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Case Comment - Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US) Preliminary Objections, ICJ.

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Introduction

The case that we will be dealing with today is a case filed in the International Court of Justice, against the United States of America by Libya, in regard with the application of the Montreal Convention of 1971, with respect to the Lockerbie incident. This case talked about the application of the Montreal Convention, 1971. This case also talked about conflict between an obligation of a member state of an UN Charter and their obligation under any other international agreement. This case highlights the fundamental flaw in prosecuting the offence of a person, who is accused to be a terrorist, through bilateral extradition treaties and multilateral convention. Here, despite the fact that, Libya wouldn't give up the two suspects in the bombing of Pan Am Flight 103, measures taken by the Security Council suggests that the willingness of the United Nations to challenge State-supported terrorism with more than a mere rhetorical condemnation³. In this paper we will be discussing about the judgment given by the ICJ in this case and also analyse the same. We will also be discussing about the background of this case, laws discussed in the judgment, the development and the present situation of this case.

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³ Christopher C. Joyner and Wayne P. Rothbaum, 'Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?' (1993) vol 14 issue 2 Michigan Journal of International Law <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1585&context=mjil>> accessed 5 November 2020.

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Facts of the Case

On December 21, 1988, a bomb exploded in the cargo hold of Pan Am Flight 103, killing all of its 259 passengers and crew members, as well as 11 residents of the town of Lockerbie where the wrecked flight crashed 31,000 feet below⁴. After investigating for about three years, the United States accused two Libyan intelligence officers for the bomb blast, in November, 1991. The United States and United Kingdom, issued a statement to the Libyan Government to surrender the two accused to them, for conducting a trail, on 14 November 1991. The Libyan Government refused to surrender the two accused on the grounds that such an act would constitute a direct interference in Libya's internal affairs. Following this, the Government of United States and United Kingdom issued a joint declaration, reading:

"The British and American Governments today declare that the Government of Libya must:

- surrender for trial all those charged with the crime; and accept complete responsibility for the actions of Libyan officials;
- disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
- pay appropriate compensation.
- We expect Libya to comply promptly and in full⁵."

The Government of Libya issued response to these claims on 15 November, 1991, 28 November 1991 and on 2 December 1991, in which it refused that they had anything to do with

⁴ Micheal P Scharf, 'A Preview of the Lockerbie Case' (American Society of International Law, 4 May 2000) <[⁵ Gerald P. McGinley, 'The I.C.J.'S Decision In The Lockerbie Cases' \(1992\) vol 22 Georgia Journal Of International And Comparative Law <<https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1523&context=gjicl> > accessed 5 November 2020](https://www.asil.org/insights/volume/5/issue/5/preview-lockerbie-case#:~:text=On%20December%2021%2C%201988%2C%20a,747%20crashed%2031%2C000%20feet%20below.> accessed 5 November 2020.</p></div><div data-bbox=)

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this act. Finally, the Government of Libya went to the International Court of Justice regarding this.

Background

In 1992, the UN Security Council responded to Libya's refusal by adopting Resolution 748, which imposed sanctions on Libya until it handed the two accused over for trial, gave compensation for the victim's family and demonstrated with concrete actions its repudiation of terrorism. This Resolution was further expanded in 1993, by the adoption of the Security Council Resolution 883, which required the members of the United Nations to freeze Libyan government funds in their banks, impose a ban on military and oil production equipment on Libya, and prohibit flights arriving from or destined for Libya. To this, Libya responded by offering to extradite the two accused to Malta, where their acts allegedly took place. The United States and United Kingdom rejected this offer on the ground that Malta was geographically too close to Libya and this might lead to improper influence. In 1994, Libya proposed an alternative, that is, to hold the trial in Netherlands. Initially, the United States and United Kingdom declined this offer but later in 1998, they agreed to this. This final deal had the following elements⁶:

- i. The Security Council imposed sanctions would be suspended when Libya surrendered the two accused to the Netherlands for trial before a Scottish panel of judges at Camp Zeist;
- ii. The two accused 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;
- iii. While in the Netherlands, the two accused would stand trial only for the Pan Am 103 case, and if acquitted, would be returned directly to Libya;

⁶ *Supra* note 2

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- iv. If the two accused are convicted, U.N. monitors would be permanently stationed inside "Barlinnie Prison" in Scotland where the two would serve sentence; and
- v. The United Kingdom would permit Libya to establish a consulate in Edinburgh to watch over the two accused's interests, despite the absence of diplomatic relations between the United Kingdom and Libya.

Laws in Question

This case is mostly talked about due to the conflict between an obligation of a member state of an UN Charter and their obligation under any international agreement, which are; the UN charter and the Montreal Convention of 1971, respectively. All the parties to this dispute are also signatories of these Charter and Convention.

