

**An analysis of the temporary installation of a Scottish Court in the Netherlands
in the context of Statehood and Sovereignty**

Sam Allen (596140), Maurice van Schendel (564805)

Erasmus University College

Public International Law (SBS219)

Alexandros Sarris LLM

18 September 2022

The Lockerbie Bombing

On December 21st 1988, an American Pan Am flight exploded, crashing into the Scottish town of Lockerbie. Among the 270 victims of the flight 171 of them were American citizens. The suspects of the crime were two Libyan intelligence officers residing in Libya.

Nearly three years after the events that took place, and after a lengthy investigation, the United States indicted two Libyan nationals. Libya declined the requests for informal extradition stating that such an act would directly interfere with Libyan internal affairs. The United Nations security council offered two resolutions in 1992, firstly urging Libya to keep up with international efforts put into the Lockerbie Case and secondly introducing sanctions on Libya for failure to comply with their requests.

This raises the issue of if Libya's Sovereignty is being threatened by these two resolutions. The United States claims jurisdiction over the case by citing the "law of the flag principle" which assumes that all flag-bearing vessels are considered detached parts of State territory, as Pan Am does fall under this category technically the crime was committed in US territory.

Libya, refusing to submit to the requests of the US, UK and UN, issued two separate applications to the ICJ against the United States of America and the United Kingdom. Regarding a dispute over the prosecution of the suspects. Libya argues that, in accordance with the 1971 Montreal Convention, they are obliged to domestically prosecute and punish the two criminals under article 7. This is due to the fact that in the event of non-extradition, which Libya argues is the case as there are currently no extradition treaties between Libya and either opposing States, a State is obliged, with no exception whatsoever, to submit the case to its competent authorities.

After this lengthy dispute Libya finally agreed to the extradition, to a neutral country, of the two intelligence officers suspected to be behind the bombing of the Pan Am flight. An agreement was reached between Libya and the UK. The two suspects would be tried in the Netherlands, where they would be extradited to and tried under Scottish law. A former US military base in Zeist, the Netherlands, would be the location of this trial. The location and jurisdiction of the case was determined in a bilateral Treaty between the Netherlands and the United Kingdom. This Treaty found that, for the duration of the Court proceedings, the premises would be under the full authority and control of the Scottish Court. On the 31st of January 2001, one of the two suspects would be charged with 270 counts of murder, receiving a life sentence, whilst the second suspect was acquitted and found not guilty in the hearing. The following year, camp Zeist, the military base in Utrecht, was handed back to Dutch authorities by the British after an appeal from the now prisoner on his life sentence which was subsequently rejected by the Court. The aforementioned bilateral Treaty between the UK and the Netherlands should, in theory, protect the Sovereignty of the States involved and therefore we ask, "did the agreements made in the Treaty adequately safeguard the involved States' Sovereignty?"

Rule

In order to analyse the application of laws and agreements to the juridical process in the aftermath of the Lockerbie Attack, we will first need to determine which Laws and agreements are relevant to the case.

Preceding to Libya extraditing two nationals suspected of being responsible for the bombing, Libya submitted two separate applications to the International Court of Justice instituting proceedings against the United States and the United Kingdom, the applications centered around a dispute with regards to the interpretation of the 1971 Montreal Convention¹. Several Articles of the 1971 Convention were mentioned in Libya's application:

Article 1, which outlines the offences that fall within the scope of the Convention, these include acts of violence on board a civil aircraft, destroying an aircraft, interfering with its operation or communicating false information, thus endangering it. A person has also committed an offence if he attempts to, or is an accomplice to, any of the acts determined by paragraph 1 of Article 1².

Article 5 determines the situations in which a Contracting State is obliged to establish jurisdiction over any offences determined by Article 1. Paragraph 2 of the same Article compulses a Contracting State to establish jurisdiction if the offender is within the State's territory and the State does not extradite him³.

Article 7 requires a Contracting State to submit a case to its competent authorities for prosecution, if the Contracting State chooses to not extradite the offender⁴.

Following a lengthy impasse, Libya extradited the two Libyan nationals suspected of being responsible for the attack, under the condition that they would be tried by a Scottish Court within a neutral State's territory. This was achieved by temporarily installing a Scottish Court on a former military base in Zeist, the Netherlands⁵.

