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APA 7th ed.

Scharf, M. P. (2000). Terrorism on trial: the lockerbie criminal proceedings. ILSA Journal of International & Comparative Law, 6(2), 355-362.

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Michael P. Scharf, "Terrorism on Trial: The Lockerbie Criminal Proceedings," ILSA Journal of International & Comparative Law 6, no. 2 (Spring 2000): 355-362

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MLA 9th ed.

Scharf, Michael P. "Terrorism on Trial: The Lockerbie Criminal Proceedings." ILSA Journal of International & Comparative Law, vol. 6, no. 2, Spring 2000, pp. 355-362. HeinOnline.

OSCOLA 4th ed.

Michael P. Scharf, 'Terrorism on Trial: The Lockerbie Criminal Proceedings' (2000) 6 ILSA J Int'l & Comp L 355
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TERRORISM ON TRIAL: THE LOCKERBIE CRIMINAL PROCEEDINGS

*Michael P. Scharf**

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I. INTRODUCTION

On December 21, 1998, a bomb exploded in the cargo hold of Pan Am Flight 103 killing all 259 passengers and crew, as well as eleven residents of the town of Lockerbie where the wreckage of the Boeing 747 crashed 31,000 feet below. After years of negotiations and diplomatic maneuvering, Libya recently surrendered the two Libyan officials accused of the bombing (Abdelbasset Ali Ahmed Al-Megrahi and Ali Amin Khalifa Fhimah) for trial in the Netherlands before a panel of Scottish judges. The trial is set to begin on May 3, 2000.

Experts are already calling this "the trial of the century," - though the label is somewhat misplaced given that the century will only be a few months old when the trial begins. There is no question, however, that this will be the most important and unique, as well as the longest and most expensive, trial in Scottish Legal History. This article, which is an expanded version of a speech delivered at International Law Weekend '99 at the House of the Association of the Bar of the City of New York, describes the events that led to this historic trial, analyzes the unique aspects of the proceedings, and previews the likely outcome of the criminal case.¹

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1. This article draws from the following public sources: Lockerbie Trial Briefing, (visited July 19, 1999) <<http://www.law.gla.ac.uk/lockerbie>> (includes indictment, the UK-Netherlands Agreement, correspondence between the United Nations Secretary-General and Libya/the United Kingdom/the United States, and Security Council Resolutions 731, 748, 883, and 1192); *How the Deal was Done*, The Guardian

II. FROM LOCKERBIE TO CAMP ZEIST

Pan Am 103 was blown up just five months after the United States Frigate Vincennes mistakenly fired a missile at and shot down an Iran Air airliner, killing all aboard and provoking the Iranian Parliament to publicly call for revenge against America. Two months before the Pan Am 103 bombing, German police raided an apartment in Frankfurt, Germany, belonging to members of the Popular Front for the Liberation of Palestine - General Command (PFLP-GC), a terrorist group which operated out of Syria. The raid disclosed an arsenal of terrorist weapons, including a Toshiba radio cassette player converted into a bomb, just like the one that was discovered in the wreckage of Pan Am 103. In light of these events, United States officials initially stated that they believed either Iran or the PFLP-GC (rather than Libya) was behind the Pan Am bombing.

It was not until three years after the Lockerbie disaster that the United States and United Kingdom publicly cast the blame on Libya. In November 1991, the United States and the United Kingdom formally charged Al-Megrahi and Fhimah with conspiracy, murder, and destruction of Pan Am 103. According to the charges, the government of Libya ordered the bombing of Pan Am 103 in revenge for the United States bombing of Tripoli two years earlier. Al-Megrahi, a Libyan Intelligence Officer, allegedly prepared a suitcase containing a bomb in a Toshiba radio cassette player. Fhimah, who worked for Libyan Arab Airlines on Malta, allegedly planted the suitcase on an Air Malta plane bound for Frankfurt Germany. In Frankfurt, the suitcase was loaded onto a Pan Am feeder flight to London, and at London's Heathrow Airport, it was transferred to Pan Am 103.

Though neither country had an extradition treaty with Libya, the United States and United Kingdom both demanded that Libya immediately surrender Al-Megrahi and Fhimah to them for trial. Citing the "lynch mob atmosphere" prevailing in the United States and United Kingdom concerning this case, as well as its right to undertake its own prosecution of the accused under the Montreal Aircraft Sabotage Convention, Libya refused to comply with the United States and United Kingdom demands.