- **UN Charter:** The U.N. Charter, prohibits aggression, this is provided in Article 2(4) of the Charter. The Security Council resolutions passed responding to the Libyan aggression specify article 2(4) as the basis for it, that is, the Security Council was "convinced that the suppression of acts of international terrorism, including those in which states are directly or indirectly involved, is essential for the maintenance of international peace and security."⁷
- **Montreal Convention:** Libya claimed that they had the right and duty to investigate and prosecute the accused and to exercise jurisdiction over them under Article 14, 5(2), 5(3), 7 and 11(1) of the Convention. Libya said that these articles had been violated⁸.

Arguments Advanced

ICJ rules that it has jurisdiction in the cases brought by Libya against US and UK. Court considered the merits of the case raising out of crash. Libya claims

⁷ UN Charter, Art.2(4).

⁸ Adithya Krishnamurthy, 'The Lockerbie Incident Cases: Judicial Review by the ICJ' (Legal Service India) <<http://www.legalserviceindia.com/articles/lock.htm>> accessed 5 November 2020.

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that it has complied with the only treaty applicable between the parties, the "Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation" of September 23, 1971, but that the United States is violating that treaty and is seeking to prevent its application.

Libya invoked the application Article 14 para 1 of Montreal Convention, any dispute b/w two or more contracting states concerning interpretation of this convention that cannot be settled through negotiations, shall at request be submitted to arbitration, within 6 months, and if not agreed to arbitration, may proceed to ICJ.⁹

The preliminary objections raised by US were,

1. Court lacked jurisdiction- The United States claimed that the conditions of Article 14 of the Montreal Convention had not been complied with by Libya, first of all because no legal dispute existed between the parties, in any event not one concerning the interpretation or application of the Montreal Convention. In its view, the Montreal Convention was not relevant because, instead of there being bilateral differences, the case was one of a threat to international peace and security resulting from state-sponsored terrorism. Libya, on the other hand, maintained that the Montreal Convention was the only instrument applicable to the Pan Am disaster and that the United States was attempting to prevent its application.

The Court considered that Libya had complied with Article 14 of the Montreal Convention and that its claim was positively opposed by the U.S. claim.

2. Libyan application is inadmissible- The United States argued that, by bringing its case before the Court, Libya was endeavoring to undo the actions taken by the Security Council under resolutions 731 (1992), 748 (1992) and 883 (1993), and that Libya's

⁹ Montreal Convention, Art.14.

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claims under the Montreal Convention were superseded by those resolutions, which alone defined the obligations of the parties. But Libya argued that the Court must interpret those resolutions in accordance with the UN Charter and that the Charter prohibits the Security Council from requiring Libya to surrender its nationals to the United Kingdom or the United States.

The Court agreed with Libya that the critical date for determining the admissibility of an application is the date on which it is filed, in this case March 3, 1992. Resolutions 748 and 883 were adopted after March 3, 1992, and resolution 731, although adopted before the application was filed, was a mere recommendation without binding effect. Consequently, the Court, by 12 votes to 3, rejected the U.S. objection to admissibility derived from Security Council resolutions 748 and 883 and found that the Libyan Application is admissible.

Libyan claims had become moot as having been rendered without object- the United States argued that the Libyan claims had been rendered moot, and Libya had been precluded from obtaining the relief it seeks, by the subsequent adoption of Security Council resolutions 748 (1992) and 883 (1993). The effect of these binding resolutions was that any judgment on Libya's claims would be devoid of practical purpose.

The Court agreed with the United States that events subsequent to the filing of an application may render it without object, precluding a case from being adjudicated on the merits. It determined that the U.S. objection qualified as a "preliminary objection" under Article 79(1) of the Rules of Court. However, Libya and the United States differed on the question of whether the U.S. objection was of an "exclusively" preliminary character under Article 79(7) of the Rules of Court. The Court pointed out that objections are not "exclusively" preliminary, and hence will have to be dealt with at the merits stage, if they contain both preliminary aspects and other aspects relating to the merits. The Court considered that Libya's rights on the merits would not only be affected by a decision not to proceed to judgment on the merits, but would

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constitute, in many respects, the very subject-matter of that decision. In this light, the U.S. objection is inextricably interwoven, or at least closely interconnected, with the merits.

Analysis

The Basis of the Court's Decision in Lockerbie Case

The U.N. Security Council is one of the four primary organs of the United Nations¹⁰ which declares that Council has the primary responsibility for the 'maintenance of international peace and security.' As long as Libya is a Member State of UN, the Court stated that the parties were obliged to carry out the decision of the Security Council in accordance with Article 25 of the Charter, and that at the interim measures stage of the proceeding, Resolution 748 was prima facie binding on the parties.¹¹ Further, according to Article 103 of the Charter, the obligations of the parties under this Resolution superseded any obligations under other instruments¹², including the Montreal Convention. The indication of provisional measures would also prima facie deprive the United States and the United Kingdom of their rights under the resolution.¹³ The Court clearly stated that it was not definitively deciding the legal effect of Resolution 748 or its jurisdiction to entertain the merits of the case. The Court held that it may determine the legitimacy of Resolution in terms of the Charter and could make an order inconsistent with the Security Council's Resolution. Thus, the effect of decision is that, the respondent states may utilize the prima facie presumption of legitimacy in order to pressure Libya into extraditing the alleged offenders.¹⁴

Considering the state of majority, Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley appended a joint declaration vindicating the Court's judgment, particularly the reliance of the

¹⁰ United Nation Charter (adopted on June 1945) 213 UN Security Council Resolution Article 7.