In order to facilitate an effective functioning of the Court and protect both UK and Dutch judicial Sovereignty, the two States signed a Treaty. Although the entirety of the Treaty is intended to fully encompass the functioning of this extraterritorial Court, some articles touch upon themes that seem especially pressing in this extraordinary judicial exercise.

Article 3 lays the foundation of the functioning of the Scottish Court in the Netherlands, it limits the functioning of the Court and its jurisdiction to the duration of the trial. Under Section 3, the Article establishes the conditions under which the Court is allowed to detain persons on its premises, like witnesses participating in the trial and persons who have committed offences on the Court's premises. It further denotes when the trial is deemed to have ended⁶.

¹ International Court of justice, 'OVERVIEW OF THE CASE' (ICJ-CIJ, 3 March 2000) <<https://www.icj-cij.org/en/case/89>> accessed 14 September 2022

² International Civil Aviation Organisation (ICAO), Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Article 1, 23 September 1971, 974 UNTS 177, accessed 14 September 2022

³ ^ Article 5.

⁴ ^ Article 7.

⁵ Gerard Seenan, 'World's gaze turns to Camp Zeist' (The Guardian, 25 April 2000) <<https://www.theguardian.com/uk/2000/apr/25/lockerbie.gerardseenan>> accessed 14 September 2022

⁶ 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, Article 3, 18 September 1998, 381.L.M. 926 (1999), accessed 12 September 2022

Article 5 establishes the inviolability of the premises of the Scottish Court; authorities performing official tasks of the host country cannot enter the premises without consent of the Registrar of the Scottish Court. Emergency services can only enter the premises in case of emergency, by requesting consent of the Registrar or presuming consent, if they cannot be reached in time⁷.

Article 6 establishes the Court's control and authority over its assigned premises. The Court can make rules on its premises to ensure the Court's proper functioning, any laws by the host country which are inconsistent with these rules do not apply within the premises⁸.

Article 8, immunity, the Court's, funds, assets, property wherever located and held by whomever enjoy immunity unless explicitly waived by the Court⁹.

Article 9, the archives of the Court are inviolable¹⁰.

The host country is allowed to take any measures it deems necessary for maintaining its national security under Article 26¹¹.

Application

Although the proceedings filed by Libya against the United States and the United Kingdom were discontinued with consent of all parties, the claims made in the case are of critical importance for understanding the case and the eventual institution of a Scottish Court in the Netherlands. Taking this into account, we will connect claims made by Libya in the case brought to the International Court of Justice to the 1971 Montreal Convention as well as compare the Treaty between the United Kingdom and the Netherlands for the instalment of a Scottish Court within Dutch territory to the Court's actual functioning.

Libya, noting there was no extradition Treaty between neither them and the United States nor the United Kingdom, refused to extradite two nationals suspected of being responsible for the Lockerbie bombing. Libya was subsequently put under heavy sanctions by the United Nations under Chapter 7 of the UN Charter¹². Libya filed applications to the International Court of Justice against the US and UK, instituting proceedings, claiming both countries were in breach of the 1971 Montreal Convention through rejecting Libya's efforts to resolve the matter and were placing Libya under pressure to extradite the two Libyan nationals.

Libya recognized the Lockerbie Bombing constituted an offence within the scope of the Convention.

Libya also argued it complied with its obligations under Article 5, claiming they took measures to establish jurisdiction, like ensuring the presence of the accused in Libya to commence criminal proceedings and initiating an investigation into the indictment. Libya

⁷ ^ Article 5.

⁸ ^ Article 6.

⁹ ^ Article 8.

¹⁰ ^ Article 9.

¹¹ ^ Article 26.

¹² United nations, 'Resolution 748' (United Nations Digital Library, 31 March)<<https://digitallibrary.un.org/record/196976?ln=en>> accessed 14 September 2022

further argued that several requests to the United States to aid the Libyan investigation into the bombing were denied.