(London), April 6, 1999, at 8 (available on Lexis, Curnws File); Lockerbie Truth May be Elusive, The Canberra Times, April 10, 1999, at C4 (available on Lexis, Curnws File); CBS News: 60 Minutes, April 11, 1999 (transcript available on Lexis, Curnws File); Russell Warren Howe, *What if they are Innocent*, The Guardian (London), April 17, 1999, at 8 (available on Lexis, Curnws File); Robin Crompton, *Lockerbie and Justice*, The Korea Herald, April 23, 1999 (available on Lexis, Curnws File); David E. Rovella, *Flight 103 Highlights Scots' Law*, The National Law Journal, April 26, 1999, at A1 and A5; Nick Drainey, *Trial Will Be Fair, Insist Lockerbie Families*, Press Association Newsfile, August 24, 1999 (available on Lexis, Curnws File).

In 1992, the United Nations Security Council responded to Libya's refusal by adopting Resolution 748, which imposed sanctions on Libya to impel it to hand over the two accused for trial, make compensation to the victims' families, and demonstrate with concrete actions its renunciation of terrorism. As expanded in 1993 with the adoption of Security Council Resolution 883, the sanctions required the members of the United Nations to freeze Libyan government funds in their banks, impose an embargo on military and oil production equipment on Libya, and prohibit flights arriving from or destined for Libya.

Libya responded by offering to extradite Al-Megrahi and Fhimah to Malta, where their acts allegedly took place. However, the United States and United Kingdom rejected the offer on the ground that Malta was so close geographically to Libya that its judiciary would be susceptible to improper influence. As an alternative, in 1994, Libya proposed trial before a Scottish court, provided it sat in a neutral country such as the Netherlands. At first, the United States and United Kingdom rejected the offer, believing it to be merely a propaganda ploy. During the next few years, however, it became increasingly clear that, despite sanctions, the two Libyans would not be surrendered for trial. Meanwhile, a growing number of countries were expressing their opposition to the sanctions, and enforcement of the sanctions began to erode. Finally, in August 1998, the British Government of Tony Blair persuaded the United States to agree to Libya's plan.

The final deal with Libya contained the following elements: (1) The Security Council imposed sanctions would be suspended when Libya surrendered Al-Megrahi and Fhimah to the Netherlands for trial before a Scottish panel of judges at Camp Zeist, part of the decommissioned United States Soesterberg air base outside of Utrecht; (2) Al-Megrahi and Fhimah 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; (3) While in the Netherlands, Al-Megrahi and Fhimah would stand trial only for the Pan Am 103 case, and if acquitted, would be returned directly to Libya; (4) If Al-Megrahi and Fhima are convicted, United Nations monitors would be permanently stationed inside Barlinnie Prison in Scotland where the two would serve sentence; and (5) The United Kingdom would permit Libya to establish a consulate in Edinburgh to watch over Al-Megrahi and Fhima's interests, despite the absence of diplomatic relations between the United Kingdom and Libya. In addition to these five conditions, press reports indicated that the United Kingdom had agreed that no senior Libyan intelligence officers would be required to testify at the trial and that the prosecution would not try to trace the orders for the bombing to Khaddafi himself. Scottish prosecutors have insisted that no such deal has been made.

On April 6, 1999, Al-Megrahi and Fhimah arrived in the Netherlands. Later that day, pursuant to Security Council Resolution 1192 (1998), the United Nations sanctions were suspended when Secretary-General Kofi Annan

communicated formally to the Security Council the successful handover of the two accused.

III. SCOTTISH JUSTICE AT CAMP ZEIST

The Scottish rules of evidence and procedure that will govern the Pan Am 103 trial differ from the United States rules in several notable respects which may affect the outcome of the trial.

Under the Scottish rules, for example, there is no requirement that probable cause be confirmed at a preliminary hearing to test the sufficiency of the Prosecutor's case prior to trial. In contrast, had the case been tried in the United States, a magistrate would have to independently determine through an open and adversary hearing that there are substantial grounds upon which a prosecution may be based. This screening process is said to prevent hasty, improvident, or improper prosecutions.