¹¹ Libya v. UK [1992] ICJ 39, [1992] 1 ICGJ 75

¹² ¹²United Nation Charter (adopted on June 1945) 213 UN Security Council Resolution Article 103 reads; in the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

¹³ Joint Declaration of the United States and United Kingdom, Nov. 27, 1991, 31 I.L.M. 723.

¹⁴ Libya v. UK [1992] ICJ 39, [1992] 1 ICGJ 40, 42.

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Court on the Security Council's Resolution. They, also considered that the basis of Court's order on Resolution 748 was legitimate. Judge Shahabudden opined to view this situation not as conflict between the Security Council and the Court, but rather as a conflict between the obligations of Libya under the Charter and under the Convention.¹⁵ Later, the Court recognized that there exists a legal dispute between the Parties concerning this point. That dispute, however, falls under Article 14 of the Montreal Convention and therefore, falls within the jurisdiction of the Court only if it concerns the interpretation and application of one or more of the provisions of the Convention.

Additionally, acting President Oda thought that the Court should have based the denial on the ground that the encroachments on which Libya's claim for provisional measures were based related to Libya's sovereign rights under public international law and not the Convention. The state has right to exercise jurisdiction over crimes committed in its own territory and may claim jurisdiction over crimes committed abroad, if it affects the national security, or if there is universal jurisdiction.

Considering the opinion of dissenting judges, Judge Bedjaoui was strongly critical of Court for its reliance on Resolution 748. He viewed that it may cast doubt on the integrity of the judicial function as the Court's order was not based on its discretionary power, but appeared to directly link to the decision of the Security Council. While others thought that the Court could and should indicate interim measures despite Resolution 748.¹⁶

While the question is not clear whether Security Council has the authority to interfere in domestic law that exists independently of any treaty. In this Case, the Court held that though Libyan constitutional law prohibits extradition of its nationals still the Security Council contradicts the domestic laws of Libya if it requests extradition. Additionally, although the framers of the Charter did not affect a complete separation of powers between the Court and the Council, neither did they grant one body supremacy over the other. Also, Court stated that

¹⁵ Id. At 29 (separate opinion of Judge Shahabudden).

¹⁶ Is. At 107 dissenting Judges El-Kosheri, Ad –hoc J.

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the present case is altogether different both in the degree of conflict between the Council and the Court and the potential claim of ultra vires. The parties requesting sanctions are the respondents in the ICJ case, and therefore a decision for the applicant will conflict with the decisions of the Security Council.

Law of Extradition

Although the Libyan domestic law prohibits extradition it may put the act of terrorism at greater level. The Council determined that the Libyan action that gave rise to Resolutions 731 and 748 maintained a threat to international peace and security. As the organ is responsible for determining the existence of threat and take appropriate political response, the Council is well within the competency to demand the surrender of the two individuals accused of bombing in Pan Am Flight 103. As a result, the international legal community may become more prone to divorce political intent from unlawful international behavior, such a measure will help to overcome various obstacles in the extradition process.

Holding

On January 31, 2001, the Scottish Court in the Netherlands rendered its verdict in the Pan Am 103 bombing trial. The court found one of the two Libyan defendants, Al Amin Fhima, not guilty and he was immediately returned to Libya where he received a hero's welcome. It found the other defendant, Abdelbaset al-Megrahi, guilty of murder and sentenced him to a minimum of 20 years imprisonment in Berlinie prison in Scotland. The verdict did not, however, implicate those higher up in the Libyan government, nor did it rule out the possible involvement of Iran in the bombing. Moreover, although the decision to convict Al-Megrahi was unanimous, the judgment indicates that it had been a close call, with the three judges acknowledging that the prosecution's case had "uncertainties and qualifications" and that key witnesses had repeatedly lied. Indeed, portions of the judgment read as though the text had been drafted for a "not proven" verdict, which is used under Scottish law when the court is convinced of guilt but the evidence does not rise to the level of "beyond reasonable doubt."

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Conclusion

Thus, the study had examined the shortcoming of the international extradition process in bringing terrorists to justice highlighting the fundamental flaw in prosecuting terrorist offences through bilateral extradition treaties and multilateral conventions. This is due to a number of factors inherent in the extradition process like concerns over double jeopardy, double criminality, extradition of national, political sovereignty and the principle of *aut dedere aut judicare* (obligation to extradite or prosecute). Specifically, the Lockerbie incident provides a means both for analysing customary norms within the international extradition process and the legal implications of Security Council resolutions for Libya in particular, but also for international law in general. Clearly, the Aircraft Sabotage, the Montreal Convention and the Lockerbie related Security Council resolutions suggest that international extradition law is headed in this direction. Thus, it tends to show that the role of extradition law will undoubtedly be strengthened by the painful Lockerbie experience.