Penn State International Law Review

Volume 11
Number 2 *Dickinson Journal of International Law*

Article 7

1-1-1993

International-Extraterritorial Jurisdiction-The Lockerbie Tragedy: Will Western Clout or International Convention Win the Extradition War?

Barbara A. Timmeney

International—Extraterritorial Jurisdiction—The Lockerbie Tragedy: Will Western Clout or International Convention Win the Extradition War?

" 'This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down . . . do you really think you could stand upright in the winds that would blow?' "[1] Perhaps a more timely version of Sir Thomas More's question might ask, "How much of the forest must be felled to keep intact the might of the Western powers?" The International Court of Justice (ICJ) recently demonstrated the insignificance of one more type of tree — international conventions — by declaring them subordinate to the orders of the United Nations Security Council (UN).[2] Cloaked in the name of justice, this announcement came after the United States and Britain asserted their UN clout in an attempt to compel Libya to extradite two nationals indicted for the 1988 Lockerbie Tragedy.[3]

On December 21, 1988, Pan Am Flight 103 was destroyed while in-flight over Lockerbie, Scotland.[4] All 259 people aboard, in addition to 11 on the ground, were killed.[5] Within a week, British investigations revealed that a bomb made of plastic explosives caused the tragedy. Evidence uncovered over the next three years culminated in the joint American-British indictment of two Libyan intelligence agents.[6] Relying on the Montreal Convention, however, Libya refused to surrender its accused nationals to either the American or British judicial system. Over the next five months, a tripartite extradition battle waged among the United States and Britain, Libya, and the Security Council. Then, on April 14, 1992, the ICJ

1. H. Moss Crystle, Comment, *When Rights Fall in a Forest . . . The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abductions and Torture*, 9 DICK. J. INT'L L. 387, 408 (1991) (quoting R. Bolt, *A Man For All Seasons*, Act I, in THREE PLAYS 147 (L. Heineman, ed., 1967)).

2. Paul Lewis, *Sanctions on Libya Begin to Take Hold As Deadline Passes*, N.Y. TIMES, Apr. 15, 1992, at A1.

3. Marc Weller, *Libyan Terrorism American Swagger*, N.Y. TIMES, Feb. 15, 1992, at 23.

4. Jerry Seper & Paul Bedard, *Two Indicted in Pan Am Deaths; Suspects Are Spies for Libya*, WASH. TIMES, Nov. 15, 1991, at A1.

5. *Id.*

6. *Id.*

demonstrated its willingness to liberally interpret international law by refusing to grant Libya provisional measures against the Security Council's ordered sanctions.[7]

By withholding disapproval of the West's actions, the ICJ sent a message around the globe that terrorist activities were no longer governed by treaties and conventions among individual states, but rather by the United Nations.[8] This Note contends that the ICJ's decision drew lines for a new legal order led by the might of the West, and, that under this current regime, Libya must extradite the accused to the United States or risk further sanctions or possibly even a forcible taking of the indicted men.[9] Additionally, this Note asserts that under both international and domestic law, the United States is a valid arena for the Libyans' trial.

International law traditionally affords jurisdiction over extraterritorial crimes on five bases: (1) territorial — based on the place where the offense is committed; (2) national — based on the nationality of the offender; (3) protective — based on injury to the national interest; (4) universal — based on an offense considered so heinous that it permits trial in any jurisdiction able to gain physical custody of the accused; and (5) passive personal — based on the nationality of the victim(s).[10] Not all states subscribe to each of these five tenets.[11] Passive personal jurisdiction is the most hotly contested,[12] and, in conjunction with the universal and protective theories, is only applicable regarding specific offenses.[13] Furthermore, jurisdiction founded on any of the five is first burdened with securing custody of the accused.[14]

By far the simplest means of physical arrest is for the alleged offender to voluntarily surrender. Assuming this option is unavailable, nations generally rely on extradition arrangements.[15] Originally, international law " 'obliged [states] to grant extradition freely and without qualification or restriction.' "[16] Over time, the tide turned

---

7. Weller, *supra* note 3, at 23.

8. *See* Weller, *supra* note 3, at 23.