It is a peculiarity of the Scottish system that no one may 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 compelling, cannot support a conviction.² This corroboration requirement will make it more difficult to obtain a conviction in the Lockerbie court than if the case had been tried in the United States.

At the request of the defense, the Lockerbie court will be composed of a panel of three judges, rather than a fifteen-member Scottish jury. Yet, as with a Scottish jury, the three-judge panel can rule by a simple majority. This is to be contrasted with the United States practice of requiring a determination of guilt by a "substantial majority" (a minimum of nine out of twelve jurors) in a federal felony case.³ In contervailance to the strict corroboration requirement, this will make it somewhat easier to obtain a conviction in the Lockerbie court than if the case were tried in the United States.

Another aspect of Scottish criminal procedure that may enhance the prospects of conviction as compared to a United States proceeding is the broad Scottish hearsay exception for unavailable witnesses. An out of court statement may be introduced not only if the witness is dead or has disappeared (as in the United States), 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 lacks the power to compel the appearance of witnesses outside of Scotland.

Perhaps the greatest difference between the Lockerbie court and a United States court concerns the range of verdicts that are possible. Where the United

2. On the other hand, two eyewitnesses accounts would be sufficient; a single eye-witness account may be corroborated by circumstantial evidence pointing to the guilt of the accused, and it is even possible for two pieces of circumstantial evidence to corroborate each other.

3. *Johnson v. Louisiana*, 406 U.S. 356 (1972) (Blackmun, J., concurring).

States only has "guilty" and "not guilty," the Scottish court can issue three possible verdicts: "proven," "not proven," and "not guilty." "Not proven" in Scotland usually means that the jury thinks the defendant is guilty, but that the proof of guilt was not beyond a reasonable doubt. The existence of this third option may make it easier for the judges to acquit Al-Megrahi and Fhimah, because they can do so while simultaneously explaining in their written judgment that they nonetheless thought the defendants were guilty.

If the defendants are convicted, they cannot be subject to the death penalty, which has been outlawed in the United Kingdom. The sentence for murder is a mandatory life imprisonment, with no possibility for a reduction of sentence in light of mitigating factors. There is no prescribed sentence for a conspiracy conviction, which would be up to the discretion of the judges.

Finally, in contrast to the United States double jeopardy principle, the Scottish prosecutors can appeal an acquittal on a legal point. The appeal is to the High Court (a panel of five Scottish judges in Edinburgh), which can order a new trial if it concludes that the verdict rested on an error of law.

IV. "IF THE CIRCUIT BOARD DOESN'T FIT, YOU MUST ACQUIT" A PREVIEW OF THE LIKELY OUTCOME OF THE TRIAL

A. *The Prosecutor's Case*

From the indictment and the discovery proceedings in the civil case against Libya, one can glean what the prosecution's key evidence is in this case.

One of the most important pieces of evidence was the discovery in the Pan Am 103 wreckage of an unaccompanied suitcase bearing tags from Valletta, Malta. The charred suitcase contained clothing traced to a shop called "Mary's House" in Malta. The owner of the shop, Tony Gauci, has identified Al-Megrahi as the person who purchased the items in question. The Prosecutor will argue that Al-Megrahi filled the suitcase with this clothing, in addition to the Toshiba radio-bomb, so that it would not appear suspicious to airport security personnel.

Also important to the Prosecution's case was an intercepted radio message from Tripoli to a Libyan government office in Berlin on December 22, 1988 that said, "mission accomplished."

After months of searching through the debris of some 10,000 items spread over 850 square miles, the Lockerbie investigators found the most important piece of evidence of all - a small fragment of a circuit board from the electronic timer that had triggered the bomb. The FBI Lab, headed by Thomas Thurman, matched the fragment, which was smaller than a thumb nail, to a timer seized earlier from Libyan agents in West Africa. That timer was traced to an electronics company in Zurich, Switzerland called Mebo, which admitted that it had sold twenty such timers to the Libyans in 1985.

Finally, the Prosecution will present its star witness - a Libyan defector, presently in the United States witness protection program, who used to work for Libyan Arab airlines in Malta. He is expected to testify that early on the day of the Pan Am 103 bombing, he saw Fhimah put the suitcase containing the bomb aboard the Air Malta Flight to Frankfurt.