In the Case a Contracting State refuses to extradite a suspected offender, Article 7 requires the State in question to submit the case to its competent authorities for the purpose of prosecution. Libya argued that the efforts by the United States and the United Kingdom were keeping Libya from fulfilling its obligation under Article 7¹³.

Libya had no obligation to extradite its two nationals to either the United Kingdom or the United States as they had no extradition Treaty with either. Libya was eager to have the sanctions against them lifted, but refused to extradite the two Libyan nationals to the United States fearing they would face the death penalty. At the suggestion of Scots Law Professor Robert Black, a trial was organised at a temporary Scottish Court in the Netherlands, in this setup Libya was willing to extradite its two nationals¹⁴.

The exceptional occasion of hosting another country's judiciary, was organised through a Treaty, the inviolability of the Scottish Court and the protection of Dutch Judicial Sovereignty was ensured by the following articles:

Article 3, for example, determined the Court's temporary functioning. The trial ended in 2002 and the premises were handed back to the Dutch Government, this is because under Article 3 Paragraph 4 (c) the trial would end after a judgement of the Scottish Court following conviction would become final and conclusive¹⁵. Following the rejection of an appeal by Abdelbaset al-Megrahi, his conviction became final and conclusive, thus the trial ended¹⁶.

Article 5 established the Courts inviolability, this meant no officials from the host Country could enter the premises to perform any official duties. This is exemplified by the Court's premises being protected and managed by roughly 200 UK police officers¹⁷, an exception to this rule would only be made in case of an emergency and with consent of the Registrar.

Article 6 allowed for the Court to establish rules that superseded Dutch Law. Although technically Dutch Law would still apply to the premises, any Laws that would be inconsistent with rules made by the Court would not apply to the Court's Premises. An example of this part of the Treaty being enacted was the Court being able to detain anyone accused of contempt of Court, as without the supremacy of Scottish law over Dutch law at

¹³ International Court Of Justice, 'questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie' (Application Instituting Proceedings, 3 March) <<https://www.icj-cij.org/public/files/case-related/89/7209.pdf>> Accessed 14 September 2022

¹⁴ Christopher C. Joyner & Wayne P. Rothbaum, Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?, 14 MICH. J. INT'L L. 222 (1993), Accessed 14 September 2022

¹⁵ 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, Article 3 paragraph 4 (c), 18 September 1998, 381.L.M. 926 (1999), accessed 12 September 2022

¹⁶ Abdelbaset Ali Mohamed Al Megrahi Against Her Majesty's Advocate [2002] 2 Ac 884 (Appeal Court, High Court Of Justiciary) (The Right Honourable Lord Cullen, Lord Kirkwood, Lord Osborne, Lord Macfadyen, Lord Nimmo Smith)

¹⁷ Gerard Seenan, 'World's gaze turns to Camp Zeist' (The Guardian, 25 April 2000)<<https://www.theguardian.com/uk/2000/apr/25/lockerbie.gerardseenan>> accessed 14 September 2022

Camp Zeist it wouldn't be able for a Scottish Court to detain anyone for whatever reason on Dutch territory¹⁸.

Under Article 26 of the Treaty, the Netherlands' right to to take measures to ensure its national security was explicitly articulated. The Netherlands did exercise this right, as everyone employed on the site underwent both British as well as Dutch background checks¹⁹.

Conclusion

It is clear that the agreements made in the Treaty were effective at ensuring the protection of the involved States' Statehood and Sovereignty. By ensuring that the military base was under the authority of the Scottish Court and protection of British police and security personnel, and that Scots Law superseded Dutch Law on the premises, the judicial Sovereignty of the United Kingdom and the inviolability of the Court and its functioning was adequately ensured. With regards to the protection of Dutch Statehood and Sovereignty, the temporary nature of the Court and the return of Dutch authority over the Court's premises after the conclusion of the Case, means that Dutch Sovereignty was also protected.

¹⁸ 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, Article 6, 18 September 1998, 381.L.M. 926 (1999), accessed 12 September 2022

¹⁹ Gerard Seenan, 'World's gaze turns to Camp Zeist' (The Guardian, 25 April 2000)<<https://www.theguardian.com/uk/2000/apr/25/lockerbie.gerardseenan>> accessed 14 September 2022