

²⁵ Interview with Justice Albie Sachs, 8 April 2003. See *supra*, note 2.

²⁶ Interview with Justice Richard Goldstone, 6 May 2003. See *supra*, note 14.

²⁷ The one approach – from the ground up – has been called “incremental or practical,” whereas the other one – from the top down – has been deemed “global or conceptual.” For a comprehensive overview, see Levitt, G.M., “The international legal response to terrorism: a re-evaluation,” 60, University of Colorado Law Review, 533-551, (1989).

²⁸ See *supra*, par.1.1.

²⁹ As far as jurisdiction over the offences it relates to is concerned, the Tokyo Convention aims at ensuring that at least the state of registration of the aircraft will have jurisdiction over the suspected offender, without, however, excluding the jurisdiction of other states.

³⁰ Popularly called hijacking. Art. 11: “When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.”

³¹ Art. 1, Convention for the Unlawful Seizure of Aircraft, The Hague, 1970.

³² The International Civil Aviation Organization (ICAO) is a specialized agency in relationship with the United Nations, whose constituent instrument is the Convention on International Civil Aviation (Chicago, 1944).

³³ See *supra*, par. 1.3.

³⁴ For the concept of *mens rea*, see *supra*, par.1.3.

³⁵ More specific criminal acts of interference with civil aviation are provided by the Protocol for the Suppression of Unlawful Acts of Violence at Airport Serving International Civil Aviation – concluded at Montreal on 22 December 1990 – supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Art. 2 of the said Protocol reads as follows: “In article 1 of the Convention, the following shall be added as new paragraph 1 bis: “1 bis. Any person commits an offence if unlawfully and intentionally, using any device, substance or weapon: (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport if such an act endangers or is likely to endanger safety at the airport.” Once again, specific acts of interference are labelled as criminal but the term terrorism is not even mentioned. The Protocol adds to the definition of “offence” given in the Montreal Convention of 1971 unlawful and intentional acts of violence against persons at an airport

serving international civil aviation which cause or are likely to cause serious injury or death and such acts which destroy or seriously damage the facilities of such an airport or aircraft not in service located thereon or disrupt the services of the airport; the qualifying element of these offences is the fact that such an act endangers or is likely to endanger safety at that airport. These offences are punishable by severe penalties, and Contracting States are obliged to establish jurisdiction over the offences not only in the case where the offence was committed in their territory but also in the case where the alleged offender is present in their territory and they do not extradite him to the State where the offence took place.

³⁶ Other multilateral instruments, however, had already familiarized with the term “terrorism” and had started using it explicitly long before, although they would not provide a definition either. The European Convention on the Suppression of Terrorism, concluded in Strasbourg on 27 January 1977, for instance, refers to the increase in acts of terrorism in its preamble.

³⁷ The preamble of the Convention on the Marking of Plastic Explosives for the Purpose of Detection reads as follows: “The States parties to this Convention, conscious of the implications of acts of terrorism for international security; expressing deep concern regarding terrorist acts aimed at destruction of aircraft, other means of transportation and other targets; concerned that plastic explosives have been used for such terrorist acts;....”

³⁸ Article 3 reads as follows: “This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1, or article 6, paragraph 2, of this Convention to exercise jurisdiction, except that the provisions of article 10 to 15 shall, as appropriate, apply in those cases.”

³⁹ See the Tokyo Convention, *supra*, par.1.4.

⁴⁰ This Annex lists, amongst the others, the Convention for the Unlawful Seizure of Aircraft - The Hague, 1970 – the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation – Montreal 1971 – the Protocol for the Suppression of Unlawful Acts of Violence at Airport Serving International Civil Aviation – Montreal, December 1988, the International Convention for the Suppression of Terrorist Bombings –New York, 1997.

⁴¹ Article 3 reads as follows: “This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and no other State has a basis under Article 7, paragraph 1, or Article 7, paragraph 2, to exercise jurisdiction, except that the provision of articles 12 to 18 shall, as appropriate, apply in those cases.”

⁴² Not all definitions of terrorism explicitly make reference to civilians or non-combatants in order to stress the fact that the victims of terrorist attacks are innocent bystanders. However, this requirement seems implicit in those definitions. See, for example, the one provided by the Convention of the Organisation of the Islamic Conference on Combating International Terrorism, concluded in Ouagadougou on 1 July 1999. Art. 1 of the said Convention reads as follows: “....Terrorism means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or

endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.” If the potential victims were not to be implicitly considered innocent, the whole of this provision would not make sense.

⁴³ General Assembly Resolution No. 2625(1970). See *supra*, note 22.

⁴⁴ The debate about the problems of defining terrorism historically centred on the General Assembly. Nonetheless, since 1985, the United Nations Security Council has adopted a number of measures addressing terrorist threats to peace and security, thus revealing its own understanding of the concept of terrorism. This understanding, though, can hardly be considered widely agreed upon, given the fact that the Security Council is often criticised for not being representative of the community of nations, in fact for being the expression of an elite. See Saul, B., “Definition of terrorism in the UN Security Council: 1985-2004,” 4, no.1, *Chinese Journal of International Law*, 141-166, (2005).

⁴⁵ This is a fundamental principle in criminal law: *nullum crimen sine lege*.

⁴⁶ In fact, there are those who believe that terrorism actually amounts to a customary international law crime. See Cassese, A., *op. cit.* (*supra*, note 21), pp. 121-125.

⁴⁷ Statute of the World Court, art.38 (1)(b).

⁴⁸ State practice is obviously open textured and capable of being interpreted in various ways. For example, contrary state practice can be analysed as a breach of an old rule or as the seed of a new rule. For this reason, conflicting state practice should never be discounted as irrelevant to interpretation, because it may contain the seeds for a new custom. It also clarifies how customs change over time in light of new state practice, *opinio juris* and moral considerations. However, as far as the identification of existing customary law is concerned, the international community discounts the importance of dissenting states and contrary state practice because it is not prepared to recognize exceptions to the maintenance of certain fundamental values. Recognizing exceptions to such rules would shock the conscience of mankind whereas custom acknowledges universally shared values or a common core of values whose foundation is a broad consensus on the global scale. Modern custom evinces a desire to create general international laws that can bind all states on important moral issues.

⁴⁹ See, *supra*, par. 5.

⁵⁰ The Vienna Convention on the Law of Treaties defines *jus cogens* norms as laws “accepted and recognised by the international community of states as a whole... from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See Cassese, A., “International law,” Oxford University Press, New York, 2001, pp.138-148.

⁵¹ See Statute of the International Criminal Court, art. 5.

⁵² Interview with Justice Richard Goldstone, 6 May 2003. See *supra*, note 14.

⁵³ I had the privilege of interviewing Professor William A. Schabas in Yerevan on 20 April 2005. William Schabas is the Director of the Irish Centre for Human Rights at the National University of Ireland, Galway.

⁵⁴ Interview with Justice Albie Sachs, 8 April 2003. See *supra*, note 2.

Chapter 2

PAN AM 103 CRASH AND THE UN RESPONSE

2.1 Pan Am 103 bombing

The question that comes next is whether law has ever successfully come to terms with terrorist attacks. Apparently, it has. This happened in the Lockerbie case, where law and politics were interwoven from start and eventually both contributed to pave the way to some sort of justice. Yet, this merger has not worked smoothly all the way through. There have been times when the realm of politics and that of law seemed irreconcilable. In those times, dealing with the issues involved at Lockerbie turned out to be almost impossible. Yet, the Lockerbie affair has proved that the potential, inherent conflict between a legal and a political approach can be solved since law and politics may work together to fight terrorism. The facts at Lockerbie may be described as follows: at 19.03 hours, on 21 December 1988, Pan Am flight 103 fell out of the sky. The 259 passengers and crewmembers that were on board as well as 11 residents of the town of Lockerbie - where the debris fell - were killed. The cause of the disaster was that an explosive device had been introduced into the hold of the aircraft and exploded when the aircraft was in the Scottish air space, thus causing the aircraft to disintegrate. In a nutshell, those are the facts as reported in the verdict delivered by the High Court of Justiciary at Camp Zeist,¹ where the alleged perpetrators were eventually tried. These facts have not even been disputed by the accused and have however been proved,² at least to the extent which was deemed necessary for the said Court to be satisfied with, in order to deliver its verdict.

Who were the victims of Pan Am 103 crash, then? Most of them were Americans, flying home for Christmas. They included servicemen and thirty-eight students from Syracuse University in New York state. The

latter being the victims, Pan Am 103 bombing immediately appeared as a heinous onslaught impacting innocent civilians.³ Who were the perpetrators of the bombing, though? On 14 November 1991, Washington announced that two Libyan nationals were to be charged with complicity in the bombing of Pan Am 103 over Lockerbie.⁴ The two suspects were Abdelbaset Ali Mohmed Al-Megrahi and Al Amin Khalifa Fhimah. On the same day, the Lord Advocate of Scotland announced that he had issued warrants for the arrest of the said Libyan nationals.⁵ This was the result of major investigations and enquiries, on the basis of which the two Libyans were accused of placing a suitcase containing a bomb on board an aircraft at Malta's Luqa airport on 21 December 1988. The suitcase was then allegedly carried to Frankfurt and placed on a Pan Am flight for London Heathrow for transfer to Pan Am flight 103 to New York. Megrahi and Fhimah were believed to be responsible for causing the bomb to be placed aboard Pan Am flight 103. Thus, the United Kingdom and the United States started claiming that the two men were handed over for trial.

The option of striking back by means of military action was neither taken into account nor completely ruled out. There it stood, like a threatening possibility. At this stage, though, the United Kingdom and the United States demanded that Colonel Gaddafi accept full criminal and financial liability for the Lockerbie bombing. If Libya failed to do so, it would soon face economic sanctions. Ostensibly, the United States and the United Kingdom were ready to call a worldwide trade embargo on Libya, if Colonel Gaddafi refused to comply. If a trade embargo was to be started, an approach to the United Nations appeared as the best way to secure the widest possible support for this initiative against Libya. A number of documents were therefore lodged with the United Nations Secretary-General. In a nutshell, the said documents recorded the charges against the identified Libyan nationals and drew attention to the demands made on Libya, in particular that the Government of Libya was required to: surrender for trial all those being charged with the crime; accept full

responsibility for the actions of the Libyan officials; disclose all it knew about the crime; pay appropriate compensation. The documents referenced concluded: "We expect Libya to comply promptly and in full."⁶

In the meantime, the Libyan authorities had appointed a judge to investigate the western allegations. They actually arrested the two accused men, declaring that a Libyan investigation would be carried out into the Lockerbie disaster. Nonetheless, the United States and the United Kingdom were utterly unimpressed and continued to threaten sanctions without excluding the possibility of military action. As far as the two suspects were concerned, they soon denied their complicity in Pan Am 103 bombing. On his part, the Libyan leader - Colonel Gaddafi - refused to hand over the two men and suggested that the two Libyans would not get a fair trial abroad.⁷ The said stance did not appear totally groundless. Libya had been required to accept full responsibility for Pan Am 103 bombing even before a trial was started. It is therefore not difficult to see how the Libyan Government might be inclined to doubt the objectivity – in this matter – of western courts. What is a trial for, if the responsibility has to be accepted in advance? Besides, Colonel Gaddafi could rely upon some legal grounds in order to refuse to surrender the two Libyan nationals. Under the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done in Montreal in 1971,⁸ unless there is an extradition treaty in force, Libya was entitled to try the offenders under its own domestic law and before its domestic judicial institutions.

As a matter of fact, there was no extradition treaty between the United Kingdom or the United States and Libya. Therefore, Article 7 of the Montreal Convention applied. The said Article reads as follows: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of

any ordinary offence of a serious nature under the law of that State.” The United States, the United Kingdom and Libya were all signatories to the Montreal Convention and were therefore supposed to comply with the principle of “*aut dedere aut judicare*,” as set out by Article 7.

If a dispute pertaining to the interpretation of the said Article arose, the Convention stipulated a course of action. Article 14(1) reads as follows: “Any dispute between two or more contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.” Hence, Libya seemed to have acted in accordance with international law by appointing a High Court Judge in order to carry out the charges raised against the two Libyan citizens. If somebody were to debate its policy, Libya would have recourse to the World Court.

Hereby, in the absence of an extradition treaty with Libya, it is hard to figure out why the United States and the United Kingdom expected Libya to hand over its citizens and renounce its sovereign power to exercise the judicial function. According to the Montreal Convention, Libya had a right to refuse the extradition of the two suspects. The American and British demands for the surrender of the two Libyan nationals – instead – appeared to be at variance with international procedures on extradition. In a way, if Libya accepted to surrender the two alleged perpetrators of Pan Am 103 bombing by handing them over for trial, it would renounce an important part of its sovereignty, that is to say its judicial power over its nationals. Whatever Libyan involvement in Pan Am 103 crash, its policy seemed so far totally legitimate in pure legal terms. This does not necessarily mean, though, that the rule set out by Article 7 of the Montreal Convention would achieve an acceptable degree of fairness, if ever applied. Yet, all of the

signatories to the Convention were supposed to comply with it. At first sight, then, the stand taken by the United States and the United Kingdom looked feeble than the Libyan response. But the reasons of politics were far too strong for the case to be rested on a pure legal ground. Thus, the Lockerbie case did not stop at the dead end of Libya's extradition denial. In fact, no lesser a body than the United Nations Security Council got involved and the focus shifted on its course of action as a collective body,⁹ as it will be shown below.

2.2 The Security Council and the package of sanctions

The United Kingdom and the United States kept demanding that Libya hand over the two suspects for trial whereas Libya kept refusing and insisting that they had no right whatsoever to demand the extradition. The situation seemed to be stuck into an impasse. But the United Kingdom and the United States succeeded in involving the United Nations, thus giving a broader dimension to their confrontation with Libya. On 20 January 1992, the Security Council unanimously adopted Resolution 731 that criticised Libya for failing to respond effectively to the extradition requests made by the United States and the United Kingdom and "urge[d] Libya to provide a full and effective response to those requests." However, the legal flaw in the American and British approach had not been healed by the Security Council's support for the demands of the United States and the United Kingdom. The Security Council does not seem to be the right forum where to make retrospective decisions of a legal nature. And Resolution 731 looked like a recommendation adopted under Chapter VI of the United Nations Charter, which pertains to the "peaceful settlement of disputes." However, the passing of the said resolution represented a significant step in the escalation of pressure on Libya.

Resolution 731 reads as follows: “The Security Council Deeply concerned over results of investigations which implicate officials of the Libyan Government and which are contained in the Security Council documents that include the requests addressed to the Libyan authorities by ..., the United Kingdom of Great Britain and Northern Ireland and the United States of America in connection with the legal procedures related to the attack[s] carried out against Pan Am flight 103 and ... (.... S/23307; S/23308; ... S/23317); Determined to eliminate international terrorism; 1. Condemns the destruction of Pan Am flight 103 and the resultant loss of hundreds of lives; 2. Strongly deplores the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan Am flight 103 and... ; Urges the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism; Requests the Secretary-General to seek the cooperation of the Libyan Government to provide a full and effective response to those requests; Urges all States individually and collectively to encourage the Libyan Government to respond fully and effectively to those requests; Decides to remain seized of the matter.”¹⁰

In response, Libya explained its failure to extradite by noting that “Libyan law, which had been in force for more than 30 years, does not permit the extradition of Libyan nationals.” Libya argued that such a law “cannot be altered by a decision of the Security Council, whether a recommendation or a binding resolution.” It also stressed that “the Libyan authorities cannot bypass this legal obstacle or violate the rights of citizens protected by the law.”¹¹ Besides, Libya filed a request to the International Court of Justice in order to obtain an emergency ruling to halt any possible British or American action. On 6 March, the International Court of Justice scheduled hearings for 26 March on Libya’s request. Nonetheless, the Security Council moved inexorably towards the imposition of mandatory sanctions. Yet, Libya kept refusing to extradite the two suspected perpetrators of Pan Am 103 bombing

both to the United Kingdom and the United States. It also highlighted that it was far too premature to discuss the question of compensation, since the latter can result only from a civil court decision based on a criminal judgement.

Furthermore, Libya stressed that the United Kingdom and the United States had not responded to Libya's legitimate request to provide it with the dossiers of the investigation on the basis of which they had made charges against the two suspects, which showed an utmost lack of cooperation on their part.¹² Libya also labelled Resolution 731 as incompatible with its national legislation, international agreements, the principle of sovereignty and the Charter of the United Nations. However, it would not oppose the hand-over of the two suspects to a third party if the Secretary-General of the United Nations would be convinced - on the basis of a comprehensive inquiry - that the charges were well-founded. Libya also asked the United Nations Secretary-General to provide all judicial and legal guarantees for the conduct of a just and fair trial based on the International Bill of Human Rights and the principles of international law.

At this stage, Libya did not look isolated in the international scenario. A number of countries seemed supportive of its politics and however against mandatory sanctions. The Arab League – for instance – issued a resolution calling on the Security Council to avoid adopting economic, military or diplomatic measures against Libya and to resolve the conflict between that country and the United States and the United Kingdom by negotiation and mediation. The Arab League also called on the Security Council to wait until the International Court of Justice ruled upon the issue raised by Libya.¹³ Quite obviously, neighbouring countries might be reluctant to cut air links or withdraw their diplomats from Tripoli, if this sort of sanctions was to be adopted. As far as a possible ban on Libyan oil was concerned, some countries, which were particularly dependant on this precious natural resource and used to import it massively from Libya,¹⁴ would not be in favour.

Nonetheless, on 31 March, the Security Council adopted Resolution 748 which gave Colonel Gaddafi until the end of Ramadan - on 15 April - to comply with paragraph 3 of Resolution 731, that required Libya to hand over the two suspects. Resolution 748, unlike Resolution 731, expressly invoked Chapter VII of the United Nations Charter.¹⁵ Stating that Libya's failure to renounce terrorism constituted a threat to international peace and security, it laid down that Libya must comply with the earlier resolution. Resolution 748 was passed by a vote of ten in favour with none against and five abstentions.¹⁶ As of 15 April, all states were required to cut air links with Libya, except those based on humanitarian needs; prohibit the supply of parts or servicing to Libyan aircraft; prohibit the provision of arms-related material, advice or assistance to that country; significantly reduce the level of Libyan diplomatic representation in their territory; prevent the operation of all Libyan Arab Airlines offices; and deny entry or expel Libyan nationals suspected of involvement in terrorist activities. The Security Council also required the Libyan Government to commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups and to demonstrate promptly, by means of actions, its renunciation of terrorism.

Colonel Gaddafi immediately threatened to halt oil sales and severe business ties with all countries that imposed sanctions against Libya. It was easy to discount such attitude though; nothing, short of military action, would damage Libya more than a curtailment of its oil sales. Nonetheless, those sanctions, as specified in Resolution 748, would not easily achieve their objectives. Ostensibly, a ban on civilian air travel would turn out to be more a nuisance than a serious problem; a ban on arms sales would have little effect on a trade that was in any case often clandestine; besides, Libya was already massively armed and such ban would have very little effect in the short run; a scaling down of diplomatic activity would involve political isolation without necessarily forcing Libya's compliance with the United Nations demands. However, Resolution 748 looked like the first stage of an

escalating process, a planned strategy that was designed to cripple the Libyan economy and possibly topple Colonel Gaddafi.

On 15 April 1992, as expected, the mandatory sanctions came into effect and states started to comply with them. Italian fighter aircraft were used to turn back a Libyan passenger aircraft, and Tunisia and Egypt refused to grant permission for Libyan planes to land. Libyan diplomatic missions were downsized in a number of countries such as the United States, France, Sweden, and Japan. Switzerland announced that it would curb arms sales whereas Russia informed that it would withdraw hundreds of its military experts training the Libyan armed forces. Libya immediately threatened to take reciprocal measures against any country that would expel Libyan diplomats.¹⁷

Article 13 of Resolution 748 established that the Security Council would, every 120 days or sooner - should the situation so require - review the measures imposed. On 12 August, the Security Council decided to retain the sanctions imposed on Libya. The scene was therefore set for a long-lasting confrontation between the Gaddafi regime and the United Nations political organ *par excellence*, the Security Council. The first tranche of United Nations sanctions against Libya had been set up. Unless the Libyan Government handed over the two suspects for trial, the sanctions would remain in place. Nevertheless, the Libyan authorities continued to maintain that they were under no legal obligation to surrender the two suspects. On the other hand, the United States and the United Kingdom would not negotiate or compromise and insisted on the two suspects being extradited.

In mid-August, the United States and the United Kingdom gave Libya fresh deadline of 1 October: the suspects would be handed over by that date or Libya would face additional sanctions. In further effort to undermine support for sanctions, Gaddafi was now taking further initiatives: offering to pay compensation to Libyan Jews whose properties had been confiscated; offering compensation to the Lockerbie families (while still disclaiming any responsibility for the bombing); and even hinting that he might surrender

the two Libyans for trial in Scotland or the United States if the West were prepared to offer diplomatic recognition to Tripoli. None of these initiatives bore fruit. The deadline of 1 October remained in place. On 1 October, the United States and the United Kingdom formally introduced their new sanctions package to the Security Council. Thus, while Tripoli seemed to play for time, the noose around the Libyan regime was going to be tightened.

The fresh package of sanctions, as specified in Resolution 883, achieved an adequate majority vote in the Security Council: eleven voted in favour and none against.¹⁸ This new resolution, passed on 11 November 1993, represented a further blow against the Libyan economy. Paragraph 3 required all states in which there were funds or other financial resources - owned or controlled by the Government or public authorities of Libya or any Libyan undertaking - to freeze the said funds and financial resources and made them unavailable to the owners or those who somehow controlled them. As far as Libyan oil sales were concerned, they were not blocked-up, although Resolution 883 was clearly intended to hit Libyan oil refining and exports. Paragraph 5 of the resolution prohibited the exporting to Libya of a wide range of equipment: pumps of medium or large capacity, gas turbines and electric motors, loading buoys, single point moorings, flexible hoses, anchor chains, and many more. This meant that Libya's revenue from oil sales would not be immediately blocked but Libya's capacity to produce and export oil products would be gradually crippled.

It seems noteworthy that Paragraph III of the appended Annex to Resolution 883 bans the export to Libya of equipment not specifically designed for use in the oil industry but "which can be used for this purpose." This meant that a wide range of equipment that Libya might wish to import for non-oil sectors of its economy would fall within the scope of Resolution 883. Thus, the block concerned also equipment for Libya's agricultural, industrial and other projects. It therefore seemed that those sanctions would also hit Libya's agricultural development. Hence, in one plausible long term

scenario, Libya would be progressively less able to import food, because an oil industry starved of vital new equipment would necessarily yield diminishing revenues; and less able to achieve food self-sufficiency because of the unavailability of equipment essential for large agricultural development projects. In a nutshell, those sanctions would result in more poverty and shortage of food. Ostensibly, the aim was causing the collapse of Libya's economy and possibly achieving the overthrow of the Gaddafi regime. However, those measures would become effective, if ever, only in the long run. Actually, many European states were heavily dependant on Libyan oil and an oil embargo would have affected their economies. Thus, the reasons of diplomacy did not allow for sterner measures.

2.3 Libya' request for interim measures

Meanwhile, Libya had tried to react by legal means. On 3 March 1992, it had actually filed - in the Registry of the International Court of Justice - an application¹⁹ instituting proceedings against the Government of the United Kingdom of Great Britain and Northern Ireland in respect of a "dispute between Libya and the United Kingdom concerning the interpretation or application of the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation." Simultaneously, Libya also sued the United States and filed its application in the Registry of the Court on that very day. Both applications invoked Article 14(1) of the Montreal Convention as the basis for the Court's jurisdiction. Therefore, two separate proceedings, instituted by two different applications, took place but the position of the applicant in each case was exactly the same. Libya actually asked the Court to adjudge and declare: that Libya had fully complied with all of its obligations under the Montreal Convention; that the United Kingdom inasmuch as the United States had breached, and were continuing to breach, their legal obligations to Libya

under Articles 5(2), 5(3), 7, 8(2) and 11 of the Montreal Convention; that both the United Kingdom and the United States were under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya.

On 3 March 1992, immediately after the filing of its application, Libya also submitted a request for the indication of provisional measures under Article 41 of the Statute of the Court.²⁰ As already reported, Libya sought an order provisionally restraining the United Kingdom and the United States from taking any further step against Libya, such as the imposition of sanctions. More precisely, Libya requested the Court to enjoin the United Kingdom and the United States from taking any action against Libya intended to coerce or to compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and to ensure that no steps were taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that were the subject of Libya's application.

The Court - in its Orders of 14 April 1992 - declined the indication of provisional measures and ruled that: all members of the United Nations were obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; the Court, at the stage of proceedings on provisional measures, considered that *prima facie*, the said obligation extended to the decision contained in Resolution 748; in accordance with Article 103 of the United Nations Charter,²¹ the obligations of the Parties in that respect would prevail over their obligations under any other international agreement, including the Montreal Convention; nonetheless, the Court was not called upon to determine definitively the legal effects of Security Council Resolution 748. All the above considered, the Court essentially assessed that, whatever the situation previous to the adoption of Resolution 748, the rights claimed by Libya under the Montreal Convention could no longer be regarded as appropriate for protection by the

indication of provisional measures, since an indication of the measures requested by Libya would be likely to impair the rights which appeared *prima facie* to be enjoyed by the counterparts pursuant to Security Council Resolution 748. Thus, Libya's request for interim relief was rejected.

This was a very important determination that was to be relied upon by the United Kingdom and the United States in the following stages of the proceedings. Interestingly, the vote ruled on the competence of the Court to issue the protective injunction and the outcome thereof was that the Court could rule on the application for the indication of provisional measures without deciding whether it had jurisdiction on the merits. For its part, Libya, with the request for provisional measures, had somehow challenged the Security Council²² by asking the International Court of Justice to rule against it. This was actually the core of Libya's claims. As a matter of fact, it was a Security Council resolution to ask Libya to surrender the two alleged perpetrators of the Lockerbie bombing and to set forth sanctions. The United Kingdom and the United States had certainly put forward drafts but, at that stage, the resolutions had to be regarded as Council's decisions. Hence, was Libya's request too far-reaching and beyond the Court's power or was it consistent with the United Nations set-up? Ostensibly, the Court had been put in a very difficult position. Whatever the inherent justice of the Libyan case, it was hard to imagine that the Court would rule against the Security Council. It is not so difficult to speculate that, if Resolution 748 was scheduled for a vote but not yet passed, then the Court ruling might have been different.²³ Instead, in the given circumstances, the Court had to rule pursuant to Article 103 of the United Nations Charter, that the demands of a Security Council resolution should take precedence over the requirement of the Montreal Convention.

Yet, it seems that Libya's application had left the Court with more than one option: the Court could have held that the sanctions ordered by Resolution 748 should be suspended until the Court ascertained, at the merits stage, that Libya's claim was groundless; it could have decided that,

since no sufficient case of *mala fides* or *ultra vires* had been established, there was no ground upon which the Court could possibly order interim relief; or, it could have held that no relief would be allowed at any stage of the proceedings if granting it required the Court to make a finding that a Chapter VII decision of the Security Council exceeded its lawful authority. Two of the above mentioned options postulate an implicit right of judicial review, albeit leading to opposite results, whereas the third assumes judicial restraint or abdication. The Court's choice was the second possible option, which it elected in a soft manner. The Court actually rejected Libya's request for interim protection, since, under Article 25 of the Charter,²⁴ member states are obliged to carry out decisions of the Security Council. The Court therefore considered that, *prima facie*, this obligation extended to the decision contained in Resolution 748.

Hence, the Court simply relied on the Council's resolution without explicitly addressing whether it might be *ultra vires* or not. The Security Council's action in imposing sanctions was deemed *intra vires* precisely because the majority of judges seemed to agree that, for purposes of interim measures, Article 103 of the Charter "trumped" any rights Libya might have under the Montreal Convention and thus freed the Council to apply sanctions as a suitable remedy in exercise of its powers under Chapter VII of the Charter. In a nutshell, the Court presumed the validity of Resolution 748 and therefore held that Libya's rights were no longer suitable for protection by the indication of provisional measures. The Court did not enquire into whether the said resolution was valid or invalid. It simply assumed the validity of the resolution and proceeded accordingly.

Thus, the Court rejected Libya's application for provisional relief and apparently acceded to the broad discretionary power of the Security Council. It seems however noteworthy that the Court acceded to that power not by refusing to decide, but by exercising its power of decision. As a matter of fact, both the Order and the Opinions attached therein seem to suggest that the exercise of the Security Council's power is no bar to the Court's making

its pronouncements. It was actually the particular circumstances of the case that led to a dismissal. Judges Evensen, Tarassov, Guillaume and Aguilar, in a joint declaration attached to the Court's Order *de quo*, actually expressed their complete agreement with the decision of the Court, but stressed that, before the Security Council became involved in the case, the United States and the United Kingdom were entitled to request Libya to surrender its nationals inasmuch as Libya was entitled to refuse extradition and to recall its domestic law prohibiting it. But then the said Justices pointed out that the situation was not considered satisfactory by the Security Council, which was acting, with a view to fighting international terrorism, within the framework of Chapter VII of the United Nations Charter. The Council accordingly decided that Libya should surrender the two accused to the countries that had requested their extradition.

Thus, Resolution 748 had changed the legal scenario that existed prior to its adoption. The Court was therefore fully justified in rejecting Libya's request for interim measures, which was intended to preserve the legal situation existing prior to the adoption of the resolution thereof. The said Justices therefore assessed that the Court was justified in holding that the circumstances of the case were not such as to require the exercise of its power to indicate such measures.

Acting President Oda, for its part, appended a declaration concurring with the Court's decision but expressing his view that the Court's decision should not have been based exclusively on the consequences of Security Council Resolution 748, since this suggested the possibility that, prior to the adoption of the said resolution, the Court could have reached legal conclusions with effects incompatible with the Council's actions, and the Court might in that case be blamed for not having acted sooner. However, President Oda highlighted that the essential right of which the interim protection was claimed - that of not being forced to extradite one's own nationals - was a sovereign right under general international law, whereas the subject-matter of Libya's application consisted of specific rights

claimed under the Montreal Convention. Given the principle that the rights sought to be protected in proceedings for provisional measures must relate to the subject matter of the case, this meant that the Court would in any case have had to decline to indicate the measures requested. Such a mismatch between the object of the application and the rights sought to be protected ought, in the view of Acting President Oda, to have been the main reason for taking a negative decision, which would have been appropriate no less before than after the adoption of Resolution 748.

There were some dissenting opinions, though. Judge Bedjaoui, for instance, highlighted that there existed two altogether distinct disputes, one legal, and the other practical. The former concerned the extradition of two nationals and was dealt with, as a legal matter, before the World Court at the request of Libya, whereas the latter concerned the wider question of state sponsored terrorism as well as the international responsibility of Libya, which, for its part, was being dealt with, politically, before the Security Council at the request of the United Kingdom and the United States. Judge Bedjaoui considered that Libya was fully within its rights in bringing before the Court, with a view to its judicial settlement, the dispute concerning the extradition, just as the United Kingdom and the United States were fully within their rights in bringing before the Security Council, with a view to its political settlement, the dispute on the international responsibility of Libya.

The situation should, in the opinion of Judge Bedjaoui, be summarized as follows: on the one hand, the rights claimed by Libya existed *prima facie* and all of the conditions normally required by the Court for the indication of provisional measures were fulfilled in this case, so that these rights might be preserved in accordance with Article 41 of the Statute of the Court. And it is on this point that Judge Bedjaoui expressed reservations with regard to the two Orders of the Court. But it should also be noted that Security Council Resolution 748 had annihilated these rights of Libya, without it being possible, at that stage of provisional measures, for the Court to take it

upon itself to decide prematurely the substantive question of the constitutional validity of that resolution, for which reason, the resolution enjoyed a presumption of validity. He was therefore in agreement with the Court as to this second point. At that stage of the proceedings such a “conflict,” governed by Article 103 of the Charter, resulted in any indication of provisional measures being ineffectual.

Judge Bedjaoui therefore arrived, concretely, at the same result as the Court, via an entirely different route but also with the important nuance mentioned, as a result of which he did not reject the request for interim measures but, rather, declared that its effects had disappeared. The Court, then, could have decided to indicate provisional measures in the very general terms of an exhortation to all the parties not to aggravate or extend the dispute. Judge Bedjaoui therefore regretted that the Court was unable to indicate neither specific provisional measures of the kind sought by Libya, nor, *proprio motu*, general measures, a way that would have enabled it to make its own positive contribution to the settlement of the dispute.

Judge Weeramantry, in his dissenting opinion, drew attention to the unique nature of the Lockerbie case in that it was the first time that the International Court of Justice and the Security Council had been approached by opposite parties to the same dispute. He underlined that the Security Council, in discharging its duties, was required to act in accordance with the principles of international law. In regard to matters properly before it, the Court’s function was to make judicial decisions according to the law and it would not be deflected from this course by the fact that the same matter had been considered by the Security Council. However, decisions made by the Security Council under Chapter VII are *prima facie* binding on all members of the United Nations and would not be the subject of examination by the Court. Judge Weeramantry concluded that Resolution 731 was only recommendatory but that Resolution 748 was - *prima facie* - binding. He concluded that provisional measures could be indicated in such a manner as not to conflict with Resolution 748 and

indicated such measures *proprio motu* against both parties preventing an aggravation or extension of the dispute.

Judge Ajibola, in his dissenting opinion, also regretted that the Court, by a majority decision, declined to indicate provisional measures even though Libya had established sufficient warrant for its doing so under the applicable provisions of the Court's Statute and Rules. He strongly assessed that, even if the Court concluded that such measures should be declined because of the possible effect of Resolution 748, the latter did not raise any absolute bar to the Court's making pronouncements not in conflict with it. He went on to stress the Court's powers, especially under Article 75 of its Rules, to indicate provisional measures *proprio motu*, quite independently of the applicant's request, for the purpose of ensuring peace and security among nations, and in particular the parties to the case. Thus, the Court, *pendente lite*, should have indicated provisional measures, with a view to preventing any aggravation or extension of the dispute which might result in the use of force by either party or by both parties.

Finally, Judge ad hoc El-Kosheri, in his dissenting opinion, focused mainly on the legal reasons which led him to maintain that paragraph 1 of Security Council Resolution 748 should not be considered having any legal effect on the jurisdiction of the Court, even on *prima facie* basis, and accordingly the Libyan request for provisional measures had to be evaluated in conformity with habitual pattern as reflected in the established jurisprudence of the Court. Then, he also came to the conclusion that the Court should have acted *proprio motu* to indicate measures having for effect that the two suspects whose names were identified in the proceedings should be placed under the custody of the governmental authorities in another state that could ultimately provide a mutually agreed upon convenient forum for their trial; moreover, the Court could have indicated that the parties ensured that no action of any kind would be taken which might aggravate or extend the dispute submitted to the Court or likely to impede the proper administration of justice.

All the above-mentioned opinions allow a better understanding of the Court's ruling, which was to prove an extremely remarkable one, since it reached far beyond the inherent legality of the suit brought before the International Court of Justice. It was actually the first time that a significant portion of the International Court of Justice suggested that it could exercise a power of judicial review over the Security Council's decisions in contentious cases - albeit expressing this view in separate opinions - and the majority of judges implicitly assumed to be entrusted with such a power.²⁵ They certainly assessed that the fact that a certain matter had been considered by the Security Council was no bar to the Court's jurisdiction. However, if the Court impliedly recognized a power of judicial review, it did not seem to be prepared to adopt a very stringent standard. Many of the opinions expressed by the judges are based on the "presumption of validity" of the action of the Security Council, which sounds like a very deferential standard of review.

More importantly, the Court did not go so far as to endorse a doctrine of judicial supremacy. While it suggested it might review the validity of the acts of other organs in a particular case, it did not hold that its interpretation of the Charter would be final and binding on all states and all United Nations organs in the future. This means that the Court may consider it wise to apply a presumption of validity when examining Security Council's actions but it must, when cases involving such questions come before it, make up its own mind on the matter, having recourse to principles and standards of law. Therefore, in so far as the questions before the Court are legal and the Court has jurisdiction,²⁶ it has a duty to decide the matter even though it needs examining whether another principal organ - such as the Security Council - has exceeded its powers.

2.4 Libya's case

The International Court of Justice fixed a time limit for the filing by Libya of a memorial and by the United Kingdom and the United States of counter-memorials. Meanwhile, no negotiated settlement seemed likely to take place. In both its applications, Libya had reported that – on 17 January 1992 – the Secretary of the People's Committee for Foreign Liaison and International Co-operation, had addressed letters to the Foreign Secretary of the United Kingdom and to the Secretary of State of the United States. Those letters referred to the fact that Libya had undertaken the necessary measures provided for in the Montreal Convention, whereas, despite requests to the competent British and American authorities to provide assistance to the Libyan judicial authorities, those requests had not met with any response. Thus, he had invited the United Kingdom and the United States to agree to arbitration in accordance with Article 14(1) of the Montreal Convention. Both the United Kingdom and the United States had failed to respond formally to that letter. Thus, Libya inferred that, despite its efforts to resolve the matter within the framework of international law, including the Montreal Convention, the United Kingdom and the United States had rejected this approach and continued to try to coerce Libya into surrendering the accused.²⁷ Therefore, it seemed there was no overture whatsoever for a negotiated settlement.

Libya had claimed that the Montreal Convention was the only appropriate convention in force between the parties dealing with the offences listed in Article 1,²⁸ that is to say the offences the two Libyan suspects had been indicted with. Thus, Libya always maintained that the Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie, for the following reasons: the respondents and Libya were all bound by the Montreal Convention which was definitely in force between the parties; the Montreal Convention is actually specifically aimed at preventing that type of action; the actions ascribed to the Libyan nationals

fell within the scope of Article 1 of the Montreal Convention; the system of the Montreal Convention, as compared to the system of the United Nations Charter, is both a *lex posterior* and a *lex specialis*; consequently, for matters covered by that Convention, it must *a priori* take precedence over the systems for which the Charter provides; and there was no other convention concerning international criminal law in force which was applicable to the issues at stake in the relations between Libya, the United Kingdom and the United States, as far as the incident occurred over Lockerbie was concerned.

Libya therefore contended that the United Kingdom and the United States were bound to adhere to the provisions of the Montreal Convention relating to the incident. Libya's case basically relied on the codified principle of *aut dedere aut iudicare*, which Article 7 of the Montreal Convention sets out. Besides, Libya submitted that, pursuant to Article 5(2) of the said Convention,²⁹ it was entitled to take such measures as might be necessary to establish its own jurisdiction over the above mentioned offences whenever the alleged offenders were present in its territory and were not extradited pursuant to Article 8 of the Convention. Thus, Libya argued that the United Kingdom and the United States, by their actions and threats, were attempting to preclude Libya from establishing its legitimate jurisdiction and, in so doing, they were violating Article 5(2) of the Convention. Pursuant to Article 5(3) of the Convention, Libya was instead entitled to exercise criminal jurisdiction over the matter *de quo* in accordance with its national law. Moreover, Libya contended that, under Article 7 of the Convention,³⁰ it was bound to submit the case to its competent authorities for the purpose of prosecution, which it had already done.

The United Kingdom and the United States were therefore attempting to prevent Libya from fulfilling its obligations in this respect by trying to force it to surrender the two Libyan suspects. Besides, under Article 8(2) of the Convention,³¹ extradition is subject to the laws of the state from which extradition is requested. Under Article 493(A) of the Libyan Code of Criminal Procedure, Libyan law actually prohibits the extradition of Libya's

nationals. It follows therefore, that there was no basis in either Libyan law or under the Montreal Convention for the extradition of the accused from the territory of Libya. Besides, under Article 11(1) of the Convention,³² the United Kingdom and the United States were under an obligation to provide Libya with the greatest measure of assistance in connection with criminal proceedings brought by Libya in respect of the offences listed in Article 1. Libya therefore concluded that, by failing to provide such assistance, the United Kingdom and the United States had breached their obligations under the Montreal Convention.

This was pretty much Libya's case, which was entirely based on treaty law. Were there other options, though? Maybe, Libya might have asserted its rights under general international law. Yet, it seems doubtful that the non-extradition of nationals is a peremptory norm of international law. Nonetheless, Libya might have argued that the widespread practice of refusing to extradite nationals, while not a peremptory norm of international law, was nonetheless a rule of customary law - important enough to override a command under the Charter. The Court might have viewed certain aspects of customary law, especially those dealing with the fundamental attributes of sovereignty, such as territorial integrity and disposition of state's nationals, as more fundamental than rules not directly related to state sovereignty. Should this be the case, the Security Council might actually be prevented from altering expectations built up over years of state practice.

Thus, Libya might have set-up its case and refuse to extradite its nationals by pointing to state practice on extradition. Why did it rely on the Montreal Convention instead? Perhaps, because it would seem paradoxical to rely on ordinary customary law, but not treaty law, since the latter is easier to find: it is actually written down for all to see, whereas customary law exists in the often unascertainable practice of states. It therefore seems that resort to the Montreal Convention was the wisest course of action that Libya's counsels could take. Whether this sets up a sound legal case or not,

this is a totally different question. The issue at stake was the Security Council's involvement. The United Nations political organ had not challenged the validity of the extradition system based on treaty law but had somehow "supplemented" it,³³ given the exceptional circumstances that constituted, in the Council's view, a threat to the peace. And what Libya ended up doing, was actually challenging the Security Council's authority. Yet, the latter was strenuously defended by the United Kingdom and the United States in their cases, as it is to be shown below.

2.5 Preliminary objections by the United Kingdom

The United Kingdom filed Preliminary Objections and presented them at the hearings held at the Peace Palace in The Hague between 13 and 20 October 1997.³⁴ In the Preliminary Objections, the United Kingdom asked the Court to dismiss the Libyan action at the preliminary stage. Its submissions were the following: that the Court should adjudge and declare that it lacked jurisdiction over the claims brought by Libya against the United Kingdom and that those claims were however inadmissible.

There are therefore two main stances in the United Kingdom's case: one addressing the jurisdiction of the Court under Article 14(1) of the Montreal Convention and actually claiming total lack of jurisdiction; the other, on much wider grounds of admissibility, based on the existence of overriding legal obligations under binding resolutions of the Security Council. It seems worthwhile to sum up the Preliminary Objections that the United Kingdom put forward, since they entail a number of noteworthy arguments. In respect to the Court's jurisdiction, the United Kingdom basically argued that there was no substantive dispute in any recognized sense of the term between Libya and the United Kingdom relating to the interpretation or to the application of the Montreal Convention since Libya had not been able to point to any conduct of the United Kingdom which could plausibly be considered as a violation of the said Convention; the conduct Libya

complained of was either not that of the United Kingdom at all or a conduct for which the United Kingdom carried no legal responsibility. The United Kingdom suggested that Libya was rather attempting to frustrate the exercise by the Security Council of its responsibilities under the United Nations Charter, which could hardly be depicted as a Montreal Convention matter.

Nonetheless, Libya had asked for a declaration that the United Kingdom had violated its legal obligations towards Libya under certain specified Articles of the Montreal Convention.³⁵ On its part, the United Kingdom argued not to be bound by any of those provisions, which rather set out obligations that, within the context of the Lockerbie case, utterly rested on Libya. With respect to Article 5(2), the United Kingdom argued that the said provision requires each party to the Convention to take whatever measures are necessary within its own legal system to ensure that its courts have jurisdiction to deal with an offender who is brought before them, whenever the circumstances described in the provision occur. In the United Kingdom's view, though, this does not mean that a state has to try an alleged offender. It only has to put in place the mechanism that would enable it to do so, if ever the case. Article 7 of the Montreal Convention, instead, requires a state which does not extradite an alleged offender "to submit the case to its competent authorities for the purpose of prosecution" and then provides that those authorities "shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

The United Kingdom argued that the said provision would be redundant if the requirement in Article 5(2) to establish jurisdiction was interpreted as a duty to exercise jurisdiction. Thus, the United Kingdom argued that the logical conclusion was that Article 5(2) is concerned with the creation of jurisdiction and Article 7 with the exercise of that jurisdiction. But then the United Kingdom never suggested that Libya did not establish its jurisdiction. And anyway it did not have the power of hindering Libya from doing so. Anyway, even if Article 5(2) should be interpreted as requiring the

exercise of jurisdiction, it would impose obligations only upon Libya, not upon the United Kingdom or other states. The United Kingdom submitted that a similar argument also applied to Article 5(3), which sets out that nothing in the Convention operates to restrict the exercise of existing criminal jurisdiction under national law. But then again, such a provision would not impose obligations upon the United Kingdom.

Moreover, the United Kingdom pointed out that Article 7 of the Montreal Convention requires a state in whose territory an alleged offender is found to submit the case to its competent authorities for the purpose of prosecution if it does not extradite the alleged offender. Libya had done so, which the United Kingdom did not even question. Again, no dispute existed under Article 7, which only sets out obligations on the state in which the alleged offender is found. So, whatever Libya objected about the United Kingdom's request for surrender of the two accused, this could not possibly embody a dispute under Article 7 of the Montreal Convention. Libya also relied upon Article 8(3), which specifies that the Montreal Convention requires a state, which does not make extradition dependent upon the existence of an extradition treaty, to treat offences falling within the Convention as extraditable offences. It does not, however, require a state to extradite an alleged offender in circumstances that would be contrary to the domestic law of that state. The United Kingdom maintained that it had never suggested that Article 8(3) placed Libya under an obligation to extradite the two suspects. And of course the said provision did not impose any obligation upon the United Kingdom either. Therefore, no legal dispute existed between the United Kingdom and Libya regarding the application of Article 8(3).

That left out Article 11(1) as the last provision invoked by Libya to prove that there was a dispute between the United Kingdom and Libya. Article 11(1) requires contracting states to afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences and that the law of the state apply in all cases. The basis for

Libya's claim regarding Article 11(1) appeared to be related to the fact that Libya had requested the United Kingdom to supply information relating to the charges against the accused. The United Kingdom objected that it had provided Libya with copies of the Scottish charges, the warrant for the arrest of the accused and the Statement of Facts prepared by the Lord Advocate. It had certainly declined to provide Libya with more information but there were sound reasons why Libya was not regarded as an appropriate forum where to try the two accused. The latter were actually charged with having committed offences as members of the Libyan Intelligence Service and in furtherance of the objectives of that service. Besides, once the Security Council adopted Resolution 731, there was a unanimous expression of view by the Security Council, that Libya was not an appropriate forum in which to try the two accused. Then, Resolution 748 was adopted and Libya found itself under a binding obligation to surrender the accused for trial. Once that obligation came into being, there was no question of a trial taking place in Libya. Thus, any obligation that the United Kingdom might have had to provide evidence to Libya was clearly superseded by the provisions of the said resolution.

Hereby, once the Security Council took action, the legal scenario changed completely as the United Kingdom maintained. The latter therefore asked the International Court of Justice to find that, whatever the position under the Montreal Convention might have been, the point at issue was determined by resolutions of the Security Council which bound both parties and had overriding force, from the very moment they had been adopted. Article 103 of the United Nations Charter actually provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The United Kingdom therefore argued that Article 103 creates a hierarchy of treaties and sets the Charter apart from the application of the ordinary principles regarding *lex posterior* or *lex specialis*. The United

Kingdom stressed its argument by referring to Article 30 of the Vienna Convention on the Law of Treaties, which makes provision for priority between different treaties but opens with the statement that its provisions are in any case “subject to Article 103 of the Charter.”

Besides, the United Kingdom maintained that in so far as Libya’s complaint was that the sanctions imposed upon it were unfair or unlawful and that the United Kingdom had enforced sanctions against Libya, this complaint was beyond the scope of Article 14(1) of the Montreal Convention. As a matter of fact, once a situation has been duly referred to the Security Council, the subsequent handling of that matter in the Council becomes the responsibility of the Council itself as a collective body. Therefore, decisions taken by the Council cannot give rise to a course of action against an individual state, whatever may have been the role of that state in the proceedings of the Council. Thus, if Libya had a dispute regarding the adoption and application of measures by the Security Council, the said dispute was with the Council itself and not with specific members.

In this respect, the United Kingdom maintained that Libya’s argument seemed to ignore the special position of the United Nations Charter in the international legal order and the role which the Charter entrusts the Security Council with as far as the maintenance of international peace and security is concerned. Thus, the United Kingdom stressed that the decisions of the Council were a well thought-out response to a situation the members of the Council assessed to be a threat to international peace and security; that situation did not stem from the Lockerbie case only, but arose from a much wider range of Libyan deplorable conducts; the Council was therefore simply acting within its powers in response to international terrorism against civil aviation, the latter being a subject that was well within its established field of concern. The United Kingdom actually pointed out that its approach to the Council, in the light of its criminal investigation of the Lockerbie case and of the unsatisfactory Libyan response to its requests, was very clearly made in the broader context of Libya’s demonstrated past

record as a sponsor and supporter of international terrorism. It therefore reached far beyond the alleged responsibility of two Libyan nationals for placing a bomb aboard Pan Am flight 103.

The United Kingdom's case also addressed the possibility of judicial review over the Council's resolutions and the possibility that a conflict between the International Court of Justice and the Security Council might arise in this respect. But then it stressed that what the Charter actually envisages is that the actions of the Council and the Court, each in its own sphere, should reinforce the aim of preserving, maintaining and restoring peace and security in the world. The pivotal question, then, was whether the International Court of Justice is entitled to review the determinations which the Council adopts under Article 39 of the United Nations Charter,³⁶ which the United Kingdom denied, because the Council's assessment under Article 39 is an act of discretion that cannot be judged by legal standards. Thus, it is a matter for the Security Council alone. The United Kingdom therefore took the view that Libya's invitation to the Court to review the substance of the Council's resolutions amounted to an invitation to the Court to substitute its own judgment on the matters in question for that of the Council. The United Kingdom stressed that it is for the Council to decide on the measures that are an appropriate response to a threat to the peace, breach of the peace or act of aggression. Article 39 actually speaks in terms of the responsibility to determine the existence of a threat to the peace, breach of the peace or act of aggression inasmuch as the responsibility to "make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

The United Kingdom therefore maintained that there was no foundation in the Charter for Libya's stance that there is a power of judicial review of the measures ordered by the Security Council. If such a jurisdiction existed, it would have been explicitly set out. The United Kingdom argued that it is for the Council to assess whether a threat to or a breach of the peace occurs

and to adopt the necessary measures thereby. It is also for the Council to assess whether the terms of its resolutions have been met or not. Libya however did not debate that these powers are vested in the Security Council, but then argued that the Council's powers are not without limits and cannot infringe the principles of international law. In this respect, the United Kingdom maintained that the existence of limits to the Council's power does not necessarily entail the possibility of judicial control. Those limits actually exist but they belong in the political rather than the legal sphere. One such control is the membership of the Council, which is designed to be representative of the membership of the United Nations at large. Another control is the partial rotation of the Council's membership every year. A third control consists of the responsibility that the Council owes to the membership of the United Nations at large, as is reflected, for example, in its annual reports to the General Assembly pursuant to Article 24(3) of the Charter. These are forms of control but they have nothing to do with judicial review. Thus, the United Kingdom took a strong stance in excluding any power of judicial review over the Council's decisions and in highlighting the difference between the legal and the political sphere.

For all the above, the United Kingdom insisted that Libya was under obligation of complying with the requirements that the Security Council had set out in its resolutions. As a matter of fact, Resolutions 731, 748, 883 required the surrender of the accused for trial either in Scotland or the United States. The United Kingdom specified that, unlike the subsequent Resolutions 748 and 883, which were adopted under Chapter VII,³⁷ Resolution 731 was not. Nonetheless, although the text did not say so expressly, the United Kingdom assumed that Resolution 731 was adopted under Chapter VI of the Charter, which empowers the Security Council to make recommendations for dealing with situations whose continuation is likely to endanger the maintenance of international peace and security. Resolution 731 was actually designed to allow Libya a reasonable opportunity to respond to the call made on behalf of the international

community; it was Libya's inadequate response to these requirements that prompted the Security Council to adopt Resolution 748 and 883.

The latter were adopted by the Council expressly under Chapter VII of the Charter, following determinations that the circumstances constituted a threat to international peace and security, and they specifically declared that the obligations which they imposed on states were for the purpose of implementing the Council's decisions. The said resolutions thus fell within the undertaking by each member state in Article 25 to "accept and carry out the decisions of the Security Council in accordance with the [present] Charter." This may be considered the very core of the United Kingdom's case: Article 103 of the Charter had to be read in context with other crucial provisions.

In Article 24,³⁸ member states actually confer upon the Security Council pivotal responsibility for the maintenance of international peace and security. In Article 25, the member states agree to accept and carry out the decisions of the Security Council. Chapter VII gives the Council powers of decision extending even to the use of armed force. The syllogism easily follows: member states are under a legal obligation to "accept and carry out" the binding decisions of the Council; that obligation is an "obligation under the Charter;" therefore that obligation prevails over "Member States obligations under any other international agreement." Libya was therefore bound to comply with the Council's resolutions whatever its rights and duties arising under the Montreal Convention. Thus, even though the Court accepted Libya's contention that a dispute between Libya and the United Kingdom falling within the terms of Article 14 of the Montreal Convention existed, Libya's claim would however be inadmissible. This is why the United Kingdom requested the International Court of Justice to dismiss the case at the preliminary stage.

2.6 Preliminary objections by the United States

The United States also filed Preliminary Objections to the Court's jurisdiction and to the admissibility of Libya's claim. In a nutshell, the said Preliminary Objections were pretty much the following: that the Court did not have jurisdiction to entertain Libya's claims under Article 14 of the Montreal Convention since Libya had not raised any valid claim whatsoever pertaining to the application or the interpretation of the Convention itself; that, even if Libya could make such a claim, any such claims were superseded by the relevant decisions of the Security Council under Chapter VII of the United Nations Charter, imposing different obligations. Thus, Libya's claims had rather to be seen as a challenge to the lawfulness of the Council's actions under the Charter, which could not be considered as a dispute with the United States over the interpretation or application of the Montreal Convention.

Acceptance of Libya's claims would otherwise require the Court to overturn binding decisions of the Security Council that were adopted in the exercise of its functions under Chapter VII of the Charter. Moreover, even if the Court had jurisdiction to consider those claims and considered them to be admissible, it should decline to grant the relief requested by Libya because the latter's claims had been rendered moot by the Council's resolutions. Under the United Nations Charter, the obligations created by the Council's decisions under Chapter VII actually take precedence over inconsistent obligations that might otherwise apply. Thus, should the Court decide that it had and should exercise jurisdiction, and that Libya's claims were admissible, it should resolve the case in substance at the preliminary objections stage and decide, as a preliminary matter, that the decisions of the Security Council preclude the relief sought by Libya.³⁹

In submitting its Preliminary Objections, the United States stressed the fact that Libya was allegedly one of the states that sponsored international terrorism and actually underlined that the Lockerbie bombing was not the

first time that agents or officials of the Government of Libya had been involved in acts of international terrorism followed by denial of responsibility by the Libyan regime. The United States actually mentioned the bombing of La Belle discotheque in Berlin in 1986 as an example of Libya's involvement in international terrorism,⁴⁰ according to the indictments issued by competent judicial authorities in Germany. The United States also mentioned the 1989 bombing of UTA flight 772 over Niger, which killed 171 people. Libya had denied responsibility but competent judicial authorities in France had concluded that there was compelling evidence to recommend prosecution of six Libyan intelligence operatives for the attack.⁴¹

Briefly, the United States started up their case depicting Libya as one of the states that widely sponsored international terrorism. Thus, the bombing of Pan Am flight 103 was just one out of many episodes of crazed violence that served Libya's terrorist policy. The United States therefore pointed out that the Security Council kept in mind the above-mentioned scenario when requiring Libya to cease terrorist action and surrender the alleged perpetrators of Pan Am 103 bombing for trial either in the United States or the United Kingdom. But what happened in turn, were mob attacks in Tripoli on the Embassies of Security Council Members that had voted in favour of Resolution 748.⁴² In the United States' view, the latter occurrence strengthened the fact that Libya was sponsoring international terrorism and that the bombing of Pan Am flight 103 was just one episode out of many.