9. For purposes of this Note, only U.S. extradition is discussed. However, extradition was requested by both the U.S. and London. *After the Security Council Resolution on the Pan Am Bombing*, MIDDLE EAST NEWS NETWORK, Jan. 22, 1992, *available in* LEXIS, Nexis Library, Currnt File.

10. United States v. Yunis, 681 F. Supp. 896, 899-900 (D.D.C. 1988). Territorial, national and universal bases of jurisdiction are inapplicable to the United States case; therefore, this Note will focus on the universal and passive personal tenets only.

11. Wegner, Note, *Extraterritorial Jurisdiction Under International Law: The* Yunis *Decision as a Model for the Prosecution of Terrorists in U.S. Courts*, 22 LAW & POL'Y INT'L BUS. 409, 417 (1991).

12. United States v. Yunis, 681 F. Supp. at 901.

13. Wenger, *supra* note 11.

14. *See* Wenger, *supra* note 11, at 418.

15. Extradition, 6 Whiteman DIGEST § 1, at 727.

16. *See id.* § 3, at 732 (quoting The State (Duggan) v. Tapley, 109 INT'L L. REP. 336,

180 degrees, and the international community declared that, absent a treaty, there was no legal duty to extradite fugitives to a foreign state.[17] In turn, nations entered treaties requiring one party to surrender its nationals to another for certain criminal acts.[18] Ambiguity remained, however, as the circumstances for extradition were limited to specific offenses,[19] and some states flatly refused to hand over their own nationals.[20]

In the early 1970's, the international community reconsidered extraterritorial jurisdiction in response to heightened concern over drastically rising numbers of reported terrorist attacks.[21] The move was toward universal condemnation of specific crimes — in particular, aviation terrorism:[22] "[U]nlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation . . . . [T]he occurrence of such acts is a matter of grave concern."[23]

The response came in the form of several international conventions which relaxed legal restrictions on the prosecution of foreign nationals. Both the Organization of American States Convention on Terrorism and the European Convention on the Suppression of Terrorism specifically condemned aircraft piracy.[24] Each Convention ordered states to take whatever measures were necessary to establish jurisdiction over the alleged offender.[25] The 1971 Montreal Convention for the Suppression of Acts of Violence Against Civil Aviation, ratified by 137 nations,[26] specifically labelled violent acts against air-

337 (1951)).

17. *Id.* § 3 at 732.

18. *See id.* § 1 at 727.

19. *See id.* § 3 at 733. The United States permits extradition solely in situations governed by an extradition agreement encompassing the particular offense committed. *Id.*

20. For example, Libya refuses to submit its nationals to American, British or French jurisdiction because of the lack of extradition agreements. *Gaddafi Says He Cannot Hand Over Suspected Libyans*, REUTERS, Nov. 28, 1991, *available in* LEXIS, Nexis Library, Currnt File. The United States is also incapable of surrendering fugitives to foreign states absent an extradition treaty. *See* United States v. Rauscher, 119 U.S. 407, 411-412 (1886); Factor v. Laubenheimer, 290 U.S. 276, 287 (1933). This same policy is followed by Great Britain, Canada, El Salvador and the former Soviet Union. *See* Extradition, 6 Whiteman DIGEST § 4, at 733-735.

21. In 1971, 278 terrorist acts were reported, and by 1980 that number had increased over 900% to 2,773. By 1989, 4,422 incidents with a death toll of 8,237 were reported. Wegner, *supra* note 11, at 411.

22. *See* Wenger, *supra* note 11, at 417.

23. Convention For the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, 24 U.S.T. 568 (entered into force Jan. 26, 1973) [hereinafter Montreal Convention].

24. Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, P.A.U.T.S. 37; European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93.

