

論洛克比空難案所涉及之國際法問題

趙國材*

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關鍵字：國際恐怖主義、洛克比案、政治犯罪、臨時辦法、管轄權之衝突、法律責任、國際刑事協助、1963 年《關於在航空器內的犯罪和其他某些行為的東京公約》、1970 年《關於制止非法劫持航空器的海牙公約》、1971 年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》、國際法院規約、國際法院規則。

Keywords：International terrorism, Aerial Incident at Lockerbie Cases, Political Offences, Provisional Measure, Conflicts of Jurisdiction, Legal Responsibility, International Criminal Assistance, Tokyo Convention on Offense and Certain Other Acts Committed on Board Aircraft, Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Statute of the ICJ, Rules of ICJ.

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摘 要

1988 年 12 月 21 日發生在蘇格蘭洛克比機場上空的「洛克比空難案」(*Lockerbie Case*)，行為人是利比亞安全情報人員埃梅格伊(Ali-Abdel Basser al-Mergrahi)、法伊瑪(Ali-Amin Khalifa Fahima)，根據屬地主義(Territorial Principle)，英國有管轄權；行為人是利比亞安全情報人員，根據屬人主義(Nationality Principle)，利比亞有管轄權；受害者 270 人包括英國在內許多國家的國民，根據屬人主義，受害者的國籍國有管轄權；泛美航空公司 103 號班機(Pan Am Flight 103)是在美國登記的公司，被炸毀的航空器登記的國籍國為美國，根據屬人主義美國亦有管轄權。在刑事管轄權方面，犯罪行為人已逃回其本國利比亞，利比亞有管轄權。本文首先闡述國際法上關於在航空器犯罪的幾項重要公約，再討論 1971 年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》引渡或起訴的解釋與適用所引起之爭端，利比亞基於「政治犯不引渡原則」(Principle of Non-Extradition of Political Offences)，堅持不肯將嫌犯引渡給英美審判；英、美及利比亞運用國際法處理該案之經過、法律爭點、雙方辯駁、聯合國安理會第 731 號決議案與國際法院之判決；探討法律解決、政治解決、國際法院與安理會之關係及司法審查等。最後析論國際恐怖主義之管轄權衝突、法律責任歸屬及國際刑事協助等問題。

The *Lockerbie* Cases and Its relevant Issues in International Law

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Abstract

After a number of investigations the Lord Advocate of Scotland and a Grand Jury of the United States charged and indicted two Libyan nationals, Abdel Basser al-Mergrahi and Al-Amin Khalifa Fahima, of complicity in the bombing. The UK and the US demanded the rendition of two named Libyan suspects accused aircraft sabotage of involvement in the placing of a bomb on the Pan American airliner Flight 103 on 21 December 1988, which blew up over the Scottish town Lockerbie, so that they could face trial in New York or Scotland. Libya rejected the demand, stating that it would investigate the case itself and asking for the evidence in the hands of the American and British prosecutors to help to do so. Libya noted that it was legally not in apposition to extradite its own nationals. Libya then brought against the US and the UK at the International Court of Justice, the Court's treatment of Libya's request for provisional measures showed that it was alive to this point. On this premiss Libya ask the Court on 3 March 1992 to indicate provisional measures that the UK and US should cease and desist from threats and further action against Libya. The Court opened its hearings on the request for the indication of provisional measures on 26 March 1992, with the President of the case declining to use his discretionary powers under Article 74 (4) of the Rules of the Court to call upon the parties to the dispute to act in a way which would not prejudice any future Order on provisional measures. Five public sittings of the Court followed on 26, 27, and 28 March with both parties presenting oral arguments on the request for the indication of provisional measures. Libya maintains that the US and the UK breached their legal obligations under the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation by, *inter alia*, demanding that Libya surrender the alleged offenders for trial either in Scotland or in the United States. Libya arguing that the acts alleged constituted an offence under the Montreal Convention, and that the

UK and US were in breach of the convention by virtue of the pressure they were placing on Libya to surrender the two Libyan nationals for trial. It is far from clear that Libya is in breach of its obligations under the Montreal Convention. The primary duty of a State is to submit a case to its prosecutor if it does not extradite the fugitive. Libya has made elaborate gestures of its willingness to do this. Even if there were a duty to extradite, that duty is to be exercised in accordance with national extradition law and Libya may not, according to that law, surrender its nationals. In any event, the fugitives have an arguable case that the offences are political character and thus non-extraditable.

