COMMENT: TRIAL OF LOCKERBIE SUSPECTS BEFORE A SCOTTISH COURT IN THE NETHERLANDS

Introduction

On 18 September 1998, the Netherlands and the United Kingdom concluded a treaty envisaging the trial of the two Libyan suspects of the Lockerbie disaster before a Scottish Court sitting in the Netherlands. The initiative represents an attempt to break the stalemate resulting from, on the one hand, Libya’s refusal to surrender the two suspects for trial in the United Kingdom or the United States and, on the other hand, the refusal by the United Kingdom and the United States to provide the Libyan authorities with the evidence that would have made it possible to try the suspects in Libya.

The treaty envisages that after the arrival of the accused in the Netherlands the United Kingdom would request their transfer to the jurisdiction of a Scottish Court sitting in the Netherlands. This Court would proceed to try the two men under Scottish law. For the duration of the trial, the Court would enjoy immunities and privileges similar to the facilities currently enjoyed by the Yugoslavia Tribunal in The Hague. Exercise of criminal jurisdiction by the host country would be specifically excluded. Any prison sentence imposed by the Court following a conviction would be served in the United Kingdom. All costs incurred by the host country relating to the sitting of the Court would be borne by the United Kingdom.

Realizing perhaps that they were treading treacherous legal ground, the framers of the treaty managed to obtain the full backing of the Security Council for their

3. Art. 16(1).
5. Art. 16(3).
6. Art. 16(2).
initiative. On 27 August 1998, three weeks before the treaty was concluded, the Security Council, acting under Chapter VII of the UN Charter, welcomed the initiative and called upon the Dutch and British governments to implement it. This may actually have been the first Security Council resolution which ordered a state to detain specific persons. According to one of its operative paragraphs the Dutch government must, on their arrival in the Netherlands, detain the two accused pending their transfer for the purpose of trial before the Scottish Court.

The necessary implementing legislation has, in the meantime, been adopted by both the Netherlands and the United Kingdom. The Dutch law enables the Scottish Court to exercise jurisdiction in respect of the two accused, by specifically excluding the application of Dutch legislation concerning the deprivation of liberty in this case. The British Order in Council is interesting because it outlines in considerable detail how the procedures to be followed would differ from ordinary proceedings in similar cases. Most significantly, while normal Scottish law and procedure would generally be followed, the Order provides for a trial not by jury but by a panel of three Scottish High Court judges.

At the time of writing (November 1998) it was not yet known whether Libya would accept the proposed arrangement. Libya was reportedly still attempting to obtain clarifications and assurances. However, whether the plan materializes or not, in view of its innovative character and the political excitement surrounding it, some brief reflections may be in order.

8. The initiative was outlined in a letter from the Acting Representatives of the United Kingdom and the United States to the UN Secretary-General, UN Doc. S/1998/795.
12. Section 5.