25. Wegner, *supra* note 11, at 424.

26. Michael Milde, *News from International Organizations*, 13 AIR L. 95 (1988).

craft in service[27] as a universal crime[28] and ordered states to "take such measures as may be necessary to establish its jurisdiction over . . . offences . . . committed against or on board an aircraft registered in that State."[29] Furthermore, when an alleged offender is found within the jurisdiction of a party to the Convention, that state must either extradite the accused or become "obliged, without exception whatsoever . . . to submit the case to its competent authorities for the purpose of prosecution."[30] In addition to these Conventions, the United States deemed attacks on aircraft as crimes of universal concern in both the Restatement (Third) of the Foreign Relations Law[31] and recent caselaw.[32]

Following the universal condemnation of aircraft piracy and hijacking, audiences became more receptive to the idea of passive personal jurisdiction. International conventions, once again led the way, proclaiming that "jurisdiction may be justified on the passive personal principle."[33] In addition, this tenet was incorporated within the criminal codes of several nations.[34] Even the United States, a long time opponent of jurisdiction based on the victim's nationality, enacted the 1986 Omnibus Diplomatic Security and Antiterrorism Act calling for the prosecution of "[w]hoever kills a national of the United States, while such national is outside the United States."[35] Although the passive personal principle is still unlikely to be accepted as the sole basis for jurisdiction, its increased international adoption indicates that, at a minimum, it is applicable regarding the specific offenses cited in the Conventions.[36]

In addition to the influx of multilateral conventions, an attitude change regarding terrorism developed among the states. "The effect of an incident on legal norms is ultimately a function of what relevant elites are willing to accept as legitimate,"[37] and the consensus

27. *Id.*

28. *See* United States v. Yunis, 681 F. Supp. at 900.

29. Montreal Convention, *supra* note 23, art. 5, para. 1(b), at 570.

30. Montreal Convention, *supra* note 23, art. 7, at 571.

31. " 'A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as . . . attacks on or hijacking of aircraft . . . and perhaps certain acts of terrorism.' " Wegner, *supra* note 11, at 425 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)).

32. *See* United States v. Yunis, 681 F. Supp. at 901; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781, n.7 (D.C. Cir. 1984).

33. Wegner, *supra* note 11, at 428. Examples of such include the Tokoyo, New York, Hostage Taking and European Convention on the Suppression of Terrorism. Wegner, *supra* note 11, at 429.

34. The Federal Republic of Germany, Israel, Italy, Japan, Mexico, Turkey, France, and the U.S. all have incorporated this principle into their criminal laws. Wegner, *supra* note 11, at 429.

35. 18 U.S.C. § 2332(a) (1986).

36. Wegner, *supra* note 11 at 429; *See also* United States v. Yunis, 681 F. Supp. at 896.

37. Gregory V. Gooding, Comment, *Fighting Terrorism in the 1980's: The Interception*

indicated that a violation of international law was permissible so long as states " 'abided by its spirit to make sure justice was done.' "[38] Some crimes were now opposed so universally that nations were called upon to take any necessary actions to gain jurisdiction over the alleged perpetrators.[39] This message was delivered as early as 1960 when Israel received a mere "slap on the wrist" for its forcible removal of Adolf Eichmann from Argentina.[40] Even more belligerent was the American reaction to the *Achille Lauro* hijacking. Believing the perpetrators to be aboard an Egyptian airliner, American military planes intercepted the flight and directed the plane to land at the Sicily NATO Base.[41] Criticism of the United States mission was limited to the Arab nations while praises rang from America's European allies, Canada, and Australia.[42] Even the former Soviet Union's news reporting agency agreed that "American anger over the hijacking and murder [was] 'understandable and just.' "[43]

Even more startling was the recent United States Supreme Court decision in *U.S. v. Alvarez-Machain.*[44] Humberto Alvarez-Machain, a Mexican national, was kidnapped from his office in Guadalajara, flown to Texas and arrested by United States Drug Enforcement (DEA) officials for the kidnap and murder of an American DEA special-agent.[45] Although the United States conceded the shocking nature of Mr. Alvarez-Machain's abduction, and even that such action might violate general principles of international law, the Court refused to find a breach of the extradition treaty[46] existing between the United States and Mexico.[47] Lacking a legal niche which would condemn the DEA's actions, the Court found the United States had proper jurisdiction to try the defendant.[48] With nations around the world condoning "illegal"[49] methods of bringing

---

of the Achille Lauro *Hijackers*, 12 YALE L.J. 158, 172 (1987).

38. *Id.* (quoting *Israel: Papers Welcome Capture of PLA Hijackers*, FBIS (Mid. East), Oct. 15, 1986, at 113 (text from Davar)).