It may yet be that there are legal questions to be raised on the merits about the right of the Security Council to proceed in the way that it has, and political questions about the influence of the Western permanent members of the Security Council's decision-making. It appears that the Security Council in the *Lockerbie* Cases as an innovation which may be relied upon for the enforcement of the counter-terrorism treaties. Whether terrorist State exception is applicable in this case or not that is another issue. Libya had questioned whether they would have a fair trial if they were surrendered. However, this is irrelevant to some extent because the Security Council requests in its Resolution 731(1992) to extradite two Libyan suspected bombers to the United Kingdom or the United States for trial. On 31 March 1992, the Security Council passed a Resolution 748 (1992), which makes no express reference to Chapter VII, is concerned with the threat to international peace and security posed by Libya's support for terrorism, imposed a relatively restricted range of sanctions upon Libya due to its refusal to renounce terrorism, and demand that the accusers be handed over two suspected bombers makes with no reference to the Montreal Convention. The Security Council requests in its Resolution 748 (1992) and Resolution 883 (1993) surrender two Libyan suspects and to impose sanctions against the Libyan Arab Jamahiriya for its failure to comply. The rendition of the men is only one of the steps required to be taken by Libya with the object of removing the threat to international peace. These sanctions imposed a mandatory arms and air embargo upon Libya. It also called upon States to reduce significantly the number and the level of staff at Libyan diplomatic mission and diplomatic posts. A Committee was design up to monitor compliance with the sanction. Upon the certification by the Secretary-General of the arrival of the two accused Libyan indictees in the Netherlands for trial, thus the Security Council passed the Resolution 1192 (1998) provided, *inter alia*, for the suspension of the sanctions. Sanctions on Libya had been suspended. Libya and the UK and the USA reached an agreement in 1998 and the Security Council endorsed and mandated the arrangements for the trial. This duly occurred and the President of the Council issued a statement on 9 July 1999 noting therefore the suspension of the sanction. The Scottish Court presiding over the trial of the two Libyans accused of bombing Pam Am Flight 103 on 21 December 1988, has found Abdel Basser al-Mergrahi guilty of murder and sentence of life imprisonment under Scottish law. With regard to Al-Amin Khalifa Fahima, the Court concluded that the Crown failed to present sufficient evidence to satisfy the high standard of proof beyond reasonable doubt that is necessary in criminal cases. This does not mean that defendant is innocent of the crime charged. The Government of Libya must take responsibility. The sanctions on Libya were formally revoked by S.C. Resolution 11506 (2003) on the Libyan government's acceptance of responsibility for the Pan Am 103 bombing, its renunciation of terrorism and the payment of appropriate compensation to the victim's families.

The purpose of this article is to examine various implications of the 1992 *Aerial Incident at Lockerbie* Cases. The article divides into four sections. The first section analysis international conventions regarding to crimes committed on aircraft as well as unlawful acts of violence at airports serving International Civil Aviation. The second section explores *Lockerbie* Cases. The third section discusses the power limit between the International Court of Justice and the United Nations Security Council focus on justiciable and non-justiciable disputes, as well as judicial review in respect of the Security Council Resolution. The four section considers international terrorist issues on conflicts of jurisdiction, legal responsibility, and international criminal assistance. It also addresses that a new framework of international law that confronts modern threats is long overdue. If it is to revive the legitimacy of international law, this order must be predicated on a new principle, under which individual States assume reciprocal obligations to contain transnational threats emerging from within their border.