The United States also pointed out that the Council, in Resolution 883, had basically reaffirmed Resolutions 731 and 748. Altogether, these resolutions established legal requirements that the Government of Libya was required to meet in order to resolve the Lockerbie impasse, which Libya had hitherto failed to do. In the United States' view, Libya's case looked like an effort to undo the Security Council's actions. Libya tried to portray itself as an aggrieved state that had been deprived of its rights under the

Montreal Convention and under general international law by the actions of the Security Council. And in so doing, it expected the Court to validate its case. The United States therefore objected that the Court did not have jurisdiction to entertain Libya's claims. Undeniably, the Court had jurisdiction over a dispute involving the interpretation or application of the Montreal Convention, but Libya had not raised any valid claim under the said Convention.

The United States considered the specific allegations Libya had submitted. Libya had alleged that the United States had violated five provisions of the Montreal Convention: Articles 5(2), 5(3), 7, 8(3), and 11. Libya basically contended that the Montreal Convention is the exclusive means by which one state may pursue criminal jurisdiction over a suspect located in another state, at least where the two states are signatories to the Convention. On this ground, Libya actually argued that the United States did not pursue criminal jurisdiction with respect to the two suspects in the Lockerbie incident through resort to the Montreal Convention. Hence, Libya inferred that the United States had violated Libya's rights under the Convention. On its part, the United States refused Libya's underlying assumption that the Montreal Convention is the exclusive means for addressing acts of aircraft sabotage. It rather maintained that the Convention is just one of many international instruments designed to create various opportunities to bring accused terrorists to justice.

And anyway, the Montreal Convention did not eliminate the United States' right to promote - through peaceful, diplomatic means - Libya's hand-over of people charged with a hideous crime. None of the provisions of the Montreal Convention actually identified by Libya prohibits, expressly or implicitly, a party from pursuing through peaceful, diplomatic means the surrender of an offender for trial. Thus, the fact that the United States had been pursuing opportunities outside the Convention in order to bring the alleged perpetrators of the Lockerbie bombing to justice could not be said to violate any rights Libya might enjoy under the Montreal Convention. Thus,

this did not seem to give rise to a dispute under Article 14 in order to found the Court's jurisdiction in this case.

The United States further contended that they had not violated any of the provisions relied upon by Libya in order to found the Court's jurisdiction. Not Article 5(2), under which, the United States and Libya were obligated to take steps to ensure that their courts, respectively, had jurisdiction over persons covered by the Convention that were either in one country or the other. The United States had actually taken such steps. Libya claimed that it had also taken such steps, but then nothing gave rise to a dispute between the United States and Libya under Article 5(2). Article 5(3) does not impose any obligation on states but simply clarifies that the Convention does not exclude criminal jurisdiction that otherwise exists in contracting states. In the United States' view, such provision was by no means violated, which gave no rise to any dispute whatsoever.

Libya had also invoked Article 7 of the Convention, which obligates a contracting state to submit for prosecution an alleged offender found within its territory or to extradite him. In this respect, the United States was fully prepared to prosecute the alleged Libyan offenders, should they be surrendered to the United States for trial. Once again, Libya had not pointed to any action by the United States that could be regarded as violating Article 7. In the United States' view, Article 8(3) was not applicable either. The latter actually required certain contracting states to recognize the offences set forth in the Convention as extraditable offences. Libya had stressed that it was not obligated to extradite the two suspects under Article 8(3) but the United States had never argued that Libya was required to do so under the said provision. The "prosecute or extradite" formula was designed to ensure that one of many possible *fora* would exercise authority to prosecute, but it did not establish a priority for doing so.

In short, in the United States' case, the only dispute between the United States and Libya seemed to concern the United States' right to promote -

through diplomatic means - Libya's hand-over of the two alleged perpetrators of the Lockerbie bombing. The Montreal Convention does not deny any such right. The said right has actually nothing to do with profiles of interpretation or application of the Montreal Convention, and therefore was not properly brought before the International Court of Justice under Article 14 of the said Convention. In its pleadings, Libya also claimed that the United States had violated Article 11 of the Montreal Convention, which provides that contracting states shall afford one another the greatest measure of assistance in connection with criminal proceedings. Yet, Article 11 does not specify the sort of assistance that needs being afforded. In this respect, the United States submitted that it had satisfied the general obligation imposed under Article 11 by transmitting to Libya copies of the indictment of the two Libyans, which provided detailed information regarding the facts underlying the charges and the United States laws that had been violated. The United States added, though, that Article 11 could not be viewed as obligating the United States to provide further information and disclose more evidence.

Hence, the United States' conclusion was that no dispute existed between the parties regarding the interpretation or application of the Montreal Convention. On their part, the United States had simply sought to exercise its own national criminal jurisdiction without reference to the Montreal Convention, as Article 5(3) of the Convention makes clear it is permitted to do. Undeniably, the United States had criminal jurisdiction to prosecute the two Libyans involved in the bombing of Pan Am flight 103 over Lockerbie, because of the nationality of the aircraft and the nationality of many of the victims of the onslaught. In the exercise of that jurisdiction, the United States was certainly entitled to seek custody of the two alleged offenders. Hereby, the core issue in the Lockerbie case had nothing to do with Libya's rights under the Montreal Convention. It rather concerned the right of the United States under general principles of international law to pursue a diplomatic initiative for the surrender of the suspects for trial.

And obviously, the United States had the right, under the United Nations Charter, to bring situations, which might lead to international friction, to the attention of the Security Council and of the General Assembly pursuant to Article 35(1) of the United Nations Charter. The United States stressed the fact that their ability to seek surrender for trial was not affected by the Montreal Convention, which simply imposes an obligation on contracting states to surrender for trial or submit to national prosecution alleged offenders who are in their territory.

The core of the United States' case was that the Montreal Convention represents one important means to be used in the struggle against international aviation terrorism but not the only one. Libya's antithetical theory, if correct, would preclude resort to other sources of law for addressing this problem, as well as preclude resort to international *fora* where the issue could as well be discussed, a result that not only sounded inconsistent with the language of the Montreal Convention, but also looked at variance with its fundamental object and purpose.

Anyway, even if Libya had a valid claim under the Montreal Convention at the outset, any such claim had been superseded by the binding decisions of the Security Council. The latter were taken under Chapter VII of the Charter in response to Libya's support for terrorism and its suspected involvement in the Pan Am 103 onslaught. The United States stressed that those resolutions were adopted by a proper majority of the Council and were legally binding on all members of the United Nations under the Charter. As such, they prevailed over any allegedly inconsistent obligations under the Montreal Convention. Therefore, in the United States' view, the Court could accept Libya's claims only if it was prepared to second-guess and overturn the Security Council decisions. Yet, the Court had no authority to overturn or modify the said decisions, and certainly had no authority to overturn the Council's determination under Chapter VII that a threat to the peace had occurred, or its choice of measures to deal with that threat.

In any event, the Council's decisions in the present case were clearly lawful and were abundantly justified by the circumstances. Therefore, the relief requested by Libya would be incompatible with the role of the Court, and in any event Libya had no standing to make such a request. Accordingly, Libya's claims were labelled by the United States invalid and inadmissible. What the Council did when adopting the above-mentioned resolutions was well within its powers under the Charter. And the Court, when faced with a challenge to Security Council decisions adopted under Chapter VII, can do nothing else but acknowledging the Council's authority to adopt such decisions. Accordingly, the United States submitted that the Court should find Libya's claims to be inadmissible or in any event should decline to exercise jurisdiction over them.

The United States further contended that any judgment by the Court in favour of the rights asserted under the Montreal Convention could have no lawful effect on the rights and obligations of the parties in light of the Council's binding decisions, and would, therefore, not be within the Court's proper judicial function. Besides, the validity of Security Council actions can only be addressed in the context of a proper request for an advisory proceeding, not by way of a contentious proceeding between two states. The questions posed by Libya's claims actually involved fundamental ones regarding the allocation of powers under the United Nations Charter. As such, they could not be viewed as incidental to the Court's limited jurisdiction relating to the interpretation or application of the Montreal Convention. And certainly Libya lacked the capacity to contest the validity of the Council's resolutions.

Besides, Libya could not show that it had any legal right or interest infringed by the United States as the result of the Security Council's adoption of those resolutions. Libya was legally bound to comply with the latter, rather, under Article 25 of the Charter. Thus, no claim of rights or obligations under the Montreal Convention could relieve Libya of its duty to carry out the Council's decisions. The United States also addressed Libya's

argument that the said resolutions went beyond the scope of the Council's powers under the Charter. But then, the Charter gives the members of the Security Council the responsibility for determining which measures are required to maintain or restore international peace and security. Once the Council has made a decision under Chapter VII, an individual member of the United Nations cannot refuse to comply because it claims to disagree with the decision. The obligation to comply with Security Council decisions applies equally to decisions affecting the rights and to those affecting the obligations of states.

The United States also stressed that Libya attempted to depict the Security Council's actions as procedurally flawed. It actually contended that Article 33 of the Charter required the parties to a dispute to seek peaceful settlement through the various means listed in that Article. Only after such means are attempted and exhausted can the Security Council act. The United States argued that Libya's reading of the Charter was unacceptably narrow. The Council adopted Resolutions 748 and 883 under Chapter VII. In so doing, the Council was acting to maintain or restore international peace and security. Now, the Charter does not require in such a situation that the parties to the dispute work their way through the steps of Chapter VI before the Council can act. In the United States' view, it would actually cripple the Council's ability to carry out its Chapter VII responsibilities to protect peace and security if, each time it faced a threat to or breach of the peace, it had to wait for the parties to exhaust the means of peaceful settlement beforehand. Libya's other claim was that the Council could only act on the basis of fully demonstrated facts, which was not the case as far as the Lockerbie affair was concerned. In this respect, the United States submitted that this is not what the Charter requires. Given its functions and powers, the Security Council must make vital decisions in evolving and complex disputes and often needs acting rapidly.

Libya also complained that it was wrong for the United Kingdom and the United States to take part in the Council's voting on these matters. Libya

contended that none of these countries should have voted when Resolution 731 was unanimously adopted, and that doing so somehow invalidated Resolution 731 and the subsequent Chapter VII resolutions. But then, in the United States' view, the attack on Resolution 731 inexorably failed. The language of Resolution 731 and the circumstances of its adoption showed that the Council sought to address a situation within Articles 34 and 35 of the Charter, not a dispute under Article 27(3).⁴³ The Council was actually concerned by the broad problems of terrorism and of attacks on aircraft. Libya's suspected involvement in aircraft sabotage was therefore addressed as part of a broader situation. In any case, Libya's claim would not entail legal consequences, since questions regarding voting on Resolution 731 could not affect the validity of the Council's subsequent actions under Chapter VII. In adopting Resolutions 748 and 883, the Security Council had concluded that Libya's alleged involvement in acts of terrorism inasmuch as its unsatisfactory responses constituted a threat to international peace and security. Besides, in the United States' view, Libya's complaint that the Security Council itself had acted unlawfully was not a claim under the Montreal Convention and could therefore not fall within the Court's jurisdiction.

This left out Libya's assertion that Resolution 748 was invalid and its request that the Court reviewed and overturned that decision. The United States' stance in this respect was quite clear: should such second-guessing occur, the existing relationship between the Court and the Council would be dramatically altered, to the detriment of both institutions. If the Council's decisions under Chapter VII concerning the existence of a threat to peace, and the measures to be adopted to deal with such a threat were subject to review and reversal by the Court, then the work of both the Court and the Council could be seriously compromised. The viability of the Council's decisions under Chapter VII actually rests in very large part on their acceptance by states as binding decisions of the United Nations which must be promptly complied with. In particular, review of such decisions by the

Court could be expected to take years, during which period the validity and effectiveness of Council decisions would be crippled. In practice, the United States reached to the core of the relationship between the Court and the Security Council by highlighting that the decisions made by the Council under Chapter VII are essentially political in character and not reviewable pursuant to judicial standards.⁴⁴ For all the above mentioned, the United States asked the International Court of Justice to dismiss the case at the preliminary stage.

2.7 The World Court addresses Preliminary Objections

It was not before 1998 that the International Court of Justice eventually addressed the Preliminary Objections filed by the United Kingdom and the United States. The Court adopted its ruling after hearing the parties' presentations and Libya's response. Its judgment was delivered on 27 February 1998. In a nutshell, the United Kingdom and the United States had both contended that the Court did not entertain jurisdiction under Article 14(1) of the Montreal Convention since no dispute between the parties had ever arisen under the said Convention. They also argued that, even if the Montreal Convention did confer on Libya the rights it claimed, those rights were superseded by Security Council Resolutions 748 and 883. The latter, by virtue of Articles 25 and 103 of the United Nations Charter, had priority over all rights and obligations arising out of the Montreal Convention or any other treaty. The United Kingdom and the United States had therefore argued that the only dispute which existed from the very moment the said resolutions had been adopted was between Libya and the Security Council; quite obviously, this was not a dispute falling within the terms of Article 14(1) of the Montreal Convention.

They further contended that it was not for the Court to review the Council's decisions. On this basis, the United Kingdom and the United

States maintained that the Court should exercise its power to declare that it lacked jurisdiction and that Libya's application was however inadmissible. Both the United Kingdom and the United States sought to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the Court was requested to assess something more: on the one hand, it was requested to deliver a decision establishing that the rights claimed by Libya under the Montreal Convention were incompatible with its obligations under the Security Council resolutions; on the other hand, it was requested to deliver a decision that those obligations prevailed over those rights by virtue of Articles 25 and 103 of the Charter. This is what the decision not to proceed to judgment on the merits would actually postulate.

Yet, the Court upheld Libya's submission arguing that the only relevant date for determining whether it had jurisdiction or not was that of 3 March 1992, that is to say the very date when Libya filed its application. In accordance with its jurisprudence,⁴⁵ if the Court had jurisdiction on that date, it would continue to do so, no matter what happened afterwards. The Court actually assessed that the coming into being of Resolutions 748 and 883 could not affect its jurisdiction, once established. In fact, the said resolutions could not affect the admissibility of the application either. Once again, the only relevant date was that of 3 March 1992. As to Resolution 731, adopted before the filing of the application, it could not form a legal impediment to the admissibility of Libya's claim because it was a mere recommendation without binding effect. Consequently, the Court declared that Libya's application could not be held inadmissible on these grounds, as both the United States and the United Kingdom had sought in their Preliminary Objections. Nor the line that there was no dispute between the parties was attenable.

As already reported, both the United Kingdom and the United States had maintained that the destruction of Pan Am aircraft over Lockerbie did not give rise to any dispute whatsoever between the parties regarding the

interpretation or application of the Montreal Convention, and that, for that reason, the Court did not entertain jurisdiction under the said Convention. Yet, the Court did not uphold the line of argument thus formulated and assumed that it had jurisdiction on the basis of Article 14(1) of the Montreal Convention, on the lawfulness of the actions criticized by Libya, in so far as those actions would be at variance with the provisions of the said Convention. The parties actually differed on the question whether the destruction of the Pan Am aircraft over Lockerbie was ruled by the Montreal Convention or not. In the view of the Court, this embodied a proper dispute⁴⁶ between the Parties as to the legal régime applicable to the event at issue. Such a dispute actually concerned the interpretation and application of the Montreal Convention and, in accordance with Article 14(1) of the Convention, fell to be decided by the Court. More precisely, the Court assessed that several disputes existed: first, on the Convention's applicability to the Lockerbie case; secondly, on the alleged right of Libya itself to prosecute its nationals, according to Article 7 of the said Convention; thirdly, on the alleged lack of assistance by the respondents to the Libyan prosecution, in terms of Article 11 of the Convention.

There remained the claim that the Security Council resolutions would have rendered the case without object and therefore the Court was required not to proceed in the merits. The Court rather determined that the argument that the decisions of the Security Council could not form the subject of any contentious proceedings before the Court would not preclude any consideration by the Court of the claims submitted by the applicant, for the very simple reason that Libya's rights on the merits would not only be affected by a decision not to proceed to judgment on the merits but constituted, in many respects, the very subject matter of that decision. In fact the Court accepted Libya's argument that the fact that the Council's resolutions had rendered the case without object was not exclusively preliminary in character. Thus, the Court assessed that it would consider it at a different stage of the proceedings pertaining to the merits of the case.

Libya had actually argued that the above-mentioned objection entailed the pivotal question pertaining to the possibility of judicial review over the political organ's decisions.

Thus, the Court rejected the Preliminary Objections to its jurisdiction and the admissibility of Libya's application as set forth by the United Kingdom and the United States and found that it had jurisdiction, pursuant to Article 14(1) of the Montreal Convention, to hear disputes pertaining to the interpretation or application of the said Convention. It then found Libya's application admissible. The Court therefore upheld its jurisdiction and deemed the relationship between the Montreal Convention and the Council's resolutions as a matter which utterly fell within its jurisdiction. In so doing, it therefore interpreted its jurisdiction broadly, as to encompass not only the rights and duties of the parties pursuant to the Montreal Convention, but also the relationship between the Convention and subsequent Security Council's resolutions. Once again, the International Court of Justice held that the determinations of the Council were no bar to its jurisdiction.⁴⁷ The simple fact that the Council was a political organ *per se* did not entail a limitation of the Court's power. Though cautiously, the Court kept assessing its power inasmuch as it had done in its Order of 14 October 1992 rejecting Libya's request for interim protection. At the preliminary stage, the Court therefore assessed that it entertained jurisdiction and that the Council's action could fall under the Court's scrutiny if a case was properly brought before the Court. This actually seemed to be the case in Lockerbie.

2.8 The Court and the Council within the U.N. system

Hence, the Court refused to hold the view taken by the United Kingdom and the United States that no judicial scrutiny was allowed over the political organs' acts. The Court's stance sounds reasonable. In most states'

legal systems, a mechanism of judicial review resolves disputes about the scope of legislative acts and underlies a philosophy of checks and balances that should enlighten the relation between the highest institutions, which are in charge of the state's powers. In the United Nations system, the fact that Article 92 of the Charter labels the International Court of Justice as the "principal judicial organ" seems to vest it with a power of judicial review. Nonetheless, the Charter does not explicitly authorize its principal judicial organ to review the validity of acts by other branches of the United Nations. *Quid iuris*, then, if the Court has to deal with a Council's decision which is not consistent, for some reasons, with the Charter? Is the Court entitled to declare a Council's decision illegal in a specific case?

Judicial review of a Council's action by the Court, in the sense of the Court expressly declaring a Council's decision to be beyond the Council's powers, would be very far-reaching. In fact, it would be a declaration as to how far the Security Council can go, in taking action for the maintenance of international peace and security. In a sense, the legal constraints would be opposed to the political aims, in the exercise of power by the Council. Obviously, the possibility of judicial review would imply acceptance of certain higher norms and values, which the international system should recognise as constraining international institutional action. Possibility of judicial review by the Court would indicate an institutional mechanism through which aggrieved states can obtain an objective determination of when those values and norms are threatened by the main organ that the international community has entrusted with maintaining peace. Thus, judicial review would turn out to be crucial to a United Nations system that strives for universal adherence to agreed principles of international law. Can those principles shape the reasons of politics, though?

The Lockerbie case actually raised the question whether the United Nations Charter and the World Court's Statute support any form of judicial review over political decisions adopted by the Security Council.⁴⁸ In a way, the core of the issue is whether law can limit politics and if there are legal

standards that have to drive political actions. Should the Court rule in favour of Libya's application, it would actually outlaw the Council's resolutions. As a matter of fact, the United Nations Charter empowers the Security Council to make decisions which are binding on all states. Article 24(2) specifies that this power is limited by the "purposes and principles of the United Nations," which certainly do include compliance with international law. Yet, it does not clarify whether the International Court of Justice can review Council's decisions for conformity to these "purposes and principles."

However, Chapter VI, which contemplates recommendations (as opposed to binding decisions) by the Council and the Assembly for the peaceful settlement of disputes, does envision some role for the Court. Actually, Article 36(3) provides that, in making recommendations, the Security Council "should also take into consideration that legal disputes should, as a general rule, be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." The said provision, however, falls far short of an explicit power of judicial review over Security Council and General Assembly recommendations for peaceful settlement of disputes. It mainly points out the fact that the Security Council and the Court should deal with different issues, the former being a political organ and the latter a judicial one. Chapter VII, which empowers the Security Council to either make recommendations or decide on measures necessary to maintain peace and security, says nothing about any role for the Court in reviewing Council's resolutions. Indeed, it does not mention the International Court of Justice at all.

The only part of the United Nations Charter that deals with the Court in any detail is Chapter XIV, entitled the "International Court of Justice,"⁴⁹ but once again no provision whatsoever addresses judicial review. Thus, the fact that the International Court of Justice is considered the principal judicial organ of the United Nations simply does not resolve the issue one way or another.⁵⁰ In sum, neither the Charter nor the Court's Statute

clearly indicate whether the Court has the power of judicial review and certainly do not indicate how thorough such review might be. Thus, it might be inferred that the Court lacks any power of judicial review. Equally, however, there is nothing that expressly prohibits such review. In this perspective, Libya's application was rather challenging. It was actually the first time ever that a state had requested the Court to rule against the Security Council. Yet, Libya did not challenge the United Nations' political organ *par excellence* directly. It rather sued the United Kingdom and the United States. And this turned out to be an element of weakness in Libya's case.

However, it is undeniable that the Court's jurisdiction extends to any question of international law, while its advisory jurisdiction covers any legal question. It is clear from Article 36 of the Court's Statute that the Court is empowered to consider any question of international law, in so far as it has jurisdiction to decide the case before it. Thus, if there are questions in law as to the competence of the Security Council to act in a particular manner, or as to its competence to affect the rights of a state in a particular case, those questions are not excluded from the legitimate consideration of the Court, when occasions arise to determine what those rights are. And this was actually the stance that the Court took in *Lockerbie*, at the preliminary stage.

Quite obviously, the legitimacy of the Council's resolutions turns out to be a fundamental issue. Actually, the applicant state might argue that the Council's resolutions are outside its powers and not in accordance with the purposes and principles of the Charter, which would make Article 103, according to which the Charter always prevails on treaties, inapplicable. This was actually one of the issues at stake in the *Lockerbie* case and obviously one of remarkable sensitivity. The discussion of limitations on the Security Council's ability to intervene, of the possible invalidity of Security Council's resolutions, and of judicial review, reaches to the very core of the functioning of the United Nations system: the obligations of member states

to comply with Security Council's resolutions under Article 25 of the Charter. If the Court deems that compliance with a Security Council's resolution violates international law, such a decision may invite or oblige non-compliance. Of course, it may be argued that any behaviour sanctioned by a Security Council resolution enjoys a presumption of legality and this was the way the Court ruled when rejecting Libya's request for interim protection. It actually presumed the Council's decisions to be *intra vires*. Yet, this presumption should not prevent a member state from invoking the manifest illegality of a resolution and concurrently the Court to be able to charge the Security Council with having abused its power in a manner sufficiently gross and evident to defeat the obligation of obedience mandated under Article 25.

Hereby, the question that arises is whether the Council is competent to affect the rights of a state in the way that it has sought to do in the Lockerbie case. This is a pivotal question of international law, the answer to which may be determinative of the rights of a state in any particular case before the Court. Thus, it seems very important to determine whether the Security Council is subject to international law, as Libya tried to submit. In fact, the question proves broader and involves a wider issue: whether international politics and the action of political bodies within the United Nations system are bound by international law. If this is the case, questions about the validity of the Council's decisions are clearly legal questions and accordingly subject to review, provided that the other requirements of the World Court's Statute are satisfied. If this is the case, Libya's case does not look that far-reaching any more. It was in Libya's own right to seize the Court and also to implicitly challenge the Security Council's policy as subsequent to Pan Am 103 bombing.

Speculating about the legitimacy of the course of action taken by the Security Council in the Lockerbie case makes it necessary to identify the scope of the Council's power within the United Nations framework. The purposes of the United Nations, as set out in Article 1 of the Charter,⁵¹ are

to maintain international peace and security, develop friendly relations among nations, achieve international cooperation in solving problems of an economic, social, cultural or humanitarian character, in promoting human rights, and in being a centre for harmonising the actions of states in attaining these ends. Of these many purposes, which are certainly interrelated, the maintenance of international peace and security occupies a pivotal place. As a matter of fact, peaceful settlement may be achieved through litigation inasmuch as through political tools. This is certainly a pivotal role for the Security Council, as set out by Chapter VI of the Charter, which is wholly concerned with the pacific settlement of disputes.

Under Article 34 of the United Nations Charter, the Security Council may investigate “any dispute or any situation which might lead to international friction or give rise to a dispute,” while consultations through bilateral arrangements or regional institutions provide a way of avoiding disputes which do not need to reach the judicial stage. The specialised role of the Security Council receives further emphasis in Article 33(1), which provides that the parties to a dispute shall first of all seek a solution by negotiation or some other peaceful means of their own choice, and Article 52(2), which provides that members of regional arrangements or agencies “shall make every effort to achieve pacific settlement of local disputes” through such arrangements or agencies, before referring them to the Security Council. In a sense, just disputes which have become “serious” are the subject matter of the Council’s concern. However, it is worth noting that, despite these priorities, the Council has the right to recommend appropriate procedures or methods of adjustment - under Article 36(1)- at any time.⁵²

Furthermore, the Council can consider a matter at the request of the General Assembly, a member state or the Secretary-General, whether or not the states involved consent to its doing so. The Council’s authority to consider a dispute, unlike that of the International Court of Justice, does not depend on the consent of the state concerned. Actually, the Security Council, on its own initiative, may investigate any dispute or situation that

might lead to international friction, or give rise to a dispute, to determine whether its continuance is likely to endanger the maintenance of international peace and security. Besides, Article 35(1) of the Charter enables any member of the United Nations, not only the parties to the dispute concerned, to bring to the Council's attention any dispute or situation referred to in Article 34. It seems noteworthy that, in deciding whether it should take a matter up, the Council is free to adopt a broader conception of an international dispute than might be acceptable in a judicial forum. When this is combined with the authority under Article 34 to act in "any situation which might lead to international friction," as well as in disputes, it can be seen that the Council's jurisdiction can be extended to virtually all matters of international competence.

Finally, if the provisions of Chapter VII are read alongside those of Chapter VI, it is evident that a dispute or situation which leads to an actual "threat to peace, breach of the peace or act of aggression," activates the provisions of the Charter concerned with political and military sanctions. As a result, the Council's authority in the field of dispute settlement, unlike that of the International Court of Justice, is complemented by powers of enforcement in the very circumstances in which they are most likely to be needed. This makes the Council's potential particularly significant and its action more likely to achieve the ends it is designed for. Thus, the involvement of the Security Council is the most relevant way of achieving a possible settlement at a political level, whenever an international crisis occurs.

This is why the United States and the United Kingdom looked for the Council's support and involved the United Nations. And then they were able to claim that even though they had proposed drafts, it was the Security Council, as a collective body, that had adopted the resolutions applying sanctions. In so doing, the Council had actually addressed an issue that reached beyond Pan Am flight 103 downing and pertained to Libya sponsoring international terrorism. Thus, the United Kingdom and the

United States maintained that they did not carry any specific responsibility whatsoever. Indeed, when they had started applying economic and diplomatic sanctions and tightening the noose around Libya, all they were doing was “just” complying with the Council’s resolutions,⁵³ as all United Nations member states are bound to do under Article 25 of the Charter. Yet, the question remained whether what the Council had decided might be reviewed and possibly quashed by the judicial organ or if the Council’s say was to be final and undisputable.

2.9 The International Court of Justice and judicial review

Both the United Kingdom and the United States maintained that the political organ should deal with political matters and the International Court of Justice with legal ones, their respective jurisdiction being different and separated. The Court’s function is to decide disputes in accordance with international law⁵⁴ and its proceedings are legal ones, whereas the Security Council does not need to apply international law in recommending “such terms of settlement as it may consider appropriate;”⁵⁵ and certainly it is not bound by judicial proceedings. Yet, drawing a line between what is political and what is legal may turn out to be extremely difficult, if ever possible.⁵⁶ As a matter of fact, most international disputes are complex and multifaceted. Thus, they do often raise both political and legal issues. That is why the International Court and the Security Council may well face problems of overlapping jurisdictions.

Therefore, it is important to assess whether, when a case is properly before the Court, the latter may exercise judicial control by holding the action of the Security Council to be illegitimate. This is what Libya expected the International Court of Justice to do, in the Lockerbie case. It is also important to assess whether the Court’s competence is affected, if the Council is dealing or has already dealt with a given dispute. The Court

certainly has jurisdiction only with respect to disputes that are legal in nature. Moreover, in exercising its advisory function, as well as in deciding contentious cases, the Court has to deal only with the legal questions actually put before it and may not, without necessity, express its views on wider issues. The function of the International Court of Justice, like that of other judicial bodies, is not to prevent disagreements from escalating, nor to alleviate situations of on-going tension, but to intervene only when called upon to resolve a particular crisis in the parties' relations, which may be deemed legal in nature. Thus, whenever international disputes do not raise legal issues, they do lie outside the Court's formal competence.

In the *Lockerbie* case, Libya raised an issue that it deemed legal in nature. As a matter of fact, it called for the Court to interpret the scope of the Montreal Convention and ascertain Libya's rights thereunder. The respondents, on the other hand, considered the dispute to be political in nature and assumed that the Court had no jurisdiction whatsoever. As already reported, the core question was whether there are any legal limits to the power of the Security Council, especially when it is acting under Chapter VII of the Charter, as it explicitly did when adopting Resolutions 748 and 883. The key, then, is to distinguish determinations calling for political appreciation from those involving legal standards. For Libya, the issue before the Security Council was a purely legal dispute arising over a conflict of jurisdiction and a request for extradition. The United Kingdom and the United States instead contended that, if indeed there was a dispute, it could not be reduced to a legal dispute involving a bilateral question of treaty interpretation. On the contrary, it was a fundamental political controversy over terrorism and hence it raised a multilateral problem involving the maintenance of peace.⁵⁷ The United Kingdom and the United States argued that a decision by the Council under Article 39 that a situation constitutes "a threat to peace, breach of the peace or act of aggression" is not reviewable and that the same holds true of a decision as

to whether a certain measure is likely or necessary to restore or maintain peace.

As a matter of mere common sense, though, there must certainly be some legal limits to the power of the Security Council, even in the area of maintaining international peace and security. Actually, the Security Council is not a sovereign authority. The Security Council is an organ of limited membership and the members of the United Nations through the Charter confer its powers on it.⁵⁸ Yet, for the Court to be able to cast doubt on the validity of Council's decisions, there must be legal standards that the Court can apply. The United States and the United Kingdom maintained that the limits that bind the Security Council's action are political in nature. It would actually be detrimental if the Council were bound by legal standards. Nonetheless, it seems unconceivable that the Council is not bound to legal limits, although identifying such limits is not an easy task. Chapter VII of the Charter confers very broad powers on the Council. Article 39 gives the Council the discretion to make determinations as to whether an act or situation constitutes a threat to peace, breach of the peace or act of aggression. Once that determination is made, the door is then open to the Council to take decisions, for the purpose of maintaining or restoring international peace and security. However, the Charter seems to support the contention that the power of the Security Council is not unlimited.

As already recalled, the main limitation on the powers of the Security Council is the duty to act in accordance with the purposes and principles of the United Nations Charter. Nonetheless, the purposes of the United Nations are very broad goals that the organization is set up to achieve and the principles to be observed in achieving those goals are, for the most part, directed at the conduct of member states and not the Organisation. Nevertheless, there are specific limitations in the provisions of Articles 1 and 2 of the Charter that circumscribe the powers of the whole Organisation and the Security Council's powers are no exception.

The first possible limit on the power of the Council under these provisions is a duty on the part of the Council not to violate general international law, unless the Charter specifically allows it do so. Article 1(1) of the Charter provides, as one of the purposes of the United Nations, that international disputes or situations which might lead to a breach of the peace, may be settled or adjusted in conformity with the principles of justice and international law. The contention, then, is that, in exercising its responsibilities, the Security Council is bound to act in accordance with international law and may not disregard or derogate from it, unless the Charter specifically allows it to do so. Actually, it would be unacceptable that sovereign states had set up an organization equipped with broad power of control and sanction over themselves, being it exempted from the duty to comply with the Charter through which it was created and to respect international law.

Yet, it might be argued that the Security Council is capable of affecting the rights of the states under international law when it is acting under Chapter VII, because Article 103 of the Charter provides that, when the obligations of member states under the Charter are in conflict with a treaty, the Charter obligation is to prevail. This was actually the case in *Lockerbie*, where any possible rights Libya could have claimed under the Montreal Convention seemed to be trumped by its duty to comply with the Council's resolutions under Chapter VII of the Charter. Thus, the pivotal question for consideration that arose in the *Lockerbie* case was whether the Court might second-guess the decision of the Security Council under Article 39, that a particular situation constitutes a threat to the peace, breach of the peace or act of aggression. This is the determination that opens the way to the Council's power under Chapter VII. In the *Lockerbie* case, Chapter VII was actually invoked as the very basis of Resolution 748 and 883.

The United Kingdom and the United States maintained that the determination under Article 39 is one entirely within the discretion of the Council. The philosophy behind the said stance is that the Charter gives the

discretion to make the determination of the existence of a threat to the peace, breach of the peace or an act of aggression to the Security Council and that no one else is allowed to second-guess the Council's understanding of a certain situation. It can be contended that the question whether a certain state of affairs is a threat to the peace, breach of the peace or an act of aggression cannot be answered by recourse to legal reasoning, as there are no legal standards by which to reach such decision. The latter inevitably entails a political decision as to factual matters and apparently is in no way constrained by legal considerations.

Nonetheless, the Security Council is bound to the observance of *jus cogens* norms. These norms are peremptory norms of international law and by definition they cannot be derogated from. They are overriding norms of the international legal order and they supersede all other norms. Any Security Council's decision in conflict with a norm of *jus cogens* is necessarily to be without effect.⁵⁹ Thus, the powers of the Security Council are not to be deemed unlimited in legal terms. The question that arises is exploring what might happen, should the Council exceed its powers. As a matter of fact, to say that there are limitations on the power of the Council does not necessarily entail that the question whether those limits have been exceeded can be judicially determined. This was a crucial issue in the Lockerbie case. Had the Council exceeded its inherent limits, was the International Court of Justice entitled to check it? And how?

The problem is then considering the effects of the Court's possible assessment of invalidity of the Council's decisions. Is an invalidated act void *ab initio* - as though it had never been passed - or instead it does not produce effects for the parties to that suit, but no one else is bound? In other words: should the international community accept a doctrine of judicial supremacy under which the holdings of the Court are binding on all other organs of the United Nations in all future cases? Or should it accept a doctrine of concurrent review, that no organ of the United Nations has the final say on the interpretation of the Charter and that a decision of the

Court must be respected in the case that it resolves, but not necessarily in future cases? Advisory opinions are of course advisory only, and do not have binding effects. Therefore, any determination in an advisory opinion that a Security Council decision is *ultra vires* and invalid would not be binding neither on the organ concerned nor on states. Such a decision in a contentious case, however, raises an important issue. Actually, Article 59 of the Statute of the World Court states that the decision of the Court in any particular case has no binding force except between the parties and in respect of that particular case. The effect of this provision is to remove the possibility that any decision of the Court declaring that a Security Council's resolution or action is invalid would be binding on the Security Council or even on states that are not parties to the litigation and cripple the political organ's action.

Finally, it also seems noteworthy that the importance of any Court's assessment declaring a Security Council's decision to be *ultra vires* would not lie only in its legal effect. The most important effect of any such decision would be the fact that it would undermine the legitimacy of the Council's course of action. Any state seeking such a decision would probably be more interested in the "public relations effect" of the decision of the Court than in its legal effect. Such a state would be using the Court to mobilise world opinion in support of its cause. A decision of the Court that a certain resolution or decision of the Security Council is invalid or beyond its powers would undermine the legitimacy of that decision and weaken its claim to compliance. Any decision of the Court, be it in a contentious case or in an advisory opinion that a Security Council's decision is illegal, would encourage unwilling states not to comply with such resolution and would serve the cause of strengthening disrespect for the resolution. This is the effect that a state or organ seeking a pronouncement on the illegality of a decision might want to achieve. This was certainly the aim Libya was pursuing by activating the Court's power and claiming for provisional measures. If the Security Council's course of action were labelled as invalid

or illegal, no state would be bound to apply mandatory sanctions against Libya in order to comply with the Council's resolutions. And the world's support for the aggrieved state would increase.

2.10 Conclusion

Hence, in the Lockerbie case, the International Court of Justice extended its jurisdiction pertaining to the interpretation or application of a specific multilateral instrument such as the Montreal Convention to far-reaching and fundamental questions of general international law and United Nations Charter law. In so doing, the Court did not avoid the question of the primacy of the Security Council resolutions over the Montreal Convention. Despite the Court's apparent acceptance of the binding force of Resolution 748, the Court actually held that, at the merits stage, it might question its validity. This means that the Court did not regard itself as precluded from questioning the validity of a Council resolution in so far as it affects the legal rights of states.

Nonetheless, many interpreted the Court's attitude as too deferential and inferred that the reasons of law had been totally overwhelmed by politics. In a way, it was argued that the only superpower in the United Nations framework was the Security Council and even though no hierarchy between the political organ and the judicial organ was established anywhere in the Charter, yet, the Court had played an ancillary role and simply ratified the political organ's course of action. True, the Security Council is a political organ and adopts political decisions, as both the United Kingdom and the United States kept stressing in order to prove their case and exclude any power of judicial review over the Council's action. But this does not entail that the Council can dispose of questions of legal rights with any finality. The fact that the Council is a political organ leads rather to the opposite conclusion.

At the very core of the case brought by Libya before the International Court of Justice there was a matter of extradition. The United Kingdom and the United States did not trust Libya's investigations and feared sham trials. Thus, they insisted on extradition in order to exercise their own jurisdiction on the alleged perpetrators of Pan Am 103 bombing. The Security Council supported their stance and, without denying Libya's sovereign rights, it accepted that Libya could not be relied upon for the very simple reason that the two alleged perpetrators of the Lockerbie bombing were supposed to be officials of the Libyan Government. The general principle – *nemo iudex in causa sua* – makes a country unable to judge its own citizens when they are supposed to be governmental officials, since nobody can be a party and a judge in the same trial.

The Security Council therefore upheld the stance taken by the United Kingdom and the United States and supported their request of extradition, acknowledging their right of trying the suspects instead of Libya, the former on the basis of the principle of territoriality and the latter on the basis of the principle of passive personality. The United Kingdom was actually the country where the alleged crime was perpetrated and the United States was the country where the aircraft was registered inasmuch as the national state for most of the victims. Thus, it made sense that the alleged perpetrators of the bombing were tried within their national jurisdictions. The Council therefore took a legal stance as far as extradition was concerned. Hence, the issues that the Security Council addressed in adopting its resolutions cannot be considered utterly political in nature.

This is why Libya's claim that its dispute with the United Kingdom and the United States was a legal one does not sound groundless at all. Of course, it was also political in nature. But not only that. Where the Council decides under Article 39 of the United Nations Charter that Chapter VII applies, and in addition decides that a certain state has to accept responsibility for an onslaught and pay compensation, such finding is not simply a matter of political judgment. It is a finding based upon an

assessment of the facts and the application of a norm of international law, based on the said assessment of the facts. The same holds true when the Security Council decides that member states must apply economic sanctions against another member state. The obligation to apply sanctions arises because a certain state has done something that the Council condemns and deems unlawful. Such a finding is a finding of fact and law and can hardly be deemed a political decision.

Undeniably, it is not that easy to draw a clear-cut line between what is legal and what is political since the two do not necessarily form an antithetical pair. Questions of legality can actually arise about political decisions and this was pretty much the case in *Lockerbie*. The Court, when rejecting Libya's claim for interim protection, simply presumed the legality of the Council's political decisions, but this does not mean that the Court gave undue deference to the determinations of the Council. The Court rather started with a presumption that the Council's decisions were valid, but this means only that the burden of proof was on Libya, since the latter was seeking to show that the Council had acted beyond its powers. In fact, Libya could have further proved its case when the proceedings reached the merits stage. Was the Court's attitude too cautious, then?

If one accepts that it is for the Court to evaluate whether or not the Council is competent to take the action it did and whether it was able to affect the rights of the state concerned in the way that it had sought to do, this would lead to far-reaching, yet remarkable consequences. Actually, a decision taken in violation of the Charter should not be held to be binding. States have certainly agreed to undertake the Council's decisions under Article 25 of the United Nations Charter but it is quite reasonable to assume that this is true as long as those decisions are in conformity with the Charter. It is actually difficult to contend that member states have accepted, in advance, whatever decisions the Council might make, and therefore exclude the very possibility that the Council may act *ultra vires*. It needs therefore being inferred that the Council's decisions are binding

only in so far as they are in accordance with the Charter. They may specify the obligations of members that arise from the Charter, but they may not set out totally new obligations that have no basis in the Charter. The Council is not a legislative organ, after all. Besides, there cannot be two different legalities, a subjective one for the Security Council and an objective one for judicial determination. This might threaten the coherence of the United Nations system as a whole.

On the other hand, unbalanced mobilization of judicial review for constitutional restraints threatens to affect the authority of the Security Council, which may turn out to cripple the whole system. Desirable Council's action may be irreparably delayed while the target state challenges the lawfulness of that action. If the Court is allowed to second-guess the Council's resolutions, as it assumed it was in *Lockerbie*, this would bring about quite a number of problems. The conclusion on the voidability of the political organ's resolutions meets the objection that the effectiveness of the Security Council's action should not be undermined by having its decisions, which might be effective immediately on adoption, become void *ab initio*. This consideration seems to be particularly important with regard to the operation of collective security measures, in view of the urgency of the situations that trigger them and the initial need for certainty to assure their implementation. Where, for example, the Security Council authorizes states to use force to urgently tackle humanitarian disasters, it does not seem wise to encourage judicial review, which might take a while. Thus, there are sound policy reasons for judicial restraint.

The Court should interfere with the Security Council's discretion only when the latter clearly abuses it. Judicial review should be possible but subject to severe restraints. Hence, the debate shifts from whether the Court can exercise judicial review to how much. This means that the International Court of Justice should rather exercise judicial review in respect of the kind of measures adopted by the Security Council to restore international peace. Here, the Court may certainly examine considerations

of proportionality and infer that the measures taken are disproportionate to the goals to be achieved. However, there should be no inherent conflict between litigation and action by the political organs of the United Nations. Legal and political means of settling disputes should be complementary and the exercise of its institutional function by the Court should not hinder the Council's institutional function. At the same way, the Council's action should be no bar to the Court's jurisdiction. Yet, the Court should be able to decide that some measures are not open to the Council because they are likely to transgress basic principles of international law, or are otherwise beyond its powers. The Security Council's action is not unlimited and also when it acts under Chapter VII, it is supposed to be consistent with international law.

It should therefore be for the Court to play a dual role: through a process of interpretation and some forms of review of Council's resolutions, the Court should be able to act as a restraining factor in tracing the limits of Security Council's action in terms of both the Charter and international law. Besides, the Court should be able to exercise its independent judicial function in disputes involving the responsibility of states for breaches of fundamental obligations considered by the Security Council to constitute a threat to or breach of the peace. This obviously also entails limits for the Court. As Pieter Bekker suggested, "the Court cannot deny its role within the constitutional system of the United Nations and cannot, therefore, operate in complete isolation." Thus, "the relationship between the Court and the Security Council will remain a delicate one and it will depend on the composition of the Court and especially its presidency how the Court deals with this relationship."⁶⁰ Thus, the Court's activity is limited too.

As Professor John Noyes put it, the International Court of Justice has to deal "with both Charter and political limitations on its power. These factors limit what the Court can do." Yet, "the great need is for the Council to exercise restraint itself, especially when it has the possibility of taking on quasi-judicial or quasi-legislative roles. Perhaps the Court can help to signal

the Council about the need for such self-restraint.”⁶¹ Thus, the Court should have the power to declare decisions of the Security Council to be invalid but the fact that the limitations on the powers of the Council are not far-reaching would limit the scope of possible review. This, of course, imposes a serious constraint on the exercise of this power by the Court and indicates that even if the Court chooses to exercise its power of judicial review, a flood of such cases is quite unlikely.

Besides, it does not seem that the Court should enter into question matters of political judgment. In particular, it would be wrong to allow the Court to question a Council’s judgment that a Chapter VII situation – a threat to peace, breach of peace, or act of aggression– either had, or had not, occurred. Nor should the Court second-guess the Council’s decision over the choice of means to deal with situations, whether to order provisional measures under Article 40, or economic sanctions under Article 41, or to institute measures of peacekeeping, for example. The same holds true with respect to decisions as to the timing of, or participation in, such measures. But the allocation of legal responsibility to a particular state is a different matter. In so far as the Court is called upon to apply or not to apply or even to consider the applicability or consequences of a Security Council’s resolution, it may have to check in order to see whether the resolution is valid. It may also have to ensure that the Council has not exceeded its powers in passing such resolution or deciding on a course of action. The Court’s function in contentious cases is to decide the legal rights and responsibility of states and, in so far as a Security Council’s resolution appears to have an impact or even determine those rights or responsibilities, it must be the Court’s function to determine whether those resolutions or decisions validly operates to do so.

Thus, the course of action the International Court of Justice took in *Lockerbie* seems to be reasonable and cautious enough. The use of the presumption of validity of the decisions of the Security Council allowed the Court to defer in some respect to the Council, while, at the same time, not

detracting from the judicial function of the Court in deciding the legal issues brought before it. In so doing, the Court could assess the Court's power of judicial review and infer that the reference of a dispute to the Security Council is no bar to the consideration of the same matter by the Court. So far, the case brought by Libya before the International Court of Justice proved absolutely noteworthy and reached beyond the inherent justice of the Lockerbie case. Yet, as far as the latter was concerned, it still looked pretty nebulous and far from being achieved. In fact, also the legitimacy of the Council's resolutions had not been assessed hitherto but just presumed and put off for further scrutiny at the merits stage. The question of extradition remained.

The Council's resolutions requiring Libya to surrender the two alleged perpetrators for trial either in the United Kingdom or the United States were still there, deploying their binding effect. Libya kept refusing to surrender the two Libyan nationals and to avenge the right of trying them itself. The only overture towards a possible compromise relied upon Libya suggesting that it could consider the possibility of handing the suspects over to a third and neutral country rather than the United Kingdom or the United States. This sounded reasonable enough. The United Kingdom and the United States did not trust Libya's jurisdiction whereas Libya did not trust theirs. What applies to one country should apply to the others if the principle –*nemo judex in causa sua* - is to be considered a general principle. Thus, if nobody can be a judge and a party to the same trial, which applied to Libya, this should also apply to the United States and the United Kingdom that should not be justices and victims at the same time. Thus, Libya's proposal of a trial to be held in a neutral country seemed reasonable and was to prove the only way to overcome the long-lasting impasse into which the confrontation between Libya and its counterparts had led. In this sense, it was time for Libya to capitalize on the Court's ruling and insist for a trial to be held elsewhere.

Notes

¹ Case no. 1475/99. Facts and data about Pan Am 103 bombing may be found in a number of scholar and academic writings. However, having they been assessed by the Court which was in charge with the prosecution of the alleged perpetrators, it seems reasonable to stick to the version the Court was satisfied with and on to which it founded its judgment. The whole trial and its outcome are to be further investigated. See *infra*, chapter 3.

² Not everybody agrees that there was enough evidence to support the account of facts as it was set out in the judgment delivered at Camp Zeist. Besides, there have been a number of unofficial investigations that have led to very different versions of the Lockerbie affair. It is to be reported that Syria and Iran were also suspected at the beginning but then they were totally discharged. *Ex multis*, see Ashton, J. and Ferguson, I., "Cover-up of convenience," Mainstream Publishing Company Ltd., Edinburgh, 2002. The said authors also say that the Lockerbie bombing might be connected to drug trafficking and in particular to CIA protected drug-running operations that the bombers had actually exploited to reach their ends. For a very detailed report of the initial investigations and the dead ends where they often led, see Leppard, D., "On the trail of terror," Jonathan Cape, London, 1991.

³ Major outrages seldom occur in a political vacuum and are generally related to prior political events and possible other grievances. Often, crazed violence is the outcome of some thirst of vengeance. And thirst of vengeance is related to something else. This does not mean excusing or justifying terrorist acts but just trying to put them into a context. It seems of some interest, then, to recall some events that might have paved the way for the Pan Am disaster. On 27 December 1985, there were terrorist attacks at Rome and Vienna airports; nineteen people were killed, including five Americans. Libya was supposed to be behind those episodes and the United States decided to strike back. On 14 March 1986, three American carrier battle groups assembled off the Libyan coast. On March 23, a huge American armada appeared in the same area. The Libyans launched missiles that missed the targets and the Americans responded, by launching more missiles and sinking at least two Libyan patrol boats. Seventy-two Libyans had been killed whereas no American casualties were reported. On 26 March, the American operation was over. A few days later, something else made international tension shoot up. On 5 April 1986, a bomb exploded in La Belle discotheque in West Berlin, a place frequented by American servicemen: this explosion killed three and injured 230 others. The United States administration claimed that the interception of coded messages proved Libyan involvement in the atrocity. Once again, the United States was immediately ready to strike back. On 15 April 1986, an American aircraft bombed Tripoli and Benghazi, causing numerous casualties. Colonel Gaddafi's wife and three of his children were also injured. Another child of his was killed. In two years time, another episode worsened the international scenario. On 3 July 1988, a United States guided missile cruiser mistakenly shot down an Iranian airliner on a regular flight over the Gulf, so to kill all 286 people on board. On those events, see Simons, G., "Libya: the struggle for survival," St. Martin's Press, New York, 1996, pp. 5-8, 331-337. See also Matar, K.I. and Thabit, R.W., "Lockerbie and Libya. A study in international relations," McFarland & Company, Inc., Publishers, Jefferson, North Carolina, 2004, pp. 54-63.

⁴ The indictment was set up by the United States District Court for the District of Columbia. It lists the alleged chronology of the events, gives details of the alleged conspiracy, describes the manners and means used by the alleged conspirators, records specific alleged acts and names the alleged conspirators. The indictment also lists all the victims of Pan Am 103 bombing and lists separately the US nationals that died as a

result of the bombing. Copy of the indictment was submitted to the United Nations. See UN Doc. S/23317, issued by the United States to the United Nations, on 23 December 1991.

⁵ See UN Doc. S/23307, issued by the United Kingdom to the United Nations on 20 December 1991. Amongst others, it includes the Lord Advocate's statement that records the issuing of warrants for the arrest of the two Libyan nationals and details the charges.

⁶ See again UN Doc. S/23307 (*supra*, note 5) which also contains a covering letter, the text of the Foreign Secretary's statement in the Commons on 14 November 1991 and the text of a statement issued by the British Government on 27 November 1991. The statement issued by the British Government demands that the Libyan Government: surrender for trial those charged; accept complete responsibility for the actions of the Libyan officials; disclose all it knows of the crime and pay appropriate compensation. See also UN Doc. S/23308, issued by the United States to the United Nations on 20 December 1991. It contains a covering letter, plus a statement from the United States Government and a joint declaration from Governments of the United States and the United Kingdom. The statement notes that the indictments had been conveyed to the Libyan Government and introduces the joint declaration. The latter again demands that Libya: surrender for trial those charged; accept responsibility for the action of Libyan officials; disclose all it knows of the crime and pay appropriate compensation.

⁷ For reactions following the Pan Am crash see, *ex multis*, Simons, G., *ibidem* (note 3), pp.30-51.

⁸ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done in Montreal on 23 September 1971, to which Libya, inasmuch as the United Kingdom and the United States of America, were signatories.

⁹ The Security Council has been defined as a "dual concept: it is each of the individual members, stating the case, and also the sum total of the members acting in the name of the organ." See Higgins, R., "The place of international law in the settlement of disputes by the Security Council," 64, *American Journal of International Law*, 1-18, (1970).

¹⁰ Resolution 731 addresses also the terrorist attack against a French DC-10 airliner, UTA 772, which exploded because of a bomb, planted on board, over the Sahara Desert, on 19 September 1989. All the passengers and crew were killed. The Libyan Government was suspected of being the sponsor of the onslaught. France joined the United States and the United Kingdom in the course of action they took against Libya and pursued the same policy they chose when reacting to the bombing of Pan Am flight 103. It is however beyond the scope of the present work to investigate the blowing up of UTA 772 and its aftermath. Thus, every reference to be found in UN documents about France or UTA 772 will be dropped.

¹¹ See Letter from the Secretary of the People's Committee for Foreign Liaison and International Cooperation of the Libyan Arab Jamahiriya addressed to the United Nations Secretary-General and transmitted on 2 March 1992. Annex II to the Second report on Libyan Crisis by UN Secretary-General on 3 March 1992 (UN Doc. S/23672).

¹² Letter dated 27 February 1992 from the Secretary of the People's Committee for Foreign Liaison and International Cooperation of the Libyan Arab Jamahiriya addressed to the Secretary-General. Annex I to the Second Report on Libyan Crisis (UN Doc. S/23672).

¹³ Arab League Resolution 5161 adopted on 22 March 1992.

¹⁴ Such as Germany or Italy, for instance.

¹⁵ Chapter VII pertains to “Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression.” Article 39, in particular, reads as follows: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security.”

¹⁶ China, Cape Verde, India, Morocco and Zimbabwe.

¹⁷ For a detailed report of the application of sanctions by different states and Libya’s reactions, see Simons, G., *ibidem*, pp. 51-67.

¹⁸ There were four abstentions, though: China, Djibouti, Morocco and Pakistan.

¹⁹ General List, no. 88 (1992).

²⁰ Article 41 reads as follows: “1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”

²¹ Art. 103 reads as follows: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

²² States have no right to bring proceedings or challenge decisions of the political organs directly. Article 34(1) of the World Court’s Statute reads as follows: “Only states may be parties in cases before the Court.”

²³ It seems noteworthy to recall the chronology of the events. When Libya suited the United States before the International Court of Justice (3 March 1992), Resolution 748 had not been adopted yet. However, it was passed on 31 March when the proceeding before the World Court was still pending. Thus, at the time the Court delivered its judgment (14 April), the Security Council had already ruled. It might be argued that the adoption of Resolution 748 while the case was still pending before the Court was the escamotage the Council found in order to prevent the Court from exercising its function and interfere with the Council’s course of action. See Gaja, G. “Quale conflitto fra obblighi negli affari relativi all’incidente aereo di Lockerbie?,” LXXV, *Rivista di diritto internazionale*, pp.374-376, (1992).