B. *The Defense's Case*

The Defense will suggest that Pan Am 103 was blown up not by Libya, but by Iran or the PFLP-GC, as the criminal investigators originally suspected. Under Scottish law, this is the special defense of "incrimination." It is permissible to blame "persons unknown" in Scottish law. A special defense is special only in the sense that it must be announced prior to trial. It does not shift the burden of proof to the defense.

But if Libya was not behind the bombing, why the radio transmission from Tripoli saying "mission accomplished?" To answer that question, the Defense is likely to call Victor Ostrovsky, a former Mossad Secret Service agent and author of *By Way of Deception*. In his book, Ostrovsky tells how Israeli commandos set up a transmitter in Tripoli that generated a false signal about "success" after the 1986 LaBelle Disco Bombing. Believing Libya was behind the attack on the German nightclub where United States servicemen were killed and injured, the United States retaliated by bombing Tripoli a few weeks later. The Defense will suggest that the Israelis likely accomplished the same feat in 1988, thereby once again incriminating their enemies, the Libyans.

And how will the Defense deal with the circuit board, which had been sold by Mebo to the Libyan Government? The Defense is likely to call Edwin Bollier, the director of Mebo, who will testify that the fragment found in the Pan Am 103 wreckage does not in fact match the timers that his company sold the Libyans in 1985. Bollier told CBS "60 Minutes" in April 1999, that investigators had shown him a photograph of the Lockerbie fragment. In contrast to the circuit boards that he sold to Libya, which were smoothly printed by machine, that photograph shows clearly that the Lockerbie fragment was roughly soldered as if made by hand.

In addition, Bollier has publicly stated that he had previously sold roughly soldered handmade timers similar to the one used in the Lockerbie bomb to the Stasi, the East German secret police. And the Stasi was known to have supplied weapons and explosives to Palestinian terrorist groups including the PFLP-GC, the original Lockerbie suspects. Bollier has also said that a few months before the Lockerbie bombing in 1988, he reported a break in at his company in which photographic blueprints for a circuit board like the one used to blow up Pan Am 103 were stolen. Whoever had the blueprints was in a position to make the Lockerbie circuit board and timer. Thus, the Defense has ammunition to argue

that the necessary connection between the Lockerbie circuit board and Libya is broken. And to bolster its case, the defense will point out that Thomas Thurman, the FBI forensic expert responsible for the Pan Am 103 investigation, was forced out of the FBI after a Justice Department inquiry found that he had allowed examiners in his explosives unit to overstate conclusions in favor of the prosecution in several cases.

There seems to be little doubt that the clothes in the suitcase containing the bomb were bought at Mary's House in Malta. But Tony Gauci, the eyewitness who links Al-Megrahi to the mysterious suitcase, identified Al-Megrahi from a photo a year after the bombing. Prior to the photo ID, Gauci said the person who purchased the clothing was fifty years old, six feet tall, and heavily built. Al-Megrahi was then only thirty-six, just five foot eight, and slight of build. And after the ID, Gauci later identified the person who purchased the clothing as Mohammed Abu Talb, a PFLP-GC terrorist who was in Malta at the time in question and is now serving a life-sentence in jail in Sweden.

Finally, the Defense will try to impeach the Libyan defector by pointing out that he stands to gain \$4,000,000, which is the reward that has been raised by the United States and Air Pilots Association for evidence which leads to a conviction of Megrahi and Fhima.

V. CONCLUSION

Given the peculiarities of the Scottish procedures and the problems with the prosecution's case which are discussed above, it will be very difficult for the prosecution to obtain a conviction in the Lockerbie case. And no matter the outcome, the Lockerbie criminal proceedings will play into Colonel Khaddafi's hands.

If the verdict is "not proven," Colonel Khaddafi can claim he was not behind the bombing. Even if found guilty, Al-Megrahi and Fhimah are unlikely to implicate Khadaffi because their families remain in Libya. They will take the fall and Colonel Khaddafi can claim that the trial never proved that he was involved. Most importantly, the Security Council has already lifted the sanctions on Libya, thus putting an end to Colonel Khaddafi's pariah status. International trade with Libya is booming since the surrender of Al-Megrahi and Fhima, and even the United States seems poised to remove Libya from its list of terrorist-supporting states.

Faced with no trial, or this trial, perhaps this was the best possible solution. The families of the victims of the bombing will finally see some sort of closure to their ordeal. Yet, they will not necessarily see justice done, nor the full truth told in the case.