壹、前言

本文除前言與結論外，首先闡述國際法上關於在航空器犯罪的幾項重要公約，其次討論 1988 年 12 月 21 日「洛克比空難案」(Lockerbie Case)牽涉之國際法問題，包含利比亞基於「政治犯不引渡原則」(Principle of Non-Extradition of Political Offences)¹，堅持不肯將嫌犯利比亞安全情報人員埃梅格伊 (Ali-Abdel Basser al-

Mergrahi)、法伊瑪 (Ali-Amin Khalifa Fahima)，引渡給英美審判；英、美及利比亞運用國際法處理該案之經過、法律爭點、雙方辯駁、聯合國安理會第 731 號決議案與國際法院之判決；探討法律解決、政治解決、國際法院與安理會之關係及司法審查等。最後析論國際恐怖主義之管轄權衝突、法律責任歸屬及國際刑事協助等問題。

洛克比空難發生在蘇格蘭洛克比機場上

¹ Extradition may be denied for grounds relating to: the offense charged; the relator; the criminal charge or the prosecution of the offense charged; or the prosecution of the offense charge; or the penalty and punishability of the relator. The political offense exception relates to the offense charged. In *re Castioni* [1891] 1 Q.B. 149, where construing the phrase political offense, Justice Denman stated that it is not "necessary or desirable ... to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offense of a political character." The Court held that Castioni, a Swiss citizen, a member of the uprising group, who shot a government official because (a) a political uprising existed at the time and place of the offense, and (b) the offense committed was incidental to and in furtherance of the uprising. Castioni committed his acts with a sufficient nexus to the political insurrection as to render his acts "political" and therefore non-extraditable. It was indeed "political offenders" rather than "common criminals" that States considered worth the effort of a request for surrender. Most extradition laws and treaties provide that extradition need not or shall not be granted when the acts with which the accused is charged constitute a political offense. Extradition treaties between individual States invariably exclude extradition for a political offence, yet again the definitions differ widely. Generality, a distinction is drawn between a "pure" and a "relative" political offense is particularly significant because extradition treaties often grant extradition in terms of "pure" and a "relative" political offense. A "relative" political offense may be defined as one in which a common crime is so connected with a political act that the entire offense is regarded as political. In *re Ezeta*, 62 F. 972, 997 (N.D. Cal. 1894), where alleged acts non-extraditable because they were incidental to a political uprising and committed during the progress of actual hostilities. In the *Asylum Case* (1950) ICJ Reports 266 at 298, where Judge Alvarez, dissenting, understood the term to mean "any act which purports to overthrow the democratic political order of a country...; in that sense even murder may sometimes be termed a political offence." In the *Asylum Case* (1950) ICJ Reports 266 at 298, where military rebellion in itself emanating from all Peruvian legal documents has not constituted a common crime. Asylum protects the political offender against any measures of a manifestly extra-legal character which a Government might take or attempt to take against its political opponents. Judge Alvarez, in his dissenting, opinion understood the term to mean "any act which purports to overthrow the democratic political order of a country...; in that sense even murder may sometimes be termed a political offence." In *Haya de la Torre Case* [1951] ICJ Reports 71, where the Court considered that the 1928 Havana Convention does not justify the view that the obligation incumbent on a State to terminate an asylum irregularly granted to a political offender, imposes a duty upon that State to surrender the person to whom asylum has been granted. Consequently the Court concluded that the Government of Colombia is under no obligation to surrender Haya de la Torre to the Peruvian authorities. In *R. v. Governor of Brixton Prison. Ex parte Kolczynski* [1955] 1 Q.B. 540, where seven Polish nationals, members of the crew of a Polish fishing vessel in the North Sea, decided to seek political asylum in England, over-powered the captain and other members of the crew, and brought the ship into an English port where they were placed under arrest. The accused contended that they were political offenders. The Court under the 1679 Habeas Corpus Amendment Act granted their application for a writ of *habeas corpus* ('the great writ of liberty'). Article 3 of the European Convention on Extradition of 1957 excludes the obligation of extradition among the parties where the requested surrender is "regarded by the requested Party as a political offence or as an offence connected with a political offence," thus leaving it to the Parties to determine, according to their own interpretation of the term, what constitutes a political offence. See generally, A. Connelly, "Ireland and the Political Offence Exception to Extradition," *Journal of Law and Society*, 12 (1958), p. 153; I. A. Shearer, *Extradition in International Law* (Manchester: Manchester Univ. Press, 1971); M.C. Bassiouni, *International Extradition and World Public Order* (Leiden: Sijthoff, 1974); V. Epps, "The Validity of the Political Offence Exception in Extradition Treaties in Anglo-American Jurisprudence," *Harvard International Law Journal*, 20 (1979), p. 61; Carboneau, "The Political Offence Exemption as Applied in French cases dealing with the Extradition of International Terrorists," *Michigan Yearbook of International Studies*, (1983), p. 109; M.A. O'Connor, "International Extradition and the Political Offense Exception: the Granting of Political Offender Status to Terrorists by the United States Court," *New York Law School Journal of International and Comparative Law*, 4 (1983), p. 613; K.S. Sternberg and D.L. Skelding, "State Department Determination of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law," *Case Western Reserve Journal of International Law*, 15 (1983), p. 137; Colm Campbell, "Extradition to Northern Ireland: Prospects and Problems," *Modern Law Review*, 52(1989), pp. 585-621; G.. Gilbert, *Aspects of Extradition Law* (Dordrecht: Martinus Nijhoff, 1991); Admiral Stansfield Turner, *Terrorism and Democracy* (Boston: Houghton Mifflin Co., 1991), pp. 203, 224, 232.