²⁴ Art. 25 reads as follows: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

²⁵ This development is important because it suggests that the Court does not think judicial review should be exercised only when implicitly or explicitly endorsed by a United Nations organ seeking an advisory opinion on the effect of that organ’s act.

²⁶ In a sense, the question of justiciability is closely tied to the question of jurisdiction. Actually, as long as the parties agree on the Court's jurisdiction, the dispute may be considered a legal dispute, since the Court is bound by Article 38(1) of its Statute to apply international law to such disputes. Besides, should the parties not agree on the Court's jurisdiction, one claiming that it is a legal dispute and the other rejecting that claim, then the Court itself is to decide whether it has jurisdiction pursuant to Article 36(6) of its Statute.

²⁷ See K.I. Matar and R.W.Thabit, *ibidem*, pp.14-21.

²⁸ Article 1 of the Montreal Convention provides as follows: "1. Any person commits an offence if he unlawfully and intentionally: (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight. 2. Any person also commits an offence if he: (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or (b) is an accomplice of a person who commits or attempts to commit any such offence."

²⁹ Article 5 provides: " 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases: (a) when the offence is committed in the territory of that State; an aircraft registered in that State; (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State. 2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

³⁰ Article 7 is worded in the following terms: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

³¹ Article 8 reads as follows: "1. The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them. 2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its

option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State. 3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State. 4. Each of the offences 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)."

³² Article 11 reads as follows: "1. Contracting States shall afford one another the greatest measures of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases. 2. The provisions of Paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters."

³³ See Plachta, M., "The Lockerbie case: the role of the Security Council in enforcing the principle *aut dedere aut judicare*," 12, no.1, *European Journal of International Law*, 125-140 (2001).

³⁴ The Preliminary Objections to the Court's jurisdiction and the admissibility of Libya's claims filed by the United Kingdom have been presented in details at different hearings before the Court, in The Hague. See verbatim records of the hearings of the Public Sittings respectively held on Monday, 13 October, Tuesday, 14 October 1997.

³⁵ See *supra*, chapter 2, paragraph 4.

³⁶ Article 39 reads as follows: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security."

³⁷ Chapter VII of the United Nations Charter pertains to "action with respect to threats to the peace, breaches of the peace and acts of aggression."

³⁸ Article 24 reads as follows: "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

³⁹ See verbatim record of the Public Sitting held on Tuesday 14 October 1997, at the Peace Palace, in The Hague.

⁴⁰ See *supra*, note 3.

⁴¹ In this respect, see *supra*, note 10.

⁴² The Embassies of Venezuela (then the President of the Council) and of Russia were seriously damaged.

⁴³ Article 27 reads as follows: "1. Each member of the Security Council shall have one vote. 2. Decisions of the Security Council on procedural matters shall be made by an

affirmative vote of nine members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.” Article 34 reads as follows: “The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.” Article 35 reads as follows: “1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly. 2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter. 3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12. “

⁴⁴ Public sitting held on Wednesday 15 October, at the Peace Palace in The Hague. See verbatim Record.

⁴⁵ Although the Court had acknowledged that “The critical date for determining the admissibility of an application is the date on which it is filed,” it has also said that events subsequent to the filing of an application may “render an application without object.” See *Border and Transborder Armed Actions, (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, I.C.J. Reports 1988. *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974.

⁴⁶ As recalled by the Parties, the Permanent Court of International Justice stated in 1924 that “[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” (*Mavrommatis Palestine Concessions*, 1924, P.C.I.J., Series A). The World Court for its part, in its Judgment of 30 June 1995 in the case concerning *East Timor (Portugal v. Australia)*, emphasized the following: “In order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other” (*South West Africa, Preliminary Objections, Judgment*; and further, “Whether there exists an international dispute is a matter for objective determination” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*).

⁴⁷ This has met with strong criticism by some judges. In their joint declaration, Judges Guillaume and Fleischhauer emphasized their narrow reading of the Court’s jurisdiction and argued that the World Court jurisdiction only extends to interpreting and applying the Montreal Convention and not to the Security Council resolutions. Besides, the matter of the prevalence of the Montreal Convention or the Council’s resolutions had already been argued by the parties and would simply end the case if decided in favour of the defendants. The latter view may seem more in line with the treaty-based jurisdiction of the Court. Nonetheless, it would considerably limit a judicial review of Security Council resolutions by the Court itself. Agreeing with Justice Fleischhauer and Justice Guillaume on the jurisdiction issue, Judge Koijmans pointed out that the Security Council’s resolutions did not definitively abrogate or change the existing obligations of the parties, but might only supersede them for the time they are in force. Accordingly, the Court could still decide on the rights and duties of the parties under the Montreal Convention, even if the Security Council’s resolutions superseded it for the time being.

⁴⁸ There are many scholars and academic writings about the role played by the Security Council and the International Court of Justice in the Lockerbie case. *Inter alia*, see Martenczuck, B., "The Security Council, the International Court and judicial review: what lessons from Lockerbie?", 10, European Journal of International Law, 517-547, (1999). See also MacDonald, R.S.J., "Changing relations between the International Court of Justice and the Security Council of the United Nations", 31, The Canadian Yearbook of International Law, 3-32, (1993). A thorough analysis is also to be found in David, M., "Passport to justice: internationalizing the political question doctrine for application in the World Court", 40, no.1, Harvard International Law Journal, 81-150, (1999). See also Ziccardi Capaldo, G., "Verticalità della comunità internazionale e Nazioni Unite. Un riesame del caso Lockerbie," in "Interventi delle Nazioni Unite e Diritto Internazionale," p. 61-82, Cedam, Padova, 1995.

⁴⁹ Even this Chapter speaks only in the most general terms. As stressed above, Article 92 declares that the Court is "the principal judicial organ of the United Nations." Article 93 provides that all States party to the United Nations Charter are *ipso facto* party to the Statute of the Court. Article 94 obliges states parties to disputes before the Court to abide by its judgments and allows the prevailing party to seek assistance from the Security Council, in the event the losing party fails to comply with the judgment. Article 95 permits states to use other international tribunals to resolve disputes. Article 96 authorizes the political organs of the United Nations to seek advisory opinions from the Court on various questions. As a matter of fact, no provision of Chapter XIV explicitly addresses judicial review.

⁵⁰ Other provisions of the Charter provide little additional guidance on whether the Court can exercise any power of judicial review. Article 103 provides that "obligations under the present Charter shall prevail over conflicting treaty obligations," but nothing in the text of the provision suggests it is to be enforced only by the Court. Moreover, the provision by its terms applies to the obligations of states, not the acts of United Nations organs. Vertical supremacy over the acts of sovereign states does not necessarily imply horizontal supremacy over the acts of co-equal organs of the United Nations.

⁵¹ Article 1 establishes: "The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends."

⁵² Art. 36 reads as follows: "1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment. 2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties. 3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

⁵³ The Security Council's activism has not always met with satisfaction; there is also some concern regarding its power to intervene, as it looks like the last remaining superpower within the United Nations framework. Thus, the activity of the Council has provoked debate in recent years whether the Council is subject to any limitations when it is acting to maintain or restore international peace or security. In particular, there has been a growing interest in the question whether there is any room for judicial control, by the International Court of Justice, of decisions made by the political organs of the United Nations. The perception on the part of some states that the Security Council is directed by an unrepresentative elite may have certainly fuelled this interest. Whatever the stretch of the Court's power of judicial review, the mere fact that it exists may prove important as far as the developing world is concerned. As stressed above, there is growing disenchantment among some states, particularly developing ones, with the composition and actions of the Security Council. Rightly or wrongly, they perceive the Security Council to be unrepresentative and subject to the dictates of a powerful elite. Failure to hold some prospects of judicial review to disenchanted states may prompt them to refuse to comply with Security Council measures. Thus, that judicial review of Security Council's action is theoretically possible seems irrefutable. Whether it is desirable, and if so in what circumstances, are questions that admit no easy answers. The subject is, however, high on the agenda of international law and one that seems to challenge the Court in the years ahead. *Ex multis*, see D.Akande, "The International Court of Justice and the Security Council: is there room for judicial control of decisions of the political organs of the United Nations?" 46, *International and Comparative Law Quarterly*, 309-343, (1997). See also G.R. Watson, "Constitutionalism, judicial review and the World Court", 34, *Harvard International Law Journal*, 1-45, (1993); M. Perrin de Brichambaut, "The role of the United Nations Security Council in the international legal system," in M.Byers (ed.), "The role of law in international politics," Oxford University Press Inc., New York, 2000, pp. 268-276; V. Gowlland-Debbas, "The functions of the United Nations Security Council in the international legal system," *ubi supra*, at 301-313. See also J.Dugard, "Judicial review of sanctions", in V.Gowlland-Debbas (ed.), "United Nations sanctions and international law", pp.83-91, Kluwer Law International, 2001.

⁵⁴ Unless the parties have authorized it to decide *ex aequo et bono*.

⁵⁵ See Article 37(2) of the United Nations Charter.

⁵⁶ About this issue, see Gowlland-Debbas, V., "The relationship between the International Court of Justice and Security Council in the light of the Lockerbie case", 88, *American Journal of International Law*, 643-677, (1994).

⁵⁷ See again V.Gowlland-Debbas, *op.cit.* (note 56).

⁵⁸ In this respect, see Bowett, D., "The impact of Security Council decisions on dispute settlements procedures," 5, *European Journal of International Law*, 1-101, (1994). The author says "It may be doubted whether States ratifying the Charter ever believed they were granting to the Council a blank cheque to modify their legal rights."

⁵⁹ Thus, it does not seem correct to contend that the Security Council is not at all restrained by principles of international law when it is taking collective measures to enforce peace or to suppress aggression. To the extent that the United Nations is a subject of international law, it follows that its organs are thereby subjected to international law. Thus, where the Charter gives the Council a right to derogate from international law, it is clear that the said right exists. Where no express permission is

given, the right does not seem to exist. Therefore, this right cannot exist as far as *jus cogens* norms are concerned, for they cannot be derogated from, by definition. Actually, the relief that Article 103 of the United Nations Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot extend between a Security Council resolution and *jus cogens*, as a matter of hierarchy of norms. For example, the Security Council is empowered to use force in the maintenance of international peace, but this does not relieve it of its duty in using such force to respect humanitarian international law in armed conflict (*jus in bello*). Actually, in transferring the power of waging war or conducting military operations, member states could not transfer a power which themselves do not possess. As stressed above, the United Nations and its member States are equally subject to international law and therefore have obligations under it. Another limitation on the powers of the Security Council is a duty on its part to observe generally accepted norms of human rights, when it is acting. Since the end of the Second World War, there has been an increasing awareness of the need to protect the rights of the individuals and this was one of the reasons for setting up the United Nations. Indeed, one of the purposes of the United Nations, which limits the power of the Security Council, is that expressed in Article 1(4) of the Charter, which provides for international co-operation “in promoting and encouraging respect for human rights.” Likewise, Article 55 of the Charter declares that “the United Nations shall promote ... universal respect for, and observance of human rights and fundamental freedoms.” It would be unacceptable if an organ of the United Nations were itself empowered to violate human rights when the whole tenor of the Charter is to promote the protection of human rights by member States. This is why, for instance, the Security Council, in the exercise of its powers to impose economic and diplomatic sanctions under Article 41, cannot pursue a policy of starvation. Thus, protection of human rights, that is to say compliance with international humanitarian law, binds the Security Council in the exercise of its powers. For a recent reflection about the interaction between peremptory norms and the power of the Security Council, see A. Orakhelashvili, “The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions,” 16, no.1, *European Journal of International Law*, 59-88, (2005).

⁶⁰ I had the privilege of interviewing Pieter H.F. Bekker, via e-mail, on 8 May 2001. He is a former staff attorney of the International Court of Justice and a Counsel in the International Arbitration Group.

⁶¹ I had the privilege of interviewing John E. Noyes - Professor of Law and Director of the International Legal Studies Programs, Western School of Law, San Diego, California - via e-mail, on 22 May 2001.

Chapter 3

THE LONG WAY TO THE LOCKERBIE TRIAL

3.1 Libya and the United Nations sanctions

Throughout the long-lasting Lockerbie stalemate, a new geo-political scenario had been emerging: the Berlin Wall was literally pulled down and the Soviet bloc entirely collapsed, which marked the end of the bipolar world and the balance of powers that had been featuring since the end of the second world war. After the end of the cold war and the demise of the Soviet Union, it became possible to introduce sanctions without opposition from Moscow, which before would mean a veto in the Security Council and serious difficulties in finding the consensus that was necessary in order to adopt the said sanctions.¹ By virtue of their right of veto, permanent members actually have a crucial weight on decisions pertaining to sanctions, both when it comes to adopt them and when it is time to lift them. Sanctions resolutions do actually contain a mechanism whereby, for sanctions to be lifted, a new resolution of the Security Council is needed in each case. This obviously creates a possibility of leverage for the permanent members of the Council. Hence, in Lockerbie, the United Kingdom and the United States, being permanent members of the Security Council, had a decisive weight as far as the adoption or lifting of sanctions was concerned. In fact, they did not even have to abstain when the Security Council decided under Chapter VII of the United Nations Charter and the latter, at Article 27, sets out that a party to a dispute - which is also a member to the Security Council - needs abstaining only when the Council decides under Chapter VI.²

This situation proved particularly hard on Libya which stood very little chances of effectively lobbying within the Security Council and gain sympathy to its cause. Thus, Libya had to search elsewhere if it wanted to

break its political isolation and find some support in the international *fora*. Colonel Gaddafi therefore found that an effective way to gain some sympathy around the world consisted in drawing the international community's attention on the appalling humanitarian suffering the Libyan people was experiencing because of the United Nations sanctions.³

In those times, the debate about the acceptability of economic sanctions as a tool of international politics had started heating up. Even former Secretary-General Boutros Boutros-Ghali, in his "Agenda for Peace" presented to the Security Council on January 5, 1996, called on the United Nations to reconsider how it uses sanctions.⁴ Noting that sanctions are generally acknowledged to be a "blunt instrument," Boutros-Ghali said that their use raises ethical issues concerning the suffering they inflict on innocent victims, especially those most vulnerable, and questions as to whether inflicting such suffering on innocent persons is a legitimate means of bringing pressure to bear on political leaders. In addition to having a severe effect on neighbours or major economic partners of targeted states, the Secretary-General noted that sanctions can also defeat their own purpose by "provoking a patriotic response against the international community, symbolized by the United Nations, and by rallying the population behind the leaders whose behaviour the sanctions are intended to modify." Thus, it was becoming quite clear, within the United Nations system, that sanctions were more likely to adversely affect a country's population at large than bending the target country's leadership.

In most cases, economic sanctions, especially when broad in scope, actually end up "punishing" the civilian population more than the political élites. This obviously entails an ethical problem, with the civilian populations becoming a "hostage" in the political dispute, while those in the government and the military often skirting the effect of sanctions. In fact, those who are in command of the distribution of goods easily find a way out. By creating scarcity, sanctions can actually enable them to better control the distribution of goods. For civilian populations, instead, sanctions can be

a powerful and deadly form of intervention. Those adverse effects on civilians are not only ethically questionable; they also bear some weight from a legal point of view. Human rights and the humanitarian provisions of international law are increasingly being recognized as marking the limits of permissibility for economic sanctions. They certainly form part of the core of the United Nations goals and principles, which Article 24(2) of the United Nations Charter requires the Security Council to observe in fulfilling its mandate to safeguard peace.⁵ Hence, the peremptory rights of the people affected by sanctions - particularly the right to life, health, food, water, housing, and clothing - must be taken into account when sanctions are being imposed.⁶ Yet, sanctions are certainly attractive, since they might prove a means of exerting international influence that seems more powerful than diplomatic mediation but lies below the threshold of military intervention. In fact, after the bombing of Pan Am 103, the United States did not strike back by means of military intervention although such option was not necessarily ruled out.

Yet, sanctions do not always achieve the aim they are designed for. As Justice Mauro Politi points out,⁷ not only sanctions do not necessarily influence a regime but they risk backing it up: any regime can always justify whatever despicable policy or domestic problem in terms of sanctions imposed by the United Nations and the population may end up accepting such explanation and stop questioning whether there are other causes for its own poverty or deprivation. Besides, sanctions may prompt a general sense of siege that governments can exploit to maintain political control. This is why, nowadays, the United Nations would no longer rely upon the sort of broad sanctions they imposed on Libya during the Lockerbie stalemate. It would be preferable to go for the so-called smart sanctions that are designed to affect individual leaders, their close family and their own assets, without striking the masses.⁸ Justice Politi however underlines that the question whether sanctions may prove useful tools of policy does not necessarily entail an ethical profile. Sanctions may prove effective without being fair or

morally justified. They actually turn out to be effective whenever they influence the policies of the state at which they are directed.

Thus, if the target state fulfils the conditions set out in the sanctions resolutions and no longer engages in the behaviour classed as constituting a threat to peace,⁹ in any such case, sanctions are to be deemed a successful and effective political tool that helps achieving political aims. As Justice Richard Goldstone points out,¹⁰ it is difficult to find other ways in order to have a country surrender its citizens for trial abroad if it is not bound to extradite them. In fact, there is no international police force which is allowed to arrest people in various countries and it is quite unlikely that there will ever be one. International justice, after all, depends on the cooperation of governments and if some governments do not see it in their self-interest to abide by the law, then sanctions can help, which is actually what happened in the Lockerbie case, when Libya kept refusing to comply with the demands put forward by the Security Council.

Thus, in the Lockerbie case, the sanctions regime has proved successful to a certain extent but it was not only its harshness to bring the deadlock between Libya, the United Kingdom and the United States to an end. Yet, it is undeniable that sanctions had a very strong impact on Libya and adversely affected it in terms of lost revenues. Obviously, the masses experienced the most appalling consequences. Colonel Gaddafi therefore built his diplomatic offensive on the fact that the United Nations sanctions were affecting the population at large and prompting devastating effects. Once, he actually addressed the Security Council as follows: "I used to rely on the world conscience, but it turns out to be a world without conscience. And I used to rely on the justice of the Charter of the United Nations and international law, but they turn out to be inoperative and to have been annulled by a new status quo of extreme ugliness and injustice that is being forcibly imposed by naval fleets, by intercontinental missiles, by economic sanctions that place a stranglehold on peoples and by threats to deprive children of milk, bread and medication."¹¹

Gaddafi actually tried to show the world that the United Nations sanctions embodied a collective punishment the Libyans had been charged with, although there was no verdict establishing Libya's liability for the bombing of Pan Am 103. Ostensibly, he aimed at shattering the world's conscience. The United Nations sanctions had however been imposed on Libya not because of the bombing but because the Libyan Government would not co-operate with the investigation into the Lockerbie disaster and refused to surrender the two suspects for trial in the United Kingdom or the United States. The Security Council in particular had claimed that there was a threat to international peace and security. Nonetheless, it was a fact that Resolutions 748 and 883 were based on the mere suspicion of two Libyan citizens, without they having been condemned in accordance with any judicial verdict. Thus, the fact that the Security Council had imposed sanctions on Libya on the basis of mere suspect and without any verdict of guilty being delivered was a powerful criticism that still remains on the face of the entire process, undermining its legitimacy. Certainly, it helped Libya in building its diplomatic offensive and gaining some sympathy around the world.

In a way, it looked as if the Libyans were collectively paying the bill before anybody was sentenced culpable. In this respect, it has to be recalled that the United States had also imposed its own separate sanction regime on all commercial and financial transactions with Libya.¹² Thus, the Libyans were subjected to two different sets of sanctions, which, altogether, might prove absolutely devastating. Obviously, Gaddafi's diplomatic offensive would address the United Nations sanctions. The international community had actually sponsored them and conveyed through them its disapproval to the target country. Nonetheless, the fact that the United Nations sanctions convey the international community's disapproval turns out to be more credible when the parties to a dispute are not in charge when sanctions have to be voted and endorsed. If the United Nations resolutions imposing sanctions on Libya were decided by the Security Council with the abstention

of the United States and the United Kingdom, they would have been perceived as less biased and politicised not only by the Libyans but by many others.¹³ And if the removal of sanctions was not in the “hands” of those countries but of different ones, not involved in the Lockerbie affair, the entire sanctioning process would have been more credible. Or at least the perception would have been different.

Sanctions may actually hold great promise and provide a serious alternative to military options but only under conditions of wide international agreement, clear legal basis and purpose, and minimal harm to the innocents. Be it as it may, the United Nations sanctions were in place and Libya had started claiming that no innocent Libyan national was spared from the inhumanity of the United Nations sanctions, those same sanctions that had been imposed on the basis of mere suspect while the fact that they were justified in terms of an actual threat to peace remained pretty questionable.

3.2 Libya gains African support

Meanwhile, the world was watching and the international community did not prove deaf to Gaddafi’s attempt at drawing its attention onto the suffering of the Libyans. Nonetheless, Libya’s argument was not based on the sole inhumanity of sanctions and their devastating consequences on the masses. The other crucial contention was that Libya was ready to hand over the two suspects for trial any time. Yet, it would never surrender its citizens to the United Kingdom or the United States, where they would stand no chance whatsoever of being given a fair trial by a panel of independent judges. The media campaign against the Libyans had actually been huge, which made it quite unlikely to find unprejudiced judges and jurors. Thus, Libya urged that the trial be held in a third and neutral country, where no suspicion of biased and politicised justice would arise. This proved a

powerful argument. Libya sounded ready to comply with the terms the United Nations resolutions and all it asked for was a fair trial for the accused, which seemed to be a reasonable request after all. This was the bedrock of the diplomatic offensive that Colonel Gaddafi unleashed. He addressed the international community but mostly focused on the African continent as a potential source of precious ties.¹⁴ This policy was to prove fruitful in the long run since it would succeed in breaking Libya's isolation. It actually put the Lockerbie case in the spotlight to such an extent that no less a leader than Nelson Mandela volunteered to act as an intermediary between Libya and the United Kingdom.

In fact, the South-African "icon" started acting as a mediator in the Lockerbie case even before becoming President of South Africa.¹⁵ On 21 January 1992, for example, he had already made a remarkable statement on behalf of the ANC, which reads as follows: "The ANC has consistently condemned all acts of terrorism. The Lockerbie disaster was a tragic incident which resulted in the unfortunate loss of innocent lives. The ANC once again takes the opportunity to express deep-felt sympathy to the families of the deceased. It is in the interest of peace, stability and security that if there is clear evidence of the involvement of identified suspects they should be arrested and punished as soon as possible. In the present climate of suspicion and fear it is important that the trial should not be intended to humiliate a head of state. It should not only be fair and just, but must be seen to be fair and just. This must be in the context of respect for the sovereignty of all countries. The ANC believes that if the above objectives are to be achieved, the following options should be considered: if no extradition treaty exists between the countries concerned the trial must be conducted in the country where the accused were arrested. The trial should be conducted in a neutral country by independent judges. The trial should be conducted at The Hague by an international court of justice. We urge the countries concerned to show statesmanship and leadership. This will ensure that the decade of the Nineties will be free of confrontation and conflict." ¹⁶

Thus, in Mandela's view, the most important thing was ensuring that the trial took place in the context of respect for the sovereignty of all countries involved. He therefore excluded that the Lockerbie trial could ever be held in the United Kingdom or the United States: as he said, no country can be claimant, prosecutor and judge in the same case, and if it is, this should be regarded as a source of serious concern. Mandela was to play a pivotal role in brokering the final deal and bringing the Lockerbie case to a close by proving a crucial link between Colonel Gaddafi and the West. Meanwhile, other self-appointed mediators tried to help bringing the long-standing Lockerbie stalemate to a close. One of those was Prince Bandar bin Sultan of Saudi Arabia,¹⁷ who concentrated his efforts on the relationship between Libya and the United States and offered his good auspices to improve it. Bandar was the other charismatic mediator that left no stone unturned to bring the Lockerbie stalemate to an end. Mandela and Bandar played a crucial role especially in terms of confidence building. The story of their shuttle diplomacy was to prove a success story although it took years before noteworthy results were accomplished. For a long time, their efforts actually seemed to lead to nowhere. Yet, they kept trying and their quiet yet strenuous mediation was to prove pivotal for the final deal to be stricken.

The possibility of a trial to be held in a third and neutral country started gaining some support. At this stage, various regional organizations came into picture and started taking sides with Libya. They found it reasonable that the Libyan suspects required some guarantees about the fairness of the trial. They therefore believed that a trial in a neutral country would have met all parties' requirement: it would have brought the suspects to justice but it would have allowed them a fair trial before a panel of non-prejudiced judges. Yet, it was necessary to make sure that Libya would actually hand over the two suspects for trial as it had said it would and convince both the United Kingdom and the United States to agree upon the trial being held in a third country. The Organization of African Unity pushed explicitly towards this end and insisted that continued imposition of sanctions would

have forced the Africans to devise a scheme in order to spare the Libyan people more suffering.

The Council of Ministers of the Organization of African Unity, which met in Tunis from 6 to 11 June 1994, actually adopted a resolution urging the Security Council “to reconsider its resolutions 731 (1992), 748 (1992) and 883 (1993) and lift the embargo imposed on Libya in appreciation of the positive initiatives taken by the Great Jamahiriya in addressing the [Lockerbie] crisis.”¹⁸ One year after, the Organization of African Unity, meeting in its sixty-second session in Addis Ababa, Ethiopia, from 21 to 23 June 1995, adopted a further resolution that literally reiterated “its appeal to the Security Council to reconsider its resolutions 731 (1992), 748 (1992) and 883 (1993) so as to lift the current embargo on Libya.”¹⁹ Both the said resolutions adopted by the Organization of African Unity called on all parties to rely upon dialogue and negotiations to secure a peaceful settlement of the crisis pursuant to Article 33 of the United Nations Charter, which calls for the settlement of disputes through negotiations, mediation and legal procedures in conformity with international law. Moreover, they called for a fair trial of the two suspects in a neutral country to be agreed upon by the parties concerned.

Furthermore, during its summit in Harare in June 1997, the Organization of African Unity adopted a resolution suggesting a neutral venue to try the accused. The African leaders explicitly regretted the continuation of United Nations sanctions against Libya and expressed deep concern over the human and material deprivations to which the Libyan people had been subjected.²⁰ Three solutions were therefore suggested in order to overcome the long-running Lockerbie deadlock: trying the two suspects in a third, neutral country to be determined by the Security Council; trying them before Scottish judges sitting at the International Court of Justice in the Hague and acting under Scottish law; establishing an ad hoc tribunal at the International Court of Justice headquarters in The Hague and let it try the Libyan suspects. In the view of the Organization of African Unity, one of the

said options would have solved the impasse in the interest of all the parties concerned.²¹

The Organization of African Unity was determined to make its contribution to the Lockerbie crisis and support Libya's stance. It therefore adopted another resolution, during its summit in Burkina Faso in June 1998, which explicitly called on African nations to suspend compliance with United Nations sanctions with humanitarian or religious implications and those relating to official business pertaining to the Organization itself. The Organization of African Unity actually made it clear that the sanctions were unacceptable, since they kept hitting the masses although Libya was ready to deliver the two suspects for trial to a neutral country. Thus, there were no longer reasons why those sanctions should remain in place²² and if they did, it was just because of the unwillingness of the British and the Americans of overcoming the impasse. Many African leaders actually started implementing the said resolution and fled directly into Libya in breach of the sanctions, which appeared to be legitimised by the resolution itself. Such move was very far-reaching since it challenged the authority of the Security Council, whose resolutions seemed now sort of obsolete with the Africans infringing them and urging a final solution for the Lockerbie stalemate. If the United Nations sanctions are also meant to convey the world's disapproval over the conduct and policy of the target country, in this case, that disapproval had started weakening. In fact, there was a widening gap between the African continent and the West in the way they were dealing with Libya.

The Arabs also took a strong stance against the continuation of the United Nations sanctions against Libya. The Arab Summit Conference held in Cairo in 1996 actually called for the lifting of those sanctions. The Arab League then adopted a resolution calling on Arab States to ease the level of sanctions against Libya. On September 21, 1997, Arab Governments actually voted to defy United Nations sanctions by affirming support for Libya and inviting Arab countries to ease the sanctions on Libya until a

peaceful and just solution to the Lockerbie crisis was found. The resolution actually urged the Arab League's twenty-two members to allow flights carrying political leaders and official Libyan delegations participating in regional and international meetings to land on their territories. The said resolution also authorized Arab countries to permit flights for humanitarian reasons such as the transport of the ill and the dead and medicine as well as religious flights.²³

The Arab requests were reinforced by the declaration of the Ministerial Meeting of the Movement of Non-Aligned Countries, held in Cartagena, Colombia, from 18 to 20 May 1998, which also called for the immediate suspension of the sanctions imposed on Libya, until delivery of the judgment by the International Court of Justice on the substantive issue.²⁴ The Non-Aligned Movement backed Libya's position in more than one occasion. At its XII summit held in Durban in September 1998, the Heads of State or Government participating to the summit reiterated their shock at the immensely harmful effects the United Nations sanctions imposed upon Libya kept causing to the Libyan people. They also deplored the threats to further tighten the sanctions in total disregard to the positive compliance by Libya to the United Nations demands. Thus, the summit decided that the sanctions imposed on Libya must be suspended once an agreement was reached between the parties on the arrangements and the guarantees leading to the appearance of the two suspects for trial. They also urged that the sanctions be totally terminated once the suspects appeared for trial.

Furthermore, the Permanent Representatives of Algeria, Egypt, Libya, Mauritania, Morocco, Syria and Tunisia to the United Nations addressed a letter to the President of the Security Council²⁵ asking for the immediate suspension of the sanctions imposed on Libya, pending the judgment of the International Court of Justice on the issue pertaining to the application of the Montreal Convention to the Lockerbie case. They actually inferred that the continuation of sanctions had no justification whatsoever since the International Court of Justice had assessed that it had jurisdiction over the

dispute between Libya, the United Kingdom and the United States and would have therefore dealt with the substantive issue. In fact, the judgment that the International Court of Justice had delivered on 27 February 1998 had put Libya in a better position and was offering some sound bedrock for its diplomatic offensive. States that were ready to support Libya's line, could actually base their challenge to the Security Council's authority on the International Court's ruling. The International Court of Justice was empowered with jurisdiction over the Lockerbie case and the Libyan application had been deemed admissible.

Obviously, Libya was capitalizing on that and found it easier to claim that the United Nations' sanctions were no longer justified pending the proceedings before the World Court. In those years, then, Libya did not look isolated any more. It had succeeded in gaining some sympathy around the world. Several countries and regional organizations were backing its stance and were calling for an easing of the United Nations sanctions if not even a definitive lifting. Libya was capitalizing on diplomatic gains and was perceived as the one country that was willing to comply with the United Nations demands whereas the United Kingdom and the United States seemed in no hurry of overcoming the Lockerbie stalemate. In fact, they seemed pretty deaf to compromise. They had actually made it clear that they would accept nothing short of the surrender of the two Libyan suspects. Having a trial within the borders of the United Kingdom or the United States therefore seemed a priority in the British and American agenda, as if the location of the trial was more important than the trial itself.

In the meantime, eminent people from all over the world were speaking in favour of lifting the sanctions imposed on Libya. Even His Holiness the late Pope John Paul II, on 31 October 1997, called in unambiguous terms for the lifting of such sanctions imposed on Libya.²⁶ Meanwhile, the United Nations sanctions had started experiencing an enforcement crisis, with the Africans deliberately infringing them. No longer they seemed to embody the international community's disapproval for Libya's stand since regional

organizations and charismatic leaders were demanding that they be suspended if not even lifted. New sources of pressure had therefore started featuring in the international politics scenario. A change in the United States and the United Kingdom's policies seemed eventually required to face the international support Libya had started enjoying. And, above all, it was necessary to eventually bring to a closure a case that had been stuck into an impasse for over ten years. The families of the victims had never stopped demanding that justice be made. The more such justice was delayed, the more it was perceived as if it were denied.

Thus, a trial in a neutral country appeared as the only viable way to overcome the long-lasting Lockerbie stalemate. In a way, it might have proved a "win-win" situation for the United States and the United Kingdom, although for many years they had refused to come to terms with such an option. In fact, either Libya handed over the two suspects for trial as it had assured it was ready to do, or it would lose its international credibility and the political support it had been gaining hitherto. On the contrary, the more the United Kingdom and the United States refused the possibility of a trial in a third country, the more it seemed as if they were not interested in bringing the Lockerbie case to a close. Or at least it looked as if they considered the venue more important than the trial itself. In a way, they were at a dead end: it was time for them to move on and come to terms with the expectations of a rapidly changing world.

3.3 The possibility of a trial in a third country

The possibility of trying the two suspects in a third and neutral country had started being perceived as the only viable option that would have brought the Lockerbie stalemate to an end. Libya had ostensibly agreed upon it and many countries inasmuch as regional organizations around the world found it a reasonable way out. Although the United Kingdom and the

United States had made it rather clear that they would accept nothing short of the surrender of the two suspects for trial before their national courts and within their own boundaries, the possibility of a viable alternative had been considered within the United Kingdom too. Since 1994, Professor Black of the University of Edinburgh had actually been suggesting that a trial might be held outside Scotland, yet according to Scottish law and procedure.²⁷

Professor Black had actually put forward a detailed proposal for the setting up of a court operating under the law and procedure of Scotland, but sitting in a neutral venue such as The Hague.²⁸ The said proposal took into account a variety of different issues, such as the rights of the accused, the panel of judges, the appeal of the verdict. In a nutshell, Professor Black's proposal envisaged a trial in which the governing law and procedure would be the law and procedure of Scotland; the prosecution would be conducted by the Scottish public prosecutor, the Lord Advocate, or his authorised representative; the defence of the accused would be in the hands of independent Scottish solicitors and counsels appointed by the accused whereas the jury would be replaced by an international panel of five judges chaired by a judge of the Scottish High Court of Justiciary. According to Professor Black's proposal, should the accused be convicted, they would serve any sentence of imprisonment in a prison in Scotland. In case of an appeal, the High Court of Justiciary would hear it in Scotland, in its capacity as the Scottish Court of criminal appeal. Thus, the core of the proposal was that the trial would be a Scottish trial, under Scottish law and procedure, and before a Scottish court. The only peculiar feature would be that such court would sit outside Scotland.

As a matter of fact, there was a feature in the Scottish criminal justice system that the Libyans would find unacceptable, namely the role played by the jury. From the outset, Libya had actually been contending that, in a case that had received unprecedented publicity in the media, including widespread dissemination of photographs of the accused, it would be impossible to find a British or an American jury that was unaffected or

uninfluenced by pre-trial publicity. Such concern was not self-evidently baseless in the Lockerbie case. It was undeniable that the latter had been having very wide coverage ever since and would undoubtedly generate further publicity once the accused surrendered themselves for trial. Libya seemed to have a point there.

It is pretty undeniable that any audience could have been affected - consciously or unconsciously - by the flood of information and speculation that, for years, had accompanied the Lockerbie case. It was therefore at least questionable whether a jury in the United Kingdom or the United States would judge the evidence of the Lockerbie case with the degree of objectivity and impartiality that a fair trial demands. However, this should be no obstacle to the trial. The jury in criminal proceedings is conceived of as a safeguard for the interests of the accused, which means that it is also a safeguard that the accused can do without by waiving the inherent right. Besides, the issue of the physical security of the accused, if the trial were to be held in Scotland, as the United States and the United Kingdom required, was also a matter of concern and needed being addressed in due course.²⁹ Interestingly, though, it was not Libya but the United Kingdom and the United States that rejected Professor Black's proposal for a number of years. As above mentioned, they seemed deaf to compromise and would accept nothing short of the surrender of the two accused before their own courts and within their own territory. The location of the trial seemed a non-negotiable priority in their agenda. Despite early rejections, Professor Black's proposal would however serve several years later as a basis for the trial that eventually took place. It was still a long way to go, though.

In the meantime, Libya was tired of economic sanctions and seemed willing to move on in order to overcome its "pariah status" and restore its position in the international fold. Personal contacts amongst leaders and official diplomacy kept going on in search of a final solution for the long-standing Lockerbie stalemate. Eventually, the United Kingdom and the United States chose a different course of action and accepted the idea that

the trial could be held elsewhere. The international pressure had actually been rising and the family of the victims were still claiming that justice be made. Yet, the United Kingdom and the United States would compromise on the venue but not on the applicable law or the nationality of the judges. While agreeing in principle to a neutral venue as Professor Black had suggested, the United Kingdom actually kept rejecting Black's proposal for an international panel and opted for an all-Scottish judges panel. If the trial was not to take place in Scotland, it had to be a Scottish trial with Scottish judges and under Scottish law.

Eventually, on 31 October 1997, the Permanent Representative of the United Kingdom to the United Nations addressed a letter to the President of the Security Council³⁰ in which he invited representatives of the United Nations to visit Scotland and to study the Scottish judicial system. The Secretary-General accepted the invitation and requested two scholars to undertake this study. In their report on the Scottish judicial system, they concluded that the Libyan accused would receive a fair trial in Scotland.³¹ Their rights during pre-trial, trial and post-trial proceedings would be protected in accordance with international standards. Now, it was for Libya to take the further step of accepting Professor Black's proposal. The first breakthrough in bringing the suspects to justice eventually came at a meeting in Tripoli in April 1998 between government officials, lawyers and British representatives of the bombing victims at which the Libyans confirmed that they would accept the plan devised by Professor Robert Black. But the arrangement about the venue and set-up of the court was not the final obstacle.

A number of issues had still to be addressed and resolved. These included guarantees about safe custody of the Libyan suspects. If they were acquitted, guarantees about their safe custody back also needed being ruled. Other questions arose with respect to the conditions of their detention, their access to their legal team, pre-trial custody, the defence team's possibility of access to the evidence, the rights of the defence and so forth. The trial

however would have taken place in the Netherlands, which seemed the best possible venue if it had to take place in a third and neutral country. The Hague, in particular, was already home to the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia. It therefore seemed the best possible location ever for the Lockerbie trial. Obviously, talks and negotiations at diplomatic and political level continued for quite a while. In the meantime, the atmosphere was loaded with speculations about the possibility of a forthcoming change in the policy of the United States and the United Kingdom. Some facts started being leaked to the press, which had never stopped paying the Lockerbie case lots of attention and wide coverage. Nonetheless, if an agreement was on its way, it was still enveloped in secrecy. Besides, if a trial had to take place in The Hague, not only the United States, the United Kingdom and Libya were to be involved. The Netherlands had become part of the game and needed making arrangements for the trial to come about.

In the event, on 24 August 1998, the British and United States Governments officially announced their willingness to allow the trial to be held before a Scottish court of three judges and no jury, sitting in the Netherlands. Their stand on the matter of a “neutral venue” trial was depicted in a letter of that date to the Secretary-General of the United Nations, Kofi Annan, wherein the British and American Acting Permanent Representatives to the United Nations stated: “... in the interest of resolving this situation in a way which will allow justice to be done, our Governments are prepared, as an exceptional measure, to arrange for the two accused to be tried before a Scottish court sitting in the Netherlands. After close consultation with the Government of the Kingdom of the Netherlands, we are pleased to confirm that the Government of the Kingdom of the Netherlands has agreed to facilitate arrangements for such a court. It would be a Scottish court and would follow normal Scots law and procedure in every respect except for the replacement of the jury by a panel of three Scottish High Court judges. The Scottish rules of evidence and

procedure, and all the guarantees of fair trial provided by the law of Scotland, would apply.”³² Thus, both Washington and London confirmed the official adoption of an agreement between the United Kingdom and the United States, on the one side, and the Netherlands on the other, which was actually confirmed by the Dutch Government.³³

The Secretary-General had been requested by the British and the United States Governments to convey to the Libyan Government a letter elaborating their proposal. He was also asked to provide to the Libyan Government any assistance it might require with regard to the physical arrangements for the transfer of the two accused directly to the Netherlands. In this respect, the Secretary-General issued a statement expressing appreciation about the announcement the United Kingdom and the United States had made and gratitude to the Netherlands for its willingness to assist in the matter.³⁴ Libya, on its part, “announce[d] its acceptance of the development in the positions of the Governments of the United States and the United Kingdom” and confirmed that it would “deal positively” with such step, though stressing “the necessity to lift the sanctions imposed on the basis of Security Council resolutions 748(1992) and 883(1993).”³⁵ In a letter to the Security Council, Libya actually stated: “1. Libya is anxious to arrive at a settlement of this dispute and to turn over a new page in its relations with the States concerned. 2. Libya’s judicial authorities need to have sufficient time to study [the proposal] and to request the assistance of international experts more familiar with the laws of the States mentioned in the documents. 3. We are absolutely convinced that the Secretary-General of the United Nations, Mr. Kofi Annan, must be given sufficient time to achieve what the Security Council has asked of him, so that any issue or difficulty that might delay the desired settlement can be resolved”³⁶

Undeniably, all the parties concerned had taken a considerable step forward. A Security Council resolution was however necessitated inasmuch as changes to Scottish and Dutch law, and a treaty between the Netherlands

and the United Kingdom, with respect to the initiative as contained in the agreement. The United Nations resolution, in particular, would provide for sanctions to be lifted upon the appearance of the two accused in the Netherlands for the purpose of trial before the Scottish court. Hence, on 27 August 1998, the Security Council adopted Resolution 1192.³⁷ The said Resolution reads as follows: “The Security Council ... 2. Welcomes the initiative for the trial of the two persons charged with the bombing of Pan Am flight 103 (“the two accused”) before a Scottish court sitting in the Netherlands, as contained in the letter dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and of the United States of America (“the initiative”) and its attachments, and the willingness of the Government of the Netherlands to cooperate in the implementation of the initiative; 3. Calls upon the Government of the Netherlands and the Government of the United Kingdom to take such steps as are necessary to implement the initiative, including the conclusion of arrangements with a view to enabling the court described in paragraph 2 to exercise jurisdiction in the terms of the intended Agreement between the two Governments, attached to the said letter of 24 August 1998; 4. Decides that all States shall cooperate to this end, and in particular that the Libyan Government shall ensure the appearance in the Netherlands of the two accused for the purpose of trial by the court described in paragraph 2, and that the Libyan Government shall ensure that any evidence or witnesses in Libya are, upon the request of the court, promptly made available at the court in the Netherlands for the purpose of the trial; 5. Requests the Secretary-General, after consultation with the Government of the Netherlands, to assist the Libyan Government with the physical arrangements for the safe transfer of the two accused from Libya direct to the Netherlands; 6. Invites the Secretary-General to nominate international observers to attend the trial.”

Resolution 1192 then continues as follows: “7. Decides further that, on the arrival of the two accused in the Netherlands, the Government of the

Netherlands shall detain the two accused pending their transfer for the purpose of trial before the court described in paragraph 2; 8. Reaffirms that the measures set forth in its resolutions 748 (1992) and 883 (1993) remain in effect and binding on all Member States, and in this context reaffirms the provisions of paragraph 16 of resolution 883 (1993), and decides that the aforementioned measures shall be suspended immediately if the Secretary-General reports to the Council that the two accused have arrived in the Netherlands for the purpose of trial before the court described in paragraph 2 or have appeared for trial before an appropriate court in the United Kingdom or the United States, and ...; 9. Expresses its intention to consider additional measures if the two accused have not arrived or appeared for trial promptly in accordance with paragraph 8; 10. Decides to remain seized of the matter.”

3.4 The handover

The solution to the long-standing Lockerbie deadlock was therefore on the way while the handover of the two suspects seemed no longer a remote possibility. Nonetheless, many legal and political issues still needed being addressed: details needed being specified concerning the rights of the accused while in custody inasmuch as guarantees pertaining to witnesses or the possibility of further accusations. Other questions were related to the place where to have the two suspects imprisoned, if convicted, the official lifting to the sanctions and the issue of compensation.³⁸ The issue of the imprisonment was one that was immediately sorted out: the United Kingdom had excluded that it could possibly take place outside Scotland, although Libya had insisted that any sentence of imprisonment should be served either in Libya or in the Netherlands. In the event, it was agreed that Libya would establish consular relations with the United Kingdom by setting a consulate in Scotland in order to monitor the situation of the

convicted, which in any case would take place under the United Nations observers' supervision. Obviously, this meant re-establishing diplomatic relationship between Libya and the United Kingdom, which would prove a noteworthy development.

Hence, the final arrangement was eventually set up and its details are to be found in two documents: a British Order in Council,³⁹ made on 16 September 1998, conferring the necessary legal authority for Scottish criminal proceedings against the two Libyan suspects to be conducted in the Netherlands, and an international agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom, concluded on 18 September 1998, making the diplomatic arrangements necessary for the "neutral venue" trial to take place.⁴⁰ The United Kingdom and the United States then engaged in a process of intense diplomatic activity in order to persuade the Libyan Government to comply with the above-mentioned arrangements. In the event, on 19 March 1999, Libya announced its agreement to deliver the two accused for trial before a Scottish court sitting in the Netherlands.

The United Nations Secretary-General was immediately informed of Libya's decision by means of a letter⁴¹ in which Libya agreed to hand over the two suspects for trial by 6 April 1999 on the basis of the agreed points: that a Scottish court would be convened in the Netherlands for the purpose of trying the two suspects in accordance with Scottish law and with the presence of international observers appointed by the Secretary-General of the United Nations, and also in consultation with the Republic of South Africa and the Kingdom of Saudi Arabia. The two suspects would be permitted to fly on a non-stop flight from Libya to the Netherlands so that they would not be susceptible to arrest in a third country. While in the Netherlands, they would stand trial only for the Pan Am 103 case, and if acquitted, would be returned directly to Libya. In case of conviction, they would serve their sentence in Barlinnie Prison in Scotland where United Nations monitors would be permanently stationed. The United Kingdom

would permit Libya to establish a consulate in Edinburgh to watch over the prisoners' interests.⁴² The United Nations imposed sanctions would be immediately frozen upon the arrival of the two suspects in the Netherlands and then lifted upon submission of the Secretary-General's report to the Security Council within 90 days.

Eventually, on 5 April, the two suspects boarded an Italian governmental aircraft flying under the authority of the United Nations that flew them to the Netherlands where they were transferred to the site of their imprisonment at Camp Zeist⁴³ and handed over to the Scottish police. All had gone according to schedule. On that very day, the Secretary-General of the United Nations addressed a letter⁴⁴ to the President of the Security Council informing that the two accused had safely arrived in the Netherlands and the conditions set forth in Resolution 1192 had been met. The Secretary-General also expressed his appreciation to all the parties for their willingness to arriving at a mutually acceptable solution and to the Governments of South Africa and Saudi Arabia for their efforts in search of a fair solution. Immediately, the sanctions were suspended. Three days later, the Security Council issued a presidential statement in which it noted that "with the letter of the Secretary General of 5 April 1999, the conditions set forth in paragraph 8 of resolution 1192 (1998) for the immediate suspension of the measures set forth in resolution 748 (1992) and 883 (1993) ha[d] been fulfilled." In this regard, the Council recalled that, in accordance with resolution 1192 (1998), the measures set forth in resolution 748 (1992) and 883 (1993) were immediately suspended upon receipt of the letter of the Secretary-General on 5 April 1999 at 14.00 Eastern Standard Time. This development was immediately acknowledged through a statement of the President of the Security Council to the press on 5 April 1999.⁴⁵

The long-standing Lockerbie deadlock was therefore overcome without actual extradition to the United Kingdom or the United States taking place. What happened instead was the "delivery" of the accused to a third state. In fact, the two Libyan suspects were extradited to the United Kingdom only

“on paper,” which was however sufficient to allow the Scottish police to take over. They were actually surrendered to the Dutch authorities in the first place and then delivered not to Scotland but to the Scottish court sitting in the Netherlands. Dutch military helicopters actually took the Libyans to Camp Zeist, which, from that moment on and until the end of the forthcoming trial, would be legally Scottish soil. This proved quite unique a situation. Nothing of the like had ever occurred before. This was the first time ever that a foreign court sat in another country for the purpose of a trial to be held according to the court’s domestic law. The only comparable courts that had been sitting in a country where they did not belong to had been war tribunals but they had held trials under international legislation. The court in Camp Zeist was instead a Scottish court and would apply Scottish law and procedure. Thus, the only element of “internationality” was the venue where the trial was to be held. That aside, it was a domestic court in every respect although it had been created on purpose since it did not exist – in fact, it had not even been thought of – before.

In a way, something very peculiar happened when the two suspects were surrendered to a court and not to a country. Their delivery actually embodied a *de facto* extradition, particularly from the perspective of the requested state and its domestic law. As Justice Politi said,⁴⁶ the fact that there was no extradition to Scotland pertains only to the venue where the court was set up but then it was a Scottish court, which applied Scottish law. Nonetheless, the situation was rather peculiar because extradition as such can take place only if somebody is delivered from one state to another. This never happened in Lockerbie. In fact, Libya had never complied with the request of extradition filed by the United Kingdom and the United States even when it was the Security Council to adopt resolutions allowing no other option and urging Libya to extradite the two suspects. On the other hand, the United Kingdom and the United States had made it clear that they would accept nothing short of extradition. As already reported, the United Kingdom and the United States were in their own right of

demanding the extradition of the two alleged perpetrators of the Lockerbie bombing, whereas Libya was in its own right to claim that it was not bound to extradite; rather, it could try the suspects before its own courts according to the Montreal Convention of 1971.

Nonetheless, both sides involved in the Lockerbie wrangle contributed to next stages by refusing to come to terms with the counterpart's stance. In an extraordinary measure of international efforts to bring the Lockerbie case to a close, all the parties involved eventually agreed upon a Scottish trial in the Netherlands, which amounted to renouncing to a proper extradition on the one side and to the domestic prosecution on the other. In a way, it had been the Security Council to set the stage for the "third way," by upholding the existing extradition system and yet providing for an alternative since the treaty model was proving unworkable.⁴⁷ It is to be assumed that the intervention of the Security Council in extradition was justified, in so far as the situation constituted a threat to international peace and security, thereby legitimising the action of the Council under Chapter VII of the United Nations Charter.⁴⁸ And the International Court of Justice endorsed such course of action assuming that, under Article 103 of the United Nations Charter, Resolution 748 took precedence over any other international agreement, including the Montreal Convention.

Nonetheless, the intervention of the Security Council had brought the choice between extradition and domestic prosecution down to a situation where extradition was required and no other option was given. This had led to the long-running deadlock between Libya, the United Kingdom and the United States. Eventually, it was clear that an alternative way had to be found and agreed upon, which should happen in the respect of the sovereignty of all parties involved. Surrendering the two Libyan citizens before a court allowed the only possible compromise that would have overcome the impasse. Thus, the idea of a Scottish court sitting in a third country was the political solution that diplomatic efforts eventually brought

about for the legal proceedings to come true, which seemed to feature a certain sort of fairness.

This also vested the court at Camp Zeist with a measure of undeniable international credibility. As Justice Albie Sachs pointed out, even though a court in the United States or the United Kingdom might have been capable of delivering a just and fair verdict, the perception would have been different: “now they have caught them and therefore they are going to take their revenge. The Libyans have hit the Americans and the Britons, now the United Kingdom and the United States are striking back.”⁴⁹ This also allowed the suspension of the United Nations sanctions. The United States sanctions, instead, remained in place. In fact, the United States kept requiring Libya to meet further demands: Libya had still to renounce support for terrorism and pay appropriate compensation to the families of the victims. It also had to cooperate with the authorities in charge for the trial. Thus, the political questions were still there, hindering the full normalization of the international community’s relations with Libya and maintaining the stigma on the rogue state. Such demands, no matter how urgent and important, were however not going to be met prior to the conclusion of the trial.

3.5 Trial arrangements and charges

The trial began before the Scottish court – namely, the High Court of Justiciary – housed in Camp Zeist, the Netherlands, on 3 May 2000, after lengthy delays necessitated by the defence’s need for adequate time to prepare.⁵⁰ According to the agreement between the United Kingdom and the Kingdom of the Netherlands, the proceedings were to be conducted as if they would take place in Scotland, actually under Scottish law. Three judges rather than a single judge and jury would try the case.⁵¹ The court would decide any question of law put to it and would come to its verdict by a

majority. In case of an appeal, the appeal court would consist of five judges and would be heard either in Scotland or in the Netherlands. The accused would be detained in the court building prior to and during the trial. The court's premises were declared to be inviolable. The Dutch authorities were actually responsible for the external security of the court building. As far as solicitors and advocates of the accused were concerned, it was agreed upon that they would not be subjected to any measure, which might affect the free and independent exercise of their functions. Witnesses would be allowed free admission to attend the court; and international observers would be allowed to attend the trial.⁵²

The court had been established for the sole purpose of trying the two Libyan suspects - Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah - on several charges.⁵³ In fact, it was originally contended that the accused were guilty of conspiracy to murder,⁵⁴ alternatively murder, alternatively a contravention of section 2(1) and 2(5) of the Aviation Security Act 1982. The charges against the two accused, previously outlined in the Petition of the Procurator Fiscal⁵⁵ in 1991 and then in the indictment, were actually drafted as "alternative charges," meaning that the accused could only be convicted of one of them. Charge one, therefore, was conspiracy to murder rather than murder. Charge two, instead, was murder, that is to say not the agreement in order to commit the crime but the complete and accomplished crime. The difference between the two therefore relates to whether the act of murder was completed or not.⁵⁶ In the Lockerbie bombing, the occupants of the aircraft and the 11 residents in Lockerbie were certainly murdered. Yet, possible reasons for having both the charge of conspiracy and the completed crime was to allow evidence of conspiracy to be led and also to safeguard in the event that the completed crime could not be proven beyond reasonable doubt.

Thus, the second, alternative charge was that the two accused, being members of the Libyan Intelligence Services, destroyed a civil passenger aircraft and murdered the 259 passengers and crew on board the aircraft

inasmuch as 11 residents of the town of Lockerbie. The indictment narrates similar events leading up to the bombing of the aircraft as those outlined above with respect to the charge of conspiracy. Yet, the charge of murder differs from the charge of conspiracy to murder since it refers to a completed crime and not merely to an agreement to commit a crime. Understandably, the degree of evidence required to prove a completed crime is greater than that required to prove that an accused merely conspired to commit such crime. As already reported, the charges were drafted as alternatives. Charge three consisted of contravention of Section 2(1) of the Aviation Security Act of 1982, which makes it an offence for any person to unlawfully and intentionally destroy an aircraft in service, or to damage it to the extent as to render it incapable of flight or as to be likely to endanger its safety in flight; or, to commit on board an aircraft in flight, any act of violence which is likely to endanger the safety of the aircraft. Thus, to achieve a conviction under the terms of the Aviation Security Act, it would be necessary to show that the accused intended to destroy or damage the aircraft or alternatively that they committed an act of violence on board the aircraft likely to endanger the safety of the aircraft.

At the conclusion of the prosecution's submissions, however, the libel was restricted to the charge of murder. A common feature of the charges was however that the two accused were charged with acting in concert together and with unnamed others. The indictment narrates that Abdelbaset Ali Mohamed Al Megrahi was a member of the Libyan Intelligence Services, and in particular the head of security of Libyan Arab Airlines and then Director of the Centre for Strategic Studies in Tripoli. It then specifies that the second accused, that is to say Al Amin Khalifa Fhimah, was the Station Manager of Libyan Arab Airlines in Malta. The prosecution's case was that the cause of the Pan Am 103 disaster was that an explosive device had been introduced into the hold of the aircraft by the two accused whether acting alone or in concert with each other and others. In particular, the indictment specified the following: between 1 January 1985 and 21 December 1988,

both dates inclusive, within the offices of Libyan Arab Airlines at Luqa Airport, Malta, and elsewhere in Malta, Megrahi and Fhimah were in possession of quantities of high performance plastic explosive and airline luggage tags; they, between 20 November and 20 December 1988, both dates inclusive, ordered and attempted to obtain delivery - from the firm of MEBO AG, in Switzerland - of forty timers capable of detonating explosive devices and of a type previously supplied by the said firm of MEBO AG to members of the Libyan Intelligence Services.