39. *See id.* at 158-79.

40. *Id.* at 161. Eichmann was taken to Israel and tried for Nazi war crimes. *Id.*

41. *Id.* at 166.

42. Gooding, *supra* note 37, at 170-72.

43. *Id.* at 173 (quoting *From Soviet, Sympathy and a Barb for the U.S.*, N.Y. TIMES, Oct. 12, 1985, at 7).

44. U.S. v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

45. *Id.* at 2190.

46. Extradition Treaty, May 4, 1978, United States - United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656.

47. The extradition arrangement between the United States and Mexico "does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution." Alvarez-Machain, 112 S. Ct. at 2194. As abduction was not specifically included within the language of the agreement, the Court found that the treaty - which would prevent the United States from taking Mexican nationals against Mexico's will — was inapplicable. *See id.*

48. *Id.* at 2197.

49. *See* Gooding, *supra* note 37, at 172.

alleged terrorists to trial, a movement developed declaring terrorism a special problem calling for extraordinary measures.[50] Apparently these measures now include the accused's forcible removal to the desired jurisdiction.

Thus, the formation of a new "chaotic" international regime began. Nations, once the major proponents of multilateral treaties and conventions, now apply only those laws which conveniently work to their favor. The current United States-Libya situation serves as a perfect example of the "elite" attempting to break down those pillars of international law which are adverse to Western goals.

Abdel Basset Ali Megrahi and Lamen Khalifa Fhimah are accused of planting and detonating the bomb aboard Pan Am Flight 103 and murdering 270 persons.[51] The United States requested that Libya extradite the two intelligence agents. Relying on both the lack of an extradition treaty[52] and the Montreal Convention,[53] Libya refused all such requests.[54] Instead Libya arrested the suspects and initiated a judicial inquiry into the matter. Under the Convention, "Libya can either extradite or try individuals in its own courts who are accused of 'placing on an aircraft in service . . . a device or substance which is likely to destroy that aircraft.' "[55] Libya went even a step further by offering to admit both British and American observers to the Libyan trial,[56] or, in the alternative, to have the ICJ determine which nation has the proper jurisdiction.[57]

The United States responded with complete inflexibility. First, the Americans claimed that the Montreal Protocol was not meant to encompass " 'state-sponsored terrorism,' "[58] and that the Libyan courts were "unlikely to convict agents who may have been on an official, though illegal, mission."[59] Second, according to the United States, Libya's traditional involvement in terrorism rendered it unqualified to pass judgment on such activities.[60] Unable to obtain compliance, the Americans tried a new approach: the United Na-

50. *Id.* at 177.

51. Seper & Bedard, *supra* note 4.

52. *After the Security Council Resolution on the Pan Am Bombing*, *supra* note 9.

53. The U.S., U.K., and Libya are all signatories to the Montreal Convention.

54. Weller, *supra* note 3.

55. Weller, *supra* note 3.

56. Weller, *supra* note 3.

57. Weller, *supra* note 3.

58. Dave Todd, *Terror: U.S., Libya Battling Over Suspects*, CALGARY HERALD, Mar. 25, 1992, at A5.

59. Weller, *supra* note 3.

60. Libya provides facilities and millions of dollars to several terrorist groups including the Abu Nidal Organization, the PLO, and the PFLP-GC, Seper & Bedard, *supra* note 4. Additionally, "Libya has long offered a safe haven for such terrorists as Abul Abas, the mastermind behind the hijacking of the *Achille Lauro*." Jonathan Miller, *A Missed Opportunity*, CHRISTIAN SCI. MONITOR, Apr. 21, 1992, at 18.

tions Security Council.[61]

Both Libya and the United States, as members of the UN, are bound "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace."[62] The Charter of the United Nations gives the Security Council the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression," and to impose peace-keeping measures.[63] Relying on this document, the Security Council unanimously passed Resolution 731 urging " 'the Libyan government to provide a full and effective response to those requests [for extradition] so as to contribute to the elimination of international terrorism . . . [and] urg[ing] all states individually and collectively to encourage the Libyan Government to respond fully and effectively to those requests.' "[64]