空，根據屬地主義（Territorial Principle）²，英國有管轄權；行為人是利比亞安全情報人員，根據屬人主義（Nationality Principle）³，利比亞有管轄權；受害者 270 人包括英國在內許多國家的國民，根據屬人主義，受害者的國籍國有管轄權⁴；泛美航空公司 103 號班機（Pan Am Flight 103）是在美國登記的公司，被炸毀的航空器登記的國籍國為美國，根據屬人主義美國亦有管轄權。在刑事管轄權方面，犯罪行為人已逃回其本國利比亞，利比亞有管轄權。該案涉及 1971 年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》引渡或起訴的解釋與適用所引起之爭端，亦涉及國際恐怖活動之管轄權衝突、法律責任歸屬、國際刑事協助等問題。

貳、關於在航空器之犯罪

有關在航空器犯罪之國際公約如下：

一、1963 年《關於在航空器內的犯罪和其他某些行為的東京公約》（Tokyo Convention on Offense and Certain Other Acts Committed on Board Aircraft）⁵

禁止任何人於航空器上為觸犯刑法之犯罪行為，或危害航空器及其所載人士或財產，或危害航空器上良好之秩序與紀律之行為。

二、1970 年《關於制止非法劫持航空器的海牙公約》（Hague Convention for the Suppression of Unlawful Seizure of Aircraft）⁶

禁止直接或間接藉武力或其他方式之威脅，對該航空器非法劫持或行使控制或企圖行使此項行為。為了防止這類行為，以規定適當的措施以懲罰罪犯。各締約國應採取必要措施，對罪行和對被指稱的罪犯對旅客或機組所犯的同該罪行有關的暴力行為，實施管轄權（jurisdiction）⁷。罪犯所在的任一締約國如認為有需要時，得將罪犯拘留。

三、1971 年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》（Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation）⁸