The indictment further specifies that Megrahi and Fhimah unlawfully removed airline luggage tags between 1 and 21 December 1988, both dates inclusive, at Luqa Airport; that Megrahi, on 7 December 1988, in a shop known as Mary's House, in Sliema, Malta, purchased a quantity of clothing and an umbrella; that both the accused entered Malta at Luqa Airport on 20 December 1988, Megrahi using a passport in the false name of Ahmed Khalifa Abdusamad; that both the accused caused a suitcase to be introduced to Malta; that Megrahi resided at the Holiday Inn, in Sliema, using the false identity of Ahmed Khalifa Abdusamad, on 20 and 21 December 1988; that both the accused, on 21 December 1988, at Malta's Luqa Airport, placed or cause to be placed on board an aircraft of Air Malta flight KM180 to Frankfurt am Main Airport, Germany, the said suitcase, or a similar suitcase, containing the aforementioned clothing and umbrella and an improvised explosive device. The latter contained high performance plastic explosive concealed within a Toshiba RT SF 16 "Bombeat" radio cassette recorder which was programmed to be detonated by one of said electronic timers. The suitcase that contained the explosive device had been tagged or caused to be tagged so as to be carried by aircraft from Frankfurt Airport via London, Heathrow Airport, to New York, John F. Kennedy Airport.

The indictment then narrates that Megrahi departed from Malta on 21 December 1988 and travelled from there to Tripoli using a passport in the already mentioned false name of Ahmed Khalifa Abdusamad, while

travelling with Mohammed Abouagela Masud, who was also a member of the Libyan Intelligence Services; that the mentioned suitcase was thus carried to Frankfurt am Main Airport and there placed on board an aircraft of Pan American World Airways flight PA 103A and carried to London, Heathrow Airport where, in turn, it was placed on board an aircraft - flight Pan Am 103 to New York, John F. Kennedy Airport; that the said improvised explosive device detonated and exploded on board the said aircraft Pan Am 103 while in flight over Lockerbie. There, the aircraft was destroyed and the wreckage crashed to the ground; the 259 passengers and crew inasmuch as 11 residents of the town of Lockerbie were killed. It was therefore Megrahi and Fhimah that murdered them. Furthermore, the indictment also refers to the fact that, between 1 January 1985 and 21 December 1988, both dates inclusive, in Tripoli, at Dakar Airport, Senegal, in Malta and elsewhere, the Libyan Intelligence Services were in possession of the said electronic timers, quantities of high performance plastic explosive, detonators and other components of improvised explosive devices and Toshiba RT SF 16 "Bombeat" radio cassette recorders, all for issue to and use by their members.⁵⁷

The absolutely essential component of the charge of murder brought against the accused is paragraph g from charge 2 on the indictment: "you Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah did on 21 December 1988 at Luqa Airport aforesaid place or cause to be placed on board an aircraft of Air Malta flight KM180 to Frankfurt am Main Airport, Federal Republic of Germany said suitcase [the suitcase allegedly introduced into Malta by Megrahi on 20 December 1988] or a similar suitcase, containing said clothing and umbrella [items allegedly purchased by Megrahi from Mary's House, in Malta, earlier in December] and an improvised explosive device containing high performance plastic explosive concealed within a Toshiba RT SF 16 "Bombeat" radio cassette recorder and programmed to be detonated by one of said electronic timers [timers allegedly obtained by the accused from a Swiss company called MEBO AG],

having tagged or caused such suitcase to be tagged so as to be carried by aircraft from Frankfurt am Main Airport aforesaid via London, Heathrow Airport to New York, John F. Kennedy Airport, United States of America.”

The matter at issue in the Lockerbie trial was therefore whether or not the prosecution might prove beyond reasonable doubt that one or other or both of the accused were responsible, for the deliberate introduction of the explosive device on board Pan Am flight 103. It was not disputed, actually, and was adequately proved, that the cause of the disaster was the explosion of a device within the aircraft. Nor it was disputed that the person or persons who were responsible for the deliberate introduction of the explosive device on board the aircraft would be guilty of the crime of murder. The evidence proving that Megrahi and Fhimah had placed the explosive device or caused it to be placed on the plane was crucial in order to convict them.

3.6 Evidence and findings

The trial lasted over one hundred and thirty court days and featured the statements of 235 witnesses as well as the admission of thousands of pieces of physical and documentary evidence. The whole case basically turned on four key pieces of physical evidence recovered from the wreckage of Pan Am 103, plus one vital document supplied by Germany, and some crucial witnesses from the United States, Switzerland, Malta and Sweden. The first important piece of physical evidence was the reconstruction of the aircraft itself, on the basis of which the court held that there had been a bomb detonation in cargo container AVE 4041. The court also held that the suitcases loaded onto that particular container came from the Pan Am feeder flight (Pan Am 103A) from Frankfurt. The second piece of material evidence was the recovery from the wreckage of charred pieces of a Toshiba RT-SF 16 “Bombeat” radio cassette player and a brown Samsonite suitcase, which the court found had contained the bomb.

The third key piece of evidence was the discovery of charred fragments of clothing (two pairs of Yorkie trousers, a blue Babygro jumper, and an umbrella), which had been packed in the said suitcase. The court found that the clothing came from Malta and had been sold by a small store called “Mary’s House.” The fourth piece of evidence was a fragment of a circuit board for an MST-13 timer, which the court found had been manufactured by a Swiss electronics firm called MEBO AG. The latter appeared to be the most important piece of evidence and in fact the device that had triggered the bomb. The FBI Lab matched the said fragment to a timer seized earlier from Libyan agents in West Africa. MEBO actually admitted that it had sold twenty such timers to the Libyans in 1985. As far as documentary evidence was concerned, the document that played a pivotal role in the case was a computer printout of baggage tracking information for Frankfurt airport at the time Pan Am feeder flight 103A was being loaded. The document proved to the court’s satisfaction that an unaccompanied bag had been transferred from Flight KM180 from Malta to Pan Am 103A. Nonetheless, the court acknowledged that the prosecution had not proved how this suspicious suitcase had been placed on board KM180. This, the court pointed out, was “a major difficulty for the Crown case.”

With respect to witnesses, the first one was Abdul Majid, a member of the Libyan External Security Organization (JSO) who worked as a double agent for the CIA and was then in the United States witness protection program. In light of inconsistencies in his testimony and CIA documents released late in the trial suggesting he was prone to fabrication, the court found that Abdul Majid could not be accepted as a “credible and reliable witness.” After summarizing Majid’s various lies and exaggerations, the court concluded: “Information provided by a paid informer is always open to the criticism that it may be invented in order to justify payment, and in our view this is a case where such criticism is more than usually justified.” The court therefore rejected Majid’s claims that the defendant Fhimah possessed plastic explosives in his office desk at Luqa airport and that he saw the two

defendants load a brown Samsonite suitcase into Air Malta flight KM180 on the morning of the Lockerbie bombing. The court did, however, accept Majid's testimony that Megrahi was a high-ranking member of the Libyan External Security Organization, who travelled on a fake passport, and that his job was military procurement. These findings were to prove crucial to the verdict.

The second important witness was Edwin Bollier, the owner of the MEBO electronics firm in Zurich. The court found that Bollier was an "untruthful and unreliable witness" and much of his testimony "belong[ed] in the realm of fiction where it [might] be best placed in the genre of the spy thriller." However, the court accepted Bollier's testimony that he had rented office space "some time in 1988 to the firm ABH in which the first accused [Megrahi] and one Badri Hassan were the principals." The court also accepted that Bollier had supplied MEBO MST-13 timers to both Libya and the East German Ministerium für Staatssicherheit (Stasi), but found that there was no positive evidence that the Stasi ever supplied the timers to the PFLP-GC terrorist group as the defense rather suggested.

The most important witness of all was however Tony Gauci, the proprietor of Mary's House in Malta. Gauci actually identified Megrahi in court as the person who purchased the clothing that had been found in the Lockerbie bomb suitcase, although in the words of the court it was "not an unequivocal identification." The court noted that Gauci had previously identified individuals other than the defendant out of photo displays. In particular, Gauci had previously said that a photo of Abu Talb, a member of a Palestinian terrorist group, "resembled him a lot." Gauci also testified that it had been raining the evening of the sale and that his brother had been at home watching a soccer game on TV. However, the day Megrahi was in Malta and allegedly purchased the clothes from Mary's House, December 7, 1988, had, according to meteorological records, been dry and there was no soccer game on TV.

Despite the above-mentioned inconsistencies, the court stated that it was “nevertheless satisfied that [Gauci’s] identification so far as it went of the first accused as the purchaser was reliable and should be treated as a highly important element in this case.” Then, the final important witness was Abu Talb, a member of a Palestinian terrorist group, who had close ties to a PFLP-GC bomb-making operation in Germany that was uncovered by German authorities two months before the Lockerbie bombing. Talb, it was revealed, had been in Malta in late October 1988. He was subsequently arrested and convicted by a Swedish court in 1989 for a series of terrorist bombings in Copenhagen. A search of his apartment in 1989 had uncovered a barometric detonator, clothing from Malta, and a calendar with the date of Pan Am flight 103 bombing, December 21, 1988, circled. Despite these revelations, the court concluded: “We accept that there is a great deal of suspicion as to the acting of Abu Talb and his circle, but there is no evidence to indicate that they had either the means or the intention to destroy a civil aircraft in December 1988.”

As far as the findings in fact are concerned, the court in Camp Zeist established as credible and proven that the seat of the explosion was in a particular Samsonite suitcase (which contained clothing manufactured in Malta and sold both there and elsewhere) at or near the bottom of a particular aluminium luggage container (AVE 4041); that the bomb had been contained in a black Toshiba RT SF 16 cassette recorder; that a fragment of circuit board from a MST-13 timer manufactured in Zurich by MEBO AG formed part of the timing mechanism which detonated the bomb; that MEBO AG supplied MST-13 timers to the Libyan army, and may have done so also to other customers such as the East German Ministerium für Staatssicherheit.

As far as Megrahi was concerned, the court established as credible and proven that he was a member of the Libyan intelligence services and was known to the principals of MEBO AG; that he was involved, in an official capacity, in obtaining for Libya electronic equipment (including timers) from

MEBO; that he possessed and used Libyan passports in false names; that, sometimes under a false name, visited Malta on a number of occasions in 1988, including the night of 20/21 December; that arrived in Malta by air from Tripoli with a hard-shelled brown suitcase at some point in the two or three weeks following 7 December 1988; that some weeks before 21 December 1988, a person who “resembled a lot” Megrahi, but who also “resembled a lot” Mohamed Abu Talb, bought in Malta items of clothing and an umbrella like those that the Crown assumed be in the suitcase that contained the bomb; that in 1986 a conversation took place between Megrahi and Abdul Majid regarding the possibility of a piece of unaccompanied baggage being inserted onto a British aircraft at Malta. In the course of that conversation Megrahi used the words “Don’t rush things.”

About MEBO, the court found that a company of which a Libyan intelligence operative was a principal for a time had office accommodation in the premises occupied by the said MEBO in Zurich. As far as the second accused was concerned, the court established as credible and proven that Fhimah travelled by air to Malta on 20 December 1988 and departed by air the following day; that he was then in possession of a permit (obtained when he was station manager for Libyan Arab Airlines) which allowed him access to airside at Luqa Airport; that Fhimah, when he was station manager for Libyan Arab Airlines (which he ceased to be some months before the Lockerbie bombing), kept blocks of plastic explosive in his desk drawer at Luqa Airport; that a diary kept by Fhimah contained entries for a date six days before the Lockerbie bombing referring to the arrival of Abdusamad (the false name sometimes used by Megrahi) in Malta from Zurich and to getting tags from Air Malta.

And then, in respect of the suitcase, the court found that a piece of interline baggage arrived at the luggage station (206) at Frankfurt Airport used for baggage destined for flight Pan Am 103A (the feeder flight to Heathrow) on 21 December 1988 at a time consistent with its having been offloaded from flight KM 180 from Malta; that, albeit the security and

baggage reconciliation systems in operation at Luqa Airport in 1988 were highly effective by international standards, it would have been theoretically possible for an unaccompanied suitcase to be introduced into the interline baggage system at that airport, though there was no documentary or other record of any such piece of baggage being loaded on Air Malta flight KM 180 to Frankfurt on 21 December 1988.

The clothing issue was obviously a very important piece of evidence. Actually, the judges held it proved that Megrahi bought from Mary's House, in Malta, the clothes and umbrella which were in the suitcase with the bomb and that the date of purchase was 7 December 1988 (when Megrahi was on Malta). The fact that Megrahi was the purchaser was held proven on the basis of what Mr. Tony Gauci had said. As already reported, he actually assessed that Megrahi "resembled a lot" the purchaser, a phrase which he equally used with reference to Abu Talb, one of those mentioned in the special defence of incrimination⁵⁸ lodged on behalf of Megrahi. Gauci had also described his customer to the police as being six feet tall and over fifty years of age. However, the evidence at the trial established that Megrahi is five feet eight inches tall and was thirty-six years old in December 1988. Tony Gauci also said that when the purchaser left his shop it was raining to such an extent that his customer thought it advisable to buy an umbrella to protect himself while he went in search of a taxi. The unchallenged meteorological evidence, as already reported, established that it was unlikely that it had rained at all on 7 December; and if there had been any rain, it would have been no more than a few drops. Yet, the judges found that the clothes were purchased on 7 December.

The judges also held it proved that the bomb was contained in a piece of unaccompanied baggage which was transported on Air Malta flight KM 180 from Luqa to Frankfurt on 21 December 1988, and was then carried to Heathrow where Pan Am flight 103 was loaded from empty. The evidence supporting the finding that there was such a piece of unaccompanied baggage was the above mentioned computer printout which could be

interpreted to indicate that a piece of baggage went through the particular luggage coding station at Frankfurt Airport used for baggage from flight KM 180, and was routed towards the feeder flight to Heathrow, at a time consistent with its having been offloaded from KM 180. Against this, the evidence from Luqa Airport in Malta was to the effect that there was no unaccompanied bag on that flight to Frankfurt. All luggage on that flight were accounted for. The number of bags loaded into the hold matched the number of bags checked in (and subsequently collected) by the passengers on the aircraft. The court nevertheless held it proved that there had been a piece of unaccompanied baggage on flight KM 180.

It has already been stressed that a very important link to Libya in the evidence was a fragment of circuit board from a MST-13 timer manufactured by MEBO AG. Timers of this model were supplied predominantly to Libya although a few did go elsewhere, such as to the East German Stasi. This fragment was very important since it was the only piece of evidence that indicated that the Lockerbie bomb was detonated by a stand-alone, long-running timing mechanism, as distinct from a short-term timer triggered by a barometric device when the aircraft reached a pre-determined altitude. The origin of this vitally important piece of evidence was challenged by the defence and, in their written Opinion, the judges accepted that in a substantial number of respects this fragment, for reasons that were never satisfactorily explained, was not dealt with by the investigators and forensic scientists in the same way as other pieces of electronic circuit board (of which there were a multitude). The judges said that they were however satisfied that there was no sinister reason for the differential treatment. But the reason why they were satisfied is not really explained.

The court eventually rendered its verdict on January 31, 2001, after over one hundred and thirty court days. The three judges in charge for the Lockerbie case issued a unanimous verdict of guilty⁵⁹ of murder in respect of one of the accused, Abdelbaset Ali Mohmed Al Megrahi, who was sentenced

to life imprisonment, with a recommendation that he served at least twenty years. The court issued a unanimous verdict of not guilty of murder in respect of the other one, Al Amin Khalifa Fhimah. The murder conviction of Megrahi was therefore basically based on four findings: first, that he was proved to be a Libyan intelligence officer “of fairly high rank;” second, that he travelled on a fake passport; third, that he was in military procurement and had dealings with MEBO; and fourth, that Gauci had identified him as the purchaser of the clothing found in the bomb suitcase. As far as Libya’s responsibility for the bombing was concerned, the court stated: “The clear inference which we draw from this evidence is that the conception, planning, and execution of the plot which led to the planting of the explosive device was of Libyan origin.” From the point of view of the families of the victims, the latter was to prove the most important finding in the judgment since it suggested Libya’s responsibility for the bombing. The court did not, however, indicate how high up the Libyan Government chain of command the responsibility extended, nor did it rule out the possibility that other countries had also been involved in the bombing plot, as many experts still suspect.⁶⁰

As the prosecution conceded in the closing submissions, the case against Megrahi was entirely circumstantial, which is obviously no bar to a verdict of guilty, since circumstantial evidence can be as persuasive as the direct evidence provided by eyewitnesses to the commission of a crime. The prosecution also conceded that they had not been able to prove how the bomb that destroyed Pan Am 103 got into the interline baggage system and on board the aircraft. Here and there, the verdict seems quite unsatisfactory and the evidence does not seem to prove responsibilities beyond “any reasonable doubt.” In fact, the court itself acknowledged the following: “We are aware that in relation to certain aspects to the case there are a number of uncertainties and qualifications. We are also aware that there is a danger that by selecting parts of the evidence which seem to fit together and ignoring parts that might not fit, it is possible to read into a mass of

conflicting evidence a pattern or conclusion which is not really justified. However, having considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, we are satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of the item of baggage from Malta to London, the identification of the accused (albeit not absolute), his movements under a false name at or around the material time, and other background circumstances such as his association with Mr. Bollier and with members of the JSO or Libyan military who purchased MST-13 timers, does fit together to form a real convincing pattern. There is nothing in the evidence which leaves us with any reasonable doubt as to the guilt of the first accused, and accordingly we find him guilty of the remaining charge in the indictment amended.”

3.7 Reactions to the verdict

This was the unanimous outcome of a trial that lasted eight months. As already reported, the verdict did not implicate those higher up in the Libyan Government, nor did it rule out the possible involvement of other countries in the bombing. Ostensibly, portions of the judgment read as though the text had been drafted for a “not proven” verdict,⁶¹ which is used under Scottish law when the evidence does not rise to the level of “beyond reasonable doubt.” However, the three judges said that they found Megrahi to be guilty beyond any reasonable doubt. Nonetheless, a number of commentators have found the verdict based on very weak and controversial evidence. Experts like Professor Robert Black wrote that, for the judges to be satisfied of all the matters on the evidence led at the trial, “they would require to adopt the posture of the White Queen in *Through the Looking-Glass*, when she informed Alice - Why, sometimes I’ve believed as many as six impossible things before breakfast.”⁶²

In Professor Black's submission, this is demonstrated clearly in their approach to the identity of the purchaser of the clothing and the date of the purchase. The judges actually held it proved that it was Megrahi who bought from Mary's House in Malta the clothes and umbrella which were in the suitcase with the bomb and that the date of purchase was 7 December 1988 (when Megrahi was on Malta). Yet, the Maltese shopkeeper, Tony Gauci, said that Megrahi "resembled a lot" the purchaser, a phrase which he equally used with reference to Abu Talb, one of those mentioned in the special defence of incrimination lodged on behalf of Megrahi. Gauci had also described the purchaser as being six feet tall and over fifty years of age. The evidence at the trial instead established that Megrahi is five feet eight inches tall and that in 1988 he was only thirty-six years old. Tony Gauci also said that when the purchaser left his shop it was raining to such an extent that his customer thought it advisable to buy an umbrella. The unchallenged meteorological evidence, though, established that it was unlikely that it had rained at all on 7 December. Nonetheless, the judges held it proven that Megrahi was the purchaser and that the clothes were purchased on 7 December 1988.

Another crucial aspect in the prosecution's case that the court, in Robert Black's view, approached in a questionable way was that the bomb was contained in a piece of unaccompanied baggage which was transported on Air Malta flight KM 180 from Luqa to Frankfurt on 21 December 1988, and was then carried to Heathrow where Pan Am flight 103 was loaded from empty. As already reported, the evidence supporting the finding that there was such a piece of unaccompanied baggage was a computer printout which could be interpreted to indicate that a piece of baggage went through the particular luggage coding station at Frankfurt Airport used for baggage from KM 180, and was routed towards the feeder flight to Heathrow, at a time consistent with its having been offloaded from KM 180. Against this, the evidence from Luqa Airport in Malta (whose baggage reconciliation and security systems were proven to be, by international standards, very

effective) was to the effect that there was no unaccompanied bag on that flight to Frankfurt. All luggages on that flight were accounted for. The number of bags loaded into the hold matched the number of bags checked in and subsequently collected by the passengers on the aircraft. The court nevertheless held it proved that there had been a piece of unaccompanied baggage on flight KM 180 from Malta to Frankfurt, which, in Professor Black's view, is at least pretty questionable.

Robert Black also raised questions with respect to the MST-13 timer. An important link to Libya in the evidence was actually a fragment of circuit board from a MST-13 timer manufactured by MEBO AG. As already reported, such timers were widely supplied to Libya although a few did go elsewhere, such as to the East German Stasi. The said fragment was however crucial since it was proved that the Lockerbie bomb was detonated by "a stand-alone, long-running timing mechanism, as distinct from a short-term timer triggered by a barometric device when the aircraft reached a pre-determined altitude," the latter being a method known to be favoured by certain Palestinian terrorist cells operating in Europe in 1988. The provenance of this important piece of evidence was challenged by the defence and, in their written Opinion, the judges accepted that in a substantial number of respects this fragment was not dealt with by the investigators and forensic scientists in the same way as other pieces of electronic circuit board. The judges nonetheless said that they were satisfied that there was no sinister reason for the differential treatment. According to Professor Black, this also cast a shadow on the court's verdict and made it look rather flimsy. In fact, it was the court itself that acknowledged the fact that to certain parts of the case there were uncertainties and qualifications and that this could lead the evidence in an unconvincing way. In this respect, Professor Black argued that the judges' intellectual recognition of the aforementioned situation did not in the least appear to have enabled them to avoid it.⁶³ In Black's opinion, therefore, the Lockerbie verdict was highly flawed.

Many other commentators harshly criticised the Lockerbie verdict. One of those was Professor Hans Kochler, that is to say one of the United Nations observers.⁶⁴ First of all, in his report, Kochler pointed at the extraordinary length of detention of the two suspects and said that the “highly political circumstances of the trial” inasmuch as “special security considerations related to the political nature of the trial” might have adversely affected the rights of the accused, in particular as far as the length of the administrative detention was concerned. Besides, he pointed to the presence of government representatives in the courtroom on the side of the prosecution and defence team as a presence that jeopardized the independence and integrity of legal procedures and was certainly at variance with the general standards of due process and fairness of the trial.⁶⁵ He said that their presence created the impression of “supervisors handling vital matters of the prosecution strategy and deciding, in certain cases, which documents (evidence) were to be released in open court or what parts of information contained in a certain document were to be withheld (deleted).” In Hans Kochler’s view, the presence of *de facto* governmental representatives of both sides in the courtroom negatively impacted on the court’s ability to find the truth since it introduced a political element into the proceedings.

The United Nations observer also highlighted that a general pattern of the trial consisted in the fact that virtually all people presented by the prosecution as key witnesses were proven to lack credibility to a very high extent, in certain cases even having openly lied to the court. He therefore considered the guilty verdict in the case of Megrahi as particularly incomprehensible in view of the admission by the judges themselves that the identification by the Maltese shop owner was “not absolute” and that there was a “mass of conflicting evidence.” Besides, a general pattern of the trial consisted in the fact that virtually all people presented by the prosecution as key witnesses were proven to lack credibility to a very high extent and often made contradictory statements. Thus, their credibility was pretty questionable. With respect to the evidence, Kochler also suggested

that substantial information had been withheld from the court, “as an apparent result of political interests and considerations,” although the court seemed to be content with such situation.

Furthermore, in Hans Kochler’s view, the alternative theory of the defence – which would have obviously led to conclusions contradictory to those of the prosecution – was never seriously investigated. Thus, the United Nations observer inferred that “foreign governments or (secret) governmental agencies [might] have been allowed, albeit indirectly, to determine, to a considerable extent, which evidence was made available to the court.” Nor he spared the defence team and actually said that the fact that the defence cancelled the appearance of most of its witnesses put into question the credibility of the defence’s course of action and underlying motives. On top of that, Kochler expressed the view that the Opinion of the court seemed to be inconsistent since, while the first accused was found “guilty,” the second accused was found “not guilty,” although the indictment in its very essence was based on the joint action of the two accused in Malta.

Professor Kochler also highlighted the arbitrary aspect of the decision by stressing that the prosecution, at a certain stage of the trial, decided to “split” the accusation and change the very essence of the indictment by renouncing the identification of the second accused as a member of Libyan intelligence so as to actually disengage him from the formerly alleged collusion with Megrahi. Thus, he concluded that the guilty verdict with respect to the latter “appeared to be arbitrary, even irrational.” Thus, Professor Kochler’s conclusion was that “the air of international power politics” affected the outcome of the trial at large, which is utterly despicable but it is a fact that no judicial procedure is possible if political interests succeed in interfering in the actual conduct of a court. Kochler stressed that the goals of criminal justice on an international level cannot be advanced in a context of power politics and in the absence of an elaborate division of powers, since the rule of law is not compatible with the rules of power politics and justice cannot be done unless in complete independence.

He therefore inferred that political considerations might have been overriding a strictly judicial evaluation of the Lockerbie case, thus adversely affecting the outcome of the trial at Camp Zeist, which turned out to be unfair and conducted in an unobjective manner. In Kochler's view, the realities faced by the Scottish court in the Netherlands have featured a dramatic political implication stemming from a highly complex web of national and transnational interests related to the interaction among several major actors on the international scene. Instead, in Professor Kochler's view, truth in a matter of criminal justice has to be found through a transparent inquiry that can only be possible if all considerations of power politics are put aside. Thus, the trial was adversely influenced by politics and the verdict was utterly flawed.

Thus, both Robert Black and Hans Kochler, inasmuch as many others,⁶⁶ found the Lockerbie verdict pretty unconvincing and actually suspected that Megrahi had been convicted just because the court wanted to find a scapegoat in order to bring the case to an end. There were those who said that the Lockerbie affair had been a triumph of realpolitik over all the evidence and questions of motive.⁶⁷ In fact, the above-mentioned commentators seemed to agree about the fact that the verdict of guilt was supported by flimsy and controversial evidence and that the political impact the trial would have was an overriding factor that simply out-staged the reasons of law. The basic assumption was that the three judges at Camp Zeist intended to come up with a verdict of guilt and this is why they considered themselves satisfied with pieces of evidence that did not seem all that persuasive. This does not necessarily mean assuming Megrahi to be innocent. Those who expressed critical views about the Lockerbie verdict rather seemed to think that Megrahi's culpability was not proven, which is obviously something very different from him being "not guilty." Besides, Megrahi was nothing more than a foot soldier. Nobody higher up in the Libyan ranks had been involved and many questions were still un-resolved.

Not everybody agreed with the said critical approach, though. Professor Clare Connelly of the University of Glasgow,⁶⁸ for example, addressed the criticism consisting in the fact that the verdict was split since one of the accused was convicted and the other was acquitted, although in the indictment they had been said to act in concert. Professor Connelly actually said that there was nothing odd in splitting the verdict.⁶⁹ In fact, the evidence pertaining to the two accused was very different. There was actually a large quantity of evidence in respect to Megrahi, and the nature of that evidence was such that it pointed towards a verdict of guilty. With respect to Fhimah, who was acquitted, there was a lot less evidence that was presented to the court. And in the written judgment, the judges said that even if one could infer some sort of sinister purpose from the entries in his diary in regard to getting luggage tags in Malta, still there was no evidence whatsoever that he had knowledge as to even why he was asked to get those tags to Megrahi.

As Justice Richard Goldstone said,⁷⁰ the task of a court is not winning cases but just ensuring that people have fair trials. If somebody is acquitted, it means that there is no convincing evidence against him. This is the way the legal system works. Again, Professor Connelly also addressed the question of the Libyan Government involvement and specified that the fact that just a foot soldier might have been convicted did not mean that the verdict was unfair and that Megrahi was a scapegoat. As a matter of fact, the trial at Camp Zeist involved the two accused, that is to say Megrahi and Fhimah. No one else was on trial there, neither individuals nor other government agencies. Obviously, the families of the victims and many others may still have questions but it was not for the trial to answer those questions, since a trial is not a public inquiry or anything of the like. And certainly, at Camp Zeist, it was two individuals and not an entire country or a regime, to be tried. Besides, as Justice Albie Sachs clearly pointed out, the fact that it is not possible to punish everybody does not mean that law must

be prevented from punishing only somebody.⁷¹ A little justice is better than no justice whatsoever, after all.

Peter Watson, who has been involved in the Lockerbie case in the capacity of legal representative for the families of many of the victims, actually said⁷² that Hans Kochler's criticisms are totally unreasonable and shows how little knowledge the United Nations representative had of the Scottish legal system. For instance, Kochler criticised the court because representatives of "foreign governments" – namely, an official from the United States Department of Justice and a Libyan lawyer – sat respectively with the prosecution and defence. Kochler actually said that they were "checking notes and passing them on." In Watson's view, the absurdity of such criticism is self-evident since anyone with a basic knowledge of procedure knows it is not for the court to decide who the prosecution or defence have sitting with them. Professor Kochler also pointed out that efforts were undertaken to "withhold" substantial information from the court, which the court was surprisingly content with. Peter Watson specifies that Kochler here referred to information received by the prosecution from a foreign government which the prosecution undertook to investigate but which was not subsequently led in evidence. Watson says that this again proves the ignorance of basic legal procedure, since it is for the prosecution and the defence to decide what evidence to lead or not lead. The role of the court, instead, is to be a judge of fact on what is presented, since the Scottish system is not an inquisitorial one and therefore it is not for the judges to investigate.

As far as the attack on the way in which the credibility and reliability of witnesses was approached by the court, Peter Watson highlights that it is central to the intellectual rigour and fairness of the Scottish legal system that juries and judges must examine a witness's whole evidence and only accept those parts, which are accepted as true and reliable, which is neither irrational nor arbitrary, as Hans Kochler pointed out. It is just the way the Scottish legal system works, a system that in Watson's view Hans Kochler

seems to ignore. In fact, Professor Kochler's profound ignorance of the Scottish legal system was also proved by his criticisms which labelled as "incomprehensible" the acquittal of one of the accused and the conviction of another albeit they were charged as acting jointly. Peter Watson once again points out that this is simply the way the Scottish legal system works and it is therefore absolutely normal and legitimate that courts look at the evidence against each accused separately. In fact, only if there is sufficient evidence accepted as both credible and reliable against each accused, a court could proceed to convict.

Thus, the reactions to the Lockerbie verdict were pretty mixed. There were those who found the verdict incomprehensible, flawed and even irrational and those who found the criticisms totally groundless and prone to show the utmost ignorance of the Scottish legal system. Yet, it was quite impressive that one of the United Nations observers was so critical about the verdict not to mention Professor Black, who was certainly an expert on the Scottish legal system and yet harshly criticised the verdict. On the other hand, other experts that followed closely the trial found their criticisms unacceptable. Thus, even before an appeal was filed, the debate about the happenings at Camp Zeist had already heated up.

3.8 The appeal

As expected, Megrahi appealed against his conviction.⁷³ During the appeal, he was supposed to remain in jail, in Zeist, pursuant to article 15 of the Statutory Instrument – Order in Council - no. 2251/1998.⁷⁴ Should his appeal be unsuccessful, Megrahi would have been transferred to a prison in Scotland. The appeal,⁷⁵ pursuant to article 14 of the aforementioned Statutory Instrument, was to be heard before five Lords Commissioners of Justiciary, nominated by the Lord Justice Clerk, at the Scottish court at Camp Zeist. The appellant listed a number of grounds of appeal but did not

contend that the evidence the trial court had relied upon in order to convict him could not afford a sufficient basis in law for his conviction. Rather, some of the grounds of appeal maintained that the evidence was not of such nature, quality or power to enable a certain conclusion to be drawn or to justify a particular finding. However, the great majority of the grounds were directed to the way the trial court had dealt with the evidence and defence submissions.

It was actually maintained that the trial court had misinterpreted the evidence and wrongly considered certain factors as supportive of guilt. The appellant also said that the trial court had failed to give adequate reasons in respect of some specific issues. In particular, the appellant maintained that the trial court had failed to take proper account of, or have proper regard to, or give proper weight to, or gave insufficient weight to, certain evidence, factors or considerations. Besides, the appellant said that the trial court misunderstood, or failed to deal with, or properly take account of, certain submissions for the defence. On top of that, in one of the grounds of appeal, the appellant contended that a miscarriage of justice had occurred, because some evidence was not heard in the original proceedings.

According to the appellant, for instance, the trial court would have erred in finding that the date of the purchase of the clothes from the shop at Mary's House, in Malta, was 7 December 1988, inasmuch as in accepting Gauci's identification of Megrahi as the purchaser of the said clothes, identification the trial court did not adequately justify. In the appellant's view, the trial court also failed to deal with and resolve the contradictions and inconsistencies in the evidence of Gauci regarding both the date of the purchase and the identity of the purchaser. Besides, the trial court had misdirected itself as to the accuracy of the records from Frankfurt Airport from which it found that an inference could be drawn that an unaccompanied bag travelled on KM 180 from Luqa airport to Frankfurt and was there loaded onto PA103A.

In this respect, the appellant actually contended that the documents and other evidence from Frankfurt, properly construed, were not of sufficient strength, quality or character to found the court's conclusion pertaining to the "trip" of the unaccompanied piece of luggage that allegedly contained the bomb. The trial court had therefore erred in concluding that the bomb-suitcase was dispatched from Malta. The appellant also argued that the court failed to have proper regard to the defence submissions as to the factors which would have deterred a terrorist from attempting to ingest a bomb bag at Luqa. In the appellant's submission, the trial court had actually failed to take account of the defence submission that the fact that the primary suitcase was located at or near to the optimum position to achieve its destructive purpose gave rise to an inference that the device was ingested at Heathrow airport.

The appeal court, before addressing in detail every single ground of appeal, found it important to cast some light, in its Opinion, on the way the Scottish system actually works. It therefore referred to Section 106 of the Scottish Criminal Procedure Act of 1995, which makes provision for a right of appeal against conviction by a jury. Under subsection (3), an appellant may bring under review of the High Court "any alleged miscarriage of justice, which may include such a miscarriage based on (a) , the existence and significance of evidence which was not heard at the original proceedings; and (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned." The appeal court specified that, in Megrahi's appeal, one of the grounds of appeal had invoked paragraph (a) of section 106, subsection (3). There was no reference, instead, to the aforementioned paragraph (b). Thus, the appeal court found that Megrahi's appeal was based on allegations of "miscarriage of justice" within the generality of that expression in subsection (3), with the exception of one ground of appeal only.

Besides, the specific grounds of appeal submitted by Megrahi's counsels were tabled in order to challenge the conviction only and did not even

concern the recommendation that a minimum of twenty years should be served before release was to be considered, recommendation which had accompanied the court's mandatory sentence of life imprisonment. Nor the appellant's counsels contended that those parts of the evidence not rejected by the trial court in the original proceedings did not afford a sufficient basis in law for conviction. The said concessions proved pivotal as the appeal court emphasised in the penultimate paragraph of its Opinion, which reads as follows: "When opening the case for the appellant before this court, Mr. Taylor [the appellant's counsel] stated that the appeal was not about sufficiency of evidence: he accepted that there was a sufficiency of evidence. He also stated that he was not seeking to found on section 106(3)(b) of the 1995 Act. His position was that the trial court had misdirected itself in various respects. Accordingly, in this appeal we have not required to consider whether the evidence before the trial court, apart from the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the basis set out in its judgment. We have not had to consider whether the verdict of guilty was one which no reasonable trial court, properly directing itself, could have returned in the light of that evidence."

This meant that the appeal court was constrained to operate within narrow limits as set out by the appeal's grounds, which disabled it from reviewing issues such as the sufficiency of the evidence in law in order to justify crucial findings in fact, like the date of the purchase of the clothes in Malta, the identity of the purchaser, the place where the bomb suitcase started its journey and so forth. For the same reason, the appeal court was also prevented from considering whether those findings were such that no reasonable court, properly directing itself, would have returned verdict of guilt beyond reasonable doubt. What the appellant asked the court to do instead, was to hold that some findings in fact were based upon a misunderstanding of the evidence or were not supported by the evidence admitted or were arrived at by giving undue weight to evidence that supported them or insufficient weight to evidence that contradicted them.

Or, were in the nature of inferences from primary facts drawn in situations where other, non-incriminating inferences, were also open. The appellant also submitted that a miscarriage of justice could be based on the failure of the trial court to give adequate reasons for its conclusions, including reasons of adequate clarity.

Since the trial court had included in its judgment not only factual findings and reasoning leading to the conviction of the appellant, but also an account of evidence which it had accepted or rejected, the weight attached to the said evidence and the submissions made to it, the appeal court could certainly know the basis on which the conviction of the appellant was founded, and hence it could determine whether the trial court had misdirected itself by misinterpreting such evidence or failing to take other evidence into account. Nevertheless, in the appeal court's view, the trial court's reasons did not need to be utterly detailed; nor the trial court had to review whatever fact and argument on either side; besides, reasons do not require to be given for every single stage in the decision-making process. Moreover, the appeal court specified that, once the evidence has been accepted by a trial court, it is for that court only to determine what inferences should be drawn from that evidence. If evidence is capable of giving rise to two or more possible inferences, it is for the trial court to decide whether an inference should be drawn and, if so, which inference.

In many of the grounds of appeal, it was said that the trial court failed to take proper account of, or have proper regard to, or give proper weight to, or gave insufficient weight to, certain evidence, factors or considerations. In this respect, the appeal court stated that whenever it is not contended that a trial court has misdirected itself by ignoring something, the amount of weight that should be attached to it is a matter solely for the trial court, and not for the appeal court. If, of course, the appeal court were satisfied that a particular inference drawn by the trial court was not a possible inference, in the sense that the drawing of such an inference was not open to the trial court on the evidence, that would be indicative of a misdirection and the

appeal court would require to assess whether or not it had been material. Obviously, the fact that the trial court delivered a reasoned judgment does not affect the nature and extent of the role of an appeal court in reviewing any alleged miscarriage of justice.

The initial question for an appeal court should therefore be whether, in arriving at its verdict, the trial court misdirected itself either in law or as to a matter of fact so that it took a course which was not entitled to do or failed to do what it should have done. The further question would therefore be whether a miscarriage of justice had resulted. Nonetheless, in Megrahi's appeal, it was not maintained that the evidence before the trial court, apart from the evidence which it had rejected, was not sufficient as a matter of law to entitle it to convict the appellant. The grounds of appeal were mainly concerned with the trial court's treatment of the evidence and defence submissions. Obviously, since the prosecution's case against the appellant was based on circumstantial evidence, it was necessary for the trial court to consider all the circumstances founded on by the prosecution.

In this respect, the appeal court found that it was open to the trial court to hold the guilt of the appellant to be proved on the basis of circumstantial evidence coming from at least two independent sources. As far as circumstantial cases are concerned, it is actually necessary to look at the evidence as a whole, which means that individual pieces of circumstantial evidence do not need to be incriminating in itself; what matters is their concurrence. The appeal court also specified that if the nature of circumstantial evidence is such that it may be open to more than one interpretation, it was precisely the role of the trial court to decide which interpretation to adopt. As far as the two accused were concerned, the trial court bore in mind that the evidence against each of them had to be considered separately, even though such pieces of evidence could be regarded as implicating either. In fact, the trial court could be satisfied beyond reasonable doubt as to Megrahi's guilt whereas it inferred that there

was insufficient corroboration for convicting Fhimah. Thus, the latter was acquitted.

The appeal court held that in two or three instances the trial court had found the facts proved on the basis of a misunderstanding of the evidence led, or where there was no evidential basis for the finding. But, in each such case, it went on to decide that the error was insignificant and incapable of affecting the outcome of the trial one way or another. Therefore, those errors did not give rise to a miscarriage of justice. For example, Megrahi's lawyers tried to contend that a miscarriage of justice had occurred, because some evidence was not heard in the original proceedings. This evidence related to a breach of security at Heathrow terminal 3 (which could have provided access to the baggage build-up area) the night before Pan Am 103 departed from the same terminal on its fatal flight.

The appeal court allowed the new evidence to be led before it, but then concluded that it was not that important, meaning that it would have not had any material bearing on the court's determination of the issue of whether the suitcase containing the bomb had started its journey at Luqa Airport in Malta or in Heathrow instead. This ground of appeal was therefore rejected inasmuch as all the others, directed towards issues of "weight" or "proper regard" given to the evidence. The latter were all rejected as raising matters not within the competence or powers of the appeal court. In fact, as long as it was not contended that no reasonable trial court could have made the findings in fact, challenges of findings on these grounds were simply not competent. The weight to be given to evidence or the "proper regard" to be accorded to it as well as the inferences to be drawn from the facts that had been held proven were matters entirely for the trial court. On the said ground, Megrahi's appeal was rejected on 14 March 2002.

3.9 Reactions to the appeal judgment

Once the appeal was rejected, many commentators said that the appeal court had just endorsed what the trial court had already established. Undeniably, the appeal court's review was severely constrained by the appeal's set up and it is not that groundless to assume that the court might have come up with a totally different opinion, if the appellant's counsels had chosen a different course of action. As already reported, the appeal court was not empowered to address pivotal issues such as the sufficiency of the evidence in order to convict Megrahi or the fact that the verdict of guilt might have been beyond any reasonable doubt for whatever reasonable court. In fact, amongst the grounds of appeal, there was no reference whatsoever to the fact that the evidence the trial court had relied upon might not have been sufficient in law for a conviction, nor there was any reference whatsoever to Section 106, subsection (3) (b) of the Scottish Criminal Procedure Act of 1995, which makes provision whenever miscarriage of justice occurred for a verdict having been returned, which no reasonable jury, properly directed, could have returned. Thus, the scope of the appeal court's review was pretty limited from the outset and that was because of the course of action that Megrahi's counsels had chosen when tabling their grounds of appeal. Despite the fact that the appeal court issued a predictable verdict and possibly an unavoidable one, some of the reactions to the judgment were pretty severe.

One of those that harshly criticized the appeal judgment was Hans Kochler, the already mentioned United Nations observer.⁷⁶ Once again, he stressed that the proceedings had taken place in a highly politicised atmosphere and therefore had been seriously affected by reasons others than the law. In particular, he said that the presence of foreign individuals supporting the prosecution and defence teams had given the entire proceedings an aura of international politics that is not appropriate for an independent court. Then, he said that one of the most serious shortcomings

of the appeal proceedings was that the appellant did not have adequate defence, which weighed heavily in an adversarial judicial system where the fairness of the trial largely relies upon the equality of arms between prosecution and defence. In Kochler's view, the lack of adequate representation of the appellant was self-evident since the defence did not make the point that there was insufficient evidence in law to convict the appellant and expressly disavowed any reliance on the aforementioned Section 106 (3) (b) of the Criminal Procedure Act of 1995.

Kochler further stressed his point by noting that the defence did not even raise those technical issues, on which new information might have become available since the verdict on 31 January 2001, nor did it raise the issue of substantial evidence having been withheld during the trial. Briefly, the defence chose not to make use of many of the means at its disposal and thus deprived the appellant of his right to adequate and authentic legal representation under the European Convention of Human Rights.⁷⁷ Yet, it has to be objected that an unsuccessful legal strategy or unskilled lawyers do not necessarily impinge on the fairness of a trial as such, nor they deprive an individual of his right to adequate legal representation.

Kochler did not spare the judges either and actually criticised them for being satisfied to analyse the verdict of the trial court "in a merely formal manner, not dealing with the substance of the argument nor with its plausibility and logical consistency." In Kochler's view, the appeal judges "chose a kind of evasive strategy by not scrutinizing the argumentation of the trial court in regard to its plausibility and logical consistency, thus not questioning at all the arbitrariness of the evaluation of evidence by the trial judges, and not paying adequate attention to new evidence presented in the course of the appeal, an attitude of effective denial of responsibility that made the entire process a highly formal, artificial and abstract undertaking not related to the search for truth." Kochler found the appeal court's attitude utterly inexplicable since it should have been its duty to pursue a comprehensive review of the trial verdict. In this respect, it might be

observed that once the evidence has been accepted by the trial court, it is for that court only to determine what inference or inferences should be drawn from the said evidence. This is actually the way the system works and it has nothing to do with some judges' failure to adequately deal with a specific case.

Besides, Kochler observed that the appeal court failed to deal adequately with the substantial new evidence that was presented in the course of the appeal, which was particularly serious in the light of the fact that the trial court's verdict was "inconsistent, even irrational, in the basic respect of having found one accused guilty and the co-accused not guilty, while the accusation was based on the joint action and co-ordination of the action among the two accused in Malta." Obviously, Hans Kochler did not consider that the evidence has to be considered separately even though it might implicate several suspects. Hence, Kochler came to the conclusion that a reasonable jury would have never arrived to the conclusion of guilt in regard to Megrahi, especially when considering the vague and ambivalent evidence related to the supposed sequence of events in Malta. Finally, Kochler seemed to acknowledge that the appeal outcome had to do with the way the Scottish legal system works more than with the specific and possibly questionable way the judges dealt with the Lockerbie case. On this basis, he inferred that, if the Scottish legal system excludes, in appeal proceedings, the critical review of trial courts evaluation of evidence in so far that the original evaluation of evidence becomes a dogma not to be challenged by an appeal court, an appellant is effectively deprived of his right to a comprehensive review of his case in regard to the basic principle of fairness. In Kochler's view, this is particularly serious when the judges are not vested with an inquisitive duty as it happens in adversarial systems such as the Scottish one. Once again, Kochler suggested that the Scottish legal system and not only the Lockerbie appeal judgment might not be compatible with Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Then, he concluded by saying that in Lockerbie, the extraterritoriality of the location of the proceedings was simply not sufficient to guarantee a fully independent trial. In fact, “the geographical location of the proceedings outside of Scotland, despite the enormous costs involved, finally proved to be only a kind of sedativum for those concerned about the independence and impartiality of the proceedings.” He further argued that only an international composition of the tribunal could provide remedy to the problem of fairness and impartiality. In Kochler’s view, the Lockerbie trial proved that the only viable alternative in terms of independence of the judiciary and fairness of trial in any such case would be proceedings under the regulations of the Rome Statute of the International Criminal Court (ICC). Kochler actually said that it had to be inferred from the Lockerbie trial that no national court and no ad hoc tribunal set up by the Security Council can meet the requirements of independence, due process, impartiality and fairness. Only an internationally composed court would be able, at least in regard to its basic set-up and procedural rules, to operate outside the framework of power politics. This seems to be the most meaningful part of Kochler’s view, although not necessarily related to the outcome of the Lockerbie trial but actually more inspired by considerations of a general nature.

Many other commentators were as flabbergasted as Hans Kochler with respect to the Lockerbie trial outcome. Yet, they often acknowledged that there had been loopholes in the defence’s strategy. As far as the appeal court was concerned, it seemed that there was nothing much that it could have done, given the grounds of appeal tabled by the appellant.⁷⁸ Nonetheless, there were also those who adopted a different perspective and stressed the fact that the Lockerbie case was now over. The Spokesman for the United Nations Secretary-General, on 14 March 2002, issued the following statement: “The Lockerbie trial understandably has been followed with great interest, and has caused anguish to many. The families of the victims have been suffering ever since this tragic event, and the Secretary-General

shares their sorrow. With today's decision by the court, the time may now have come when these families can at last close this tragic chapter in their lives.”⁷⁹

And Jack Straw, the United Kingdom Foreign Secretary, said: “The decision of the Scottish Appeal Court to uphold the conviction of Abdel Basset Al Megrahi for the Lockerbie bombing cannot make up for the loss of those who died or for the suffering of their relatives. Nevertheless, I hope it gives them some solace.” He also added that it still remained for Libya to fulfil its international obligations on Lockerbie and comply with the terms of the United Nations resolutions.⁸⁰ In respect to the family of the victims, obviously, the fact that the appeal court had upheld the trial court's verdict was of some importance, although this did not compensate them for the loss and the grief they had been through. But at least a trial had taken place and somebody had been held accountable for Pan Am 103 onslaught. Maybe, the entire truth was not disclosed. It was actually quite unlikely that Megrahi alone had shaped the terrorist attack and performed it. Other people were quite likely to be involved and this is why many observed that all the trial did was convicting a foot soldier. Nonetheless, the principle of accountability over impunity had been established and somebody had been brought before a court and convicted for Pan Am 103 bombing. Somebody might have got away with it too and doubts were still likely to arise. Yet, some justice had been done which is certainly better than no justice at all. At least, the legal chapter was now closed.

3.10 Conclusion.

Eventually, the trial took place and somebody was deemed accountable for what happened over Lockerbie, on 21 December 1988. It took 14 years to get there and intense diplomatic efforts. Politics and diplomacy were actually pivotal for the legal system to react and eventually deal with that massive

onslaught in terms of crime and punishment. In this respect, it has to be acknowledged that a trial would have never come about if politics and diplomacy did not work to that end although this prompted harsh criticism that the trial was highly politicised. In a way, this perception was pretty difficult to prevent: although the trial concerned specific individuals and tried them for specific criminal charges, the relationship between three states was actually at stake and not only that. The United Nations was also highly involved since the Security Council had applied economic sanctions on Libya, which had happened long before a trial was held or anybody was convicted. The trial actually took place many years after Pan Am 103 bombing. It has to be acknowledged that the economic sanctions imposed on Libya contributed to make it possible. After a few years, Colonel Gaddafi actually realized that the Libyans were going through immense hardships, which made it sensitive to co-operate in order to overcome the long-running Lockerbie stalemate.

In the event, he therefore accepted to surrender the two suspects for trial and turned out to be quite keen on ending Libya's pariah status within the international fold. This development in Libya's policies seemed to highlight a changed "cost-benefit" analysis on the part of the Libyan Government: at some point, the costs to the latter of preserving its internal political legitimacy must have become so high as a result of the sanctions that they no longer bore any justifiable relation to the advantages of delaying a peaceful settlement of the Lockerbie crisis. Thus, the United Nations sanctions against Libya have proved successful to a certain extent. Gaddafi's regime eventually took remarkable steps in order to bring the Lockerbie case to an end. The question, though, remains, whether those sanctions were commensurate with the purpose of modifying the behaviour of the Libyan leadership. It is questionable, though unlikely, that Libya would have otherwise surrendered the alleged perpetrators of the Lockerbie bombing for trial. Nonetheless, ensuring justice does not only mean making

trials possible. It should also mean avoiding major injustices and making the diplomacy of mediation achieve more than any policy of starvation.

Besides, the humanitarian angle is not the only one by which sanctions may prove unfair. In fact, when the United Nations apply economic sanctions, the target country must be given a fair chance of achieving the lifting of those sanctions through appropriate behaviour. As far as Libya was concerned, the requirements to be met in order to get sanctions lifted were set out clearly, from the outset. Nonetheless, interpretation of those requirements is not necessarily all that simple. For example, how could Libya possibly prove to have renounced terrorism? This seemed too general a condition and very much a question of points of view. On the contrary, the compensation issue was quite clear-cut. Be it as it may, for both conditions to be met, the trial needed taking place. And if it did, this happened also because of the United Nations sanctions.

Nonetheless, despite their potential efficacy, sanctions would have never brought about any success in isolation. The trial was mainly possible because of the political and diplomatic effort in search of a final solution for the long-standing Lockerbie stalemate. The role of intermediaries was also pivotal. Quiet diplomacy and intensive talks amongst the parties never stopped and certainly piled up with the pressure exerted through sanctions for subsequent developments to come about. Sanctions cannot actually be regarded as a panacea that can achieve every foreign-policy goal with the same degree of success. Rather, they offer possible strategies and procedures to be used and combined with other pacific means of dispute settlement. The Lockerbie case actually proved that sanctions may turn out to be an effective alternative to military confrontation but they are not sufficient and need being complemented by intense diplomacy and mediation.

The latter means of settlement may not bite as dramatically as the economic weapon but can enjoy a more desirable and long-lasting result at less cost. This is why sanctions would have never been sufficient to secure the trial, although they exerted a remarkable pressure on the Libyan

Government and contributed to the subsequent course of action it eventually took. Interestingly, they also allowed the Lockerbie case to stay in the spotlight for many years after the bombing of Pan Am 103 occurred. The world actually focused its attention on the suffering of the Libyans and Gaddafi tried his best to this end. He actually complained about the inherent unfairness of the United Nations sanctions and kept pointing at the unjustifiable hardship they were causing to the Libyans. The international community did not prove insensitive to the Libyan cause and actually proved quite sympathetic. Many leaders around the world and regional organizations started taking stances in favour of Libya and Gaddafi therefore succeeded in breaking its country's international isolation.

The role of self appointed intermediaries proved crucial and above all the role of former South African President Nelson Mandela. It was actually possible to capitalize on the moral authority of the South African icon since the stand Mandela took in respect of the Lockerbie crisis bore undeniable international weight. His contribution in terms of confidence building was certainly pivotal and his sympathetic attitude towards the Libyan cause had worldwide resonance. Besides, emerging sources of pressure started playing a significant role in the Lockerbie affair: the Organization of African Unity, the Non-Aligned Movement, the Arab League actually took strong stands that favoured the dialogue on the one side but also urged the impasse to be overcome on the other. In particular, many Africans challenged the United Nations sanctions by deliberately infringing them and calling for their immediate lift.

This exerted remarkable pressure in the international arena and pushed the United Kingdom and the United States towards the acceptance of a negotiated solution, which would prove satisfactory to all parties to the dispute without infringing anybody's sovereignty. As Nelson Mandela openly remarked, a trial not only needs to be fair but also needs to be perceived as such. This would have never been the case if the Lockerbie trial were held in the United Kingdom, the United States or Libya. Justice to be

perceived as credible and fair cannot be seen as the justice of the victors or of the powerful or of the first world. Pretty much the same way, domestic trials are often unsatisfactory if an international case has to be dealt with, for the very simple reason that domestic courts may be biased and prone to stage sham trials. In a nutshell, the idea of a trial to be held in a neutral and third country highlighted the political sensitivity of Nelson Mandela, in the first place, and of the aforementioned emerging powers on the others. Thus, the vitality of mediation contributed to overcome the Lockerbie deadlock by serving a useful bridge between the West and a politically isolated Libya.

It was therefore the combination of politics, official diplomacy, mediation and economic tools that made the trial possible in the Lockerbie case and transformed a complex and sensitive political issue in a legal case. In the event, it was however the establishment of a tribunal that brought the case to an end and allowed the principle of accountability to prevail over that of impunity. The very fact that a proper trial took place and somebody was brought before a court certainly marked an important milestone as far as the international community's commitment to punish aviation terrorism and achieving the inherent legal accountability are concerned. It is actually for the judicial to establish the truth and only a tribunal can be acknowledged as impartial and objective. Nonetheless, many commentators expressed their doubt whether the Lockerbie trial ever established the full truth. Besides, it can be argued that justice that takes 14 years to be done somehow embodies a denial of justice. As years go by, memories may dim and evidence can become less reliable. The more it takes to get to trial, the more difficult it turns out to be to prosecute it successfully.