Due to Libya's continued noncompliance, the Security Council delivered Libya an ultimatum through Resolution 748 in March 1992: Extradite within fifteen days or face mandatory air, military and diplomatic sanctions.[65] Still unwilling to budge,[66] the Libyans asked the ICJ to declare that they were fulfilling their obligations under the Montreal Convention and that no measures were appropriate to encourage Libya to extradite.[67] However, on April 14, 1992, the ICJ declared that "the circumstances were not such as to require the Court to exercise its power . . . to indicate provisional measures."[68] In reaching its decision, the ICJ relied on the fact that the Charter of the United Nations gives its own provisions precedent over those of any international agreement where the two are in conflict,[69] and, furthermore, that signatories are required to "accept and carry out the decisions of the Security Council."[70]

Whether justice or merely the passing needs of the West were served by the ICJ's ruling is now a moot question. The moral of the decision is twofold. First, the Security Council is "a tool of the interests of Britain, France, and the US."[71] Agreements once the staples of international law must now bow to the decisions of the Security Council — traditionally a political organ — when it comes to legal disputes.[72] Second, extradition is no longer a national act.[73] Sanc-

61. Weller, *supra* note 3.
62. U.N. CHARTER art. 1, ¶ 1.
63. *Id.* art. 39.
64. *After the Security Council Resolution on the Pan Am Bombing*, *supra* note 9.
65. Lewis, *supra* note 2.
66. Lewis, *supra* note 2.
67. *Provisional Measures Not Appropriate in Libya Case*, THE TIMES, May 7, 1992.
68. *Id.*
69. U.N. CHARTER art. 13.
70. *Id.* art. 25.
71. Miller, *supra* note 60.
72. *See Libya: Lockerbie Extradition Case Opens in the Hague*, INTER PRESS, Mar. 26,

tions, rather than treaties, are the legally superior means of bringing an alleged terrorist to a foreign state for trial. The states have set a new standard for dealing with aviation terrorists: extradite or extradite. Libya's only real choice then is to send Megrahi and Fhimah to the United States to stand trial. The ICJ has shown Libya "the writing on the wall" by condoning international sanctions for any continued refusal to do so. Additionally, since the legal community already accepted luring, interception and abduction as viable methods of bringing terrorists to trial in foreign states,[74] if sanctions fail, the United States could legally "capture" the accused Libyans. Whether by extradition or force, once Megrahi and Fhimah are within the United States, both international[75] and domestic law[76] permit their prosecution.

The international legal order designed to protect future generations from the threat of war[77] has been reduced to disorder. The international community previously attempted to equalize nations by assuring both large and small countries comparable rights and responsibilities within the legal order. This policy of equalization no longer prevails. Currently, those who are politically strongest wield the "double-dulled sword": Jurisdiction over alleged aviation terrorists is established through convention, treaty and judicial precedent, yet the elite can dismiss the same if custody problems arise. Meanwhile, smaller nations are left at the mercy of whatever Western political pressure manages to push past the Security Council. Instead of a search for justice, international law becomes a matter of clout. Ironically, with the ICJ's decision, the liberty and justice Americans value so dearly[78] was sold out to the might of the West.

Libya may yet extradite Megrahi and Fhimah. However, Libyans, no less than the people of any other state, cling tightly to the values of national legitimacy and sovereignty.[79] Regardless of whether the trial is held in an American or Libyan courtroom, an old legal "tree" was axed to accommodate the West's insatiable desire for "justice."

Barbara A. Timmeney

1992 *available in* LEXIS, Nexis Library, Currnt File. *See also* U.N. CHARTER art. 36, ¶ 3.

73. *See* Extradition, *supra* note 15, at 728.

74. *See, e.g.*, United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988); United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992); *see also* Gooding, *supra* note 37.

75. As described above, the universal and passive personal principles of jurisdiction combine to provide adequate bases for an American trial.

76. *See generally*, United States v. Yunis, 681 F. Supp. 896; 18 U.S.C. §§ 2331-2338 (1986); 18 U.S.C. §§ 31-32 (1988).

77. U.N. CHARTER pmbl.

78. *See* U.S. CONST. pmbl.

79. *After the Security Council Resolution on the Pan Am Bombing, supra* note 9.