禁止任何人為劫機行為以外之其他危害民

² 屬地原則（Territorial Principle）：是一國管轄權的首要根據，當客觀上有另一個國家同時具有行使管轄權的其他根據時，此另一個國家管轄權的權力就受到了限制。又可分為主觀和客觀；主觀係指，依屬地原則的主體領域觀點，國家有權對在本國內發生的犯罪行為行使管轄權。客觀係指，國家有權對開始於他國領土內而結果完成或發生於本國領域內的犯罪行為進行管轄。例如 1994 年《聯合國人員和有關人員安全公約》第 10 條刑事管轄權之屬地主義規定：犯罪行為發生在該國境內，或嫌疑犯在該國境內被捕，或犯罪行為人是慣常居住在該國境內的無國籍人。又如 1999 年《非洲統一組織預防和打擊恐怖主義公約》第 6 條規定：恐怖主義行為發生在該國領土上，且行為人在其境內被捕，或行為人是慣常居住在本國的無國籍人，行為針對的是締約國的安全及政府設施。以及 2007 年《東南亞國家聯盟反對恐怖主義公約》第 7 條國家管轄權的恐怖主義犯罪：罪行在該國境內實施，犯罪嫌疑人在該國境內，罪行是由慣常居所在該國境內的無國籍人所為，罪行針對該國在國外的國家或政府設施，包括該國外交或領事財產或本國的任何其他財產。

³ 屬人原則（Nationality Principle）：又可分積極的屬人原則與消極的屬人原則。積極的屬人原則即國家對本國公民擁有的管轄權；消極的屬人原則是以被害人所具有的國籍為基礎，使其國籍本國取得管轄權。例如 1994 年《聯合國人員和有關人員安全公約》第十條刑事管轄權之屬地主義規定：嫌疑犯是本國國民，或犯罪行為發生在本國登記的船舶或航空器上，或犯罪行為是針對該國的國民，或犯罪行為之目的是企圖迫使該國從事或不從事某種行為。又如 1999 年《非洲統一組織預防和打擊恐怖主義公約》第六條規定：恐怖主義行為人是該國公民，或行為對象是該國公民，或發生在該國營運的船舶或航空器上。2007 年《東南亞國家聯盟反對恐怖主義公約》第 7 條國家管轄權的恐怖主義犯罪：罪行為該國國民所為，或罪行發生在該國登記的船舶或航空器上。In *Dow v. Attorney-General* [1992] Botswana, Court of Appeal; 103 ILR (1996) 128-202, held that nationality-descent-nationality conferred only upon those whose fathers were nationals. 103 ILR (1996) 128-202.

⁴ 保護管轄（Protective Principle）：是指國家有以保護本國的重大利益為基礎對外國人在外國的犯罪（通常結果也發生在國外）行使管轄之權力。保護管轄是屬地管轄的例外，但此種例外僅適用於影響國家法益重大的嚴重罪行，如威脅一國之政治獨立、軍事安全、金融秩序穩定等。

⁵ 1963 年 9 月 14 日訂於東京。

⁶ 1970 年 12 月 16 日訂於海牙。The Hague Convention by itself will not be enough to prevent all types of attacks against aircraft. Bengt Broms, "The Hague Convention for the Suppression of Unlawful Seizure of Aircraft," *Finnish Branch of International Law Association* (Suomen Osasto-Avdelning, Finland, 1/1972), pp. 8-18; Nancy D. Joyner, *Aerial Hijacking as an International Crime* (Dobbs Ferry, NY: Oceana, 1974).