Besides, the Lockerbie trial ended up convicting no more than a foot soldier. Despite the mixed verdict and limited findings, though, and the fact that the trial may not have achieved the full truth to the satisfaction of the families of the victims, it has however proved that a trial can be mounted in a third country without prejudicing either the prosecution or the wider

interests of justice. The Lockerbie trial actually showed that international criminal trials may offer an important alternative to domestic trials. Besides, it closed the legal case and paved the way for further developments, such as compensation for the families of the victims and rehabilitation of Libya, as it is going to be discussed in due course.

And then, last but not least, the Lockerbie trial established a remarkable principle and showed that the international community is ready to take position against outrageous terrorist attacks that slaughter innocents. The fact that no impunity has to be tolerated is eventually part of the world's common heritage. The very fact that a trial took place means that the international community is actually committed to punishing atrocities in order to establish accountability over impunity. Aviation terrorism infringes the rules. Applying the law means going back to the rules, those rules that express widely agreed values. And this is what a trial allows for: stating, applying and restoring the rules. The success of the rule of law is mainly the affirmation of accountability against impunity, which can contribute to the final, far-reaching though indispensable aim: a world where peace exists at once with justice. The legal process can certainly be one of the tools to be used in this respect. It is actually grouped with other peaceful methods of dispute settlement in Article 33 of the United Nations Charter and can bring about peace and reconciliation.

Of course, the legal process has its inherent limits and often pursues reconciliation at states' level and not with the individuals. It is certainly not a trial or a conviction that can compensate the families of the victims for their loss or give them a sense of overall closure for the outrageous onslaught that killed their beloved ones. Yet, the society level is also important and this is what international justice deals with. This is actually the political end that international law may serve whenever it allows the truth to be established and accountability to prevail over impunity. Obviously, a trial may end up convicting a few but not all that are guilty with criminal offences and this is probably what happened in the Lockerbie

case. Megrahi possibly stood for a larger group of individuals. Nonetheless, even though individual justice lets off some of the criminals, still, it cannot be considered as a *de facto* way of exonerating many of the guilt. Obviously, in theory, all criminals should be punished. The system does the best it can with the case and the evidence before it. And in Lockerbie, the court convicted one of the suspects because that was the evidence at its disposal.

The credibility of the court is also an extremely important aspect. In this respect, the Lockerbie case showed that the international community needs a neutral and independent court, which has nothing to do with whatever national government. In the Lockerbie case, it was necessary to achieve a political agreement in order to set out an ad hoc tribunal that embodied a compromise solution, which was acceptable by all parties. Probably, the long-lasting Lockerbie deadlock would have never occurred or would have never lasted that long if a pre-established international tribunal already existed. The lesson that might be inferred from the Lockerbie case is therefore that there is an absolute need for a pre-established, neutral and independent judicial institution empowered with jurisdiction over aviation terrorist attacks whenever they entail aspects of internationality and therefore cannot effectively be dealt with at domestic level.

Obviously, such a judicial institution should ensure the independence of both the investigator and prosecutor. In the Lockerbie case, both have been seriously questioned. Only a pre-established, non-national court seems to embody the concept of a fair, independent and impartial justice. In this respect, the Lockerbie trial can be considered part of an important development that has come about in the international legal scenario and has seen the establishment of War Crimes Tribunals for Rwanda and Yugoslavia and then eventually the creation of the International Criminal Court. The underlying philosophy has been always the same: demand for justice and refusal of impunity inasmuch as the need for atrocities to be punished before they are relegated to history books. It is a long way to go, though. Yet, for judicial institutions to be established the need is pretty

much the same as in Lockerbie. Politics and diplomacy are actually the tools that pave the way to trials. In this respect, the Lockerbie case has proved a success story, albeit a complex one. There was actually a crucial place for political action in securing the interests of justice. It was a political and diplomatic achievement to secure the resources for the investigation and prosecution, secure the co-operation and goodwill of foreign governments and agencies and in the end achieve the hand over of the accused for trial.

Nevertheless, for some, politics has interfered with the due process of law. Two people accused of the most serious of crimes have been protected by their government to the point where national laws both in Scotland and the Netherlands were amended in order to accommodate their fears about inability to receive a fair trial. Despite the apparent success of the trial, this remains on the face of it a remarkable criticism. Nonetheless, without a compromise, there would have been no trial at all. Besides, the fact that the United Kingdom and the Netherlands accepted to be flexible in their criminal justice systems was very important. It actually showed that justice can be pursued if there is willingness to co-operate and to act in good faith. And it also meant that the fact that the Libyans' suspects feared that they would not be allowed a fair trial in countries where they had been convicted by the media before any judge could try them was not that groundless. As a matter of fact, the bombing of Pan Am 103 was not only a very complex political and diplomatic affair inasmuch as a remarkable legal case: it was also a major media issue as it is going to be shown below.

Notes

¹ Or a Soviet subsidy for a target of U.S. sanctions.

² See *supra*, par. 6 and note 43, chapter 2.

³ It seems worth recalling that, since 1992, Libya was subjected to the United Nations sanctions that included a number of different measures, such as a ban on Libyan airline flights, military assistance to Libya, and sale of parts needed by Libya's oil industry, as well as the downgrading of diplomatic ties with Libya. See *supra*, par.2, chapter 2.

⁴ See J.A. Paul and S. Akhtar, "Sanctions: an analysis," available at <http://www.globalpolicy.org/security/sanction/analysis2.htm>

⁵ See *supra*, par. 8, chapter 2.

⁶ Starvation is not allowed. The limit is overstepped if sanctions help bring about a situation where a large part of the population falls below subsistence level.

⁷ Justice Mauro Politi is currently appointed as one of the Justices at the International Criminal Court in The Hague. I had the privilege to interview him in Yerevan, on 13 May 2004.

⁸ The choice of sanctions may prove crucial, since different sanctions bring about different effects. For example, an arms embargo is generally the easiest to accept; however - like all partial embargoes - it is also particularly difficult to enforce effectively, because arms trade is largely clandestine. In most cases, it merely helps drive more trade underground and push prices upwards. A second category of measures, comprises those that primarily serve to express the disapproval of the international community. This would include, for example, exclusion from the Olympic Games, or, at a general level, the halting of exchanges in sport, culture, science, technology, information, diplomacy, and development co-operation, as well as the suspension of the target state's membership of international organizations. A further group of measures includes those in the fields of transport and communications, financial sanctions, and partial embargoes for specific goods, whereas partial or total trade boycotts may be regarded as constituting a fourth category. Such boycotts entail a ban on the import of all or some goods from the target country and are to be seen as the opposite of embargoes, which block the export of goods from United Nations member states to the country against which the sanctions are directed. For an overview about the use of economic sanctions, see Chan, S. and Cooper Drury, A., (eds.), "Sanctions as economic statecraft," St. Martin's Press, LLC, New York, 2000, pp.1-16. About the debate pertaining to the need of smartening sanctions, see Craven, M., "Humanitarianism and the quest for smarter sanctions," 13, no.1, European Journal of International Law, 43-61, (2002). See also O'Connell, M.E., "Debating the law of sanctions," *ubi supra*, pp.63-79.

⁹ Under Article 41 of the United Nations Charter, the Security Council may actually call upon member states to apply measures not involving the use of armed force in order to maintain or restore international peace and security. The legal bases for United Nations sanctions are to be found in Chapter VII of the Charter. According to this, the pre-condition for the imposition of sanctions in a specific case is a determination by the Security Council that there is a threat to the peace, breach of the peace, or an act of aggression. According to Articles 39, 41, and 42 of the UN Charter, the Council can then choose whatever coercive measures of a non-military or military kind it considers necessary to preserve world peace

and international security. In terms of the Charter system, non-violent sanctions as stipulated in Article 41, rank as a milder means than the use of military measures. Article 42 actually establishes that the Security Council may only have recourse to the latter, if it believes “that measures provided for in Article 41 would be inadequate or have proved to be inadequate.” See par. 2, chapter 2.

¹⁰ As I have already reported, I had the privilege of interviewing Justice Richard Goldstone for the first time, in Johannesburg, at the Constitutional Court, on 5 March 2003. See *supra*, note 9, chapter 1.

¹¹ Letter dated 22 July 1996 from Libya’s leader, addressed to the President of the Security Council, <http://www.geocities.com/Athens/8744/mqtoun.htm>

¹² Not all of the suffering the Libyan people were going through was caused by the United Nations sanctions though. The United States had actually imposed on Libya its own sanctions and those were particularly stern. The Iran and Libya Sanctions Act (US Public Law 104-172; 104th Congress), endorsed in 1996, was aimed at boycotting countries and companies that continued to deal with Libya and Iran, notwithstanding the economic sanctions the United States had imposed on the said countries. The Iran and Libya Sanctions Act was actually an “Act to impose sanctions on persons making certain investments directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop its petroleum resources, and on persons exporting certain items that enhance Libya’s weapons or aviation capabilities or enhance Libya’s ability to develop its petroleum resources, and for other purposes.” The said Act reads as follows: “(b) Policy With Respect to Libya. The Congress further declares that it is the policy of the United States to seek full compliance by Libya with its obligations under Resolutions 731, 748, and 883 of the Security Council of the United Nations, including ending all support for acts of international terrorism and efforts to develop or acquire weapons of mass destruction.” Other Acts restricting trade and transactions with Libya were also endorsed in the following years. The Foreign Operations, Export Financing and Related Programs Appropriation Act prohibited the use of certain funds to finance or assist Libya. The Trade Sanctions Reform and Export Enhancement Act of 2000 further limited commercial exports to Libya.

¹³ The parties’ abstention would have been required by the Charter if the Council had acted under Chapter VI. See *supra*, par. 6, chapter 2, especially at note 43.

¹⁴ See K. Sturman, “The rise of Libya as a regional player,” 12, no. 2, *African Security Review*, (2003), also at <http://www.iss.co.za/Pubs/ASR/12No2/c2.html>

¹⁵ Libya had been supporting many African causes and sympathizing with African liberation movements in a number of countries. In particular, it supported the anti-apartheid struggle in South Africa. About Nelson Mandela’s crucial role in the Lockerbie affair, see, *ex multis*, Arzt, D.E., “The Lockerbie extradition by analogy agreement: exceptional measure or template for transnational justice?,” 18, *American University International Law Review*, 163-227, (2002). About his role and the way the media echoed it, see *infra*, par. 9, chapter 4.

¹⁶ He actually made such statement and again expressed his strong support for the proposal of the trial being held in a neutral venue during his attendance at the Conference of the Commonwealth Heads of Governments, which took place in Edinburgh in October 1997. See ANC Daily News Briefing, Monday 27 October 1997, available at <http://www.anc.org.za/anc/newsbrief/1997/news1027>

¹⁷ Bandar was his country's military attaché and then his country's Ambassador in Washington. See Matar, K. I. and Thabit, R. W., op. cit., pp. 172-173. See *supra*, note 3, chapter 2.

¹⁸ Resolution CM/Res.1525 (LX), adopted by the Organization of African Unity in Tunis, in 1994.

¹⁹ Resolution CM/Res. 1587 (LXII), adopted by the Organization of African Unity in Addis Ababa, in 1995.

²⁰ AHG/Decl.2 (XXXIII), Declaration of the thirty-third Ordinary Session of the OAU Assembly of Heads of State and Government, adopted in 1997. About the said declaration, see Machipisa, L., "Overwhelming support for Libya from African leaders," available at <http://www.hartfordhwp.com/archives/32/025.html> See also Kumalo, D., "Africa's own international organisation," <http://ospiti.peacelink.it/anb-bia/nr333/e10.html>

²¹ For a detailed report of the initiatives undertaken by the Organization of African Unity, the Arab League and the Non-Aligned Movement, see Matar, K. I. and Thabit, R.W., op. cit., pp. 94-104. See *supra*, note 3, chapter 3.

²² See Phytian, N., "OAU announces decision to ignore anti-Libya sanctions," <http://www.geocities.com/Athens/8744/oau.htm>

²³ Jehl, D., "Arab Governments agree to defy U.N. Libyan sanctions while witness to bombing pleads guilty of perjury," New York Times, September 22, 1997, available at <http://www.ielr.com/8b.htm>

²⁴ On 27 February 1998, the International Court of Justice had actually ruled that it had jurisdiction over the dispute pertaining to the interpretation and application of the Montreal Convention that had arisen between Libya, the United States and the United Kingdom. See *supra*, par. 2.7, chapter 2.

²⁵ Letter from Permanent Representatives of Algeria, Egypt, Libya, Mauritania, Morocco, Syria and Tunisia to the United Nations to the President of the Security Council on 1st July 1998 (UN Doc. S/1998/598).

²⁶ The Vatican opened diplomatic relationship with Libya in 1997. See Gerson, A. and Adler, J., "The price of terror," Harper Collins Publishers, New York, 2001, pp.262, 273. See also *infra*, par. 9, chapter 4.

²⁷ On Scottish rules, see Black, R., "The Lockerbie criminal trial: the Scottish rules of evidence," http://www.thelockerbietrial.com/lockerbie_criminal_trial.htm See also Scharf, M. P., "Terrorism on trial: the Lockerbie criminal proceedings," available at <http://137.52.46.28/student/organizations/ILSAJournal/6-2/Scharf%206-2.htm>

²⁸ See Black, R., "The Lockerbie disaster," 3, *Edinburgh Law Review*, 85-95 (1999).

²⁹ Ostensibly, what the suspected also feared was that they might be snatched by special forces of the United States, removed to America and put on trial there. On this particular issue, see Black, R., "From Lockerbie to Zeist (via Tripoli, Tunis and Cairo)," http://www.thelockerbietrial.com/from_lockerbie_to_zeist.htm

³⁰ UN Doc. S/1997/845.

³¹ UN Doc. S/1997/991, Annex.

³² Letter Dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, UN Doc. S/1998/795.

³³ See the Press Release by the Foreign Affairs Press Office of the Netherlands, on 24 August 1998, at <http://www.geocities.com/CapitolHill/5260/dutch248.html>

³⁴ Press Release SG/SM/6682 on 24 August 1998.

³⁵ See Libya's Press Release on 26 August 1998 (Statement by the People's Committee of the Foreign Liaison and International Cooperation), available at <http://www.geocities.com/CapitolHill/5260/pb268.html>

³⁶ Letter dated 25 August 1998 from the Charge d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/803 (1998).

³⁷ Security Council Resolution 1192 adopted on 27 August 1998.

³⁸ See the "Memorandum on the latest developments on the dispute between Libyan Arab Jamahiriya and the United States and the United Kingdom over Lockerbie" adopted in September 1998 by the Permanent Mission of Libya to the United Nations, www.libya-un.org

³⁹ The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 - Statutory Instrument 1998 no. 2251 – intended to giving effect to Security Council Resolution 1192 of 27 August 1998 which called on all states, but particularly the United Kingdom, the Netherlands and Libya, to act to ensure that there be a trial of the accused in the Netherlands. The Statutory Instrument is available at <http://www.hms0.gov.uk/si/si1998/19982251.htm>

⁴⁰ See Draft Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish trial in the Netherlands, then undersigned on 18 September 1998, available at <http://www.ltb.org.uk/trialtreaty.cfm>

⁴¹ Letter available at <http://www.ict.org.il/spotlight/det.cfm?id=242>

⁴² Establishing a Libyan consulate in Scotland would obviously mean re-establishing diplomatic relations between Libya and the United Kingdom.

⁴³ Camp Zeist is about 30 miles south of Amsterdam. It used to be a US airbase.

⁴⁴ UN Doc. S/1999/378 issued on 5 April 1999, containing UN Secretary-General's report of the handover of the Libyan defendants to the Scottish Court in the Netherlands.

⁴⁵ Press release SC/6662.

⁴⁶ As already reported, I had the privilege of interviewing Justice Mauro Politi in Yerevan on 13 May 2004. See note 7, in this same chapter.

⁴⁷ See M. Plachta, *op.cit.* (note 33, chapter 2).

⁴⁸ See *supra*, par. 2, chapter 2.

⁴⁹ As I have already reported, I had the privilege of interviewing Justice Albie Sachs on 8 April 2003 at the Constitutional Court in Johannesburg. See note 2, chapter 1.

⁵⁰ See Boyd, C., “The Lockerbie trial,” paper presented at the 15th International Conference of the International Society for the reform of criminal law, which took place in Canberra, Australia, 26-30 August 2001. The paper is available at www.isrcl.org/Papers/Boyd.pdf

⁵¹ Statutory Instrument 1998 no. 2251 established that the three judges had to be appointed by the Lord Justice-Clerk, the second most senior judge in Scotland. The senior judge, the Lord Justice-General, was not given this function, at the beginning, because he had previously been the Lord Advocate and therefore responsible for all prosecutions in Scotland, including the Lockerbie prosecution. The said Order was later amended by means of Statutory Instrument 2001 no. 3918 - the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) (Variation) Order 1998 - which removed the requirement that anything which the Lord Justice General required, or had power to do in relation to criminal proceedings should, in relation to proceedings conducted by virtue of the 1998 Order, be done by the Lord Justice Clerk. It therefore provided that the appointments of the Lords Commissioners of Justiciary - who were to constitute the court for the purpose of hearing any appeal in relation to proceedings to which the 1998 Order applied - were to be made by the Lord Justice General. See *infra*, par. 8, in this chapter.

⁵² See the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order of 1998 and the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish trial in The Netherlands, signed on 18 September 1998. See *supra*, par. 3, in this same chapter.

⁵³ On 14 November 1991, the Lord Advocate, Scotland’s chief law officer, and the US Acting Attorney General issued warrants for the arrest of the two Libyan nationals. See *supra*, par. 1, chapter 2.

⁵⁴ In pursuance of the charge of conspiracy, the indictment narrates that the two accused, in concert with others, had formed a criminal purpose to destroy a civil passenger aircraft and murder the occupants in furtherance of the purposes of the said Libyan Intelligence Services.

⁵⁵ In Scotland, responsibility for the investigation of sudden deaths rests with the Procurator Fiscal, that is to say the local public prosecutor, who actually attends the scene and may direct the police in the conduct of their inquiries. His Petition - upon which warrant for arrest was issued by the Sheriff of South Strathclyde, Dumfries and Galloway on 13 November 1991 - was then superseded by the indictment served on Friday 29 October 1999. The petition is available at <http://www.ltb.org.uk/chargespetition.cfm>

⁵⁶ The charge of conspiracy relates to an inchoate crime and is defined as “an agreement between two or more people to behave in a manner that will automatically constitute an offence by at least one of them.” See Oxford Dictionary of Law, Oxford University Press 2002.

⁵⁷ The indictment is available at <http://www.ltb.org.uk/chargesindictment2.cfm>

⁵⁸ The defence suggested that Pan Am 103 was blown up not by Libya, but by Iran or the PFLP-GC, as the criminal investigators originally suspected.

⁵⁹ As far as the verdict was concerned, the judges could have found either of the accused “guilty” or “not guilty” or the guilt “not proven.” “Not proven” means that the proof of guilt was not beyond a reasonable doubt. Other features that characterised the Lockerbie trial are the following: first and foremost, at the request of the defence, the Lockerbie court was composed of a panel of three judges, rather than a fifteen-members Scottish jury. Yet, as with a Scottish jury, the three-judge panel were supposed to rule by a simple majority. Another interesting aspect of Scottish criminal procedure that featured in the Lockerbie trial was the broad Scottish hearsay exception for unavailable witnesses. Under Scottish law, an out of court statement can be introduced not only if the witness is dead or has disappeared, but also if the witness simply refuses to appear at Camp Zeist to testify. This is important since the Scottish court sitting in the Netherlands lacked the power to compel the appearance of witnesses outside of Scotland. Another peculiarity of the Scottish system is that nobody can be convicted without corroboration. This requires that, for every element of the crime, there must be credible evidence from more than one source. A single piece of evidence of guilt, no matter how persuasive, cannot support a conviction. Obviously, it is far beyond the scope of the present work to give an overview of Scottish criminal procedure. Yet, highlighting a few aspects may help understanding how the trial was shaped.

⁶⁰ Such as Syria or Iran, for example. See *supra*, note 2, chapter 2 and *infra*, par. 8, chapter 4.

⁶¹ See Scharf, M. P., “The Lockerbie Trial Verdict,” ASIL Insight, February 2001, available at <http://www.asil.org/insights/insigh44.htm>

⁶² See Black, R., “In order to convict,” http://www.thelockerbietrial.com/in_order_to_convict.htm

⁶³ See Black, R., “Background to the Lockerbie Appeal,” available at http://www.thelockerbietrial.com/appeal_background_to_the_appeal.htm

⁶⁴ See report on and evaluation of the Lockerbie Trial conducted by the special Scottish Court in the Netherlands at Camp Zeist by Prof. Hans Köchler, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998). Hans Kochler’s report (2001/P/HK/17032) was given at Santiago de Chile on 3 February 2001 and is available at <http://www.library.cornell.edu/colldev/mideast/koechl.htm>

⁶⁵ The Government representatives’ presence is not even acknowledged in the official documents pertaining to the trial as Prof. Kochler himself reports.

⁶⁶ See for example Ferguson, I., “The Lockerbie bombing trial: new problems in the prosecution’s case,” 2, no.8, Middle East Intelligence Bulletin, (2000). Ferguson seriously questions the credibility of the witnesses relied upon by the defence.

⁶⁷ On this, see especially Ashton, J. and Ferguson, I., *op. cit.* (note 2, chapter 2). See also James, S. and Marsden, C., “Pan Am 103/ Lockerbie verdict politically motivated,” at <http://www.wsws.org/articles/2001/feb2001/lock-f07.shtml>

⁶⁸ Clare Connelly is Professor of law at the University of Glasgow in Scotland. She is also Director of the Lockerbie Briefing Unit, a team of university legal experts who have been observing the trial.

⁶⁹ See Clare Connelly interviewed by Margaret Warner on January 31, 2001, at Online News Hour. <http://www.pbs.org/newshour/bb/transportation/jan-june01/lockerb1-31.html>

⁷⁰ I had the privilege of interviewing Justice Richard Goldstone for the second time on 6 May 2003, at the Constitutional Court, in Johannesburg.

⁷¹ My interview with Justice Albie Sachs on 8 April 2003. See *supra*, note 49 to this same chapter and note 2, chapter 1.

⁷² Peter Watson was the lawyer representing the majority of the Britons who died in Pan Am 103 crash and has been secretary of the Lockerbie Air Disaster group. I had the privilege of interviewing him via e-mail on 10 February 2004.

⁷³ The appeal was heard at Camp Zeist from 23 January to 14 February 2002.

⁷⁴ High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 (SI 1998 No 2251). See note 39 and 51 to this same chapter.

⁷⁵ See Note of Appeal under the Criminal Procedure (Scotland) Act 1995 available at http://www.thelockerbietrial.com/appeal_grounds.htm

⁷⁶ See Hans Kochler, "Report on the appeal proceedings at the Scottish Court in the Netherlands (Lockerbie Court) in the case of Abdelbaset Ali Mohamed Al Megrahi v. H. M. Advocate," Vienna, 26 March 2002, 2002/P/RE/17553, available at <http://www.portia.org/latest/lockerb2.html>

⁷⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6(1) of the Convention stipulates: "In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Art. 6 (3) par. (c) states that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing.

⁷⁸ The already mentioned expert, Professor Robert Black, for example, insisted that a miscarriage of justice had been perpetrated, until "such time as an appellate court is required to address the fundamental issue of (i) whether there was sufficient evidence to warrant the incriminating findings, (ii) whether any reasonable trial court could have made those findings (and could have been satisfied beyond reasonable doubt of the guilt of Megrahi) on the evidence led at Camp van Zeist and (iii) whether Megrahi's representation of the trial and the appeal was adequate." See Black, R., "Appeal front page," <http://www.thelockerbietrial.com/>

⁷⁹ Press release SG/SM/81/61

⁸⁰ Statement by the Foreign Secretary, Jack Straw, on Thursday 14 March 2002, <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1017049158968>

Chapter 4

THE LOCKERBIE AFFAIR AND THE MEDIA

4.1 Terrorism and media coverage

Pan Am 103 crash and the long-lasting Lockerbie aftermath are certainly the sort of events that do not go unnoticed. As already reported, the bombing - in which, as it was written,¹ the skin of the aircraft peeled back in a petalling effect - was in itself particularly impressive. It took place a few days before Christmas and killed 270 people. Amongst the other victims, there were 35 students from Syracuse University² heading home for their holidays and altogether 58 passengers were less than 21 years old.³ The small and quiet Scottish town of Lockerbie was immortalized forever as the place of horror where bodies were scattered all over across fields, on top of houses, on a golf course and in gardens: just everywhere, as it was still to be recalled several years after the date of the tragedy, despite the efforts the town had made to move forward.⁴ Pan Am 103 crash was described by forensic expert, within days from its occurrence, as “the most appalling crime since the Second World War.”⁵ The press labelled it as “the worst episode of mass-murder in the history of modern Scotland,”⁶ in fact “the worst terrorism atrocity in British history,”⁷ inasmuch as “Britain’s worst peace-time atrocity,”⁸ or “an act of callous brutality.”⁹ However, only the witnesses’ reports could describe - in an utterly graphical fashion - the horror that Pan Am 103 bombing entailed: that “something” that looked like meat but unfortunately wasn’t meat, or the sudden rain of glass, small pieces from the shattered windows falling down from the sky, or the mass of debris and gas balls coming down, as well as those pieces of metal and stuff coming through the roofs.¹⁰ Hunting details seared in the memory of those who were there and had the luck to survive, then being able, many years

later, to tell what they saw and experienced when Pan Am 103 was blown apart.

The Lockerbie case was obviously paid worldwide media coverage, as it always happens when terrorist actions occur. Pan Am 103 crash and the subsequent follow-ups instantly made headlines. They actually worked out as perfect “attention grabbers” with respect to a huge potential audience and immediately fed the media with some sensational news, which journalists, reporters and photographers started covering the very moment they could relay the first facts. They have never stopped ever since. From the outset, it seemed quite clear that the Pan Am 103 story was overwhelming in scope and needed being followed up filling in details and addressing a number of questions that it unavoidably prompted: what had actually happened? Where? When? How? And above all: who did it and why? Man-made catastrophes should actually be avoidable, at least to a certain extent, which makes it absolutely pivotal to find answers and explanations. When a disaster occurs, responsibility is certainly the main issue. Did Pan Am 103 crash occur because of human error or because of wilful sabotage? Or both? One thing is an accident, one thing is an intentional disaster. The latter happens because someone wants it to happen and wilfully makes it happen. It would never occur otherwise. And then the question obviously was: could it happen again? These were the issues that both the media and institutions found themselves addressing, while trying to share, spread and explain both the bombing and the follow-ups.

Even after years of painstaking investigation, some of the questions stayed unanswered although the need to make sense of the Lockerbie disaster was still alive. In fact, not even the trial answered those questions entirely. Media and institutions therefore raised those questions as well as many more and left no stone unturned trying to answer them. Pan Am 103 crash was therefore paid enormous attention and given long-term coverage. In fact, a coverage that has been lasting to date. Over the years, the media have been portraying the Lockerbie tragedy as both a global and a personal

one, at once public and yet utterly intimate. A tragedy that could not be ignored. Thus, the media thoroughly focused on government actions and inactions, diplomatic headways and stalemates, United Nations and world leaders involvement, families' grievances and claims. Years and years of reportages, TV programmes, interviews, comments and media involvement of all sorts.

What is particularly impressive, in retrospect, is the fact that Lockerbie proved a turning point in the coverage of tragedies, marking the first time ever that advances in technology and transportation permitted "live" coverage of an event of such magnitude. Since then, it has become routine to witness terrible occurrences live. Every available technology was actually used to portray the tragic events at Lockerbie: seismic readings, deployment of reporters, photographers and television crews, cellular telephones and satellite transmitters to the sites of the tragedy and to scenes of profound sorrow where relatives and friends were learning of their losses. Pan Am 103 therefore turned a marking point in media coverage, one that cannot be reversed, since it proved for the first time ever the possibility of live coverage of anything that happens in the world.¹¹ Yet, such quick accessibility of whatever tragic event in whatever part of the world also raised ethical dilemmas, which are still far from being solved. In fact, the right of being informed and that of duly inform can sometimes clash with the right to privacy. Feelings and emotions should be a private matter but, in the Lockerbie case, they made headlines and fed the media with stories that would sell. When dealing with terrorism, media do control the flow of information while simultaneously making the news "entertaining" enough to sell. Striking a balance between the right to know and the desire to be entertained is obviously difficult but it seems indispensable to draw a clear-cut line. Entertainment should not take place at the expense of law, order and security, and should not infringe on anybody's rights. A distinction should be made between exploitation of victims and journalists' willingness to provide a forum to victims and survivors.

Even alleged terrorists, who are suspected of having performed the most callous of crimes, have to be granted some basic rights in this respect. Media seldom portrait terrorism in a favourable light, which generally builds little sympathy for their cause. Nonetheless, the wider the media coverage, the better for the terrorists. The media, though unwillingly, make terrorist acts sufficiently sensational to shock the audience and prompt its reaction. In a way, media coverage itself may become part of the terrorist event, performing as a multiplier that promotes fear and magnifies the threat in the public mind. This seems to be what terrorists actually aim at.¹² Terrorism is a publicity seeking activity after all. Even negative publicity can turn out to be better than no publicity at all. Media therefore influence the way terrorists select their targets: to spread violence, they need to choose their objectives for maximum exposure. Terrorist activities may actually enjoy a great deal of power because of the media's attention, which can expand the potential audience to the global scale. In fact, terrorism might turn out to be contagious and media coverage may also help terrorists spreading a culture of violence. The potential audience may wish to support the terrorists' causes, if not physically, then with money and through moral persuasion.

Nonetheless, terrorists have also to cope with the degree of public tolerance their deeds may enjoy, if they want their cause to be understood and sympathized with. Acts of extraordinary violence might well turn out to be counterproductive, causing massive fear and triggering no sympathy whatsoever. Once again, the role of the media may prove crucial. The very way they depict an initiative and its effect may induce totally different reactions and turn out to be decisive in the delivery of the very message the terrorists want to forward to their potential audience. Certainly, the media have the duty of duly inform. People have the right to know not only about the on-going threats to life and property, but also about the causes other people may advocate to the extent that they may be willing to lay down their lives for. Thus, the media play a crucial role in serving the cause of

information and fulfilling the right to know while considering the same issue from different angles. Nonetheless, reporting terrorist acts generally stigmatise the alleged perpetrators of violence, which can end up labelling them as guilty before any verdict of guilty being issued. In the Lockerbie case, the media stigmatisation of the two alleged Libyan bombers was one of the issues at stake. The role the media play in this respect and the way they fulfil such role is often controversial, as the Lockerbie case shows. The right to inform and to being informed can often clash with other rights and liberties that command enforcement. The alleged bombers could be victimized by the media, in their own way. Until the moment a verdict of guilty was issued, they actually had the right to be considered innocent.

Thus, the alleged bombers' right to not being stigmatised inevitably falls into frame. In this respect, what seems particularly interesting in the Lockerbie case is that the media themselves were somehow "on trial" for infringing the human rights of the alleged perpetrators of the bombing. The right to know actually clashed with the right to receiving a fair trial, whatever the possible charge for the accused. The issue proved one of pivotal importance: may the media impact so strongly on the audience that they can even manipulate the opinion of judges, juries, witnesses, thus influencing the outcome of a trial? Undeniably, the Lockerbie case has been having such wide media coverage, with spread dissemination of photographs of the accused, that when the latter assumed they would have never received a fair trial in the United Kingdom and the United States and that no jury would have been impartial in judging their case, their fears needed being accommodated. Otherwise, there would have been no trial at all. Their fears did not seem all that unrealistic. The alleged perpetrators of the Pan Am 103 bombing did consider themselves as victims of an unprecedented media campaign, which turned out to be a sort of undesirable and unfair "media trial." Was the media's power so strong that it could actually influence the outcome of the trial at Camp Zeist, though? Was it fair and reasonable to accommodate the suspects' fear in this respect?

4.2 The media issue at Camp Zeist

Not only the media issue was raised before the trial and impacted on it in a way that influenced its location. It also erupted at Camp Zeist and was one for the court to be solved. In fact, the line between information and entertainment appeared quite nebulous and the freedom of information, cornerstone of any democratic system, was to be balanced with other rights of paramount importance, first and foremost the right to a fair trial. Not an easy balance to strike, though, as reported herein. The British Broadcasting Corporation actually lodged a petition to the High Court of Justiciary in order to be authorized to televise the trial. The prayer of the petition invited the court, in the exercise of its *nobile officium*,¹³ to give its consent to the petitioner “to televise the proceedings of the trial (a) for the purpose of broadcasting simultaneously the entire proceedings of the trial, (b) for the purpose of broadcasting edited portions of the proceedings of the trial in news broadcasts and other broadcasts of topical or other interest, and (c) for the compiling and broadcasting after the ending of the proceedings of the trial one or more documentary programmes on the circumstances surrounding the subject of the trial and including parts of the proceedings of the trial, and that subject to such conditions as to [the court] shall seem proper.”

In their answers, other broadcasting companies claimed that they also wished to televise and broadcast the trial. Thus, they submitted that any order pronounced in favour of British Broadcasting Corporation should be in such terms as to permit them to do so. Some of them actually wished to broadcast the whole proceedings simultaneously inasmuch as BBC, whereas all of them intended to broadcast shorter extracts from the proceedings as part of news programmes or programmes somehow pertaining to the trial. Therefore, they pleaded that the prayer of the petition lodged by BBC should be granted “as varied in accordance with [their own] Answers.” In the submissions for the petitioners, the unique nature of the application,

which the petitioners sought to make, was widely emphasised. It was said that this exclusive connotation stemmed from the character of the proceedings, namely that they were to take place in the Netherlands before a bench of three judges, sitting without a jury. The petitioners did not seek to establish any precedent to the effect that broadcasters would have a general right to broadcast proceedings in criminal trials. What was sought was no more than a judicial determination that in the particular circumstances of the Lockerbie trial the petitioners should be permitted to televise the proceedings.

Reference was then made to the Directions issued by the Lord President and Lord Justice-General, the Senior Scottish Judge, on 5 August 1992, headed "Television in the Courts," which set out the circumstances in which court proceedings might be televised. The Directions read as follows: "The Lord President has issued the following directions about the practice which will be followed in regard to requests by broadcasting authorities for permission to televise proceedings in the Court of Session and the High Court of Justiciary. a) The rule hitherto has been that television cameras are not allowed within the precincts of the court. While the absolute nature of the rule makes it easy to apply, it is an impediment to the making of programmes of an educational or documentary nature and to the use of television in other cases where there would be no risk to the administration of justice. b) In future the criterion will be whether the presence of television cameras in the court would be without risk to the administration of justice. c) In view of the risks to the administration of justice the televising of current proceedings in criminal cases at first instance will not be permitted under any circumstances. d) Civil proofs at first instance do not normally involve juries, but the risks inherent in the televising of current proceedings while witnesses are giving their evidence justify the same practice here as in the case of criminal trials." The Directions conclude: "h) Requests from television companies for permission to film proceedings, including proceedings at first instance, for the purpose of showing educational or

documentary programmes at a later date will be favourably considered, but such filming may be done only with the consent of all parties involved in the proceedings, and it will be subject to approval by the presiding judge of the final product before it is televised.”

The petitioners submitted that they had already televised proceedings before the Court of Session and the High Court of Justiciary on a number of occasions and Scottish Television Limited averred that they had televised criminal trials before. However, everybody acknowledged that there had been no occasion on which proceedings in a criminal trial had been broadcast during the currency of the trial. The core of the petitioners’ argument was that televising proceedings was not forbidden in principle in light of the Directions and broadcasting might take place with the consent of the court. The petitioners insisted that in Scotland there was no statutory prohibition that would stand in the way of the televising of court proceedings. Section 41 of the Criminal Justice Act 1925, which prohibited the taking of photographs in court and the publication of any such photograph, did not extend to Scotland (section 49(3)). The rule against photography in Scottish courts had depended merely on the practice of the court, and the terms of the Directions made it clear that it was recognised that television broadcasting of court proceedings was in principle acceptable. That applied in the same way to the proceedings in the Netherlands that were to be held under Scottish law.¹⁴ As further background to the application for consent to the broadcasting, the petitioners drew attention to their position as public service broadcasters and emphasised that their broadcasting of the proceedings of the trial would not be a profit-making venture. They would therefore not claim any intellectual property or other exclusive rights in their record of the proceedings of the trial.

Thus, according to the aforementioned Directions, the criterion seemed to be one of determining whether the presence of television cameras in the court would be without risk to the administration of justice.¹⁵ Nonetheless, the

Directions also stated the continued prohibition of televising current criminal proceedings at first instance in rather categorical terms. It was only in relation to filming proceedings for future documentary use that provision was made for obtaining the consent of parties.¹⁶ The said obstacles were quite significant. Hereby, the petitioners insisted that: "The trial is of international significance. Its conduct and outcome are of unique significance for a criminal trial in Scotland having regard to the number of victims, the fact that they are of different nationalities, and its implications for a number of governments including those of the United Kingdom, the United States, Libya and the Netherlands." Another reason they put forward in order to support their application related to the fact that the trial, although before the High Court of Justiciary, would take place in the Netherlands by virtue of the inter-governmental agreement, in a purpose-built courtroom within a secure cordon. Thus, the trial would not be accessible to members of the public in Scotland as would any other sitting of the High Court of Justiciary "by virtue of its physically distant location from Scotland and by virtue of the security surrounding it." The submission continued: "The conduct of the trial is a matter of legitimate public interest in Scotland having regard to the fact that the destruction of the aircraft caused the deaths of persons in Scotland."

Yet, the fact remained that the aforementioned Directions did not provide for the simultaneous broadcast of first instance criminal proceedings, no party had consented to the proceedings being televised, and the accused had even expressed opposition to that taking place. Besides, whatever might be said about the arrangements to be made, the critical issue was whether or not broadcasting in the ways for which consent was sought would be "without risk to the administration of justice." It was however undeniable that the trial concerned a case which was of wide public interest, not only in Scotland but also elsewhere. Furthermore, the petitioners submitted that televising and broadcasting the trial could not possibly raise the risk of any prejudice as a result of impact on members of the jury, since the trial would

be conducted by three judges sitting without a jury. That was obviously so. Given that there was no jury, the effect of broadcasting on jurors did not even enter into the matter. The petitioners also averred that the televising and broadcasting of the trial would not prompt any effect whatsoever on potential witnesses before they gave evidence or in the course of the trial, for the very simple reason that the Lockerbie case had already been the subject of “widespread publicity and public speculation throughout the world since,” with widespread dissemination of photographs of the accused both in Scotland and elsewhere. Nonetheless, broadcasting would not compromise any concealment of identity of witnesses because adequate arrangements could be made to this end. In these circumstances, the submission was that paragraph (c) of the Directions should not be regarded as ground for refusal of the consent sought.

This was basically the stand taken by BBC. The other broadcasting companies adopted the same submissions and added none of their own. The position of the Crown instead was one of refusing the prayer of the petition, also because of well-established rules of practice that regulated the proceedings of the court. It was formerly a rule of practice of the Court of Session and the High Court of Justiciary that neither cameras nor sound recording facilities might be used in court. The Contempt of Court Act 1981, section 9, actually made it a contempt of court to use a sound recording instrument in court and to publish any recording made by means of such an instrument, except in each case with the leave of the court. In respect of the use of cameras in court, especially television cameras, this issue was clearly addressed in the above-mentioned Directions. The latter do not have the force of law, yet they are based on well-established rules of practice. As far as current criminal proceedings at first instance were concerned, the Directions could not be clearer in identifying that the rule of practice against televising such proceedings remained in force. This, for the Crown, was conclusive ground for refusal of part of the prayer of the petition.

Thus, it appeared that televising the Lockerbie trial and broadcasting it simultaneously would entail serious risks for the administration of justice. One requirement of the administration of justice was that witnesses should come to court to give their evidence. If they did not, the administration of justice would be undermined. In the Lockerbie case, a large number of witnesses lived abroad, that is to say beyond the jurisdiction of the Scottish courts. They were therefore not compellable witnesses. If the proceedings of the trial were to be televised, many of the witnesses simply would not attend,¹⁷ whether out of concern for their own safety, or because of the total loss of privacy or simply because of increased anxiety about their testimony. Moreover, they would be briefed about the evidence provided by earlier witnesses, which was also forbidden by Scottish law unless explicitly allowed by the court.¹⁸ Simultaneous broadcasting of the trial would certainly entail the briefing of witnesses as to the detail of the evidence of earlier witnesses. Finally, witnesses should be able to give evidence without being unjustifiably influenced by external circumstances, which would happen if the trial were to be televised. A witness might be more influenced by anxiety and uneasiness than he would otherwise be or he might play to the gallery. In so doing, he might as well be prone to restrict or expand his evidence. Nonetheless, this would be the case even if the evidence was only being televised for later documentary use and no simultaneous broadcasting occurred.

As far as the counsels of the two accused were concerned, they basically shared the view taken by the Crown. They actually submitted that paragraph (c) of the Directions, which contained an absolute prohibition of the televising of first instance criminal proceedings, applied, whatever the specific format of the Lockerbie trial. Besides, they also referred to paragraph (h) of the said Directions, which made the consent of all participants a pre-requisite of televising such proceedings for future documentary use, and specified that no such consent was forthcoming from the accused. They also agreed with the position of the Crown as far as the

witnesses' attitude was concerned. Finally, they emphasised that the accused had voluntarily agreed to attend for trial before the High Court in the Netherlands. They had done so on the clear understanding that the trial would be conducted in accordance with existing Scots law and practice.¹⁹ And Scots practice was that criminal trials at first instance could not be televised. Before surrendering themselves for the purpose of the trial, the accused had specifically asked whether the trial was to be televised or not and had been told that it would not be televised. It would clearly be prejudicial to the accused if their images were to be televised world-wide in the context of the allegations made against them, which prompted legitimate concerns about the effect which public television would have on a fair trial. The accused were not prepared to agree to a documentary programme being televised after the trial was over. If they were acquitted they should not have to endure re-runs of the trial and the risk of undergoing a subsequent trial by the media.

With respect to those submissions, the petitioners made further points. In so far as the briefing of witnesses was concerned, they averred that the practical effect of the common law rule excluding witnesses from court during the evidence of earlier witnesses had already been undermined because of previous press reports. The difference between watching a televised broadcast and reading or hearing reports was actually insignificant. The petitioners also addressed the argument put forward by the counsels of the accused according to which the latter had voluntarily submitted to the jurisdiction of the court in reliance on the assurance that the proceedings would not be televised. To this respect, they actually submitted that no absolute assurance to that effect could soundly have been given. In any event, the court's power to grant consent to television broadcasting of the proceedings could not be affected by the understanding upon which the accused had relied in submitting to the court.

4.3 The “remote sites” issue

The petitioners also challenged the Crown’s stand by pointing out that because of the arrangements made to transmit the trial proceedings to four remote sites in the United Kingdom and the United States, similar equipment to that necessary to televise the proceedings would be present in the courtroom, and the impression, in so far as uninformed witnesses were concerned, would be that the proceedings were simply being televised. Thus, as far as witnesses’ reaction to the physical presence of cameras was concerned, no difference seemed to exist between the impact of cameras present for the purpose of public television broadcasting and that of those present for the purpose of the transmission of the proceedings to the remote sites. Witnesses would react to the physical presence of cameras and equipment, whatever purpose they might serve. Thus, the petitioners’ point was that there was no remarkable difference between public broadcasting and broadcasting to remote sites. If the families of the victims were entitled to watch the contemporaneous broadcasting of the proceedings, why a larger audience should not be allowed to do the same? Yet, in the opinion of the court the two forms of televising were not quite the same thing, since they were meant to satisfy different interests.

In this respect, the main proposition put forward by the petitioners was that the court had already consented in principle to television broadcasting of the proceedings of the trial because of the arrangements that had already been made for the transmission of the proceedings to the four remote sites. It was actually the case that approval had been given by the court for the transmission of the proceedings of the trial by television to four locations beyond the precincts of the court in the Netherlands. Those locations, the so-called “remote sites,” were situated one in Dumfries, one in London, one in New York and one in Washington DC. The initiative, which resulted in that approval being given, came from the Office for Victims of Crime (OVC), an agency of the US Department of Justice. The model on which the

arrangements were based is to be found in the US Code, Title 42, Section 10608, which is headed "Closed circuit televised court proceedings for victims of crime." The latter establishes that, whenever the venue of a trial is changed out of the original state and more than 350 miles from the original location, closed circuit television transmission of the proceedings to the original location may be ordered to enable victims of crime to watch the trial proceedings. Viewing is permitted by people with a "compelling interest" in doing so, excluding anyone whose testimony would be materially affected by hearing other testimony in the trial. The signal would be transmitted under the strict control of the court and public broadcast of it would be prohibited.

The OVC originally approached the Crown with a view to a similar arrangement being made in the Lockerbie trial in order to enable relatives of the victims to view the proceedings without travelling all the way to the Netherlands. The Crown supported the initiative and regarded the making of such arrangements as desirable, but assumed that the approval of such arrangements would be a matter for the court. A detailed scheme was therefore worked out, involving a number of strict rules for the actual conduct of the remote sites. The system to be adopted would make use of closed circuit television cameras to be installed in the courtroom. Thus, proceedings would be transmitted from the courtroom to the media centre, within the precincts of the court. These same pictures transmitted to the media centre would then be transmitted to the remote sites. Encryption would guarantee the safety of the transmission. Scottish Court Service personnel would control the facility at each of the remote sites. There would be no recording of the proceedings, other than such recording as necessary to enable the proceedings to be transmitted to the remote sites at a suitable local time. On top of that, the tape containing the recording would be physically destroyed after transmission. Only previously accredited members of the families of the victims would be allowed to attend to view the proceedings at the remote sites, with the exclusion of those family

members who were themselves witnesses and had not already given evidence.

A formal application for approval of the arrangements was made by OVC on 28 January 2000, and approval was given administratively by Lord Sutherland, the presiding judge at the trial, on 4 February 2000. The accused, although their legal advisers had been involved in discussions about the arrangements for transmission to the remote sites, had neither consented nor objected to the arrangements. On this basis, the petitioners submitted that the court's consent to those arrangements was to be understood as consent in principle to the television broadcasting of the proceedings of the trial, albeit to a restricted number of locations. The Directions did not draw any distinction whatsoever between different types of broadcast output, save a distinction between contemporaneous output and recording for subsequent documentary use. Thus, the court appeared to be satisfied that there was no reason in principle to deny consent to the televising of the trial. In particular, the court had accepted the presence of television cameras in the courtroom, seemed satisfied that live transmission was acceptable and, since the accused had not consented to the arrangement, seemed to deem such consent as unnecessary. Hereby, if the petitioners' application was to be refused, it was necessary to identify a positive reason for limiting the output of the broadcasts to the four remote sites. And what sort of reason could actually justify this different attitude towards what in the event looked like the same thing – televising and broadcasting of the proceedings?

The Crown, in response, took the view that the arrangements for transmission of the proceedings to the four remote sites did not even fall within the scope of the Directions. The latter applied to requests by broadcasting authorities for permission to televise court proceedings for public broadcasting. The transmission to the remote sites was different since it did not involve any public broadcast whatsoever. Actually, those remote sites had to be considered as “an electronic extension of the

courtroom,” which enabled people who had a particular interest in viewing the proceedings without travelling all the way to the Netherlands. In a nutshell, the arrangements did not even amount to broadcasting. The Remote Site Guidelines themselves stated this version in undebatable terms: “The remote sites are an extension of the Scottish Courtroom.” Thus, it was not a pure matter of analogy. The counsels for the accused took the same view of the Crown and made similar submissions. Yet, the petitioners insisted that the trial court would contain television cameras in order to record the proceedings, including the testimony of witnesses, as they occurred; that the signal from those cameras would be transmitted beyond the precincts of the court in the Netherlands, actually to different countries, such as the United Kingdom and the United States; and that access to the output of the signal would be enjoyed in those countries by people who were not officers of the court or otherwise involved in the trial. Such features would apply likewise to any other broadcasting. Arrangements involving those features would therefore constitute television broadcasting of the proceedings as contemplated in the Directions. As a matter of principle, therefore, the Directions would apply to those arrangements. In giving its consent to those arrangements, the court had given consent as contemplated in the Directions. Besides, in the petitioners’ view, the proposition that the remote sites were equivalent to an extension of the courtroom and did not involve anything comparable to public broadcasting was unacceptable. First and foremost, there was no precedent in Scotland for the court transmitting its proceedings to any site beyond the judge’s control. Moreover, two of the remote sites were in a foreign state, hence none of the diplomatic or legislative formalities which were required for the set up of the Scottish court in the Netherlands were required over there. As a matter of fact, there would be no formal presence of the court at the foreign sites. The Scottish Court Service personnel would rather be visitors in the United States, subject to the domestic laws of such country. Finally, the court would have no sanction whatsoever in order to secure compliance with the rules

regulating conduct at the remote sites, short of complete withdrawal of the transmission.

The petitioners also made reference to Article 10 of the European Convention of Human Rights, pertaining to freedom of expression, even though the Human Rights Act 1998 was not yet in force at the time. They actually averred that the Convention had in some respects been given effect in Scots law by the Scotland Act 1998. Section 57(2) of the Scotland Act provides that: “A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights...” By virtue of section 44(1)(c) of the Scotland Act, the Lord Advocate is a member of the Scottish Executive. By virtue of section 126(1) of the Scotland Act the phrase “the Convention rights” has the same meaning in that Act as in the Human Rights Act 1998. The particular Convention right relied upon by the petitioners in the present case is that contained in Article 10 of the Convention, headed “Freedom of Expression,” which reads as follows: “1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Hence, the petitioners’ contention was that the Lord Advocate had acted in a way that was incompatible with the petitioners’ rights under Article 10 of the Convention. In August 1999, the Lord Advocate was

actually reported as having indicated to the families of the victims of the bombing that the proceedings of the trial would be broadcast to the remote sites, but would not be available for wider broadcast.²⁰

4.4 Striking a balance

In the event, the issues at stake turned out to be crucial in nature. First and foremost, freedom of expression needed being balanced against the right to a fair trial. Which of the two ought to prevail? Was it possible to ensure both or one needed being sacrificed for the other's sake? And, so far as information was concerned, was it reasonable and fair to treat the families of the victims as "qualified audience," whose compelling interest was such to command different rights and expectations? Can the right to be informed be modulated and adjusted with reference to different categories of people or should it be considered as unalienable as such? The main petitioners' contention was that by authorising the transmission of the proceedings of the trial to the remote sites the court had in principle authorised television broadcasting of the proceedings. On that basis, the petitioners inferred that the court had already regarded television broadcasting of the trial as acceptable; that therefore there was no *onus* on the petitioners to justify the granting of consent to public television broadcasting of the proceedings: on the contrary the *onus* was on those opposing the petition to show cause why consent should not be granted. The issues for the court seemed extremely sensitive, as it emerges from the opinion issued by Lord Justice Macfadyen, on 7 March 2000.

He pointed out that there was a clear-cut distinction between the transmission to the remote sites that the court had authorised and the broadcasting of the proceedings to the general public, although it was undeniable that there were features which would occur whatever the form and purpose of the broadcasting. Quite undeniably, the trial courtroom

would actually contain cameras in order to film the proceedings as they occurred; the output of those cameras would be transmitted beyond the precincts of the court; at the remote sites, access to the output of the cameras would be enjoyed by people who were not officers of the court. Yet, the sort of broadcasting the Directions referred to was the kind of broadcasting which is carried out either by a public service broadcaster or by a commercial broadcaster and made available for reception by members of the general public. The transmission to the remote sites, which the court had authorised, was different in a number of respects of critical importance. The nature of the transmission was different from public broadcasting, in that the signal would be encrypted so that it might only be received at the selected remote sites. Access to those sites would not be open to the general public, but controlled and available only to a precise category of people. The arrangement was made in acknowledgment of the fact that the relatives of the victims had a particular interest in watching and listening to the proceedings as they happened, but for obvious geographical and economic reasons would have some difficulty in attending at the courtroom in the Netherlands. The transmission to the remote sites would be for their benefit in recognition of their special position. As far as potential witnesses were concerned, the arrangements explicitly addressed the risk of their briefing, by excluding them from the remote sites until they had given evidence, or had been excused, or had been given leave to be present in accordance with the relevant provision of Scots criminal procedure.²¹

Thus, the remote sites were to be considered as extensions of the courtroom, and the transmission of the proceedings to those sites as nothing else but an internal arrangement within the court. The strength and effect of the point did not depend on its being literally true that the remote sites were physical extensions of the courtroom. The key was to be found in the strong functional analogy. The fact that there was no Scottish precedent for transmission of criminal proceedings to sites remote from the courtroom in which the proceedings were to take place did not seem material either. Nor

was the fact that two of the remote sites were to be in a foreign state and a third in a different jurisdiction.²² If the court was satisfied that there were satisfactory arrangements in place to ensure adequate practical control of what was to happen at the remote sites, that was enough. It did not really matter that the court had no formal jurisdiction over those remote sites, if it was satisfied that the practical arrangements were sufficient for its purposes. Therefore, the arrangements for the transmission of the proceedings of the trial to the remote sites needed to be seen as special arrangements made with the authority of and under the control of the court in order to enable a defined category of persons with a special interest in the proceedings to watch and listen to them, as if they were present in the courtroom, but with less inconvenience and expense than would be entailed in actually travelling to Camp Zeist. Those arrangements were of a different nature from public broadcasting of the proceedings and served a different purpose. Their existence, therefore, had no bearing on whether the consent that the petitioners sought should be granted or not.

Hence, the fact that the court had granted authority for those arrangements to be made could not be considered as constituting approval in principle of television broadcasting of the proceedings. Moreover, the submission that the existence of those arrangements, as authorised by the court, removed from the petitioners the burden of demonstrating that consent to public broadcasting should be given, and cast onto those opposing the petition the burden of showing cause why such consent should instead be refused, seemed totally unsound. However, the legitimacy of the interest that the petitioners had in the matter needed being acknowledged. The subject matter of the trial, involving as it did the destruction of a civilian aircraft and the deaths of approximately 270 passengers, crewmembers and people on the ground, was acknowledged as one of great public interest. Without a shred of doubt, the trial itself could properly be described as unique and could therefore be regarded as a matter of great public interest anywhere in the world. The value of full and detailed reporting of the

proceedings by all news media was therefore indisputable. The petitioners' view that the most effective and comprehensive way for them to report the trial was broadcasting the proceedings live was also acknowledged as undeniable. Yet, such view was not entitled to prevail because of other interests of paramount importance that were also at stake.

As far as the legislative aspect was concerned, Lord Macfadyen emphasised that, although the legislation that prohibited photography in court in England did not extend to Scotland,²³ the matter was not unruly under the Scottish legal system. The settled rule was that cameras (and, by extension, television cameras) were not permitted within the precincts of the court. That was a rule of practice, pertaining to the court's inherent power to rule its own proceedings, and was backed up by a legal sanction. In fact, any attempt to photograph or televise proceedings would have constituted a contempt of court and would have been punished accordingly. The Directions certainly innovated upon that situation in terms that it was contemplated for the first time that, in certain circumstances, the court might give its consent to the televising of court proceedings. Thus, if proceedings were televised in accordance with the consent of the court, that would not amount to a contempt of court. However, paragraph (c) of the Directions made it absolutely clear that "the televising of current proceedings in criminal cases at first instance will not be permitted under any circumstances." The Directions also made clear that the criterion which would be applied in determining whether the televising of proceedings would be permitted was whether that could be done "without risk to the administration of justice." It was actually because such risk could not be eliminated in the case of current proceedings in first instance criminal cases that the Directions were expressed in the above-mentioned categorical terms.

It was then to be inferred that the prayer of the petition had to be refused, if the Directions were to be applied according to their terms. Certainly, the reasoning underlying paragraph (c) was that one way in which the

broadcasting of proceedings at first instance in a criminal trial might involve a risk to the administration of justice is in its impact on the jury. In the Lockerbie trial, there would be no jury and the judges who would hear the case were not supposed to be as gullible as a potential jury. However, an adverse impact on witnesses would always be possible and it would be likely to jeopardize the administration of justice inasmuch as any media influence on a proper jury. In the event, the prohibition of broadcasting of current proceedings in criminal cases at first instance was clearly meant to protect the rights of others, in particular the rights of the accused, to a fair trial. This should also be “necessary in a democratic society,” thus the refusal of the prayer of the petition would have been legitimate in terms of Article 10 of the European Convention of Human Rights, provided the latter was already in force. On the basis of all of the above, Lord Macfadyen refused the prayer of the petition.

4.5 Appeal judgment

The petitioners, then, presented another petition to the *nobile officium* to be exercised by two or more other judges. In the prayer of the petition, they sought review of Lord Macfadyen’s Opinion which refused the prayer of the first petition, as well as that consent already sought in the prayer of the first petition. The Opinion of Lord Kirkwood, as issued on 20 April 2000,²⁴ seemed to follow the one already expressed by Lord Macfadyen, as reported before. Once again, it was emphasised that there was a clear-cut distinction between the transmissions to the four remote sites for the benefit of the victims’ relatives, which the court had already authorised, and broadcasting the proceedings at the trial on behalf of the general public. Once more, it was also explained that the consent which had been given by the court on 4 February did not amount to permission in principle for television broadcasting of the Lockerbie trial. The permission to view the proceedings

at the remote sites was restricted to the relatives and guidelines were approved by the court, in order to ensure that only relatives of the victims would be able to view the television pictures. As far as the petitioners' rights under Article 10 were concerned, Lord Kirkwood's view was that the restriction imposed by the court was not incompatible with the said provision and, even if it were, it would not necessarily follow that an unconditional permission to televise the trial to the general public existed.

On the contrary, one obvious possibility was that, if the restriction was held to be unlawful, the court that had imposed it could refuse to allow any television transmission whatsoever. Thus, the consent granted for transmissions to the four remote sites could not be said to constitute consent in principle for public broadcast of the whole trial and, that being so, the fundamental basis of the petitioners' contention disappeared. It was also stressed that the petitioners were not even seeking the right to install their cameras in the courtroom in order to televise the proceedings worldwide. What they were seeking, in their second prayer of petition to the *nobile officium*, was an unrestricted right of access to the encrypted signals that would emit from the cameras which had already been installed for transmission to the remote sites. Those signals would actually be decrypted, so that they could be used by the petitioners as well. Here again, Lord Kirkwood stressed that it did not seem that Article 10 could properly be construed in such a way as to give the petitioners the right to use the encrypted television signals which would be produced by the cameras installed in court when there was every indication that those who would be producing the signals were not willing to allow the petitioners to make use of them. On this basis, Lord Kirkwood's view was also in terms of refusal of the prayer of the petition.

Lord Justice Marnoch also delivered his Opinion on the matter. He started by emphasising at the outset what the Petition was not about. He highlighted that the second application was not seeking consent to the televising of the Lockerbie trial by the petitioners. That was the subject

matter of the first application, previously made to Lord Macfadyen and already refused. Instead, what the petitioners were seeking by means of the second petition was that the court's consent to broadcasting the trial by way of television could be seen as having already been given by Lord Sutherland, but that the restriction which he had imposed, namely the restricted link to the four remote sites, was illegal under Article 10 of the Human Rights Convention. In this respect, Lord Marnoch expressed critical reservations as to whether Article 10 might have any application to an encrypted signal emanating from a third party's equipment to which the petitioners would have no immediate right of access. With respect to the submission that the consent to televising and broadcasting had already been given in principle by the court, he squarely labelled this argument as unsound.

As to that, he simply adopted the careful and persuasive reasoning of Lord Macfadyen in the Opinion that he had delivered with regard to the earlier Petition. In the view of Lord Marnoch, it was purely a misuse of language to try to depict the arrangements pertaining to the remote sites as public broadcasting in any shape or form. For this reason, if none other, he also took the stand that the prayer of the petition should be refused in its entirety. As far as the Opinion of the third Justice, Lord Kinghart, was concerned, it represented that he wholly agreed with the two Opinions already expressed. Therefore, the Appeal Court unanimously refused the Petition. Thus, no other means of judicial review were now available. Interestingly, though, permission was granted on 9 January 2002 for the appeal proceedings to be broadcast. Lord Justice General Cullen actually gave permission to BBC to "stream" the appeal proceedings on a dedicated internet site. There were no restrictions to the accessibility of the said site, which on the contrary was accessible world-wide. Nonetheless, there was a protocol disciplining the conduct of such broadcasting which, for example, prohibited the streaming of live testimonies heard during the proceedings.²⁵ Thus, albeit a broadcasting eventually took place, it was somewhat limited and strictly controlled. Once again, other interests were given priority and

acknowledged as more important than the right to inform and being informed.

4.6 Al Fhimah and Al Megrahi v. Times Newspaper Ltd

As already reported, the Lockerbie affair has been attracting an outstanding media interest from the very outset. Many articles and editorials, often complemented by the photographs of Fhimah and Megrahi, had been published long before the trial at Camp Zeist had even started. Obviously, there was a remarkable public interest about the factual circumstances of the disaster and the subsequent actions being taken by the governments involved. People wanted to know why it had happened and which responsibilities were to be established. The width of the media coverage was such that it did not seem totally groundless to suspect that a trial by the media was actually taking place at the expense of the alleged perpetrators of the bombing. This gave rise to the question whether it is possible to achieve justice notwithstanding the emotional response that pre-trial publicity may generate. It is actually difficult to find another international case where the concept of due and fair process might have been more at stake. Undeniably, the presumption of innocence as the cornerstone of a fair trial and the freedom of press as one of the fundamental ingredients for the maintenance of democracy need sometimes being reconciled. Media portrayals may actually serve as projective devices that isolate acts and people from meaningful contexts and set them up to be victimized or stigmatised, notwithstanding the fact that they provide terrorists with a huge audience and enormous attention, which is generally what terrorists look for. The Lockerbie affair certainly raised this sort of sensitive issues and the story of the trial highlights major concerns, such as the “spectacularization” of crime and the necessity of feeding the audience with immediate answers, which might prove groundless or simply insufficient, as if the right of getting to know might overwhelm the duty of duly inform.

This sort of issue was brought before the High Court of Justiciary at Camp Zeist. Fhimah and Megrahi actually lodged a petition to the *nobile officium* of the High Court, against Times Newspapers Limited, John Witherow and Nicholas Rufford.²⁶ The petitioners submitted that, in the issue of the Sunday Times newspaper, dated 23 May 1999, an article and related editorial had been published, which they claimed was a contempt of court that could seriously hinder or prejudice the course of justice in the criminal proceedings pertaining to them. The article carried the following headline: “Official: Gaddafi’s bomb plot.” It said that, from 1990 to 1995, the British security services had obtained intelligence that Colonel Gaddafi had ordered the bombing of Pan Am 103 in revenge for an American air raid on Tripoli. The article made reference to a cousin of Megrahi who was said to have ordered the bomb timer from a Swiss Company. It also mentioned the first petitioner’s supervisor, Senussi. The editorial was instead headed: “The guilt of Gaddafi.” It stated, *inter alia*, that “it would be an odd sort of justice that found his cat’s paws guilty of murder and let the real villain off the hook.” The argument ran stating: “But even if the suspects are convicted (and it is conceivable that a verdict in Scottish law of not proven or not guilty might be found after all this time), what will the Government do then? Lift sanctions against a regime convicted of mass murder.”

The petitioners claimed that, having been arrested and committed for trial by order of the Scottish Court, they were entitled to call upon the protection of that court in respect of any matters which was likely to adversely affect their prospect of obtaining a fair trial. They represented that the impact of published material might certainly affect the course of justice, which would lead to a specific category of contempt of court. What they emphasised was that published material could actually prejudice the course of justice in two different ways: either adversely affecting the resolution of particular proceedings or damaging the legal system in a broader sense, by influencing the administration of justice in general. The petitioners emphasised that even the most detached reader would be left with the impression that their

guilt was already taken for granted. Any reader would also infer that, in case of acquittal, the latter would be justified by the fact that the evidence had been adversely affected because of the lapse of time but had nothing to do with the petitioners' being innocent. Thus, it was submitted that the above-mentioned article and editorial had been in contempt of the court.

The petitioners also sought an order prohibiting the respondents from publishing any article, feature or comment relating to the proceedings against them that were likely to prejudice the administration of justice in general and the case before the court in particular. What they basically stressed was that they feared being tried by the media before any court of law could get a chance of trying them. They maintained that pre-judgement of matters by the media usurped the role of the court and suggested to the public that the court might be influenced by what was being published. Interestingly, the petitioners did not even imply that the bench of judges might be influenced by the pressure exerted by the media. What they instead complained about was the way the administration of justice in the proceedings might be perceived both by them and by the potential audience.

The Opinion of Lord Justice Clerk, issued on 10 August 1999, did not agree with the petitioners' contention but instead maintained that "the administration of justice ha[d] to be robust enough to withstand criticism and misunderstanding." He went on submitting that liability for contempt of court should not depend on the viewpoint of the parties involved in the proceedings, whose personal perspective was actually immaterial. He therefore inferred that neither the article nor the editorial amounted to contempt of court, although they referred to one of the petitioner. Yet, it was an indirect reference and all the allegations in fact that they contained had already been extensively covered by the media over the years. Thus, Lord Justice Clerk concluded that the question of pronouncing an order against the respondents with respect to their future activities did not even arise. However, he deemed it relevant to point out that this decision would not prejudice further cases of contempt of court by publication that might arise.

In his view, the possibility, albeit remote, of judges being subconsciously influenced by some kind of publication could not be completely ruled out.

The Opinion of Lord Coulsfield was not at variance with the one reported above. It specifically referred to the strict liability rule and underlined that the latter would apply only to those publications which were capable of causing a substantial risk to the administration of justice so as to prejudicing or impeding it.²⁷ The undesirability of “trials by newspaper” and the importance for the court to be left alone to deal with cases brought before it, without interferences, were also emphasised. In Lord Coulsfield’s view, it would be quite unlikely to have publications capable of adversely affecting the outcome of a trial, especially if the question arised from a single publication. Repeated publications could actually be more threatening because they might create an undesirable atmosphere, especially if containing recurring allegations of guiltiness. Such publications might actually interfere with the due course of justice. However, this was not the case in terms of the petitioners’ submission. Thus, Lord Coulsfield also agreed that the publication of the article and editorial constituted no substantial risk for the due course of justice.

The same conclusion was drawn by Lord Justice Caplan. The latter, in his Opinion, extensively referred to the Contempt of Court Act 1981, which regulates the category of contempt of court by publication. He basically pointed out that, under the pre-existing common law, published material, which was capable of affecting the course of particular court proceedings or the administration of justice in general, could give rise to a contempt of court. With the evolution of concepts of human rights, and in particular the introduction of Article 10 of the inherent European Convention, doubts were raised as to the correctness of some aspects of the common law. In particular, the conflict between the need to have a fair and effective system of justice, on the one hand, and the need to ensure freedom of expression, enquiry and debate, on the other, had become pivotal. He stressed that article 10 sets out the fundamental parameters of freedom of expression and

provides for a number of qualifications of the right, including restriction where necessary for “maintaining the authority and impartiality of the judiciary.” He also emphasised that, in terms of section 2(2), strict liability would apply only to a publication “which creates a substantial risk that the course of justice in the proceedings in question [would] be seriously impeded or prejudiced.” Hence, it would apply to specific proceedings, whereas the questions that might arise if more general areas of justice were affected seemed to be a totally different issue.

The Act was however intended to regulate the boundary, which had always existed, between freedom of expression and the requirements of the due course of justice. Thus, he highlighted that the petitioners could establish a contempt of court only by proving that the publications complained of actually created a substantial risk that the course of justice would be seriously prejudiced or impeded. The Opinion, however, acknowledged that “the course of justice” can be quite vague as a concept. Many different interests might be affected and turn out to be in competition, including the paramount human right of an accused in criminal proceedings that is to say the right to receive a fair trial. If a publication might give rise to a substantial risk so as to influence the course of proceedings and have an adverse effect on the human rights of the accused, thus preventing a fair trial, then this could be considered contempt of court. Nonetheless, in Lord Caplan’s view, this was not the case, since the published material did not even seem to suggest that the accused were personally guilty. The aim of the article and the editorial complained of was connecting Colonel Gaddafi to the crime and then use this statement in order to question certain alleged commercial dealings between the United Kingdom and Libya.

The petitioners’ counsels had actually claimed that the publications prejudiced their clients’ right to a fair trial. In the Justice’s view, if the petitioners were to face a trial by jury, or if the prospect of a trial by jury in Scotland was realistic at the time when the Sunday Times article and editorial were published, then some risks that the publications might

influence the minds of jurors against the accused would not be all that groundless. However, at the time of publication, there was no information from which it could have been possibly inferred that the accused would have been submitted to trial by jury. Thus, the risk that the article and editorial would expose the petitioners to prejudice in the course of trial by jury seemed insignificant. The petitioners nevertheless submitted that the publication would expose them to prejudice even if the trial took place before three judges, since the terms of the publications were such that both the accused and the public could reasonably assume that the judges trying the case may have been influenced by them. The accused maintained that not only they were entitled to a trial that was fair, but that also appeared to be fair. Besides, the terms of the article were quite likely to adversely affect the conduct of witnesses. The Sunday Times material was therefore said both to hinder the due course of justice and to be prejudicial to the petitioners' trial.

Nonetheless, Lord Caplan's considered remote the possibility of a judge allowing himself to be influenced by extraneous material and assumed that the degree of risk, in those exceptional cases where it might actually exist, would concern specific facts and circumstances. In the Lockerbie trial, the facts were quite exceptional. Due to its political connotation, the case had been experiencing an extraordinary degree of media coverage both in Scotland and elsewhere. Detailed allegations about the factual circumstances leading up to the fatal explosion were available on the internet and no court would be in control. Nonetheless, the judges concerned would certainly be alerted to the problems of media involvement in the situation. They would give reasons for their conclusions and it would be most unlikely that any of the material published by the Sunday Times would be likely to influence their deliberations. However, Lord Caplan insisted on emphasising that what the Sunday Times printed was not intentionally aimed at usurping the function of the court but was rather a political comment about the United Kingdom's relationship with Libya and its leader. Thus, whether the material complained of was desirable

journalism or not, it would be incapable of affecting the outcome of the petitioners' trials.

Nevertheless, Justice Caplan acknowledged that, if the petitioners got the impression that newspapers were publicly prejudging their case, they still retained their private civil right to protect their reputation, if they deemed that being the case. As far as witnesses were concerned, if these published material was capable of influencing them, this could certainly impede or hinder the course of justice and prejudice the petitioners as well. However, in the Justice's view, such a risk did not seem to exist in this case, since no indication had been given by the petitioners of the nature of any evidence by witnesses who were likely to have read the relevant issue of the edition of the Sunday Times in question. Nor did it appear that the publications complained of contained the sort of details that might influence a witness. Thus, the possibility that the publications would make any difference to the evidence to be given at the trial seemed speculative and remote. This was particularly so when the specific publications were viewed against the huge and comprehensive press coverage the question of responsibility for the outrage had already received and would keep attracting. In the event, Lord Caplan also concluded that the petition had to be rejected, though emphasising that this did not mean that no limitations in the reporting of the pending trial existed.

4.7 The press and the bereaved families

From the outset, the media paid lots of attention to the reactions of the families of the victims and provided their individual stories with wide coverage. Yet, they also intruded their lives, in order to relay their feelings, their reactions, their expectations, their claims and grievancies in as many details as possible. Undeniably, shock and anger, inasmuch as bereavement and grief, often allow a story to sell, since the depicted emotions trigger the

potential audience's emotions. Thus, the media's attention was inevitable, although it sometimes entailed lingering on pain and anguish, which turned out to be a distasteful part of the show. This is what Dr. Jim Swire – whose 21 years old daughter Flora was killed on the doomed plane – called “voyeuristic detail on the suffering and injuries of the victims.” Unending publicity actually proved part of the price he and his family, as probably most of the victims' relatives, had to pay.²⁸ Whatever was private and personal immediately became open for everybody to see. Exploitation of pain went on for years causing the bereaved families intrusion to their privacy and harassment, often because of the unappropriate timing of the media attention, often because of the inaccuracy and distastefulness of the reports.

Nonetheless, it seems almost inevitable that pictures of a disaster turn out to be distressing to those personally involved and perhaps to other viewers too. Thus, there is no easy way out. Paying Pan Am 103 bombing no more than a superficial coverage would have looked like a denial of the trauma the family were suffering, a way of ignoring their anguish and loss or minimizing the magnitude of the event. Besides, it is never easy to select what is proper to show or relay, when tragic occurrences take place. Taste and sensitivity are subjective and it is always hard to reconcile the right to inform with the right to privacy. Moreover, reasonable standards change from time to time, from place to place, reflecting changes in society. However, the powerful role the media and its agents do have in representing catastrophes to the world must be limited by the importance of respecting pain and grievance. There must be other ways to convey the full impact of a tragic event without intruding people's private sphere. In Lockerbie, this was certainly one of the issues at stake. The families of the victims were somehow victimised themselves, especially in the immediate aftermath of the tragedy. Thus, from the outset, mediating between the public's need for information and the right to privacy by those most affected appeared pivotal.

Interestingly, though, media hardly acknowledged the intrusion into the relatives' lives. On the contrary, they highlighted that, as the legal and political issues gained the limelight, the human misery was almost forgotten.²⁹

Be it as it may, at a certain stage, the media's attention was no longer perceived in terms of harassment and intrusion: this probably happened because the relatives of the victims started developing a constructive relationship with the media and actually used them as a powerful weapon to advocate their cause. They therefore forged an alliance that prevented the Lockerbie case to be forgotten. In fact, the press widely focused on the families' requests and tried to depict their understanding of the way the events unfolded in Lockerbie. In particular, it focused on the families' reactions to the trial and the final outcome thereof. If the families had not been that persistent in their quest for justice, maybe the trial would have never taken place. Thus, the press gave voice to the bereaved relatives, reporting their comments and reactions. What did the trial actually mean for the families? Daniel Cohen, for example, whose daughter Theo was killed in the bombing said that the trial was a long way from justice, but it did something.³⁰ Before the trial, both Cohen and his wife had said that the only way to respond to Pan Am bombing was military action.³¹ The trial thus provided them with something, some kind of response, albeit probably not the one they deemed most appropriate.

The already mentioned Dr. Jim Swire, who, in the meantime, had become the spokesman for the UK Families Flight Support Group, was reported to have said that the trial would be a major advance both in the search of truth and justice.³² The press paid thorough attention to Dr. Swire's comments and initiatives, making him turn into the public face of the families of the British victims and their pursuit of justice. His wife got her share of coverage too and was reported to have said that the trial was a beginning and at least a good message for the world, meaning that people who are accused of wicked crimes are eventually brought to justice.³³ Dr. Swire said

to have pushed for the trial to take place because he could have never tolerated that “the death of [his] beautiful, talented daughter [was] being pushed under the carpet.” He just could not allow that his daughter and the other victims were forgotten.³⁴ He had therefore greeted the handover of the two suspects for trial with some satisfaction³⁵ albeit, when the verdict was issued, he said: “We accept the verdict, the conclusion of Scottish criminal justice, but this is no longer about guilt or innocence, truth and justice...The device was bundled on to a plane in 1988. There are questions to be answered. We will press the government for an independent inquiry into aviation security... Now, 14 years on, it remains our job to ensure safety...”³⁶

Swire was not the only one to demand an inquiry into the atrocity, as the press highlighted. Other relatives assumed that questions such as airport security and the intelligence services’ roles still needed being investigated, notwithstanding the closure the case might have had in Camp Zeist. After the verdict, the relatives of the victims still needed to know why and how Pan Am 103 bombing was allowed to happen.³⁷ Swire himself said that “the end-point for the court” could not be the end-point for the families,³⁸ which, above all, wanted the full truth, even though so many years had gone by. “We’ve been waiting for a trial for 12 years,” said Joan Dater, whose 20-year-old daughter, Gretchen, was on the plane. “The truth has been denied to us for all these years.”³⁹ John Bacciochi, whose 19 years old daughter was also on board the doomed plane, tried to explain the importance of seeing somebody convicted at last: “It’s an open-ended story otherwise. It’s just never ending. That’s how it is. It means making things a bit clearer.”⁴⁰ Not completely clear though.

For the Flynns, whose 21 years old son JP was on the plane, the fight for justice offered a channel for the parents’ agony. They therefore became very active in lobbying politicians and fighting for someone to be held accountable for the bombing. Kathleen Flynn actually said: “We were determined to fight for JP, because he and the others deserved more than

just to be dead and buried.” Her husband John was reported to have said: “Despite the fact that Lockerbie is a political football, this is a trial about the murder of our son. If he had been gunned down in the street, we would have fought for justice and for someone to be held accountable for the murder of our son.”⁴¹ The press also stressed that the verdict had left many questions unanswered, as Rev. John Mosey, whose 19 years old daughter Helga was killed on board Pan Am 103 flight, pointed out: “But to me it is no longer about pointing the finger of blame at someone. I don’t care who did it, I just want to know why and how it was allowed to happen.” Yet, who did it was actually the issue at stake during the trial proceedings. The press did not forget Megrahi, the bomber but also a father and a husband himself, with his wife and children attending the trial and showing the other side of the coin. There was some suffering on this side too but the families of the victims could not possibly sympathize with the Libyan spouse and children: Megrahi was alive, though jailed, whereas nothing would have ever brought their relatives back to life.⁴²

4.8 Unanswered questions and political intrigues.

It therefore made a remarkable story for the press to depict how Pan Am 103 bombing had turned ordinary citizens into activists. Family members actually filed lawsuits against Pan Am and the Libyan Government,⁴³ became experts in terrorism and aviation security, turned into media-savvy and struggled in order to keep the memory of the crash alive in the world’s conscience.⁴⁴ The security issue was one of pivotal importance since the trial had left inherent questions utterly unanswered. How was it possible to breach security and smuggle a bomb on board an aircraft? The finger was obviously pointed against Pan Am 103, “the world’s most experienced airline [that] came to grief long before its fate was sealed by a terrorist bomb,”⁴⁵ the airline that went bankrupt in 1991. The families sued Pan Am and firmly

opposed its fleet to return to the skies.⁴⁶ Airports' security became a major issue that kept gaining the media's attention over the years, once everybody was aware of the possibility of slipping a bomb onto an airplane. In fact, years after the tragedy, many airports still did not have the equipment capable of screening all checked-in baggage for explosives.⁴⁷ What had happened in Lockerbie could happen again. Yet, what had actually gone wrong in Lockerbie?

Amongst the many questions that were raised during the trial - but seemed to remain unanswered - there was one of crucial importance: ostensibly, there had been warnings prior to the bombings, which obviously added to the families' immense sorrow and outrage.⁴⁸ The media kept reporting that the CIA might have had knowledge of the bombing before it occurred and notwithstanding the warnings had just let it happen.⁴⁹ Did Washington actually know of the threat? Did anybody know that Pan Am flights were a security risk and still allowed the public to continue using them?⁵⁰ Warnings are a sensitive issue: as a former pilot and the husband of a woman killed on Pan Am flight 103 wrote, "publicly reacting to telephoned terrorist threats simply gives those terrorists a superb weapon: a risk-free way to produce expensive chaos. Ignoring telephone threats would take one weapon away from the terrorists."⁵¹ Not all threats are hoaxes, though. Warnings pertaining to Pan Am flight 103 proved tragically true. Hence, the media widely covered the fact that somebody might have known in advance that a bomb hidden inside a radio cassette could be smuggled on to a plane.⁵²

In fact, on December 5, an anonymous call to the American embassy in Helsinki had claimed that there was to be a bomb attack on a Pan Am flight out of Frankfurt. A warning about Toshiba cassette recorders was therefore circulated to all airport security units. On December 13, the US Embassy in Moscow told its staff of the Helsinki warning about Pan Am flights but left Christmas travelling arrangements up to the discretion of the individuals.⁵³ Probably, this is why Pan Am 103, of all planes crossing the Atlantic just

before Christmas, flew half-empty, carrying only 259 passengers and crew when it could accommodate 430. Maybe, there were more warnings buried in the intelligence files and several people knew in advance that Pan Am 103 would be targeted. Or, maybe, those who were warned just knew of general warnings about Pan Am, rather than of specific threat to Pan Am flight 103. According to the press, the South African Government's Bureau Of State Security (BOSS) might actually have been receiving such warning. In fact, "twelve senior officials, including Foreign Minister Pik Botha, were due to take Flight 103 to New York, but took another plane. It is believed that BOSS received its tip-off from the U.S., Britain, or Israel."⁵⁴ On the day of the bombing, the South African officials were actually travelling to the United Nations headquarters in New York to sign the Namibia peace agreement. Having arrived in London early in the morning, they were supposed to fly on board Pan Am 103 but then they took an earlier flight - Pan Am 101 - which apparently received special security checks at Heathrow. However, those who suspect that the South African Government received warnings generally acknowledge that Pik Botha was most unlikely to have known about booking arrangements.⁵⁵

Nonetheless, the press suggested "to history it will seem as if almost the only people who didn't know about a terrorist bomb threat were the tragic passengers and crew of the doomed Pan Am flight 103. From government ministers, to intelligence sources worldwide, to Pan Am executives - all had been tipped off that Islamic terrorists would blow a plane out of the sky. There were no fewer than eight warnings three weeks before the bombing - but little or nothing was done to step up security that just may have avoided the world's worst airline atrocity."⁵⁶ Of the many questions the trial left unanswered, the one pertaining to the warnings is certainly one of the most haunting and probably the one that will never find an answer.

One more pivotal question did not find a definitive explanation, though. The other pivotal issue pertained to responsibilities. Many did not believe that Libya was actually behind Pan Am 103 bombing. The already

mentioned Professor Robert Black,⁵⁷ who played a great role in staging the trial, actually said that the case against the two Libyans was a weak one. He told the press that it had always seemed to him that there was weightier evidence against the Syria-based Popular Front for the Liberation of Palestine - General Command, led by Ahmed Jibril, than against the two Libyans. Professor Black suggested that the investigators must have had the same belief, "because that's the way their probe was heading long before Libya came into the frame." Robert Black said he had the impression that, once the investigation did focus on Libya, anything which did not fit into that framework was simply discarded.⁵⁸ Hence, not everybody was persuaded of Libya's involvement. A Syrian-based conspiracy was also a possibility. This was pretty much the defence's case, which suggested other possible links that would have let Libya off the hook. The possibility of a Palestinian plot was actually raised during the trial and therefore given wide media coverage. Nonetheless, lawyers for Megrahi and Fhimah conceded that they could not prove the guilt of terrorist groups such as the Popular Front for the Liberation of Palestine - General Command - or the Palestinian Popular Struggle Front. But, as they pointed out, they did not have to prove anything. The onus was on the prosecution to establish its case against the two Libyans in the dock beyond reasonable doubt.⁵⁹

The press did not ignore the fact that, from the outset, the finger was pointed against Syria and Iran, which were afterwards ruled out, and upheld the suspicion that Libya was pretty much a scape-goat: in fact, the most suitable one at a time when the aims and interests in international politics could not afford challenging anybody else in the Middle East.⁶⁰ Many prominent observers and some of the families were actually "skeptical of the prosecution's Libya-did-it scenario" and seemed to believe that justice might have taken second place to politics in the highly volatile world of the Middle East.⁶¹ In fact, it might have proven politically desirable to blame Libya and rule out Syria, given the contingent "priorities" of international politics. In those times, the United States were actually embarking in the

Gulf War and the delicate balance in the Middle Eastern system of alliances and antagonisms made it important to rely upon Syria. The press openly suggested that Syria was too big and too significant for the United States to take on, whereas “Libya was a tinpot little place which had no real friends and no great importance in the world. Any accusations against Libya were likely to stick because, under Col Muammar Gaddafi, it had impressed itself on the international consciousness as being a terrorist state. What goes around comes around. If you give Semtex explosives and rocket-launchers to the Provisional IRA to kill innocent people in Belfast and Derry - as Libya did - and you praise the Popular Front for the Liberation of Palestine as a righteous, justified instrument of the people’s will, then you cannot, decades later, expect your protestations of innocence over the Lockerbie bombing to get much serious attention.”⁶²

The press also depicted the anti-Arab climate in the United States, “which was such that made it easy to single out the pariah state of Libya as a convenient whipping boy in a changing world where shifting allegiances dictated that old enemies Iran and Syria had to be courted as effective counters to Saddam Hussein’s Iraq. What is more, prior to November 1991, Iran and Syria had been openly suspected of complicity in the Lockerbie bombing, if not of actually carrying it out, and by fingering Libya alone, a weak but troublesome country with less international clout, it would restore relative peace to the overall conduct of foreign affairs in the Middle East.”⁶³ Middle East: that complex part of the world that the press vividly described as “one giant conspiracy theory.”⁶⁴ Thus, the media suggested that the Scottish police might have followed blindly down any path the CIA wished to tread whereas the investigators excluded whatever political interference, a standpoint that the press also reported: yet, doubts remain.⁶⁵ Thus, the legal issue pertaining to responsibility inevitably turned out to be a matter of international politics,⁶⁶ in fact an extremely complex matter that gave the entire case the flavour of a huge intrigue. In fact, even the question of where to stage the trial turned out to be pretty much a

question for the political and diplomatic arena, that reached far beyond pure legal reasoning.⁶⁷

4.9 A long deadlock, a huge trial, a poor outcome

The long way to the Lockerbie trial and the diplomatic deadlock it entailed provided the media with a number of issues of undeniable interest. The press gave wide coverage to the shadowy diplomacy that seemed to prove more effective than the official one in bringing the case to a close. The pivotal role that Nelson Mandela played in persuading the Libyans to hand over the two suspects for trial was widely highlighted.⁶⁸ The press reported what Colonel Gaddafi said in this respect: “the word of President Mandela of South Africa, who has acted as an intermediary and has assured the Libyans that the trial offer is fair, is sufficient to resolve the crisis which has prevented the accused being handed over.”⁶⁹ In a live television broadcast in Libya, Colonel Gaddafi actually asked the Libyans to trust the word of Nelson Mandela, and that of the Saudi Arabian Government, both of whom had urged the Libyan Government to accept the British and American offer of trial in the Netherlands. The press reported that Gaddafi said: “... their word is enough. When someone like Mandela or some country like Saudi Arabia intervenes, whatever the result is, we have to respect the word given.”⁷⁰ Thus, Colonel Gaddafi, despite his alleged fear that the United States and the United Kingdom might come up with “tricks” in order to make the trial impossible,⁷¹ eventually gave up.

There were those who nonetheless suggested that the fact that Gaddafi surrendered the two alleged perpetrators of Pan Am 103 bombing was to be considered a pre-emptive surrender and not actually the result of years of shrewd diplomacy: “as American tanks began to roll through Iraq to overthrow Saddam, Libya’s longtime terrorist, Muammar Qaddafi, came up with a strategy to avoid being next on the regime-change list.”⁷² Yet, the role

of shadowy diplomacy is undeniable. Nelson Mandela was praised by the press for explaining “the high and mighty” that they were also supposed to play by the rules, by publicly arguing that “no country had the right to be complainant, prosecutor and judge in the case.”⁷³ The press did not ignore the fact that the United Kingdom and the United States demanded Libya to extradite its nationals although there was no legal obligation in this respect. For a long time, the British and the American Governments seemed to be responsible of the lengthy diplomatic standoff, refusing the possibility of a trial in a third country. This probably made the press say that the United Kingdom and the United States had handled the Lockerbie case “with the delicacy of a rouge elephant inspecting the wares of a Waterford crystal shop.”⁷⁴ As already reported, while years went by, many countries around the world had started questioning the righteousness of the American and British demands whereas Libya’s cause started gaining sympathy.

Thus, the Lockerbie affair began “to take on symbolic political significance for these countries who saw it as an example of western arrogance which verged on racism,” as the press highlighted.⁷⁵ The Libyans were starving because of the United Nations sanctions, which “kill people while doing nothing to dislodge leaders unpopular in the West.”⁷⁶ Many countries were no longer ready to support the sanctions⁷⁷ and threatened to infringe them if the United Nations did not lift them.⁷⁸ Amongst those that took a stand against the sanctions, there was even His Holiness Pope John Paul II, while the Vatican’s move to open diplomatic relations with Tripoli immediately attracted the attention of the press.⁷⁹ The world was changing and the United Kingdom and the United States could not keep ignoring its voice, especially when a certain message was conveyed by such high profile authorities. And eventually, after a long-lasting and massive investigation, which the media acknowledged as the “most expensive crime investigation in world history,”⁸⁰ in fact “one of the most awesome and inspired pieces of international detective work,”⁸¹ the trial took place. The press highlighted the enormity thereof: it was the longest and most expensive

murder trial in British history - that saw months of legal argument and adjournments, heard 230 witnesses from all over the world, while the court was shown 2,488 bits of evidence such as photographs, charred clothing, shards of wreckage and a model of the luggage hold which contained the explosives. A trial that left a bill to the British taxpayer of more than 60 million pounds.⁸²

The press also suggested that the Lockerbie trial “made legal history, being the first British trial to be televised, although proceedings were curtailed because of a computer error in the transcription service,”⁸³ and because it was the first time that a Scottish court sat abroad.⁸⁴ It was written that this trial broke “any number of precedents - it [was] the biggest mass murder trial, the most heavily-protected, and follow[ed] the biggest murder investigation in history. It ha[d] its own road signs to direct visitors, its own no-fly zone, and a grandstand for the television networks right outside the courthouse. There [were] a dozen press officers to assist the media, and the judges even made themselves available for a photo opportunity before the proceedings began.”⁸⁵ But there were also those that said that the media coverage was not as wide and deep as it should have been. Despite the fact that huge sums of money had been spent by the Scottish Court Service on providing facilities for the media, no attempt had been made to give reporters what they actually needed in order to cover the trial. For example, notwithstanding the fact that print journalists were given a huge media centre with places for 240 reporters to watch the trial on a closed circuit television link, the Crown Office, which was responsible for Scottish prosecutions, did not provide even the most basic information such as the names of the witnesses.⁸⁶ Those same witnesses that sometimes failed to appear whereas the testimony of others proved “less than crystal clear,”⁸⁷ which obviously cast a shadow on the prosecution’s case.

Then, the press obviously focused on the outcome of the trial, which ended up convicting just one of the accused, whereas the other, Fimah, went back home where he was welcomed as a hero.⁸⁸ Therefore, the verdict was

believed to have given no more than “a glimpse of the truth.”⁸⁹ Some of the reactions were utterly negative. As already reported, the United Nations observer Hans Kochler said that the verdict was politically motivated.⁹⁰ The press obviously echoed his stand that the outcome of the trial was rigged by the suppression of evidence but also reported the comments made by the spokesman for the Crown Office, that pointed at Kochler’s “complete misunderstanding of the function and independence of the judiciary.”⁹¹ What was the meaning of the Lockerbie trial, then? The press defined it as “one of Washington’s most ambitious attempts to use criminal law as a weapon against a horrific act of international terror” which proved that the United States and the United Kingdom “have options in responding to terrorism and are not limited to military force.”⁹² Nonetheless, the verdict left open pivotal questions about whether the rules of the courtroom, with strict standards of evidence, are an adequate response in the face of brutal acts of terror, which are devised by the perpetrators to make it difficult, if not impossible, to detect who is responsible, therefore frustrating the criminal justice process. Many are convinced that terrorism cannot be viewed as a criminal justice matter, it is rather a national security threat that should be dealt with by military force when state sponsorship is proven.

When Megrahi was convicted, it seemed quite unlikely that he had acted alone. The media immediately pointed higher up, in the chain of possible responsables,⁹³ albeit acknowledging that the two accused, while on trial, could not possibly be made answerable for an entire nation. The trial was not supposed to try the Libyan intelligence service nor the entire Libyan regime.⁹⁴ Yet, the press suggested that the Scottish Court in Camp Zeist might as well have condemned Colonel Gaddafi himself, since “the Libyan dictator’s hands [would] forever be stained with the blood of the 270 people killed in the horror of Flight 103 on December 21, 1988.”⁹⁵ The issue was one of a pivotal nature: could individual responsibility lead to state responsibility? Would a chief of state be held liable, then? As a matter of

fact, the United Kingdom and the United States of America, by requiring that Libya admitted responsibility and paid compensation to the families of the victims, had pointed at state responsibility, which could be concurrent with individual responsibility.⁹⁶ Hence, the media pointed their finger at Colonel Gaddafi – the *enfant terrible* of the Maghreb,⁹⁷ allegedly involved in an international Masonic brotherhood⁹⁸ - and highlighted that the findings about individual responsibility inevitably supported subsequent claims of state responsibility. Megrahi could not have possibly planned and performed the bombing all by himself, acting in his “private capacity.” The press therefore echoed the relatives’ main fear, that Gaddafi could come out with clean hands. In fact, “rumours of a deal not to pursue everyone responsible for the bombing of Pan Am 103, at least in the context of the two men’s trial, have circulated for some time” among the various victims’ groups, underlying the suspicion that even though the two alleged perpetrators were convicted, those who had planned and ordered the bombing would have been let off the hook.⁹⁹ The families of the victims feared that Colonel Gaddafi and his henchmen could get immunity from national and international courts and therefore “get away with mass murder merely by giving up the lowest-level players, paying minimal compensation and allowing the passage of time and economic pressure to absolve them of responsibility.”¹⁰⁰

The question therefore remains whether full justice is done whenever no more than a foot-soldier is caught and the world’s biggest investigation into terrorist murder has managed to uncover nothing about who ordered the attack on Pan Am flight 103, what the motive was or which governments were involved.¹⁰¹ And anyway the trial, inasmuch as the investigation prior to it,¹⁰² was extremely controversial and the press raised the issue that the evidence was unconvincing or even that it had been partially withheld from the trial itself, not to mention that at every step fresh evidence might undermine the Crown’s case.¹⁰³ As the press reported, “Whatever the verdict, the sad truth is that the families of 270 people who lost their lives

on 21 December, 1988, will be no closer to discovering the identity of those who instructed and funded the destruction of Pan Am 103 and their loved ones.”¹⁰⁴ Yet, the Lockerbie trial might have set a precedent and be used as a template for other trials pertaining to terrorist act.¹⁰⁵ And anyway it paved the way for a definitive compensation offer to the families of the victims. While the appeal was still pending, the press started reporting that a deal to compensate the family of the victims was under way, whereas an acknowledgement of responsibility kept being a controversial issue for a while. In fact, even when it seemed that Libya had accepted responsibility in writing, the press reported that its prime minister suggested that Libya was not responsible for the Lockerbie bombing and other major acts of terrorism, even though it had agreed to pay compensation to victims’ families.¹⁰⁶

As already reported, paying compensation to the victims’ families was one of the Security Council’s conditions before any lifting of United Nations sanctions against Libya. The latter was also required to renounce terrorism and admit responsibility for the bombing of Pan Am flight 103. Libya was ready to offer compensation when it was tired with isolation and actually made its offer on the condition that the United States and the United Nations eventually dropped their sanctions. Libya also required to be removed from the United States’ list of countries that sponsor terrorism. Colonel Gaddafi felt it was high time to end his country’s pariah status and get back to the international fold. Thus, Libya eventually accepted responsibility for the Libyan agent’s conduct.¹⁰⁷ What lesson was to be inferred? Probably, that a rogue regime can be persuaded to get out of the terrorism business not only when it is subjected to pressure but also when it realizes the potential benefits of cooperation and the importance of restoring itself to the international community. Obviously, normalising relations and boosting trade generally proves to be in the interest of all parties.¹⁰⁸ Thus, in the event came the deal which was heralded by the press albeit some of the relatives said they were horrified at the very idea Gaddafi’s regime was

buying its rehabilitation. In fact, the press suggested that the victims of Lockerbie were being used as “bargaining chips.”¹⁰⁹ Yet, many amongst the victims’ relatives supported the efforts to bring Libya back into the international arena.¹¹⁰ However, it was a long way to go before the families of the Pan Am flight 103 victims could get any monetary compensation whatsoever. But this is another part of the Lockerbie saga, which is to be addressed in due course.

4.10 Conclusion

Pan Am 103 bombing proved a tragically spectacular event but all terrorist acts have to be if they want to grab the media’s attention. In most cases, the more spectacular is the terrorists’ action, the wider the media coverage. Blowing up an aircraft and killing all passengers and crew on the spot is certainly an impressive event that has no chance of going unnoticed. The spotlight is *in re ipsa*. It is undeniable that civil aviation provides terrorists with highly visibility targets. Due to the great media attention paid to attacks on aviation targets, it also provides terrorists with great propaganda opportunities as well as a possible leverage in the achievement of their aims. Blowing up an aircraft means making millions of people feel threatened. In a way, media may become a vehicle for the psychological impact of terrorism, which is violence for effect, not only for the physical effect on the actual target, rather for its dramatic impact on an audience. And media are definitely able to expand the potential audience to the global scale. This is why civil aviation is often an optimal target for terrorists. Air transport is certainly a vital factor for global economic growth, communication and social development. Hitting it is an effective way to spread fear and uncertainty. How many people around the world felt vulnerable after Pan Am 103 bombing? How many families thought that the

students travelling on board that doomed aircraft could have been their children instead of somebody else's?

Yet, alleged terrorists deserve to be considered innocent, inasmuch as everybody else, until a court of law issues a verdict of guilt. Media have to be careful when portraying suspects of heinous crimes. They have a duty of duly inform without infringing on anybody's rights. This was one of the issues that the Lockerbie case actually raised. The alleged perpetrators of the bombing lamented being subject to some sort of media trial to an extent that a fair trial was impossible. In fact, long before its very beginning, the media's finger had pointed at the suspects' involvement which certainly played against their case by generating an emotional response. Pre-trial publicity can actually affect the mind of judges and jurors and especially influence the witnesses' conduct, thus bearing a weight on the trial outcome. Shielding the trial from the adverse effects of publicity was an issue of considerable importance during the Lockerbie proceedings. The potential media's influence therefore suggested that the trial be staged without a jury and in a neutral country. Besides, notwithstanding the interest in the development of the proceedings, broadcasting the trial or parts thereof was prevented and then admitted within strict limits.

But the Lockerbie case was more than a terrorist attack that ended up with a criminal trial. It was a legal and political intrigue that went on for years. The aftermath of the bombing was much more than a simple epilogue. On stage, diplomats, politicians, lawyers from all over the world. In the long term, though, the main characters became the bereaved relatives of the victims who turned themselves into activists and pursued the search of truth with an incredible determination. The media focused on their efforts, their endless and brave struggle in search for the truth, their reactions to diplomatic moves and legal steps. They could not be forgotten because they made their voices rise high, which was possible thanks to the same media that at the beginning intruded their lives and harassed them denying privacy to their pain and sorrow. It was actually thanks to the

media's attention that their case could not be easily filed away despite the time going by and notwithstanding the fact that more urgent international events could grab the world's attention. The media therefore played a pivotal role to this end, ensuring the families' opinions and initiatives the due limelight. They actually allowed the victims' relatives to relay the Lockerbie story in their own terms.

Interestingly, the real impetus for addressing the tough issues of aviation security, which stemmed out of the Lockerbie disaster, came neither from institutions nor the media, but from those who might have seemed the least able to act: the grieving families and the friends of those who perished. It was they to learn to use the media and the latter, to their credit, actually cooperated, to focus public attention on security lapses that might permit would-be bombers to perform other tragic attacks on civilian aircrafts.

Probably, the trial itself can be considered the outcome of the bereaved families' activism and the media's perseverance in reporting their endless quest for justice. Yet, the relatives insisted that the trial was only the beginning of a long way to the definitive discovery of the truth, which was behind Pan Am 103 bombing. In the light of the verdicts, the families actually renewed their demand for a full public inquiry and insisted that they had received only part of the answers to years and years of questions about who carried out the act of terrorism and why. All this did not end within the families' circles. It became a matter for governments and investigators to address. And this was possible thanks to the media's attention, which gave voice to the opinions of statesmen but also to the demands of ordinary citizens whose lives had been torn apart forever. This is the democratic dynamic of the media system, after all: whatever sells deserves the utmost consideration. A desperate parent's reaction can be an attention grabber in as much as a Secretary of State's comment. Without the constant media's attention, the families' pressure would have not been as powerful as it was. The relatives of the Pan Am 103 victims were not the first ones to be stricken by terrorism and other forms of crazed violence but

probably the first to forge an alliance with the media in order to pursue their cause. Once again, the media's power proved that of a magnifying lens: in the same way they convey the terrorists' message and spread fear, by providing terrorists with a global audience, the media magnified the families' despair and anger, giving them a stage and an audience. This was crucial if the relatives of the victims were to play successfully what was to become their role before the entire world: advocacy, as the next chapter will show.

Notes

¹ See McKain, B., "Evidence to be rebuilt in court," *The Herald* (Glasgow, Scotland), May 26, 2000, p.5. See also Houston, S., "Death of flight 103; delay meant a change to plan's route, 270 lives coming to a horrific end in Scotland and vital evidence falling on dry land," *Daily Record* (Glasgow, Scotland), February 1, 2001, p.34.

² They had been in the UK on an exchange programme. To date, Syracuse University holds Remembrance Week, a series of events marking the anniversary of Pan Am 103 bombing. See Hellmore, E. "World: remembering victims of Lockerbie: ten years after the Pan Am terrorist bomb, Syracuse University honours the 35 students who never came home," *The Observer* (London, England), December 20, 1998, p.25.

³ It was extremely impressive that amongst the victims there were "so many young people on the threshold of life," as Smith, A., reported in "Lockerbie: 10 years on; on December 21, 1998, the name of Lockerbie became synonymous with tragedy. A decade on, we talk to the people whose lives were changed forever and focus on the hunt for justice." See *Daily Record* (Glasgow, Scotland), 12 December, 1998, p.31. See also McIlwraith, G., "Remember the innocents: as Lockerbie trial begins, families will never forget night they lost loved ones," *Daily Record* (Glasgow, Scotland), May 2, 2000, p.8.

⁴ Many years after the bombing, the town of Lockerbie, though tired of the media and the grim notoriety the disaster had brought about, was still in the spotlight. See, for example, Bald, J., "Pathologist speaks of horrors after Lockerbie bomb," *The Scotsman* (Edinburgh, Scotland), 8 December 1998, p.5. See also Brocklebank, J., "They were read out to the hushed court. For exactly an hour, the names of those killed at Lockerbie rang in the ears of the men accused of causing their deaths; relatives in the court bowed their heads and wept - the Lockerbie trial," *The Daily Mail* (London, England), May 6, 2000, p.21; Gerlin, A., "Lockerbie residents less than satisfied with split verdict," *Knight Ridder/Tribune News Service*, January 31, 2001, pK7122; Braid, M., "Ghosts of grief haunt a town that became a place of pilgrimage: Lockerbie verdict; the town," *The Independent* (London, England), February 1, 2001, p.5.

⁵ See Lashmar, P., "Lockerbie Trial: The Background - A long and painful road to justice," *The Independent* (London, England), April 6, 1999, p.8.

⁶ See Lord Fraser of Carmyllie, "No wonder the relatives of the Lockerbie bomb victims feel betrayed; Why the time wasn't right for Lord Hardie to quit terror case," *The Mail on Sunday* (London, England), 20 February, 2000, p.26. Lord Fraser of Carmillye was Lord Advocate when the warrants were issued against the two accused. See also Breen, S., "Conspiracy and murder charges await suspects," *The Scotsman* (Edinburgh, Scotland), April 6, 1999, p.2.

⁷ See Kane, P., "Murder trial or simply a flawed case. Doubts haunt Lockerbie prosecution," *The Mirror* (London, England), February 9, 2000, p.6.

⁸ See Cramb, A., "Lockerbie: Gaddafi must pay; Libyan spy gets 20 years for 270 lives but second suspect cleared," *Daily Telegraph* (London, England), February, 1, 2001.

⁹ See Cook, R., "Search for truth Libya need not fear," *Scotland on Sunday* (Edinburgh, Scotland), December 20, 1998, p.6.

¹⁰ See McNeil Jr., D. G., "At Libyans' Trial, Lockerbie's View of Horror From Sky," *The New York Times*, May 5, 2000, pA3(L).

¹¹ Deppa, J., "The media and disasters, Pan Am 103," New York University Press, New York, 1994, pp. 1-11.

¹² See *supra*, chapter 1, par. 1.1. See also Nacos, B.L., "Terrorism & the media," Columbia University Press, New York, 1994, pp.10-12.

¹³ That is to say the equitable jurisdiction of the Scottish Courts.

¹⁴ Article 3(2) of the Order ruling proceedings at Camp Zeist. See *supra*, par. 3.4, chapter 3.

¹⁵ As was expressly stated in paragraph (b).

¹⁶ As was expressly stated in paragraph (h).

¹⁷ See MacKain, B., "BBC bid on Lockerbie trial opposed; Court told of TV threat to witnesses," *The Herald* (Glasgow, Scotland), 23 February, 2000, p.2.

¹⁸ It is a rule of Scots law that witnesses should not hear the evidence of earlier witnesses. The common law rule has however been relaxed to the extent of conferring on the court a discretion to permit or excuse the presence of a witness in court during the evidence of earlier witnesses, but only where it would not be contrary to the interests of justice. See Criminal Procedure (Scotland) Act 1995, section 267.

¹⁹ He actually referred to the letter to the Secretary-General of the United Nations, which, in paragraph 3, stated that the court "would follow normal Scots law and procedure in every respect except for the replacement of the jury by a panel of three Scottish High Court judges. The Scottish rules of evidence and procedure, and all the guarantees of a fair trial provided by the law of Scotland, would apply." This arrangement is actually provided in Articles 3 and 5 of the Order.

²⁰ The particular reports relied upon appeared on BBC Online on 19 August 1999 and in the *Herald* of 25 August 1999. The former stated that the Lord Advocate "revealed plans for closed circuit television links for relatives in Britain and the US to watch court proceedings live from the Netherlands. ... But he ruled out general TV broadcasts of the trial and said only relatives would be able to watch the CCTV link. He said a final decision would be at the discretion of judges who are to hear the case."

²¹ See again section 267 of the Criminal Procedure (Scotland) Act 1995.

²² New York and Washington were certainly in another state whereas London was beyond the jurisdiction of the court.

²³ Criminal Justice Act 1925, sections 41 and 49(3).

²⁴ Appeal Court, High Court of Justiciary, no. 60/00.

²⁵ See Grant, J. P., "The Lockerbie trial: a documental history," Oceana Publications, Inc., New York, 2004, p. 184-185.

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²⁷ Section 2(2) of the Contempt of Court Act states: "The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced."

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Chapter 5

BEYOND RETRIBUTION: RESTORATION AND REHABILITATION

5.1 Redressing unbalances in modern times

The findings in Camp Zeist did not necessarily ensure a complete sense of closure to the Lockerbie case. The trial itself was part of much a bigger picture. Only one person was actually convicted; yet, the criminal court in Camp Zeist had no power whatsoever to prosecute anybody else beyond Megrahi and Fhimah. Nor it had the power to examine possible governments' responsibilities. Nonetheless, the criminal court found Libya to be somehow involved in the Lockerbie bombing: Megrahi was found to be a government agent, after all.¹ Nonetheless, the Scottish Court never said how high up the Libyan authorities were or might have been involved in planning and ordering the Lockerbie massacre. Thus, after the criminal trial, many questions were still unanswered much to the distress of the grieving families. Somebody had been convicted, though. Some sort of accountability had therefore been established in a court of justice. Megrahi was charged with life sentence and this is what the criminal justice system stands for: identifying and punishing the perpetrators of crimes, making accountability triumph over impunity. In Lockerbie, it might have not been full accountability. Somebody might have gone away with it. Yet, the fact that it was not possible to prosecute and punish everybody does not make it useless to prosecute and punish at least somebody. A little justice is better than nothing, after all.

Does a life sentence redress the imbalance between the wrongdoers and the victims of their wrongful act, though? Can it fully vindicate individual rights? Probably not. Whether Megrahi spent the rest of his life in Barlinnie prison or not, those who had been killed on board Pan Am flight 103 would

not come back to life. Yet, they were not the only victims of the bombing. Their families, in their own way, were victims too. For them, it made a huge difference to see somebody ending up in jail or not, no matter how vehemently the trial at Camp Zeist was criticised for convicting no more than a foot-soldier while leaving off the hooks those who had ordered the terrorist attack.² As a matter of mere common sense, some accountability is better than no accountability at all. Total impunity would have been much worse.

The next question, then, was whether there was anything else that could compensate the grieving families of the tragic loss they had suffered. Restitution was materially impossible but monetary compensation could be available. The issue started gaining the spotlight. Was there anybody that was supposed to pay at least a monetary price in order to redress the tremendous injustice the relatives of the victims had been hit with? Yet, if somebody had to pay a price, was it possible to put a monetary value on a person's life? Money cannot make a family whole again but monetary compensation is all the modern civil system knows as a means of redressing imbalances, whenever restitution is materially impossible. This is actually the way the legal system evolved, once it abandoned ancient customary retaliation practices. As legal civilization unfolded, the original rules that imposed an identity between harm and punishment gradually gave way to norms requiring mere equivalence between harm and compensation. The original system of retribution grew to include pecuniary compensation as a means of both punishing the wrongdoer's act and providing some sort of satisfaction to the victim.

Today, the desire of punishing wrongdoers and obtaining compensation from him are deeply enrooted in human nature, whereas ancient legal system gave primary importance to punishing the wrongdoer.³ Compensatory legal remedies might not be apt to fully redress major injustices but retaliation in kind would not allow for restitution either. In fact, the ancient retaliatory practice might punish the wrongdoer but the

victim would not gain anything tangible. Not to mention the fact that the regime of retaliatory threats always runs the risk of starting up a spiral of escalating violence that leads to nowhere apart from more violence. Quite obviously, the monetary sum to be paid is neither necessarily linked to the actual loss one suffers nor is necessarily adequate to repair the damage. How much money is human life worth, after all? Yet, monetary compensation embodies some sort of moral satisfaction for the victim while taking away something valuable from the wrongdoer. The latter ends up internalising the full subjective value of the loss. This should also have some deterrent effect on potential wrongdoers. Going down the path of an illicit behaviour is not a free ride: there is a price to pay. Undeniably, money cannot compensate for grief and sorrow but it is the accepted means of exchange and the only way of evaluating loss. Nevertheless, the concept of assigning a price tag to a life has always made people intensely squeamish. Yet, criminal punishment of the specific wrongdoer and monetary compensation are what criminal law and tort law allow for. The combination of the two remedies is what should avoid revenge against entire groups. Such dual system may not be able to fully redress major injustices but any form of retaliation would achieve even less.