航安全的罪行。任何人如非法和故意從事暴力、破壞行為而危及飛行安全，或妨礙其工作，即為犯罪。各締約國承允對其罪行給予懲罰，且對該罪行所提出的刑事訴訟，應相互給予最大程度的協助。

四、1988 年《補充 1971 年 9 月 23 日在蒙特利爾制定的關於制止危害民用航空安全的非法行為的公約的制止在為國際民用航空服務的機場上的非法暴力行為的蒙特利爾議定書》(Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation)⁹

將危害機場安全的行為也作為危害航空安全犯罪行為之一，包括在機場上對人進行暴力行為，及毀壞機場上的設備或航空器而危及機

場的安全。並增加當被指控的罪犯在締約國領土內出現，該國不將此人引渡時，締約國得在規定範圍內的罪犯行使管轄權。

國際民用航空犯罪管轄權：航空器登記國、犯罪行為發生地國、航空器及犯罪嫌疑人降落國、行為受害人關係最密切國、受害乘客國籍國、航空器承租人或主要營業地國，管轄權之衝突乃係各國立法保護主義所造成，解決辦法應優先適用有效原則。依國內法規定確立刑事管轄權，調查、引渡、或提供司法協助，以便循司法程序起訴懲罰劫機者。各國在製造塑性炸藥時，應添加可探測物質，使成為注標塑性炸藥，俾便偵查。¹⁰

參、「洛克比 (Lockerbie) 空難案」

一、案由

「洛克比 (Lockerbie) 空難案」¹¹ 乃 1988

⁷ 管轄權 (jurisdiction) 是指一國法院對案件行使管轄權之實質審判權力。國際刑事管轄權係指一國法院依據國際法和國內法，對特定涉外刑事案件行使管轄權的資格，主要在解決某一特定國家之法院有審理恐怖活動與行為刑事案件之權力。管轄權行為 (jurisdictional act) 具有制度性障礙的多重性，包括：(a) 立法管轄權 (legislative jurisdiction)：國家在其管轄按照意願制定法律；(b) 行政管轄權 (administrative jurisdiction)：國家透過其行政等機構執行干預權；(c) 司法管轄權 (judicial jurisdiction)：國家按照其意願行司法管轄權。Michael. Akehurst, "Jurisdiction in International Law," *British Year Book of International Law*, 46 (1972-73), p. 145; A.V. Lowe (ed.), *Extraterritorial Jurisdiction* (Cambridge: Grotius Publications, 1983), p. 198.

⁸ 1971 年 9 月 23 日訂於蒙特利爾。The 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation covers a wide range of various offences committed against persons on board and aircraft, the aircraft itself, air navigation facilities or the safety of an aircraft in flight and all the difficult problems connected with the prevention of unlawful acts against aircraft and the safety of civil aviation. Alona E. Evans, & John F. Murphy, "Aircraft and the Aviation Facilities", *Legal Aspects of International Terrorism* (Lexington: Lexington Books, 1978), pp.3-147. David Freestone, "Legal Responses to Terrorism," J. Lodge (ed.), *Terrorism: a Challenge to the State* (London: Martin Robertson, 1981), pp. 195-244; A. Sofaer, "Terrorism and the Law," *Foreign Affairs*, 64 (1986), p. 901; A. Cassese, "The International Community's 'Legal' Response to Terrorism," *International and Comparative Law Quarterly*, 38 (1989), p. 589.

⁹ 1988 年 2 月 24 日訂於蒙特利爾。This Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation supplements the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. It extends the international prohibitions against acts of violence against aircraft, including the obligation on States to prosecute offenders themselves or extradite them for prosecution by other States, to certain acts of violence at airports serving international civil aviation. For the testimony on 7 November 1989 by the U.S. Deputy Legal Adviser Elizabeth R. Rindskopf before the Senate Committee on Foreign Relations, see Margaret S. Pickering, Sally J. Cummins & David P. Stewart, eds., *Digest of United States Practice in International Law 1989-1990* (Washington, D.C.: International Law Institute, 2003), pp. 110-111.