What was there to be gained for the Lockerbie victims' families, then, now that Megrahi had been convicted and the criminal proceedings were over? The tort system gave them a window of opportunity to get some money out of punitive inasmuch as compensatory decisions that could hit hard whomever was found responsible for the Lockerbie bombing. Provided Megrahi had materially smuggled the bomb on board the doomed aircraft, somebody had mandated the terrorist attack and somebody else had let it happen. Hence, other responsibilities were still to be ascertained, the full truth was still to be known. Accountability can be multifaceted in nature. In this respect, the families of the victims were ready to keep on fighting. The fact that Megrahi had been convicted was better than nothing but it was not enough to bring the Lockerbie case to an end. As Susan Cohen, one of the

grieving mothers who had lost her child in the Lockerbie crash, wrote,⁴ the relatives of the victims wouldn't fight back to win because they had already lost and they couldn't possibly win. No sanctions, no life sentences, no compensation, not even military attacks could bring back those who were dead. But they had to fight back "because it was the right thing to do." And they would fight because their rage would not allow them to do otherwise. In the aftermath of Megrahi's imprisonment, then, the case was far from close. Somebody else was still to pay the bill.

5.2 Airline security and Pan Am's responsibility

When an aircraft falls out of the sky, the question is whether the airline is somehow responsible for lax security. Was this the case with Pan Am? Could the airline be held somehow accountable for the Lockerbie crash? And, in any such case, would the victims' families be entitled to get anything in compensation? Or are airlines liable just because one of their aircraft crashed? At the time of Pan Am 103 bombing, the issue was ruled by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as well as a number of protocols that were supposed to set forth a uniform standard of compensation in the event of a crash. Compensation was actually fixed at 125,000 francs,⁵ which the American Airlines had upped to \$75,000 in the Montreal Agreement of 1966. The latter actually raised the limitations of liability as set forth by the above-mentioned Warsaw Convention with respect to those flights originating, terminating or having a connection point in the United States. Such figure was still in place in December 1988. Nonetheless, albeit the Warsaw Convention generally limits a carrier's liability for damages to \$75,000 per passenger, Article 25 permits recovery of unlimited compensatory damages provided the carrier's "wilful misconduct" caused the damages.

Thus, after Pan Am flight 103 was blown apart, the airline was bound to pay compensation to the victims' families and actually offered \$100,000 per victim, if the families were prepared to give up the right to sue in order to collect more in a future lawsuit. However, the grieving families had a chance to get more than \$100,000 by proving that the airline had engaged in wilful misconduct, as per Art. 25 of the Warsaw Convention.⁶ Wilful misconduct reaches far beyond carelessness, actually implying that the airline knew or should have known that it was running a potentially lethal risk and acted despite it, regardless of the consequences of its course of action. Something that needs being proved, of course, no matter how difficult it is to prove it. Thus, almost nobody accepted Pan Am's offer. The families intended to fight for more and started a lawsuit that went on for several years, in order to prove that there were loopholes in the airline's security system, although, since 1986, Pan Am had been trumpeting a very far-reaching security programme, namely Alert, whose launch was advertised on The New York Times, on 20 May that year and was supposed to start the following June. This would have entailed an extra-cost for passengers but was heralded as a dramatic improvement of the standard of safety Pan Am would provide its customers with.

A few years later, in the aftermath of Pan Am 103 bombing, the victims' families seriously doubted the efficacy of the airline's security system and were ready to challenge Pan Am in order to prove its wilful misconduct. The families' lawyers actually foresaw the possibility of a gigantic lawsuit against Pan Am and its wholly owned subsidiary, Alert Management System, Inc., which was in charge for security, as well as USAIG, that is to say US Aviation Insurance Group, for wilful misconduct as a proximate cause for the death of those who were killed on board Pan Am 103. The plaintiffs' case relied on the official version of Lockerbie bombing as provided by both the American and the Scottish investigators. It has to be noted that by the time the liability trial started in New York in 1992, both the commissions investigating the Pan Am tragedy, that is to say the United

States Commission on Aviation Security and Terrorism and the Scottish Fatal Accident Inquiry, had reached the conclusion that the bomb bag had been loaded on board Pan Am 103 without being identified as an unaccompanied piece of luggage. It would have never ended up there if stricter baggage reconciliation procedures had been carried out. Thus, the plaintiffs' case was that the bomb bag had been loaded on to Pan Am flight 103 as an unaccompanied piece of luggage, which was simply X-rayed but never submitted to baggage/passengers matching procedure as required by the Federal Aviation Authority's Air Carrier Standard Security Programme. This infringement of the Rules certainly amounted to wilful misconduct.

The families of the American victims had found their way to some specialists in aviation law, many of them belonging to one particular law firm in New York: Kreindler & Kreindler.⁷ The relatives of the British victims also sued Pan Am and took their litigation in the United States, where much bigger damages were likely to be awarded. The Scottish and English experience in aviation cases was not even comparable to the one available in the United States. In the United Kingdom, it therefore seemed unlikely that a jury would be allowed to decide over a case of wilful misconduct and only inconsequential damages might be assessed. The United States system, instead, allowed juries to decide any such issues, which, coupled with the contingency fee mechanism, provided everybody with an opportunity for skilled representation. As Peter Watson, the lawyer that represented the British victims' families, wrote, this was an issue of paramount importance, given the fact that "isolated and financially weak individuals were facing the enormity of an international corporation surrounded with all the might of the international aviation insurance industry."⁸ The British plaintiffs therefore chose their attorneys⁹ and started their lawsuit in Florida, where Alert, the aforementioned company that was responsible for providing security to Pan Am flight 103, was based.

Several wrongful death actions were therefore started in different federal courts in the United States and then transferred to the District Court in the

Eastern District of New York for a consolidated liability trial, which began on 27 April 1992.¹⁰ The court heard a number of stipulated facts, which had been agreed upon by the opposing parties and therefore did not need being proved. They could actually be accepted, by Judge and jury, as presented. Amongst those facts, there was the circumstance that Pan Am had circulated a manual pertaining to the corporate policy with respect to security and safety of passengers, customers and employees. The said manual incorporated the Federal Aviation Administration's mandated Air Carrier Standard Security Programme, which required airline to conduct a positive passenger/checked baggage match resulting in physical inspection or non-carriage of all unaccompanied bags. Another stipulated fact was the fact that Alert provided security in a number of airports, Frankfurt and London included. Other facts that were accepted as "presented" were the Helsinki warning and the shot-down of an Iranian civilian aircraft by a United States missile cruiser in July 1988.¹¹ Another stipulated fact was that the Israeli Security Company that had been engaged by the airline itself to review the security provided to Pan Am flights in certain airports had reported major weaknesses and loopholes in the security system and had labelled Pan Am as highly vulnerable to terrorist attacks. Isaac Yeffet, former chief of security for El-Al and a world's leading expert in airline security, had actually made a study on Pan Am's safety measures and reported major lapses, thus inferring that the airline was highly vulnerable to terrorist attacks.¹²

During the trial, many testimonies were heard and the plaintiffs succeeded in proving that the Pan Am security system was utterly defective both in Frankfurt and London. It was because of the loopholes in the security system that it was possible to smuggle an unaccompanied bag, carrying a bomb, on board the aircraft. The finger was also pointed at the fact that Alert Management System staff at the airport, that was supposed to identify people meeting risk profile, was not numerous enough and had received no training whatsoever.¹³ The plaintiffs could therefore infer that, should have

been sufficient security at Frankfurt and London, Pan Am 103 tragedy would have not occurred. In fact, if the passenger/baggage matching procedure had been performed the way the Federal Aviation Rules mandated it to be performed, an unaccompanied piece of luggage would have never ended up on board the doomed aircraft without having been physically (and thoroughly) searched. At this stage, Pan Am, had no credible defense to put forward. The airline had however tried to spread the blame by contending that the United States authorities had failed to warn it against the threat of terrorist attacks. In fact, in December 1990, Pan Am had even tried to sue the United States Government for third party indemnity on the basis that the Government had received warnings about the bombing but had not passed the information to the airline. Nonetheless, Pan Am claim was dismissed as no evidence supported it.

Quite shockingly, during the trial, it was widely disclosed and proven that aircraft were routinely allowed to depart carrying unaccompanied bags. Flights were never held up because of no-shows of passengers who had checked in for the flight. It was then widely proven that Pan Am had abandoned the mandatory matching process both in Heathrow and Frankfurt, and replaced it with what it called “administrative match and passengers control.” The said system was utterly inadequate: in fact, it did not deal with interline bags. Thus, Pan Am ignored the rules it was bound to respect and wilfully exposed its passengers to risks. It was because of this lax security system, in constant breach of the federal rules, that the piece of luggage containing the bomb-radio could end up on board Pan Am flight 103. Hence, on 10th July 1992, the verdict came in. Pan Am was found guilty of wilful misconduct leading to the deaths of the passengers on-board Pan Am flight 103. The court therefore concluded that the lack of security which Pan Am and Alert were responsible for, inasmuch as the breach of the Federal Aviation Rules, amounted to wilful misconduct. The latter was a proximate cause of the death of those who had been killed in the Lockerbie bombing.

The issue at stake was one of establishing what sort of compensation the families of the victims were entitled to get. What sort of loss could be compensated? This might have been a question for the courts of different home states of the victims. In fact, once the Eastern District of New York had assessed that Pan Am had engaged in wilful misconduct and was therefore liable to pay compensation, the various individual cases might be sent back to those states courts to decide what amount of money could actually be awarded. The death of a relative did not necessarily entail that all the families were entitled to receive the same amount of money in compensation, at least beyond the insurance company's original take-it-or-leave-it offer. It was actually necessary to prove the monetary loss which was linked to the death of the beloved one. Projected future earnings are the typical standard of measurement. One thing was that the person killed was a wage earner that supported his or her family. One thing was that a student, still supported by his or her parents, had been killed in the crash. The economic loss was *in re ipsa* in the first case, but not in the second case. Of course, there were ways of giving monetary value to the so-called loss of services, such as household repairs, lawn-mowing or cooking. But what about the loss of companionship or parental care? And then another issue was at stake: what about the victims' loss in terms of pain for their injuries (in case their death had not been immediate) or emotional distress for impending death? Finally, there was another category of damage that fell into picture: punitive damages, which were supposed to deter future misconduct on behalf of the society as a whole, yet being paid to the plaintiffs as such.

The trial before the New York judge was bifurcated into a liability phase, binding on all plaintiffs whose cases were consolidated in the civil litigation, and a damages phase governing the cases of three specific plaintiffs. The way damages would be awarded would set the standards for damage awards in future cases resulting from Pan Am 103 crash. Thus, following the liability verdict, the jury awarded damages to the relatives of three of the

deceased. The final judgment was entered on 9 September 1992. Compensatory damages resulted in extremely varied assessments: for the death of the vice-president of PepsiCo Inc., for example, the family was given \$9,250,000. The death of another executive in the said company was also compensated with \$9,000,000. The death of an electrician who was also a calypso singer was instead compensated with \$1,725,000. The damage awards included damages for loss of society and damages for loss of parental care to adult children. No award for survival damages - sought by plaintiffs - was made because the jury found the passengers had suffered no conscious pain and suffering before their deaths. The said assessment would have set standards for all the other cases.¹⁴ The disparity, in the three awards, was there for everybody to see. Is a poor man's life worth less than a rich man's?

The inequality of compensation was a sore point. The value that would be put on the life of a student or a kid was much less than the value attached to the life of a wealthy businessman. And the value attached to the life of a baby was going to be the least of all. In the tort system, the life of a passenger on board a flight does not equal a fixed amount of money. Compensation takes into account a number of factors, such as the age of the passenger, his earning history, his family status and so forth. On this basis, the projection of future earnings based on past performance implies an economic determinism that applies to the calculation of compensation in wrongful death litigations. Thus, although all passengers on board Pan Am flight 103 had died the same horrible way, their life would not be worth the same amount of money. The disparities would have been appalling to accept but that is the way the tort system works. *Dura lex sed lex!*

Pan Am, however, would not move from its original offer of \$100,000 and appealed the verdict to the second Circuit Court of Appeal. In the meantime, there were 207 other cases pending. The outcome of the appeal would have been absolutely pivotal for them. The defense case was that Pan Am had guaranteed X-ray screening of all luggage before being loaded on board the doomed aircraft and that met the requirements set out by the Federal

Aviation Rules, considering that it had been given oral permission not to proceed with the baggage/passenger matching procedure. Nonetheless, the defendants were not able to prove who gave any such permission and anyway, if anybody did, he did not have the right to do so. On 12th September 1994, the Court of Appeal handed down its decision and rejected the Appeal. The judges confirmed, though not completely, the decision of the first instance. They certainly upheld the liability finding. They stressed that Pan Am was supposed to know the regulations, which required written application and written authorization for whatever change. Thus, no oral waiver, if any, could possibly discharge the airline and its subsidiary. The Judges also stressed that Pan Am campaign aimed at making the passengers feeling more secure had been utterly misleading.¹⁵ Basically, Pam Am had violated well-defined procedures, terrorist alerts and common sense in allowing the bomb to get on board Pan Am flight 103.¹⁶ Thus, the Court of Appeal upheld the liability findings of the court of first instance. Instead, it vacated the award for loss of society damages to one of the families inasmuch as the awards for loss of parental care in all three plaintiffs' cases. The said cases were therefore remanded to the district court for further proceedings on the damage issues consistent with the second instance verdict. In the meantime, other 207 cases could proceed for damage assessment.

The defendants however did not end their battle with the ruling of the Court of Appeals and brought their case before the Supreme Court of the United States, where they applied for a writ of *certiorari* in order to quash the decision of the lower courts after full judicial review of the prior proceedings. If the Supreme Court had granted any such remedy, the full proceedings of the lower courts would have been reviewed. Eventually, in June 1995, the Supreme Court rejected the petition for the said writ. Eventually, it was all over. Proceedings could now go ahead to compensate the families of the victims, which would take an additional year to conclude.¹⁷ It was time for Pan Am to face massive financial judgments.

Under the given circumstances, the airline started making “better” offers, ultimately one of \$575,000 but it warned the families that it would have withdrawn it if it did not get almost unanimous acceptance. Finally, the families signed in, thus discharging the airline “from any and all claims, demands, damages, suits, debts, dues, reckonings, bills, promises, covenants, extents, and executions of every kind, which they had, had ever had, or in the future could have, “for any matter, cause or thing whatsoever from the beginning of the world to the date of this Release,” arising out or somehow pertaining to the bombing of Pan Am flight 103.¹⁸ It was therefore over with Pan Am. The airline, whose security system was so lax to allow an unaccompanied bomb-suitcase to be loaded onto an aircraft, was going to pay its price. Restitution was impossible but compensation was accessible and had to be paid. The Lockerbie tragedy and the outcome of the civil lawsuit sealed forever the fate of the airline whose lax security let an unaccompanied bomb-suitcase blow out of the sky one of its aircraft.¹⁹

5.3 Civil lawsuit against Libya

Then, it came the idea to sue Libya in order to get compensation from it. The families of the victims of Pan Am 103 bombing felt they were victims of an episode of state-sponsored terrorism. Thus, the victim’s families decided to sue Libya before an American court, although it was evident from the outset that a question of jurisdiction would have arisen. The doctrine of sovereign immunity would have protected Libya from whatever lawsuit. In this respect, a state sovereign immunity means immunity from trial. Yet, in the view of the families, immunity could not lead to impunity. The families of the victims were determined not to leave Libya off the hook, although it was far from proved that the Northern African state was behind Pan Am 103 crash. Thus, a lawsuit was filed on behalf of one of the relatives²⁰ in the U.S. District Court for the District of Columbia. It was December 15, 1993

and the case was “Bruce Smith as personal representative of Ingrid Smith, deceased, v. The Socialist People’s Libyan Arab Jamahiriya; Libyan External Security Organization; Libyan Arab Airlines et al.” The case was then transferred to New York, where it was heard in winter 1995. The plaintiff’s case rested on the ground that an American aircraft is part of the American territory and therefore whatever happens on board falls within the scope of American jurisdiction. The main argument was that acts of terrorism cannot be considered a state’s sovereign prerogatives and therefore Libya could not shield itself behind the state’s immunity doctrine. On the contrary, Libya had implicitly waived sovereign immunity by engaging in “non-sovereign conduct” that amounts to violation of *jus cogens* norms, prohibiting terrorism. It was also argued that the Security Council resolutions adopted under Chapter 7 of the United Nations Charter not only bound all member countries but also created a private right of action in their courts.

The following May, the verdict was rendered. It rejected the claim on the basis that Libya had to be accorded sovereign immunity, no matter how outrageous the acts of terrorism it had allegedly sponsored might be. No waiver of sovereign immunity could actually be sustained. The said decision was appealed in the US Second Circuit Court of Appeals, where the lawyers reiterated the argument that such a huge act of terrorism as the bombing of a civilian aircraft amounted to a waiver of sovereign immunity by Libya. The three judges panel then asked for direction from the Government by writing to the Attorney General. The Justice and State Department set forth their views in an *Amicus curiae* brief which was filed in June that year. The outcome was that no state had ever acknowledged any such waiver of sovereign immunity and that there was no such thing as violation of *jus cogens* following engagement in non-sovereign activities. Therefore, there was no international law basis to found the plaintiff’s case. In November, the Appeal was dismissed. Only one step was left: trying to bring the case before the Supreme Court.

Meanwhile, on 29 April 1995, the team of American lawyers that had already sued Pan Am and that represented most of the American families filed a lawsuit in the Eastern District of New York in the name of the original plaintiff in the Pan Am case. This was the case that would go down in history under the name “Rein et al. v. Socialist People’s Libyan Arab Jamahiriya.”²¹ Smith’s case was consolidated with others pending in New York, under Kreindler & Kreindler lawyers direction. This time, the United States court retained the jurisdiction. In fact, major changes had occurred in the meantime. Libya had actually been associated with the State Department list of terrorists sponsoring countries. In 1996, the United States Foreign Sovereign Immunities Act (FSIA)²² had actually been amended, thus identifying a minority of states sponsoring terrorism, as defined by the US Department of State, and setting out that those states, unlike all the others, could be sued for their wrongful acts before the courts of the United States.²³ Thus, Libya could be sued before American courts and sovereign immunity would no longer shield it from trial.

This time, the case against Libya was that it “[had] provided material support and resources to the terrorists, in that Libyan Government agents and officials, acting in the scope of their offices” and it “[had] provided the terrorists with money, labor, intelligence information, equipment, and supplies, including electronic timing devices, electronic blasting caps and detonators, and explosives.” Moreover, Libya was accused of being “vicariously responsible” for whatever liability of those that had actually planted the bomb on board Pan Am flight 103, having acted in concert with them in accomplishing the destruction of the aircraft. The plaintiffs contended that the above mentioned Foreign Sovereign Immunities Act²⁴ creates or provides for a cause of action in favour of all of them against the defendants “for their acts of torture, extrajudicial killing, aircraft sabotage and provision of material support and resources thereof.” The plaintiffs and the estates of each decedent therefore claimed to be entitled to recover “wrongful death damages, including pecuniary losses, and damages for loss

of support, consortium, society, companionship, prospective inheritance, care, love, guidance, training, education, and services, and damages for grief and mental anguish, moral damages, burial expenses and other damages.” By reason of the foregoing, defendants were allegedly liable to each plaintiff and each decedent’s estate in the sum of \$20,000,000 dollars for wrongful death. Before their deaths, though, decedents allegedly suffered “conscious pain and suffering and fear of their impending deaths, entitling them to compensatory damages” in the sum of \$1,000,000 dollars. The civil suit also sought \$2 billion per defendant in punitive damages.

In 2001, the civil suit got a pivotal boost. The Scottish Court sitting at Camp Zeist convicted Megrahi²⁵ for the terrorist attack that blew apart Pan Am 103 aircraft. The Lockerbie verdict obviously had a remarkable impact on the civil suits pending against Libya. The civil action had been somewhat on hold, while the criminal case in Camp Zeist was unfolding. The evidence brought forward in the criminal case proved pivotal in the civil lawsuit, which could be more aggressively pursued once the guilty verdict had been issued in Camp Zeist. In fact, the criminal court’s findings made it immensely easier for the civil plaintiffs to prevail in the litigation against Libya. Once the government’s evidence implicating Libya had been used in a public trial, the plaintiffs could access it and use it in their civil litigation, albeit the Scottish court’s findings would not apply to the civil case as *res judicata* or collateral estoppel. Obviously, there is no hierarchical relation between a court assessing individual responsibility and a court trying to assess state responsibility. But it is rather obvious that relying upon the outcome of the trial at Camp Zeist was pretty much a matter of deference to the findings made by a tribunal competent and equipped to do so.

Libya tried to oppose the proceedings for lack of personal and subject matter jurisdiction. The District Court for the Eastern District of New York, though, denied Libya’s pre-trial motion to dismiss. Libya appealed from the denial of the said dismissal before the Second Circuit Court of Appeals. The latter rejected the appeal affirming the first instance court’s ruling that it

had subject matter jurisdiction over Libya. The Northern African state would therefore stand litigation. The issue at stake was one of monetary compensation. The case was automatically won against Megrahi, but what about the Libyan Government? Neither in Camp Zeist nor in any other court, the Northern African state had ever been found guilty of ordering the terrorist attack that blew Pan Am flight 103 out of the sky. Certainly, the New York judge had no more evidence than the court in Camp Zeist in this respect. Yet, the latter had ascertained that Megrahi was a Libyan agent. Could this lead to some sort of concurrent state responsibility? The question was whether Libya as a state was somehow responsible for the activities of one of its agents, even though it had not been proved to order any such activity. Megrahi might have acted in his private capacity, after all. Would the mere fact that he was a Libyan agent be sufficient to trigger state responsibility? There are a number of individual acts that can lead both to individual and state responsibility.²⁶ Acts of terrorism are amongst those. Remedies therefore fall on the state. Two paths can actually emerge, the path of state responsibility and that of individual responsibility.

Individual criminal responsibility mainly aims at punishing the culprit, whereas state responsibility is supposed to bring about the reparation of the damage, which means that a reparative and not only a punitive look is taken.²⁷ Hence, the prosecution and conviction of Megrahi did not preclude subsequent claims against Libya for compensation. Rather, the findings of individual responsibility in connection with the Lockerbie bombing supported subsequent claims of state responsibility. If an internationally wrongful act is committed against a state or its nationals by the agents of another state acting as such, that state is responsible, in international law, for the wrongful act. If the court sitting at Camp Zeist had found Megrahi not guilty, the factual basis for the claim of responsibility towards the state of Libya would have fallen away. Instead, the New York judge could infer that Libya was responsible for Megrahi's deeds, albeit the plaintiffs could not prove that the Libyan Government had ordered the bombing. Yet,

Libya's liability could be imposed under the doctrine of *respondeat superior*, under which employers can be held liable for those intentional torts of their employees that they did not command. For the all the above mentioned, Libya, having lost the FSIA immunity, ran the risk of being charged with tremendous punitive damages. Was this a reason for worrying, though? Was it realistic that Libya would have paid a huge amount of money if the New York judge so decided? Maybe not, but one thing was certain: if the plaintiffs obtained a judgment against Libya and the Libyan Government refused to pay it, that judgment could as well be satisfied by freezing Libya's huge assets in the United States.²⁸ Under the given circumstances, it would not be surprising if Libya wanted to settle the suit.

5.4 The long way to the final deal

The main reason for Libya to being prone to settle the suit was to be found in the intent of coming out of the cold. As years went by, the burden of sanctions and the isolation they prompted became unbearable. The Northern African state, which had been so long vested with a pariah status, was keen on stopping being ostracized. Hence, pending the civil lawsuit, serious talks started about a possible monetary settlement. Negotiations went on and on, mainly behind closed doors. Many were sceptical about their possible outcome and considered utterly unlikely that Colonel Gaddafi would ever compensate the victims' families, whereas many speculated that Libya was eventually ready to pay the bill for the Lockerbie bombing.²⁹ Eventually, in August 2003, Colonel Gaddafi agreed to meet demands for compensation from the families of the victims. The deal came after an extensive round of diplomatic meetings. Paying compensation to the victims' families, though, was only one of the conditions Libya had to meet for the United Nations sanctions to be removed. The African state had to renounce terrorism and admit responsibility for the Lockerbie bombing. The latter

was a sticking point but in the families' view it was one of paramount importance. They would have never settled if Libya did not acknowledged responsibility for the Lockerbie bombing and simply came clean on it by means of a huge payout.

Eventually, a striking multi-billion-dollar compensation deal was reached to compensate the families of those killed in the bombing of Pan Am flight 103. On 13 August 2003, Libya actually agreed to pay funds equalling \$2,700,000,000 directly into an escrow account set up at the Basel-based Bank for International Settlements. The deal had strings attached, though. An initial payment of \$4 million for each of the 270 victims was going to be made as soon as the Security Council lifted the United Nations sanctions imposed in 1992 and already suspended. A second instalment of \$4 million and a third of \$2 million were conditional on the United States lifting its unilateral sanctions on Libya and removing the country from the list of states sponsoring terrorism, thus opening the door for the Northern African state to return to the world stage. The said measures were to be met within eight months, then the Bank for International Settlement would pay out a further million dollars on top of the initial \$4 million compensation.³⁰ The account would be a "self-executing" one, thus the money would be released automatically as soon as the conditions for payment were met. The bank would automatically transfer the money to a Plaintiff Committee account in New York. Libya would not be able to deny payment to the plaintiffs or pull that money back.

It was now for the victims' families to accept the deal, which could bring the civil suit to an end and have significant impact on the world's international relations. The deal turned to be a three corners one, given the strings attached to the offer. It actually embodied a trade-off between cash payment and policy.³¹ For the first time ever, however, a state was offering compensation to the families of the victims of a terrorist attack. Victims in other terrorism cases had never received any money in compensation. Yet, not all of the relatives were ready to herald Libya's good will. There were

those who said they would not accept any money whatsoever from the Libyan Government if that entailed the lifting of the United States sanctions. There were also those who considered the money offer to be bribery or blackmail, “blood money” actually. Many of the relatives felt that Libya was just trying to buy its rehabilitation off by using them like pawns in order to make the United States and the United Nations lift sanctions. The offer entailed no more than a business arrangement as long as no explicit admission of culpability followed. Yet, many of the relatives seemed inclined to accept the offer and even to take a stand for sanctions to be lifted. Obviously, \$10 million is a lot of money and a major inducement. Given that it was nearly 15 years since Pan Am 103 crash, it was certainly understandable that some of the families wanted to accept the payment and finally put the past behind them.³² Besides, Libya’s offer would be by any standards substantial and it looked like an expression, if not of contrition, then at least of a rethinking of policy. Why offer a huge compensation package if new rounds of terrorism were still contemplated as an option?

Obviously, all the victims’ relatives insisted that Libya had to take full responsibility and somehow come clean on Lockerbie. The families of the victims kept therefore calling for an outright acknowledgment of Libya’s Government involvement in the bombing whereas Washington insisted that no shortcuts would be available for Libya.³³ Hence, mutually accepted understanding of responsibility language needed being negotiated. This set in motion further diplomatic contacts and intense negotiations, which culminated in Libya agreeing to meet all the conditions necessary for the sanctions to be lifted. Libya had hitherto been reluctant to accept responsibility for the Lockerbie bombing. Eventually, it was ready to acknowledge responsibility, which did not mean that the Libyan Government or leadership was taking criminal blame for Pan Am 103 bombing but simply that it would have paid compensation because a Libyan agent had been convicted. Thus, the African state would simply admit civil liability for the actions of a state-employee.³⁴ In fact, at a certain stage, the

Libyan Prime Minister even suggested that Libya was not acknowledging any responsibility whatsoever but simply trying to buy out its rehabilitation.³⁵

5.5 Meanwhile at the United Nations

Eventually, Libya accepted all the conditions it was required to accept for the United Nations sanctions to be officially lifted. The Chargé d'affaires of the Permanent Mission of Libya to the United Nations actually addressed - to the President of the Security Council - a letter dated August 15, 2003,³⁶ that reads as follows:

“I am pleased to inform you that the remaining issues relating to the fulfilment of all Security Council resolutions resulting from the Lockerbie incident have been resolved. I am also pleased to inform you that my country is confident that the representatives of the United Kingdom and the United States of America will be confirming this development to you and to members of the Council as well.

The Libyan Arab Jamahiriya has sought to cooperate in good faith throughout the past years to bring about a solution to this matter.

In that context and out of respect for international law and pursuant to the Security Council resolutions, Libya as a sovereign State:

- Has facilitated the bringing to justice of the two suspects charged with the bombing of Pan Am 103 and accepts responsibility for the actions of its officials.
- Has cooperated with the Scottish investigating authorities before and during the trial and pledges to cooperate in good faith with any further requests for information in connection with the Pan Am 103 investigation. Such cooperation would be extended in good faith through the usual channels.

➤ Has arranged for the payment of appropriate compensation. To that end a special fund has been established and instructions have already been issued to transmit the necessary sums to an agreed escrow account within a matter of days.”

In the said letter, Libya also offered its assistance in the “international fight against terrorism” and offered to “cooperate with efforts to bring those who are suspects to justice.” In particular, the text of the letter stresses the fact that Libya “has pledged itself not only to cooperate in the international fight against terrorism but also to take practical measures to ensure that such cooperation is effective.” The letter concludes as follows: “The Libyan Arab Jamahiriya appreciates the effort made and the parts played by the Member States of the United Nations, by the Secretary- General and by other entities in bringing about the resolution of this long-standing matter. In expressing such appreciation, the Libyan Arab Jamahiriya affirms that it will have fulfilled all Security Council requirements relevant to the Lockerbie incident upon transfer of the necessary sums to the agreed escrow account. Therefore, in accordance with paragraph 16 of Council Resolution 883(1993) and paragraph 8 of resolution 1192(1998), the Libyan Arab Jamahiriya requests that in that event the Council immediately lift the measures set forth in its resolutions 748(1992) and 883(1993).”

Thus, Libya accepted civil liability for the Lockerbie bombing, renounced terrorism and pledged to cooperate in fighting it.³⁷ The time was therefore ripe for the Northern African country to rejoin the family of nations. It was then for the United Nations to permanently lift sanctions on Libya, which were suspended in 1999, after Gaddafi handed over two suspects for trial in The Netherlands. Yet, it was not a deal yet. France actually threatened to veto the plan when it reached the Security Council, since Libya had paid a far smaller compensation package³⁸ to the relatives of 170 people killed in another terrorist attack on a French airliner in 1989.³⁹ Besides, even if the French winded up acceding, families of the Lockerbie victims might not see

all the money called for under the agreement. The United States sanctions on Libya remained in force, and the country kept being on the U.S. State Department's list of states sponsors of terrorism. Those two restrictions needed being lifted before the families of the victims could collect all the money, according to the agreement their lawyers had negotiated separately with Tripoli.⁴⁰ Following Libya's letter, however, the Permanent Representatives of the United Kingdom and the United States to the United Nations addressed a letter, also dated 15 August 2003,⁴¹ to the President of the Security Council where they stated that the Governments of the United Kingdom and the United States were "prepared to allow the lifting of the measures set forth by the Council in its resolutions 748(1992) and 883(1993) once the necessary sums referred to in the Libyan letter ha[d] been transferred to the agreed escrow account."

Thus, the United Kingdom Government tabled a resolution at the United Nations calling for the immediate lifting of sanctions against Libya that would immediately end the ban on arms sales and air links. On 12 September 2003, the Security Council adopted Resolution 1506,⁴² thus lifting 11-year-old sanctions against Libya. The Security Council's action cleared the way for the immediate payment of \$4 million to families for each of the 270 Lockerbie victims. The said resolution reads as follows: "The Security Council ... Welcoming the letter to the President of the Council dated 15 August 2003 from the Chargé d'affaires of the Libyan Arab Jamahiriya, recounting steps the Libyan Government has taken to comply with the above-mentioned resolutions, particularly concerning acceptance of responsibility for the actions of Libyan officials, payment of appropriate compensation, renunciation of terrorism, and a commitment to cooperating with any further requests for information in connection with the investigation (S/2003/819), Acting under Chapter VII of the Charter of the United Nations, Decides to lift, with immediate effect, the measures set forth in paragraphs 4, 5 and 6 of its resolution 748 (1992) and paragraphs 3,4, 5, 6 and 7 of its resolution 883 (1993) ...Decides also that it has

concluded its consideration of the item entitled 'Letters dated 20 and 23 December 1991 from France, the United Kingdom of Great Britain and Northern Ireland and the United States of America' and hereby removes this item from the list of matters of which the Council is seized."

The said resolution was adopted by 13 votes in favour and two abstentions. The United States and France actually abstained - Washington to protest against Libya's human rights violations and pursuit of weapons of mass destruction,⁴³ and Paris to keep pressure on Libya to finalize a deal to increase the level of compensation to victims of the 1989 bombing of the French UTA jetliner. Meanwhile, by two letters dated 9 September 2003, the Governments of Libya and the United Kingdom on the one side and the United States on the other, notified the International Court of Justice that they had agreed to discontinue the proceedings initiated by the Libyan application filed on 3 March 1992.⁴⁴ Following the said notifications, on 10 September 2003, the President of the World Court made an order in each case placing on records the discontinuance of the proceedings instituted on 3 March 1992 with prejudice, by agreement of the parties and directing the removal of the case from the Court's list.⁴⁵

5.6 Compensation in the view of the lawyers

The very fact that Libya agreed to pay compensation was extremely significant. It was the first time ever that any of the states labelled as sponsors of terrorism had offered compensation to the families of terrorism victims.⁴⁶ The events in Lockerbie therefore seem to show other countries - which sponsor terrorism - that not only they risk paying a military and political price but also a financial price. As Peter Watson⁴⁷ suggested, payment of damages works on a number of different levels. In the first place, it proves that the rule of law works: in fact, the victim can sue for and get compensation from those responsible. This establishes that there is no

hiding place for perpetrators of heinous crimes. Before or later, they will bear the consequences of their actions. But above all, in Watson's opinion, payment of damages work as an "economic imperative" in that there is always a price to pay. This is true not only for the state that sponsor terrorism or for actual perpetrators of specific crimes. It works as well for those who let the tragedy happen, because of their wilful misconduct. Pan Am also had to pay compensation to the families of the victims. Thus, given the present tort system, civil judgements can bring home to multinationals responsibility for negligence and wrongdoing and compensate those who suffer a loss because of the companies' carelessness and negligence. This is why seeking money damages brings about what Peter Watson calls the "economic imperative." This means not only that there can be no hiding place for wrongdoers but also that the obligation to compensate will force change and improvement so as to avoid future penalty. Peter Watson actually recalls that Pan Am flight 103 was blown up using a particular kind of explosive called semtec. At the time, the only way to detect it was by use of colour scanners. This technology was available but rarely used due to expense and the airline industry "made do" with black and white despite knowing this to be ineffective. Within days of the Public Inquiry making this fact know, the Airline Insurers insisted that colour scanners be installed at every airport. To pay out for the loss of life on Pan Am flight 103 was bad enough but they would not suffer this cost again. In a nutshell, the economic imperative worked again and produced meaningful changes for the good.

Obviously, money cannot replace a person whose life has been horribly taken away. It seems actually impossible to put a monetary value on a person's life but on the other end it would be worse to put no value whatsoever on it. Law cannot bring the victims back to life and therefore wrongful death litigation is all about money. Basically, the monetary value works as a marker which makes perpetrators acknowledge their fault or liability. Moreover, if somebody pays, others can be deterred. This is true for states that sponsor terrorism and for airlines that let terrorists exploit

loopholes in their security system. After Lockerbie, wrongdoers know they will not get away with their crimes or illicit activities. As far as states sponsoring terrorism are concerned, they are now aware that there is an extra-price to pay and a high price. Libya's settlement with respect to Pan Am 103 crash, in a way, proves that being somehow responsible for acts of terrorism may turn out to be an expensive ride, even when the state is held liable for acts of its own agents but no involvement of the government is proven or acknowledged. In the same way, the economic imperative works effectively for airlines: after Pan Am had to pay a huge amount of money in order to compensate the Lockerbie victims' families, it was established once and forever that a price has to be paid when security is lax and negligence or wilful misconduct let tragedies occur. As Daniel Cohen, the already mentioned father of one of the Pan Am 103 victims wrote, "virtually every victim's family member hated Pan Am with a passion and was suing them, not so much for money but for revenge." He and his wife believed that the airline had taken away what was most precious to them, their only daughter, thus they had "to take from Pan Am what was most precious to them, their money."⁴⁸ Besides, he believed that the best thing they could do to improve security for the flying public was to put Pan Am out of business. This would have been a powerful message easily conveyed to other airlines: "if you let your passengers die, you may face more than a lawsuit, you may face a corporate death penalty."⁴⁹

As far as Libya's offer to compensate was concerned, the interesting feature was that it offered to pay the same amount in each of the 270 victims' cases regardless of nationality, the decedent's earnings, or other economic loss factors. On this occasion, a poor man's life was to be worth as much as a wealthy one's. As Jim Kreindler⁵⁰ explained, since all the Pan Am 103 victims' families received compensation varying in accordance with their economic losses from Pan Am,⁵¹ in the Libya negotiations the lawyers focused on damage claims having nothing to do with specific economic loss. Accordingly, they demanded and received the same payment on each of the

270 cases. Thus, the focus was on damage elements such as “loss of love solatium” rather than the economic losses that underlay the Pan Am settlements. In evaluating the events that led to the final compensation settlement, Kreindler said that the settlement was a success story that was made possible by the fact that the politicians left the whole thing to lawyers with specific experience in resolving wrongful death cases.

In fact, much of the evidence the lawyers had developed in the civil case against Pan Am was used in the criminal trial at Camp Zeist whereas it was possible to make extensive use of the Camp Zeist trial record in the civil proceedings. Thus, in Kreindler’s view, the civil trial record contributed to the success of the criminal prosecution and vice-versa. Yet, politics played a crucial role: the lawyers were always confident of obtaining a very large judgment, but they knew that, without United Nations and United States sanctions, it was very unlikely that Libya would ever have actually paid a 2,7 billion \$ to the victims’ families. As Peter Watson suggested in this respect, the United Nations sanctions and resolutions set the international framework to focus on Libya, whereas the actual sanctions put pressure on the Libyan Government. The criminal trial sorted out in public way the evidence and “brought guilt home” to one of the accused and this made the families’ lawsuit against Libya possible. Once the verdict in the criminal case was delivered, there was a bedrock for the civil claim because the person convicted was clearly proved to be a government agent. Once litigation started, Libya made clear it was ready to settle, since huge Libyan assets in the United States had been frozen during the litigation. Thus, the civil lawsuit, the criminal trial, the United Nations resolutions, the United Nations and United States sanctions all contributed to the final outcome: somebody, if not everybody, paid a price for the Lockerbie bombing.

The next question is whether the settlement is a final step or not. What would it happen, if further evidence were discovered? Could the victims’ families sue Libya again and get something more in terms of compensation? Neither Peter Watson nor Jim Kreindler foresee any such possibility.

Should further evidence come up in the future, the right to sue Libya and get more would no longer exist: thus, the chapter is closed now for all time coming, regardless any future development. There has been a criminal sentence and a monetary compensation. It might not fully counter-balance the harm in the eyes of the victims' families but criminal punishment of those who are brought to trial and found guilty plus monetary compensation when there is no room for restitution is all what the dual system, based on criminal and civil law, allows for. If this can be perceived as doing full justice, this is obviously another question. However, as Peter Watson acknowledged, justice is an ethereal concept. Law has to be practical. Once Megrahi has been convicted, Pan Am has paid some money in compensation and Libya has also paid, acknowledging civil liability for its agent's deeds, the families will have obtained everything it can be possibly obtained under the ruling legal system. Everything, maybe, but the full factual truth. Probably, the establishment of the full truth was more important, to the families of the victims, than one life sentence or a huge cash payout both from the airline and the African state. Nonetheless, no matter how many questions were left unanswered, what the criminal system and the tort system achieved in Lockerbie were outcomes of paramount importance. In fact they set in motion a number of dramatic shifts that completely changed the relationship between Libya and the west.

5.7 What about Libya

It would have taken some more time before the United States also lifted their sanctions on Libya and re-established diplomatic relations with the Northern African state. Then, when eventually most of the remaining restrictions on doing business with Libya were lifted, President Bush stopped short of removing Libya from the state department list of nations that support terrorism.⁵² In fact, Libya still appears to be on that list. As

Ambassador George Saliba said,⁵³ in April 2005 the Libyan press reported that the Central Bank of Libya had withdrawn 0.5 billion left in the escrow account that the country had set up for compensation to the Lockerbie victims' families. The last instalment would have been paid, had the United States removed Libya from the list of states sponsoring terrorism. Libya was not supposed to wait forever: in fact, a deadline had been agreed upon. Time has now elapsed and the money has been withdrawn. In Ambassador Saliba's view, Libya is not going to pay any more money that was conditional on its being taken out of the list of state sponsors of terrorism. Does this mean that the relationship between the United States and Libya is experiencing another impasse? Ambassador Saliba said this means that the United States is not yet satisfied.

Nevertheless, in the international community's perception of world affairs, Libya is no longer the rogue state that it used to be. *De facto*, if not necessarily *de jure*, Libya has been rehabilitated, which would have never happened if compensation was not agreed upon and paid, though not entirely, to the victims' families. There might be other reasons, of course, including the fact that for the last ten years Libya has not been involved in supporting terrorism or the fact that Libya has given up its WMDs programme.⁵⁴ This was obviously a development of paramount importance and the best possible evidence of Gaddafi's new course of action. A government that spontaneously renounce terrorism as a means of pursuing its goals and gives up a programme of development of weapons of mass destruction adds to the security of all nations. It is not surprising that the West is ready to praise it and show it as a model to be followed by other nations. Nonetheless, compensation to the Lockerbie victims' families was made pre-conditional and Libya's rehabilitation would have been quite unlikely if any such settlement had not been agreed upon.

Closing the deal, for Libya meant resuming a lucrative oil business with the west. The country's oil industry was adversely affected by the United Nations and United States sanctions. Attracting new investments was

therefore crucial. On their part, many western oil companies were itching to go back to Libya's rich oil fields. For Libya, it was not all about oil, though. The settlement also meant overcoming a long-standing isolation. Air-links would be re-established,⁵⁵ which would bring to an end Libya's physical isolation. As Ambassador Saliba explained, travel to and from Libya was real hardship when the sanctions were on. For example, before the ban on air-travel was imposed, the journey from Tripoli to Valletta took 40 minutes, whereas afterwards it took some 12 hours, meaning that it took longer to fly from Malta to Libya than from Malta to New York. Once the deal was stricken and accepted by the families of the victims, diplomatic relationships would go back to normal, air-links would be re-established and the Northern African state would get rid of the Lockerbie shade.

As events unfolded, Libya was even offered the "hand of partnership," which did not mean forgetting the past but "recognising change when it happens," as Tony Blair explicitly pointed out.⁵⁶ The British prime Minister actually visited Libya in March 2004 and shook hands with Colonel Gaddafi. This officially ended Libya's isolation. The meeting proved a milestone for many of the victims' relatives. In a way, it actually, sealed the closure of the otherwise never-ending Lockerie saga.⁵⁷ Yet, many of the victims' relatives reacted to the very idea of the meeting with enormous distress. Nonetheless, Blair's official visit felt like "the latest stage of the international rehabilitation of the man once branded the mad dog of the Middle East."⁵⁸ The decision to scrap Libya's chemical and nuclear weapons programme had obviously won acceptance of the west. Tony Blair conveyed a very important message to the Libyans: that there are plenty of rewards for states that voluntarily abandon weapons of mass destruction and that alliances may be forged between Arabic states and the west in order to defeat terrorism. After all, Libya could prove some kind of demonstration project for rogue states and an example to follow, in terms of renunciation of terrorism, acknowledgment of responsibility, bearing of political and financial

consequences of terrorist activities. In fact, Libya could show other states that there are advantages in cooperation and shifts in policies.

Yet, Libya is not entirely freed of the terrorism tag. In fact, it is still on the U.S. State Department list of states sponsoring terrorism. The fact that full normalization of relations with the United States is still to come, not only means that political pressure is still there but also that Libya is still paying a price in terms of economic matters. According to Ambassador Saliba, the latest oil technology, that could help Tripoli raise its production from approximately 1.3 million barrels a day to 3.3 barrels, belongs to the United States. Libya is therefore still paying its price. Whether this is no more than a minimal price or the due amount will always be questionable. Certainly, it is a price inasmuch as prices, if not even a collective penalty, were the United Nations and United States sanctions. Yet, Libya is back from the cold and is gradually re-integrating into the world community. The Libyans are also better off now that they are freed of the burden of sanctions. As far as inter-states relationships are concerned, it is time for former antagonists to start cooperating with one another, not only as commercial partners but also as political allies. Besides, now that Gaddafi has abandoned his radical heritage, Libya could start playing a pivotal role as a mediator in order to tackle regional conflicts.⁵⁹

Claiming a crucial place in the African roundtable has always been a goal for Gaddafi's Government, after all. Since relations with the Arab League soured in the late 1990s, the Libyan leader has turned his attention toward building strategic alliances in Africa. As a pariah state under United Nations' sanctions, Libya sought recognition and respectability in the arena of intergovernmental meetings of African leaders.⁶⁰ It has therefore participated constructively in various regional forums and has hosted an extraordinary Organization of African Unity meeting to press for the creation of a "United States of Africa" as a means to promote solidarity and economic integration in the continent. The extent to which Libya bought

into African regional politics after 1997 is also evident from the establishment of the Community of Sahel-Saharan States (CEN-SAD) in Tripoli, on 4 February 1998. The latter is actually a framework for Integration and Complementarity which intends to work, together with other regional economic communities and the Organization of African Unity, to strengthen peace, security and stability and achieve global economic and social development.⁶¹ Most of these initiatives have yet to produce substantial practical results but they show Gaddafi's commitment to the continent's political cohesion and economic rehabilitation.

On top of that, Libya is a possible ally in the global war against terrorism. Gaddafi was one of the first leader to vehemently condemn 9/11 attack. In 1999, Libya had already expelled terrorist organizations from its territory and closed down once notorious training camps.⁶² Why is it still on the US state department list of terrorist sponsors, then? Probably, this is a way to keep pressure on Libya and inducing further changes. Coming clean on Lockerbie, ending weapons of mass destruction development programmes, explicitly renouncing terrorism all embodied dramatic shifts in Libya's policy. There are those who think that the prospect of going the Iraqi's pattern might have been decisive in prompting Gaddafi's shift of policy. Nonetheless, Libya's pursuit of rehabilitation had started long before.⁶³ Besides, the reasons are not that important after all. If the fact that Libya has come in from the cold will contribute to make the region and the world more secure, this is what really matters.

What else is there to be done, then? The path of democracy is still a long way to go but Libya seems on the right route. Already forgotten seems the time when Colonel Gaddafi was famous for all the wrong reasons, considered both a terrorist and a pariah, actually "the symbol, the personification, not just of international terrorism, but evil itself - the devil incarnate; the usual suspect whenever and wherever terror occurred," as the press recalled.⁶⁴ Now, Libya is considered a possible example for other rogue states, a possible partner in peace. Definitely, a line has been drawn

under the past. Gaddafi is the prize exhibit in the western case that the war on terror can be won. If the example will be followed and other countries will voluntarily abandon programmes of development of weapons of mass destruction and renounce terrorism as a means of pursuing political goals, only the time will tell. Libya's case might prove unique. Yet, the fact that Libya is back in the family of nations is *per se* a major achievement. The only way to guarantee peace and freedom from fear is to persuade the international community to unite against terrorism,⁶⁵ thus, even a single state conquered to the common cause against terrorism might make a difference, after all.

5.8 Conclusion

With the proceedings discontinued before the International Court of Justice and the Security Council no longer seized of the Lockerbie matter, the Lockerbie case seems to be officially over. Meanwhile, Gaddafi, apparently "terrorism-free" for more than a decade, is now to be seen as a leader trying to make his country come in from a long-standing isolation. This development in Libyan foreign policy has certainly been prompted by the harshness of the sanctions regime. But there was more than that. Intense diplomacy and the never-ending search for a political solution led to a legal settlement that brought to an end the Lockerbie crisis. The criminal process and civil case fall within the diplomatic and political picture. No military action was ever taken after the crash and a crisis that could have degenerated into a spiral of violence and retaliation was rather kept within the boundaries of politics, diplomacy and law. If the United States and the United Kingdom, in the aftermath of Pan Am 103 bombing, had stricken back by military means, the grieving families of the victims would not have gained more than what they actually gained. Besides, those who would have suffered retaliation would have perceived it and made others perceive it as a

further, wrongful act of violence: from victimizers, they would have become victims themselves and the cycle of victimization would have not been easy to break.

The over-all civilized way the Lockerbie crisis was handled might have left questions unanswered but military action would have not provided better explanations. Besides, at the level of inter-state relations, maybe full factual truth is not even that important. Of course, knowing the truth means establishing full accountability and therefore the quest for truth is more than understandable from the standpoint of the victims' families. Not that the truth would allow for restitution but there is an undeniable measure of moral satisfaction in finding an answer to all questions and going as high up as possible in the chain of responsibilities. Maybe, now that Libya is back to the international fold, further cooperation will help establishing the full truth about Pan Am 103 crash. An access to Libya's archives might help in this respect. It would be shortsighted, if not even cruel, not to use improved relations with Libya as a way of answering some of the many questions that remain about the bombing, or at least of eliminating some of the disquieting theories that have been circulated since Pan Am 103 crash. The families more or less know what happened on that dreadful night of December 21, 1988, but they do not know exactly how or why. The answers could lie in Libya, or further afield. The families' quest for the factual truth should not be ignored now that they have received a huge amount of money in compensation. Amongst the various things that money cannot buy, there is probably the peace of mind.

However, even in the case that the full truth will never be shown, the way the Lockerbie case was handled will still have proved a success story in many respect: in the first place, it has brought to an end the cycle of violence between the United States and Libya and it is making Libya a partner of peace in the struggle against aviation terrorism. And it has acknowledged the status of victims to the families of the factual victims of the crash. Even if the Lockerbie trial has not established the full truth, it

has been crucial because of the consequences it has prompted: families received money in compensation, the Libyans have been relieved of sanctions, Libya is back to the family of nations and somebody has paid a price. The families of the victims, of course, might not have ended up with full satisfaction but they ended up with something. It would have been worse if they had ended up with less than they actually achieved. And anyway, what would be “full satisfaction” in the eyes of somebody who has lost a kid or a parent or a spouse in such a tragic way as in Pan Am 103 crash?

Besides, somebody paid the bill for the Lockerbie bombing. At least one person is serving life sentence. At least his crime did not go unpunished. Retribution is important since it embodies the refusal of impunity and the victory of accountability. The airline and Libya have also paid their price: the former for wilful misconduct, the latter for the deeds of one of its agent. It might not be much in the eyes of the bereaved but once again it is better than nothing. Monetary compensation might be nothing much but this is what a civilized system has to allow for: when restitution is physically impossible, restoration is paramount. And it is certainly a better option than retaliation by means of military action. It is politics and law that have made this world civilized after all. Compensation is actually pivotal. It lets trials have practical and tangible effects on people's lives, which helps considering criminal justice something that happens on behalf of real people and not an abstract experience utterly detached from individual lives. With some more money, a tragic loss is still a tragic loss but maybe the burden of the loss is a little bit lighter. This can also help reconciliation, probably not at an individual level but certainly in the realm of inter-state relations.

Furthermore, the civilized and peaceful way the Lockerbie case was handled might set a precedent to be followed in other cases of aviation terrorism. If the trial in Camp Zeist has led to compensation and compensation has paved the way to Libya's rehabilitation, this is maybe a better, if not necessarily a safer world where to live: one more state which is

willing to abide by the rules of peaceful settlement of disputes, to struggle against international terrorism, to pursue the goals of justice, to take into account not only retribution but also restoration for the victims of crimes is one more brick to the construction of a more balanced, terrorism-free world.

If Libya's shift of policy will set an example that other so-called rogue states might follow, it is hard to say. Libya is eventually freed from sanctions and is back in the family of nations. It can start playing a positive role in the framework of international politics: once abandoned sponsorship of terrorist activities, it can help bring peace to the African continent, acting as a mediator in times of crisis and conflict. Itself a victim of colonialism, it could well use its complex nature – Mediterranean, African and Islamic – to prove a bridge in north-south relations, thus playing a pivotal role in the international arena. The long-term aim must be to have a Libya that co-operates with the international community and that respects international law. The real issue is how to develop the undoubted gain of removing Libya from the terror team into the longer-term goal of promoting peace, reform and stability both in Africa and the Middle East. That will not only ensure that there is no return to support for international terrorism, but encourage the emergence of a responsible partner willing to devote its many assets and energies to the positive promotion of prosperity throughout the region. The Lockerbie case is over, then: time to turn the page and move on.

Notes

¹ See *supra*, par.3.6, chapter 3.

² See *supra*, par. 3.9, chapter 3 and par. 4.9, chapter 4.

³ About the development of the ancient practice of retaliation, and the commodification of the punitive entitlement, see Parisi, F., "The genesis of liability in ancient law," 3, no.1, *American Law and Economics Review*, 82-124, (2002).

⁴ See Cohen, S. and D., "Pan Am 103," *Signet* 2001, p. 54.

⁵ See Art. 22, Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention).

⁶ Wilful misconduct means intentionally doing something that is wrong, or wrongfully omitting to do something, or doing something or omitting to do something that shows reckless indifference as to what the consequences may be. See *Oxford Dictionary of Law*, Oxford University Press, 2002.

⁷ The head of the law-firm, Lee Kreindler, was named by the Chief Judge Thomas C. Platt to head the committee that would actually run the case. Together with his son, Jim Kreindler, he represented most of the American families first against Pan Am and later on against Libya. See Gerson, A. and Adler, J., *op.cit.* (note 26, chapter 3), p. 110.

⁸ See Watson, P., "In pursuit of Pan Am," 2, no.1, *ILSA Journal of International & Comparative Law*, 204-211, (1995). Peter Watson is a lawyer for the relatives of some of the Lockerbie victims and secretary of the Lockerbie Air Disaster Group that represents the majority of the Britons who died. See *supra*, note 72, chapter 3.

⁹ Namely, Stuart Speiser of Speiser, Krause, Madole & Nolan of New York.

¹⁰ Not only the families of the victims and airline were represented but also the Federal Aviation Administration that was in charge of the Federal Aviation Programme.

¹¹ About the Helsinki warning, see *supra*, par. 4.8, chapter 4. About the destruction of the Iranian airliner, see *supra*, note 3, chapter 2.

¹² See Wallis, R., "Lockerbie. The story and the lessons," Praeger Publishers, London, 2001, pp. 81-86.

¹³ See Wallis, R., *ut supra*, p. 92-100. See also Ashton, J. and Ferguson, I., *op. cit.* (note 2, chapter 2), pp. 120-126.

¹⁴ Punitive damages were not allowed. The Second Circuit Court of Appeals, on 22nd March 1991, had already ruled that punitive damages could not be allowed, being at variance with the very purpose of the Warsaw Convention: the latter was actually meant to establish a uniform system of liability.

¹⁵ See par. 5.2, this same chapter.

¹⁶ See Maloney, A., "Now it is judgment time for Gaddafi," *The Scotsman*, February 1, 2001, p.16.

¹⁷ In the meantime, Pan Am had gone bankrupt. See Lowther, W., "Anger at Pan Am return to the skies," *The Mail on Sunday* (London, England), September 29, 1996, p.15.

¹⁸ See Gerson, A., and Adler, J., *ut supra*, p. 132.

¹⁹ Yet, Pan Am was already experiencing financial difficulties when the Lockerbie tragedy occurred. In fact, it was already bankrupt in 1991. See a concise history of Pan Am at <http://www.airchive.com/SITE%20PAGES/TIMETABLES-PAN%20AM.html>

²⁰ Bruce Smith, whose wife had been killed on the plane.

²¹ Denice H. Rein, Individually and as Executrix of the Estate of Mark Alan Rein, deceased, et al., Plaintiffs, v. The Socialist People's Libyan Arab Jamahiriya, the Libyan External Security Organization, a/k/a Jamahiriya Security Organization, a/k/a JSO, Libyan Arab Airlines, Lamen Khalifa Fhima, a/k/a A Al Amin Khalifa Fhima, a/k/a Mr. Lamin, and Abdel Basset Ali Al-Megrahi, a/k/a Abdel Baset Ali Mohamed, a/k/a Abdel Baset Ali Mohamed Al Megrahi, a/k/a Mr. Baset, Defendants. (Civil Action No. 96 2077, United States District Court, Eastern District of New York), <http://www.lectlaw.com/files/cas83.htm>

²² The FSIA is a jurisdictional statute which, in specified cases, eliminates foreign sovereign immunity and opens the door to subject matter jurisdiction in the US federal courts. Not all foreign states may be sued, though. Under Section 1605(a)(7)(A), only a defendant that has been specifically designated by the State Department as a "state sponsor of terrorism" is subject to the loss of its sovereign immunity. Furthermore, under Section 1605(a)(7)(B), even a foreign state listed as a sponsor of terrorism retains its immunity unless (a) it is afforded a reasonable opportunity to arbitrate any claim based on acts that occurred in that state, and (b) either the victim or the claimant was a US national at the time that those acts took place.

²³ See Gerson, A. and Adler, J., *ibidem*, pp.225-241; pp. 294-295.

²⁴ At 28, U.S.C. Section 1605(a)(7).

²⁵ South African former President Nelson Mandela went to visit Megrahi in prison and suggested that he should serve his sentence in a Muslim country instead of Scotland. In Barlinnie prison, he was actually all-alone and such isolation amounted to psychological persecution, in the view of the great South African statesman. To date, though, Megrahi is serving his sentence in Scotland and no transfer to Muslim countries has taken place. See *supra*, note 73, chapter 4. See also Scott, K., "Mandela goes back to jail - to fight the cause of the 'lonely' Lockerbie killer," *The Guardian*, 11 June 2002, available at <http://www.guardian.co.uk/international/story/0,3604,731055,00.html>

²⁶ *Ex multis*, see Nollkaemper, A., "Concurrence between individual and state responsibility in international law," 52, *International and Comparative Law Quarterly*, 615-640, (2003). In the Lockerbie case, the possible link between state responsibility and individual responsibility was also widely covered by the media. See *supra*, par. 9, chapter 4.

²⁷ See A. Cassese, *op. cit* (note 50, chapter 1), pp.271-272.

²⁸ See Associated Press and Reuters, "Libya sued over Lockerbie deaths," interview with James Kreindler on 1st February 2001, on CNN, available at <http://archives.cnn.com/2001/WORLD/europe/02/02/libya.sue>

²⁹ For example, see Holmes, S. A., "Libyan money for flight 103 isn't Remorse, U.S. says," *The New York Times*, May 30, 2002, p.6, S. Houston, "Gaddafi in no hurry to pay out. He'll

stall on Lockerbie,” Daily Record (Glasgow, Scotland), June 4, 2002, p.16. See also Cornwell, T., “Libya to take Lockerbie blame,” The Scotsman (Edinburgh, Scotland), March 11, 2003, p.1.

³⁰ See Wald, M. L., “Libya is offering to pay \$ 2.7 billion for Pan Am blast,” The New York Times, May 29, 2002, p.1

³¹ See Sebok, A.J., “Libya, Lockerbie, and the lawyers: what precedent will be set by a possible Pan Am Flight 103 settlement that also involves lifting sanctions?” Find Law’s Legal Commentary, 25 June 2002, available at <http://writ.news.findlaw.com/sebok/20020625.html>

³² About the compensation offer and the reactions of the victims’ families, see, *ex multis*, Bickerton, I., Burns, J., Hoyos, C., Khalaf, R., Wolffe, R., and Yeager, H., “Dismay over Lockerbie compensation offer,” The Financial Times, May 30, 2002, p.10; Cohen, D. and S., “Libya can’t buy us off,” the Wall Street Journal, 30 May 2002, at <http://www.opinionjournal.com/editorial/feature.html?id=110001774>; Wald, M.L. “Pan Am victims’ families seek end of Libya sanctions,” International Herald Tribune, June 17, 2004, p.6; see also Slevin, P. “Pan Am 103 settlement is elusive,” Washington Post, 8 July 2002, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A36867-2002Jul7¬Found=true>

³³ See Sartwell, C., “Libya’s offer hard to refuse,” Philadelphia Inquirer, May 31, 2002, <http://www.philly.com/mld/inquirer/news/editorial/3371375.htm>; see also Sipress, A. and Mintz, J., “Libya accepts responsibility for bombing over Lockerbie,” Washington Post, 1 May 2003, p.12; furthermore, see McLeod, S., “Gaddafi’s confession? The Libyan leader tells TIME his country will fess up to the downing of Pan Am Flight 103 over Lockerbie,” <http://edition.cnn.com/2003/US/Northeast/08/12/lockerbie/>

³⁴ See Cornwell, T., “Libyans accept guilt for Lockerbie,” The Scotsman, March 12, 2003, p.1 and again Cornwell, T., “Lockerbie deal on course despite Gaddafi’s remarks,” The Scotsman, July 30, 2003, p.11.

³⁵ Libya’s prime minister, Shukri Ghanem, actually suggested that Libya was in no way responsible for the Lockerbie bombing, even though it had agreed to pay compensation to the victims’ families and accepted responsibility in writing. In an interview with BBC radio, Ghanem, speaking from Tripoli, was reported to have said “we thought it was easier for us to buy peace” with the United States and Britain “and this is why we agreed on compensation” in the Lockerbie case. Ghanem’s statement prompted a demand from the US State Department for a retraction, and he was rebuked by his own Government. Libya however released a statement that quoted its August 2003 communication to the United Nations and said that the country “accepts responsibility for the actions of its officials.” See Tyler, P. E., “Libyan casts doubt on plane-bombing guilt, ending thaw for now,” The New York Times, February 25, 2004, p.11; and again Tyler, P. E., “Libyan remark criticized; U.S. demands retraction on Lockerbie,” International Herald Tribune, February 26, 2004, p.5; Sanger, D. E., “Libya Thaw to Proceed; Guilt Is Reaffirmed,” The New York Times, February 26, 2004, p.9; Sanger, D. E., “Bush is expected to remove travel restrictions on Libya,” International Herald Tribune, February 27, 2004, p.5 and Walker, C., “Libya PM condemned by Lockerbie families,” The Birmingham Post February 25, 2004, p.9. Libya was reported to be desperate to go back to the international fold, whatever it took. See S. Carrell, “Lockerbie families renew calls for inquiry,” The Independent Sunday, August 17, 2003, p.17.

³⁶ Letter dated 15 August 2003 from the Chargé d'affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council. UN Doc. S/2003/818.

³⁷ The press pointed out that the statement was expressed in "general terms" and lacked "any expression of remorse." See Barringer, F., "Libya admits culpability in crash of Pan Am plane," *The New York Times*, August 16, 2003, p.6.

³⁸ The compensation package worked out in French criminal courts actually amounted to less than an average 200,000\$ apiece. Now, France was not ready to make concessions on the principle of non-discrimination over the victims of terrorism and therefore intended re-negotiating the terms of the settlement with Libya in a way that could be comparable to the deal pertaining to the Lockerbie victims. France was not seeking parity with the Lockerbie settlement, rather an equitable and fair solution. See, *ex multis*, Barringer, F. "U.N. to weigh proposal to end 1988 penalties against Libya," *The New York Times*, August 19, 2003, p.13.

³⁹ This was the case of the UTA airliner bombed on 19 September 1989 over Niger. Libya never admitted responsibility for that bombing but agreed to pay some money to the victims' families when a French Court convicted six Libyan officials *in absentia* for the attack. See *supra* par. 2.6, chapter 2. The press did not ignore the potential threat France's veto embodied. *Ex multis*, see Watson, R., "Libya finally accepts blame for Lockerbie bombing," *The Times*, August 16, 2003, p.1 and R. Beeston, "Libya makes first payment for relatives of Lockerbie victims," *The Times*, August 21, 2003, p.14. Interestingly, a non-governmental organization and some of the victims' families filed a complaint with the national French authorities contending involvement of the Libyan Government. Therefore, they requested a case be open against Colonel Gaddafi and charges were brought against him for complicity in acts of terrorism. The Cour de Cassation declined jurisdiction on this case on the basis of the principle of immunity of heads of sovereign states. The issue was not even raised in the Lockerbie proceedings where Gaddafi or the else the Libyan Government were never actually tried. See Zappalà, S., "Do heads of state in office enjoy immunity from jurisdiction for international crimes? The Gaddafi case before the French Cour de cassation," 12, *European Journal of International Law*, 595-612 (2001).

⁴⁰ See Zagorin, A., "Gaddafi readies his checkbook," *Time*, May 6, 2002, p.17, Sinclair, K., "Libya signs (pounds) 1.7bn deal on Lockerbie compensation account," *The Herald*, August 14, 2003, p.1; Kher, U. and Zagorin, A., "A deal but no break," *Time*, August 25, 2003, p.18. The pecuniary deal, though, did not prevent the victims' families from insisting on an independent inquiry. The reason why Pan Am 103 was blown out of the sky was still unanswered. See Hardie, A., "Libya progress for Lockerbie families," *The Scotsman*, May 25, 2004, p.4.

⁴¹ Letter dated 15 August 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council. UN Doc. S/2003/819.

⁴² UN Doc. S/RES/1506 (2003).

⁴³ Cunningham, the deputy United States ambassador, said Washington would not block the resolution and the resulting financial awards. But he said the United States had abstained because of Libya's "poor human rights record," and "its history of involvement in terrorism, and - most important- its pursuit of weapons of mass destruction and their means of delivery." He also added that Washington's sanctions against Libya would remain

in full force. See Barringer, F., "Pan Am 103's bereaved watch U.N. lift Libya sanctions," *The New York Times*, September 13, 2003, p.2.

⁴⁴ See *supra* par. 2.3, chapter 2.

⁴⁵ Communiqué de presse 10 September 2003, CIJ/624 (La Libye, Le Royaume-Uni et Les Etats-Unis notifient à la CIJ leur renonciation à toute action dans les affaires liées à l'incident aérien de Lockerbie), available at <http://www.un.org/News/fr-press/docs/2003/CIJ624.doc.htm>

⁴⁶ With the exception of the earlier payment by Libya to the relatives of the victims who died in the terrorist attack that blew the French airliner out of the sky. See *supra*, note 39. See also par. 2.6, chapter 2.

⁴⁷ About Peter Watson, see *supra*, note 8 and chapter 3, note 72. As already mentioned, I had the privilege of interviewing him by e-mail on 10 February 2004.

⁴⁸ See Cohen, S. and D., *op.cit.* (*supra*, note 1), p.93.

⁴⁹ See Cohen, S. and D., *op.cit.* (*supra*, note 1), p.147.

⁵⁰ About Jim Kreindler, see *supra* note 7. I had the privilege to interview him via e-mail on 12 February 2004.

⁵¹ See *supra*, par. 5.2.

⁵² See Sanger, D. E., "U.S. lifts bans on Libyan Trade, but limits on diplomacy," *The New York Times*, April 24, 2004, p.1.

⁵³ George Saliba was Malta's Ambassador in Libya between 1987 and 1993, then in Russia between 1993 to 1997, then to the United Nations from 1997 to 1999 and eventually in the United States from 1999 until 2003. I had the privilege of interviewing him between 17 and 23 April 2005, via several e-mails. About Malta's involvement, he says that Malta's official position is still that the bomb did not leave from Malta. All the bags on board the Airmalta flight to Frankfurt were accounted for and when United Kingdom Security people did an announced inspection of Luqa's airport, they found out that security procedures there were much better than in Frankfurt.

⁵⁴ In December 2004, Libya announced its intent to dismantle its weapons of mass destruction programmes. Evans, M., "Libya knew game was up before Iraq war," *The Times*, March 13, 2004, p.8. See also Jouve, E., "Mouhamar Kadhafi dans le concert de nations," *l'Archipel*, Paris, 2004, pp.126-127. They were programmes, in any case, that Libya could ill afford. According to experts, despite a 25-year effort to develop a nuclear weapon, Libya's programme still remains in the embryonic stage. It has succeeded only in providing some training to a number of students and technicians, and the establishment of a nuclear research reactor. Libya's biological weapons programme too has suffered from similar mismanagement and lack of funds, say sources. Instead, real concern focused on Tripoli's retention of chemical weapons. Beaumont, P., Ahmed, K. and Bright, M., "Deal with Gadaffi: The meeting that brought Libya in from the cold: Only weeks after 11 September, the first tentative overtures came from Tripoli; two years later, seven men sat down in a Pall Mall club to sign a historic deal," *The Observer*, 21 December, 2003, p.6; Maddox, B., "Libya's return to the fold is merely isolated deal for obvious rewards," *The Times*, 25 March 2004, p.15.

⁵⁵ Friendly countries would get a head start in re-establishing air links: South African Airways was one of the first airline to start flying to Tripoli again. See Duval Smith, A., "Gaddafi deals with his demons; despite all the anti-US rhetoric, Libya is set to talk business with the so-called enemies of science and education," *The Independent Sunday* (London, England), April 18, 1999, p.19.

⁵⁶ See Adams, C. and Blitz, J., "Blair shrugs off conservative criticism of his meeting with Gaddafi," *The Financial Times*, March 25, 2004 p.3; Crerar, P., "Blair flies into row on Libya; Blair peace camp with tyrant," *Daily Record*, March 25, 2004 p.1, Pane, E., "Libyan visit was 'strange' admits Prime Minister," *The Birmingham Post* (England), March 26, 2004 p.7. See also Shurkman, D., "Is justice possible?," 11 September 2002, *The Wall Street Journal*, <http://www.nationalreview.com/comment/comment-shukman091102.asp>; Britain had broken diplomatic relationship with Libya in 1984, over an incident where a British policewoman, Yvonne Fletcher, had been killed by a shot from the Libyan People's Bureau in St James's Square in London, during an anti-Gaddafi demonstration. Diplomatic relations were broken off over Libya's refusal to co-operate with the investigation into the killing of Yvonne Fletcher. In the weeks following the handover of Megrahi and Fhimah, Britain engaged in repeated exchanges with the Libyan Government in an attempt to secure their co-operation with the police investigation and that resulted in a joint statement by the two Governments. In that statement, Libya accepted general responsibility for the actions of those in the Libyan People's Bureau at the time of the shooting and it expressed deep regret to the family of Yvonne Fletcher for what occurred. It also offered to pay compensation to the family. Moreover, the Libyan authorities agreed to co-operate fully with the continuing Metropolitan police investigation and to accept its outcome. See edited transcript of speech by FCO Minister of state, Brian Wilson, in a debate on UK relations with Libya, Westminster Hall, House of Commons, London, 13 February 2001, available at <http://www.fco.gov.uk/news/newstext.asp?4690>. Diplomatic relationship between the United Kingdom and Libya were re-established in 1999, after a hiatus of 15 years. About the differences of policy and attitudes towards Libya between the United Kingdom and the United States, see Halliday, F., "Libya undermines the myth of the special relationship; Britain and Europe believe there are benefits derived from having direct diplomatic links," *The Independent*, July 9, 1999, p.4.

⁵⁷ See Adams, C., "Blair adds an ally on his visit to Libya," *Financial Times*, 26 March 2004; Tyler, P.E., "Blair brings Libya back into the fold," *International Herald Tribune*, 26 March 2004, p.1; Chamberlain, G., "Extending the hand of friendship does not always work," *The Scotsman* (Edinburgh, Scotland), March 26, 2004, p.3; Nelson, F., "Solemnity and few smiles but meeting goes to plan," *The Scotsman*, March 26, 2004, p.2; Bettiza, E., "Canaglia diventa simpatico," *Panorama*, 8 April 2004, p.133.

⁵⁸ See Smith, J., "The handshake with Gaddafi...: Blair brings Libyan leader in from cold," *Daily Post*, March 26, 2004, p.2.

⁵⁹ See Sardellone, G., "La nuova Libia: da nemico dell'occidente a strumento di stabilizzazione regionale," <http://www.analisidifesa.it/numero9/libia2.htm>

⁶⁰ Sturman, K., "The rise of Libya as a regional player," available at <http://www.iss.co.za/Pubs/ASR/12No2/C2.html>, also published in *African Security review* Vol.12 no.2, 2003.

⁶¹ See Jouve, E., op. cit. (supra note 54), p. 129.

⁶² See Neep, D., "Gaddafi may find that the goalposts have been moved," *The Observer*, 21 December, 2003, p.7.

⁶³ A senior U.S. State Department official is reported to have said: "The invasion of Iraq sent a strong message to governments around the world that if the United States feels threatened by weapons of mass destruction, we are prepared to act against regimes not prepared to change their behavior." White House officials are reported to have said that the military confrontation with Iraq influenced Gaddafi's decision to reach out. Ashton Carter, assistant secretary of defence during the Clinton administration, is reported to have said: "For anyone who is a hawk on weapons of mass destruction, this is a welcome event. We should hope that our resolve over Iraq's WMD had something to do with convincing the Libyan leadership to take this course." There were those that opposed any such view, though, and thought that Gaddafi's new course of action was the result of years of diplomacy and had nothing to do with the fear of becoming the next target after Iraq. Senator J. F. Kerry, for example, portrayed Libya as an exception to the so-called (and above-mentioned) Bush Doctrine. He is reported to have said: "Ironically, this significant advance represents a complete U-turn in the Bush administration's overall foreign policy. An administration that scorns multilateralism and boasts about a rigid doctrine of military preemption has almost in spite of itself demonstrated the enormous potential for improving our national security through diplomacy." See Khan, H., "Qaddafi, not a victim of Bush doctrine," available at <http://usa.mediamonitors.net/content/view/full/3410/> See also Allen-Mills, T. and Cracknell, D., "From tyrant to statesman," Sunday Times (London, England), 21 December 21, 2003, p.15.

⁶⁴ See Mthombathi, B., "The strange tale of two dictators," available at <http://www.thestar.co.za/index.php?fSectionId=233&fArticleId=388172>

⁶⁵ Macleod, C., "Why Blair shook hands with Gaddafi; Worth the risk for prize of breaking link with terrorism," The Herald, March 26, 2004, p.7.

EPILOGUE

The explosion of Pan Am 103 was a terrorist attack which deliberately caused the death of 270 innocent persons flying on board a civilian aircraft. While destroying so many innocent human lives, it also hit at the fundamental rights of international travel, commerce and communication which are a defining characteristic of a modern world. It happened in British airspace, the aircraft was American, and the innocent passengers, crew and local residents who perished were of 21 nationalities. That gave the tragedy and the subsequent criminal investigation an undeniably international dimension. As a major incident of international terrorism, it was automatically transformed from one of purely Scottish, or purely British, concern into one of international concern. Whatever the reason for the bombing, it sent a dreadful message that was there for everybody to internalise: we are all vulnerable.

The aftermath of the disaster has been more than an epilogue. It has been a saga, rather. Fortunately, in many ways, it is a story that reaffirms what mankind can collectively accomplish in adversity through cooperation and peaceful confrontation. Nonetheless, although many years have gone by since 21 December 1988, boarding an aircraft does not feel any safer. Terrorists keep striking hard and continuously hitting at means of transport. Considering the number of acts of unlawful interference inasmuch as the number of fatalities that have been occurring since Pan Am 103 bombing, serious reasons for concern remain. Security systems might have been improved but the threat of terrorist attacks and other acts of unlawful interference is far from defeated. Safety in the air is a major challenge that still lies ahead and constitutes a matter of serious concern for governments worldwide.

A completely risk-free environment is not even realistic a prospect, though, if one considers that today's response necessarily addresses

yesterday's threat. Terrorism is something that changes on end and this is why it is so difficult to counter it effectively. In fact, it is difficult even to define the very concept of terrorism. Those who are terrorists in somebody's eyes might prove heroes in other people's view, which inevitably elicits deeply engrained political, ideological, moral or religious feelings. Thus, the international community meets with enormous difficulty, when it tries to define terrorism once and forever. Yet, there is some widespread consensus about the fact that, roughly speaking, terrorism may be considered as the instrumental use of violence against inoffensive bystanders in order to spread fear and achieve some political, ideological or religious ends. The said general features are the few ones that everybody agrees upon. Then, any attempt to depict terrorism in more a specific way does not appear to have met with any success whatsoever. It is therefore extremely arduous to objectively analyse or address terrorism, considering that its very essence is somehow vague. However, some impartiality is utterly desirable. Embracing a legal perspective can be helpful in this respect. It ensures an acceptable degree of neutrality and objectivity and helps keeping political bias at bay, although it cannot account for the many facets terrorism entails. A legal approach is inevitably limited in scope.

In a legal perspective, aviation terrorism can be approached as a criminal phenomenon, whose inherent nature does not change simply because of the ideological trait it normally features. Ostensibly, terrorism has never been prosecuted as a self-standing crime. What most laws actually address, both at domestic and international level, are specific acts, which amount to specific crimes. Whether they are terrorist or not, they are outlawed and prosecuted anyway. The fact that they bear an ideological or political trait is therefore utterly immaterial, as far as prosecution is concerned. Thus, terrorist acts against civil aviation can be specifically addressed inasmuch as ordinary crimes: murder is murder, kidnapping is kidnapping, after all. Terrorism *per se* might be a complex and questionable concept but the terrorist act in itself can be considered a criminal act, whenever it features

the elements that are necessary for human behaviours to embody specific crimes. This is precisely what happened in Lockerbie. The only person who ended up being convicted to life sentence was not charged with terrorism. He was convicted for murder. Whatever the underlying political or ideological reasons, whatever the possible motives and final goals, crime is crime and must be punished with the harshest of penalties allowed under applicable law. In particular, there is no excuse for mass-murder. Those who practice terrorism lose any rights to have their cause understood by law-abiding and decent people.

The international community has however been trying to address terrorism as a whole. This has turned out to be a remarkable effort that has led to the blanket condemnation of terrorism as such. In fact, there are a number of international conventions outlawing specific categories of activities and many others addressing and condemning terrorism *per se*. They have all been widely signed and ratified, although universal acceptance should be the final goal. Thus, a general principle condemning terrorism *per se* now exists, which makes it more difficult for terrorists to find safe havens and for states to claim that they do not have a legal foundation to apprehend, prosecute or extradite those who have allegedly perpetrated terrorist activities. Although the very concept of terrorism has not been defined at the international level, it is however important to address it as a whole in order to determine how the international community should react in cases of acts of unlawful interference with civil aviation that cause death or harm to innocent passengers, crew, people on the ground. A terrorist act is something that offends the civilized world as such. Hence, it is not only for the victims to react but also for the international community. This is all the more true when sovereign states are thought to be behind terrorist onslaughts, albeit states' sponsorship is extremely difficult to prove. What course of action is there for the international community to embrace, then?

Unilateral military action is utterly undesirable because it seldom brings about anything else but further violence, bloodshed and grief. Responding to violence in a violent way is likely to perpetuate a never-ending spiral of brutalities. Retaliation does not address problems and certainly does not eradicate the causes of terrorism. Besides, the circle of victimization gets bigger and bigger: the victims become victimizers and the cycle of mutual retaliation may become a never-ending one. Hence, the goal should be to break that cycle and prevent it from going from generation to generation. Terrorism is a global challenge and needs being addressed in a global way. This is why the role of the United Nations, in this respect, is one of paramount importance. It can actually ensure a large-scale, if not necessarily universal response, based on the widest consensus possible. Nonetheless, on the issue of terrorism, the United Nations must also draw a line by taking a strong stance against those who practice or condone terrorism and those nations who stand up against it.

There is no moral way to sympathize with uncivilized, immoral actions such as a terrorist attack on a means of transport carrying innocent civilians and moral relativism should never allow for justifications or excuses. Nonetheless, the way the United Nations structure their response is not always ideal. The problem lies with the fact that terrorist acts might be addressed as crimes but they always bear a strong political trait. What organ, within the United Nations, should therefore have the final word, in case of a terrorist attack such as the one that blew Pan Am 103 out of the sky? As the Lockerbie case has shown, roles and functions within the United Nations system are not completely clear-cut. Sometimes, the judicial and the political tasks seem to be overlapping, which can paralyse the functioning of the entire system. Nonetheless, terrorism is a multifaceted and complex phenomenon, which can be regarded as political and legal in nature. It is necessary to address both facets equally in the political and the judicial arena. Yet, different tools should pursue different aims. It is for politics to address the causes of terrorism. It is for the judicial power to

address responsibility and legal aspects pertaining to specific deeds. Politics and law are often interwoven, though.

In fact, in the Lockerbie case, what was for the judiciary and what for the political organ, within the United Nations, did not look completely clear. Libya's request for the indication of provisional measures therefore provides important insight into the problematic political-judicial dynamic between the International Court of Justice and the Security Council. As illustrated by the Lockerbie case, when situations of alleged state-sponsored terrorism are involved and the Security Council invokes powers under Chapter VII of the United Nations Charter, the possibility for conflict between the political and the judicial organ becomes troublesome. The problem is one of paramount importance: to what lengths can the Security Council go to pursue an issue of international concern, despite legal avenues in place provided for in treaties? To what lengths can accused states pursue legal action in the International Court of Justice despite Security Council's action under Chapter VII of the Charter? In the Lockerbie case, the Security Council invoked a threat to peace and security and did away with the Montreal Convention. The principle of international law that states are not obliged to extradite their own nationals, *aut dedere aut judicare*, ceased to apply because the Libyan Government allegedly supported terrorist activities of the nationals accused and contributed to the said threat to peace and security by refusing to hand them over for trial abroad. This somehow sets a precedent: the Security Council can levy sanctions, thus bypassing the conventions already in place as well as the principle of state sovereignty with regard to the extradition of accused international terrorists, by simply invoking its powers under Chapter VII of the Charter.

Hence, when an accused terrorist-sponsoring state seeks legal relief in the International Court of Justice, there is no chance to stop binding Security Council action taken under Chapter VII authority. Nonetheless, in Lockerbie, despite apparent acceptance of the binding force of Security Council resolutions, the World Court held that, at the merits stage, it might

question their validity in so far as they might affect the legal rights of states.

Many interpreted the Court's attitude as too deferential and inferred that the reasons of law had been totally overwhelmed by politics. In a way, it was argued that the only superpower in the United Nations framework was the Security Council and even though no hierarchy between the political organ and the judicial organ is established anywhere in the Charter, the Court played an ancillary role and simply ratified the political organ's course of action. If one accepts that it is for the Court to evaluate whether or not the Council is competent to take the action it did and whether it was able to affect the rights of the state concerned in the way that it had sought to do, this would lead to far-reaching, yet remarkable consequences. Actually, a decision taken in violation of the Charter should not be held to be binding. States have certainly agreed to undertake the Council's decisions under Article 25 of the United Nations Charter but it is quite reasonable to assume that this is true as long as those decisions are in conformity with the Charter. It is actually difficult to contend that member states have accepted, in advance, whatever decisions the Council might make, and therefore exclude the very possibility that the Council may act *ultra vires*.

It should be inferred that the Council decisions are binding only in so far as they are in accordance with the Charter. The Security Council is not a legislative organ, after all. Rather, it is a political organ that has to decide and act within specific legal boundaries. The Council's action is not unlimited and also when it acts under Chapter VII, it is supposed to be consistent with international law. The United Nations Charter is a legal tool and it should be for the Court to evaluate whether it has been complied with or not. The Council might not be required to apply the law the way the Court is but has to act within legal boundaries. Law can actually inspire the work of the Council in a number of ways: for example, it can provide a common language or common principles and indications to be applied in specific cases. The rule of law must be abstract and universal. And it has to

apply to everybody – people, governments, leaders, states – in the same way. Reference to a legal principle also ensures that states have to justify their views on grounds that are acceptable to others. International law is the common language and a possible bridge between states featuring different culture, history, needs and aims. Thus, it is for the International Court of Justice to apply the law, but it is for the Council to accomplish its tasks within the law. There cannot be two different legalities, a subjective one for the Security Council and an objective one for judicial determination. This might threaten the coherence of the United Nations system as a whole.

Nonetheless, unbalanced mobilization of judicial review for constitutional restraints threatens to affect the authority of the Security Council, which may turn out to cripple the United Nations system. Desirable Council's action may be irreparably delayed while the target state challenges the lawfulness of that action. The question thus becomes which organ should have the power to make the ultimate decision regarding the rights of sovereign states where the prevention or punishment of alleged state-sponsored international terrorism is at issue. It has to be established what lengths a Security Council member state or states can go in order to legally invoke Security Council powers under Chapter VII, without encroaching upon the sovereign rights of the state accused of sponsoring acts of international terrorism. Security Council resolutions may actually infringe upon the rights of a sovereign state. It should be for the Court to define the issue in a binding way.

The Lockerbie case raised the aforementioned question without solving it for good but allowing for intensive speculation. Probably, all solutions would be problematic. In an ideal world, there should be no conflict between litigation and action by the political organs of the United Nations. Legal and political means of settling disputes should be complementary and the exercise of its institutional function by the Court should not hinder the Council's institutional function. At the same way, the Council's action should be no bar to the Court's jurisdiction. Thus, some more clarity would

help, at least by avoiding the distinct feeling that the judiciary is ancillary to the political organ. Maybe, a comprehensive reform of the United Nations structure and organization should not leave the said question unanswered. It is one of paramount importance in order to avoid the crippling effects that conflicting stances between the judicial and the political organs might entail.

Thus, the Lockerbie case provides some remarkable insight about the inherent weakness of the United Nations, whose structure, not entailing any hierarchy whatsoever, runs the risk of becoming ineffective because of overlapping functions and unclear roles. For the time being, whenever the International Court of Justice and the Security Council are confronted by the same situation, they can come up with conflicting decisions, which always have distinct judicial and political effects upon the countries involved, despite their political or judicial foundations. The dividing line between political and legal disputes is quite nebulous, though, as law becomes ever more frequently an integral component of international controversies. In terms of the Lockerbie case, and issues of state-sponsored terrorism in general, the distinction is of paramount importance. As the more states are labelled “sponsors of terrorism,” the more these two competing roles will clash. Thus, since most disputes involve both political and legal issues, it is crucial that the Security Council and the International Court of Justice cooperate instead of hindering each other’s function. Yet, it is also crucial that their roles and powers are specified in a clear-cut way that leaves no room for overlaps.

In Lockerbie, however, legal and political tools succeeded to complement each other, despite the initial potential conflict between Security Council’s action and Court’s judicial control. In the event, it was the wide use of political and diplomatic tools that brought the case to a closure. The way the Lockerbie case was handled is a success story in this respect. Powerful nations had seen the rights of their citizens violated and had seen loss and destruction visited upon the families involved. The said nations could have

resorted to resolving their claims and the demands for justice by the use of force. This was not the course they followed. They rather went for political and diplomatic tools. Of course, they obtained that the United Nations imposed economic sanctions on Libya, which might be seen as utterly unfair: in order to make the Libyan leadership come to terms with the United Nations requests, an entire nation was harshly penalized. Economic sanctions generally hit the masses more than the leadership and can cripple a country's economy much to ordinary citizens' loss and dismay. The use of sanctions in Lockerbie was therefore questionable. Besides, the United Nations sanctions have been applied on the basis of mere suspect without any verdict of guilt being delivered. This is a powerful criticism that remains on the face of the entire process, shattering its inherent legitimacy.

Nonetheless, the said sanctions turned out to be effective, since they influenced the course of action Libya eventually took. The question, though, remains, whether those sanctions were proportionate with the purpose of influencing the behaviour of the Libyan leadership. Probably, Libya would have never surrendered the alleged perpetrators of the Lockerbie bombing for trial, if sanctions were not applied. Yet, despite their potential efficacy, sanctions would have never brought about any success in isolation. Thus, sanctions may prove effective and are certainly preferable to military confrontation. However, they should be applied only under conditions of wide international agreement, clear legal foundation and purpose, and minimal harm to the innocent. For those conditions to be met, there is just one way: full compliance with the general principles of international law. The Lockerbie case therefore proves that sanctions need being complemented by intense diplomacy and mediation. It was the combination of political, diplomatic and economic tools that paved the way for a legal solution, after all. The diplomacy of mediation can probably achieve more than the policy of starvation.

In Lockerbie, intensive talks and negotiations never stopped. They certainly piled up with the pressure exerted through sanctions for

subsequent developments to come about. The role of self appointed intermediaries proved crucial and above all the role of former South African President Nelson Mandela. It was actually possible to make the most of the moral authority of the South African icon in order to further confidence building: in fact, the stance Mandela took in respect of the Lockerbie case bore enormous weight in the international scenario. The vitality of mediation actually contributed to overcome the Lockerbie deadlock by serving a useful bridge between a stonewalling West and a politically isolated Libya. It has to be acknowledged that emerging sources of pressure also played a noteworthy role in the Lockerbie affair: the Organization of African Unity, the Non Aligned Movement, the Arab League took strong stands that furthered the dialogue by urging the research for a final, peaceful solution to the long-standing Lockerbie stalemate. Many African leaders did not hesitate to challenge the United Nations sanctions by intentionally infringing them and calling explicitly for their immediate lift. Probably, while the imposition of sanctions influenced Libya's course of action, the fact that many African states were ready to infringe the said sanctions influenced the course of action the United States and the United Kingdom took in the event. If the Arab League also started infringing the United Nations sanctions, the Security Council's authority would have been fiercely shattered.

This was therefore a major development in the worldwide scenario of international politics: the western powers had to confront emerging sources of pressure that were capable to undermine the credibility and authority of the Security Council. It can happen again and become a pattern. What would happen to the United Nations, then? A reform of the world organization should definitely address the said possibility. Multilateralism might be the answer. A wider participation to the Security Council and a highest pitch of democracy and representation within the United Nations set up are utterly desirable in this respect. The world geopolitics is no longer the one that emerged from the Second World War. Other powers have

emerged and other voices need being heard. Effective multilateralism can foster a new legal order and turn out to be the only sustainable way to combine security and development in a more equitable world. The United Nations are at the core of the multilateral order and their central position should always be recognized but the world organization would be far more credible if its framework allowed for a broader representation and a serious possibility of checks and balances, where the rule of law is supreme and the judiciary might question the legitimacy of the political organ's course of action.

A just and effective decision-making by the Security Council in preventing, managing and resolving conflicts can only be ensured by acknowledging the fact that the political organ's power is not unlimited. The supremacy of law should be affirmed. The behaviour of a state is not easily challenged in terms of politics, after all. It is easier to condemn it in terms of departure from legal obligations, especially if one wants to gather support from those who are not entirely involved. This is probably the only way to gather consensus and to avoid that disagreement with the Council's action can only be expressed by infringing its resolutions. The role of the International Court of Justice should be pivotal in this respect, the judicial organ being the final guardian of the United Nations legality. In fact, the judicial function is one of paramount importance. It is actually for the judicial to establish the truth and only a tribunal can be acknowledged as impartial and objective.

It was because of the establishment of a court of justice that the Lockerbie case was brought to an end. Yet, it was the combination of politics, official diplomacy and mediation that made the trial possible and therefore transformed a complex and sensitive political issue in a legal case, allowing for the principle of accountability to prevail over that of impunity. In the end, somebody was held accountable for Pan Am 103 crash. Thus, politics and diplomacy set the framework that allowed the legal system to react and deal with the Lockerbie onslaught in terms of crime and punishment. The

very fact that a proper trial took place and somebody was brought before a court certainly marked an important milestone as far as the international community's commitment to punish aviation terrorism is concerned. Nonetheless, many issues needed being addressed in order to make the trial possible.

The place of the proceedings was a question of paramount importance. For years, both the United Kingdom and the United States refused to countenance the idea that the trial could be held outside their territories, as Libya insistently requested. The latter actually contended that no fair trial could be obtained in the United Kingdom or the United States. In fact, long before the trial began, the media's finger had pointed at the suspects' involvement, which could affect the mind of judges and jurors inasmuch as witnesses, thus bearing a possible weight on the trial outcome. Protecting the trial from the adverse effects of publicity was therefore an issue of considerable importance both before and during the Lockerbie proceedings. Alleged terrorists deserve to be considered innocent, in as much as everybody else, until a court of law issues a verdict of guilt. Media have to be careful when portraying suspects of heinous crimes. They have the right and duty of duly inform without infringing on anybody's rights.

In the event, the trial took place in the Netherlands. The idea of a trial to be held in a third country was widely supported by the aforementioned emerging powers. Nelson Mandela openly spoke in favour of it and remarked that a trial not only needs to be fair but also needs to be perceived as such. Justice cannot be deemed as credible if it looks like the justice of the strongest countries. The place where to set up the trial was not the only legal issue at stake, though. A number of other matters needed being addressed. Laws were altered and a special court under special rules was created. This proved an example of a judicial system able to evolve, develop and change to meet the needs of those who seek justice whilst protecting the concerns of those who were to be tried. In the event, no matter how unusual, how unique and how difficult the circumstances were, those who had

suffered loss found justice and resolution of their claims through the rule of law and by legitimate and peaceful conflict resolution. The rule of law was supreme in dealing with the consequences and aftermath of a random and pointless act of violence, whereas the legal system overcame its inherent rigidity to adapt to the peculiarity of the Lockerbie case.

The credibility of the court was an extremely important aspect, in the Lockerbie case. Since there was no international court that could try the alleged perpetrators of Pan Am 103 bombing, it was necessary to achieve a political agreement in order to set out an *ad hoc* tribunal that embodied a compromise solution, which was acceptable by all parties. Probably, the long-lasting Lockerbie deadlock would have never occurred or would have never lasted that long if a pre-established international tribunal already existed. The Lockerbie case therefore showed the need for a pre-established, neutral and independent judicial institution empowered with jurisdiction over aviation terrorist attacks, whenever they entail aspects of internationality and therefore cannot effectively be dealt with at domestic level. The trial turned out to be a very interesting example of the transnational dimension of criminal justice, although it featured a Scottish court applying Scottish rules. Yet, it took place in a third and neutral country which helped perceiving it as fairer. In general, though, it seems that an international court is better than a national court. National courts can always be perceived as unreliable or interested more in vengeance than justice. An international court can ensure a higher pitch of neutrality and objectivity or at least can be perceived as more neutral and objective.

Obviously, a judicial institution entrusted with jurisdiction over terrorism should ensure the independence of both the investigator and prosecutor. In the Lockerbie case, both have been seriously questioned. Only a pre-established, non-national court seems to embody the concept of a fair, independent and impartial justice. However, the Lockerbie trial can still be considered part of an important development that has come about in the international legal scenario and has seen the establishment of War Crimes

Tribunals for Rwanda and Yugoslavia and then eventually the creation of the International Criminal Court. The underlying philosophy has been always the same: demand for justice and refusal of impunity, in a framework where both investigation, prosecution and judgment are perceived as being neutral, impartial and objective. Atrocities must actually be punished before they are relegated to the history book but the way they are punished is perceived as fair and just only if they are adjudicated upon by an institution which is not the expression of one particular party, group or power. However, the pattern is always the same: politics and diplomacy may pave the way to legal solutions as a viable alternative to violent retaliation.

In Lockerbie, a trial took place and somebody was convicted for Pan Am 103 bombing. This was extremely important. If crimes have been committed, trials help establishing history. Individualizing responsibilities and blame for atrocities means preventing from condemning an entire nation or stigmatising an entire ethnic group. Nonetheless, it also means detaching the responsibility issue from the underlying political reality. However, it avoids ascribing collective guilt to people. In any society there are good people and bad people, hence, responsibility has to be pinned where it belongs. Those who are really responsible need being prosecuted and punished. It is utterly uncivilized to stigmatise an entire nation and strike back at random.

Of course, the Lockerbie trial was widely criticised because it ended up convicting a foot soldier. It did not go any further in ascertaining the chain of responsibility. However, the ultimate goal of a trial is not to establish an absolute truth but rather to establish guilt and innocence and punish accordingly. The truth telling is part of the system but is not the aim of a criminal trial. That is why, to date, it is still doubtful whether the full truth was ever established in Camp Zeist. Besides, it can be argued that justice that takes 14 years to be done actually embodies a denial of justice. Memories dim and evidence becomes less reliable. Yet, the very fact that a

trial took place proved that the international community is committed to punishing atrocities in order to establish accountability over impunity. The fact that no impunity has to be tolerated is eventually part of the world's common heritage. Aviation terrorism infringes the rules. Applying the law means going back to the rules, those rules that express widely agreed values. And this is what a trial allows for: stating, applying and restoring the rules. The success of the rule of law is mainly the affirmation of accountability against impunity, which can contribute to a final, far-reaching, though indispensable aim: a world where peace exists at once with justice. The legal process, which is grouped with other peaceful methods of dispute settlement in Article 33 of the United Nations Charter, can be one of the tools to be used in this respect.

The fact that a trial took place brought about a number of consequences. Not only it ended up convicting somebody for the Lockerbie onslaught but also paved the way for compensation. The victims' families were also victims and had to be somehow restored for the tragic loss they had suffered. They had the right of getting something tangible that goes beyond the punishment of the wrongdoer. In fact, they got monetary compensation both from the airline and from the Libyan Government. Whenever physical restitution is impossible, money is the only means that can provide some sort of restoration. It is the accepted means of exchange and the only one that allows for an evaluation of a loss. Paying compensation does not necessarily mean restoring in full the harm suffered by the victims but it means trying to leave no stone unturned in order to redress the unbalance between the wrongdoer and those who have been affected by his wrongful activity. Of course, it might seem cynical to put a monetary value on a person's life. What else can be done, though, if restitution is physically impossible? Money does not bring those who are dead back to life but can somehow lighten the burden of the loss their relatives have suffered. When physical restitution is impossible, monetary compensation is the only realistic possibility that piles up with criminal punishment.

Thus, the families of the Lockerbie victims have obtained a huge cash payout. The airline paid its price for wilful misconduct: the many loopholes in its security system were acknowledged as a proximate cause of death. Libya also paid a huge price, although its government was never held directly responsible. In fact, the African state paid compensation because of the guilt of one of its agents. The huge payout did not necessarily entail full satisfaction for the grieving families but they got something tangible. It might not be everything but it is better than nothing. It would have been much worse if they had ended up getting no monetary compensation at all. Albeit compensation might not entirely redress a major injustice, it is a matter of extreme importance. It actually lets trials have practical and tangible effects on people's lives, which helps considering criminal justice something that happens on behalf of real people and not an abstract experience that happens in court-rooms and has nothing to do with real life. With some more money, a tragic loss is still a tragic loss but maybe the burden of the loss is a little bit lighter. Besides, somebody has paid a price, which might prove a deterrent for further cases. Thus, Pan Am 103 bombing was no free ride, neither for the airline nor for Libya.

Thus, in Lockerbie, a dual system proved effective. The tort system provided for compensation whereas the criminal system allowed for punishment. In both cases, accountability was established over impunity. This, unfortunately, does not necessarily ensure substantial justice. The latter is pretty much an ethereal concept. Probably, those who have suffered the tragic loss of kids, spouses, parents, brothers and sisters will never be satisfied that full justice has been done. Besides, somebody can always get away with heinous crimes. Yet, a little justice seems better than nothing. If trials, lawsuits, monetary compensation, detention can contribute to redress a major injustice and counter the repetition of heinous deeds, something will have been achieved. Of course, the establishment of truth is also important. After the Lockerbie trial, many factual details might still be missing and many questions be left unanswered. Probably, further investigation might

still reveal a number of facts about Pan Am 103 bombing. Nonetheless, a criminal trial is not about establishing the full factual truth but rather punishing the culprits.

The Scottish Court sitting in The Netherlands convicted Megrahi on the basis of the evidence it had at its disposal. It could not go any further because it had no power to do so. The success of a trial is to be measured by the person that is accused and the evidence that is made available. Of course, many other people might have been involved in the Lockerbie affair. It is difficult to believe that Megrahi acted all alone. Nonetheless, the fact that the Court could not prosecute people higher up does not mean that should have not gone for the people lower down. Courts must do what they can with the evidence they have got and within the boundaries of their jurisdiction. In a democratic system, a court must play by the rules. Even those who are charged with the most heinous of crimes have the right of being acquitted if there is no convincing evidence against them. And certainly they have the right to a defence. In this respect, the Lockerbie trial proved a civilized way of addressing issues. Somehow, it also suggested a pattern for the years to come. Inasmuch as the Court in Camp Zeist, whatever judicial organ must not only be impartial but also has to be perceived as such. The job of a court is not to win cases, but to make sure that people get a fair trial. This is also a way of affirming the rule of law by abiding to a concept of a fair, independent and impartial justice which takes into account not only retribution, but also restoration for victims of atrocities and respect for the fundamental rights of the accused.

The families of the Pan Am 103 victims may still be searching the truth. In particular, they may keep asking for further inquiries in order to know how and why Pan Am flight 103 was blown out of the sky. There is an undeniable degree of undeniable satisfaction in knowing the details and clearing the horizon of the many theories that have been circulated after the Lockerbie bombing. However, the victims' families obtained more than they expected at the outset. It was their tireless effort in advocating their cause

that made this possible. In particular, they succeeded in using the media in order to prevent the Lockerbie tragedy from being filed away in the public conscience. It was their never-ending capacity of struggling that made Pan Am crash a tragedy not to be forgotten, no matter what other international events may gain the spotlight as time went by. The role of the media in the Lockerbie affair was extremely important, in that it provided the families of the victims with a stage and an audience, thus letting the relatives of the victims tell Pan Am 103 story in their own terms. Thanks to the constant media's attention, they succeeded in making their voice rise high. Their personal tragedy and sense of loss reached other families all over the world, wakening feelings of solidarity and prompting a shared sense of vulnerability. Everybody's kid or spouse or parent could be on board Pan Am flight 103. Furthermore, the media system helped the bereaved relatives of the Lockerbie victims to turn into activists. In their struggle, which was largely aimed at improving air transport security, they channelled their grief in order to make their demand for justice and truth be heard. To date, they have been standing as remainders of Pan Am 103 atrocity, proving, through their own bereavement, that nothing in the world is worth so much pain. It was because of their determination, after all, that the Lockerbie onslaught has not been forgotten, despite the time going by and the fact that more urgent international events unfolded and gained the spotlight.

Once Megrahi was convicted and the Lockerbie victims' families have obtained compensation, the Lockerbie case has somehow come to an end. This has brought about important effects for the Libyans, who have been relieved of the burden of sanctions that have crippled their economy for years. Libya is back to the international fold, while the cycle of violence between the African state and the United States has eventually been severed. Reconciliation between the former rogue state and the rest of the world is under way. Of course, the families of the victims will never feel reconciled. Yet, reconciliation can work at states level, if not at an individual level. This is where international justice, by allowing

accountability to prevail over impunity, impacts the most. Even if some people got away with the crime and not everybody was punished, the consequences peaceful methods of settling disputes can bring about in terms of inter-state relations are absolutely crucial. This is what international justice is about, after all: the national level, not the individual level. If nobody had paid a price, if no tribunal had established methodically what had happened, the cycle of violence might have never got to an end. In Lockerbie, the legal way therefore served political ends: it proved an alternative to retaliation and brought about inter-states reconciliation. Thus, the international community achieved desired policy changes by availing itself of a basket of political, diplomatic, and legal remedies. This should always be the case: rather than rush to attack and strike back at random, peaceful means of solving conflicts and overcoming crises should always be given every chance to work. This is probably the ultimate lesson to be inferred by the Lockerbie case.

Hence, in the event, Libya is back from the cold, eventually freed from sanctions. Hopefully, this will soon bring about economic development and lucrative business. Libya's economic revival might as well reinvigorate its role as regional power broker. Removing the African state from the terror team is an undeniable gain for the whole world. The following question is how to capitalize on such major achievement. Libya can probably start playing a constructive role in the framework of international politics, by contributing to bring peace to the African continent. Its multifaceted nature – Mediterranean, African and Islamic – may help bridging gaps in north-south relations. The long-term aim must be to have a former rogue state that co-operates with the international community in the struggle against terrorism and abides by the rule of law. Libya's actual commitment to participate in the global struggle against terrorism and abandon its programme of weapons of mass destruction have to be heralded. This is a remarkable political development. Eradicating international terrorism will be possible only if all countries are fully committed to the fight. Terrorism

cannot be challenged by unilateral action. It is necessary to find solutions which are based on a wide international consensus. The latter is not something under the given, rather, it is always in the struggle, but it is more than a wish. It should be a working hypothesis, a guide for the functioning of society.

Probably, there is no universal moral order and not everybody acknowledges what is wrong and what is right in the same way. Yet, there is an order that enjoys overwhelming support. Nowadays, everybody seems to agree about the fact that there is no sustainable development without peace and security. And everybody seems to agree that freedom from fear is a fundamental human right that needs being secured in a sustainable world of development. Security is a topic close to everybody, after all. The provision of peace and security for its citizens should be a basic function of every state. However, interpretations of security and ways to achieve it vary, often causing great grievances between and within societies. In the struggle against terrorism, the most important thing seems to consist of the integration of all countries into a fair world system of security, prosperity and improved development. The struggle against terrorism will be all the more effective if it is based on an in-depth political dialogue with all countries of the world. No co-operation can prove successful if it does not filter out unilateralism and prejudices. Thus, the fact that Libya is back from the cold is a major achievement in this respect. That will not only ensure that there is no return to support for international terrorism, but will also encourage the emergence of a responsible partner willing to use its potential for the promotion of prosperity throughout Africa and the middle east, much to the entire world's benefit.

The best long term deterrent to terrorism is thus the spread of the rule of law and respect for human life. The more that spreads around the globe, the safer mankind will be. Terrorism must be fought through juridical weapons in order to re-establish the rule of law, thus abiding by the rules in order to react against those who infringe the rules. Politics also needs to respect the

rules. It lacks consensus otherwise. A good political system requires the rule of law, supports the rule of law, creates independent and impartial bodies to make sure that violations are fairly and properly adjudicated upon. At the same time, it does not function in the vacuum, it functions in the real world and therefore needs the maximum consensus ever. A political inasmuch as a legal order shouldn't be seen as supporting any particular blocks or state or ideological position. It is for the realm of law to punish terrorists and make accountability triumph over impunity in the most objective, impartial and neutral of ways. Yet, it is for politics to address the causes of terrorism. Responding to terrorism through political and legal tools is a major cultural challenge, whose progress is probably erratic. Yet, it is the only civilized way to address the fracture that exists between the civilized world and terror, between the rule of law and the chaos of crime, between a world at peace and a world in peril.

Everybody should be allowed to live in a free and secure environment and no stone should be left unturned in this respect. Many practical things can be done: universal accession to anti terrorist conventions is essential, actually a matter of urgency. Strengthening judicial and police cooperation is also a crucial element of whatever policy aimed at combating international aviation terrorism. The globalisation of realities does not require the globalisation of rules alone, but the strengthening of international institutions and their adaptation to the new issues at stake. But above all, the principles of democracy must be fostered. The latter are what make violence unnecessary. In a democracy, everybody's voice can be heard and policies can be changed. In undemocratic societies, too many issues are not even heard. In a globalising world, states are more and more dependant on each other, which should lead to closer cooperation than ever before. Even if globalization is primarily about technology, development and welfare, it is also a security issue. Globalization can be taken advantage of by means of participation and engagement. An isolated country or marginalized group can cause security problems. Cooperation is the only

way to respond to new threats and increase both awareness and will to address them. An international order based on effective multilateralism is the key and must be the long-term goal.

It is also important to address the root causes of conflicts and try to prevent them. Otherwise they will keep flaring up. States, in order to be effective actors in conflict prevention and crisis management, must be capable not only of military response but also economic cooperation, aid, civilian crisis management and so forth. This should not be a zero-sum game but an enterprise to everyone's benefit. Democracy should be strengthened and improved in both domestic and international institutions. It is important to find better ways for governments, business and civil society to engage in a dialogue about their common future and to come forward with concrete, implementable proposals. As many countries as possible should be engaged in bringing development, cooperation and security policy closer to one another, as well as supporting good governance and sustainable development, thus eliminating the root causes of conflicts. If Libya is ready to do that and can prove a reliable partner in the struggle against terror, this is a major development that might even set a model for other so-called rogue states.

Terrorism must be condemned in all its forms and irrespective of its stated aims. No cause, no grievance, however legitimate in itself, can begin to justify heinous acts that impact innocent civilians. All states should do what they can to prevent such acts from happening and to punish those responsible. Resisting impunity is pivotal and accountability is crucial for prevention. Impunity, instead, is an incentive for repetition of crimes and therefore generate insecurity. Besides, indifference or passivity should never exist in the face of evil. What is important is practical, everyday cooperation in the financial, judicial, intelligence and law-enforcement sector. Yet, in the action against terrorism there should never be resort to means that do not respect the rule of law and human rights, because that would inevitably erode the basis of human society by perpetuating the cycle

of victimization. Violence only generates further violence without eradicating the causes of terrorism. Instead, it is necessary to tackle the root causes, including deprivations, poverty, humiliations and lack of perspective associated with continuing, unresolved conflicts, which also constitute a breeding ground for extremism, fanaticism and in the event terrorism. This is for politics to address. Diplomacy can foster cooperation, which however needs to be implemented in a spirit of global responsibility, shared basic values and respect for international law. Nonetheless, the rule of law as a mere concept is not enough: laws must also be enforced, both internally and externally and ensure the highest degree of justice that can be possibly achieved. A fairer world is also a more secure world.

Thus, beyond military might, there is a range of instruments and capabilities that can be an important security factor in a globalising world. Conflicts and problems may persist, but what is crucial is whether basic issues such as human rights, the supremacy of the rule of law, fair economic development can be addressed. Peace is the ultimate prevention of terrorism, but it must be peace with justice, that does not leave behind winners and losers or open wounds that may keep festering. If nothing in the world can bring back to life the innumerable innocent victims of terrorism, at least, peace with justice can honour them and help restoring the sense of holiness of human life to the human race. In this respect, the Lockerbie case is a story that does not have to be relegated into history books. Pan Am 103 crash was a story of terror, violence blood, despair and frustration. Yet, it was also a story of effective use of political tools and affirmation of the rule of law that brought about peace and justice. Or, at least, some peace and some justice. It might not be everything but it is better than nothing. And it is certainly more that would have been achieved by striking back at random. In this respect, the Lockerbie saga seems worth being remembered. In these trying times, when acts of terrorism occur with tragic regularity, looking backward may perhaps help to look forward.

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