¹⁰ 〈反劫機及相關國際法措施〉，胡聯合著，《當代世界恐怖主義與對策》，北京：東方出版社，2001，頁 455-465；謝望原、劉艷紅，〈劫持航空器研究〉，趙秉志、陳宏毅主編，《國際刑法與國際犯罪專題探索》，北京：中國人民公安大學出版社，2003 年，頁 216-245；戴秀鳳著，《防恐怖戰略與對策》，北京：當代中國出版社，2003 年。

¹¹ In the 1992 Aerial Incident at Lockerbie Cases (Libyan Arab Jamahiriya v. U.K.) and (Libyan Arab Jamahiriya v. U.S.A.) (Provisional Measures) [1992] ICJ Reports 3. See M. Weller, "The Lockerbie Case: A Premature End to the New World Order?" *African Journal of International and Comparative Law*, 4 (1992), p. 302; Vaughan Lowe, "Lockerbie- Changing the Rules during the Game," *Cambridge Law Journal*, 51 (1992), p. 410; F. Beveridge, "The Lockerbie Affair," *International and Comparative Law Quarterly*, 47 (1992), p. 907; Gerald P. McGinley, "ICJ Lockerbie Cases," *Georgia Journal of International and Comparative Law*, 22 (1992), pp. 577-601; Sally J. Cummins & David P. Stewart (eds.), *Digest of United States Practice in International Law 2001* (Washington, D. C.: International Law Institute, 2002), pp. 98-99.

年 12 月 21 日自法蘭克福途經倫敦飛往紐約的美國泛美航空公司 103 號班機，在英國蘇格蘭洛克比鎮（Lockerbie）上空爆炸，造成機上全部 259 人以及地面 11 人喪生。經過幾年詳細調查後，美國地方法院對兩個利比亞人；其中一人為安全情報人員埃梅格（A1-Abdel Basser al-Mergrahi），另一人為利比亞航空公司駐馬爾他辦事處主任法伊瑪（Al-Amin Khalifa Fahima）提起訴訟，稱其在泛美航空公司第 103 號班機（Pan Am Flight 103）放置一枚重 10-14 盎司高效塑性炸藥，藏在輕便攜帶的收錄音機中，炸彈箱包裹使用偷來的馬爾他航空公司標籤，從馬爾他航空公司 KM180 航班飛機送到德國法蘭克福機場泛美航空公司 103 號班機上，爆炸導致班機上所有乘客包括英美等國國民 270 人罹難。利比亞兩名安全情報人員遭到蘇格蘭最高檢察長（Lord Advocate）¹² 及美國大陪審團（Grand Jury）¹³ 起訴，要求利比亞引渡兩名犯罪嫌疑人。1991 年 11 月 17 日，義大利駐利比亞大使代表美英兩國將起訴書轉交利比亞，卡達費考慮西方引渡兩名利比亞人的要求。11 月 27 日，英美法三國簽署一項聯合聲明，要求利比亞政府交出所有涉案嫌疑犯。1992 年 1 月 21 日，英、美兩國將該事件提交給聯合國安理會，要求安理會敦促利比亞答應他們的引渡要求。3 月 3 日，利比亞政府向國際法院提出兩個訴訟案，分別針對英國和美國政府對 1971 年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》的解釋與適用所引起之爭端。3

月 31 日，國際法院尚未對是否採取臨時保護措施前，安理會即通過第 748 號決議，要求利比亞引渡兩名犯罪嫌疑人，並表示若利比亞不予引渡，安理會將對利比亞實施全球性制裁。1994 年 1 月 29 日，利比亞拒絕引渡兩名涉案嫌疑犯。1997 年 7 月 11 日，卡達費對遇難者補償 3,100 萬美元。1998 年底，又同意交出兩名嫌疑犯。

二、法律爭點

(一) 利比亞指出此一有嫌疑之行動在《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第 1 條之意義下構成犯罪¹⁴，並宣稱在此制度下利比亞已完全應允其本身之義務。

(二) 《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第 5 條¹⁵ 係指在無引渡之情況下，一國對在其領域內之嫌疑犯有管轄權；利比亞與英美兩造間皆無引渡條約，因而利比亞在《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第 7 條下有義務將此案件提交國際法院。

(三) 利比亞辯稱英美兩造違背《關於制止危害民用航空安全的非法行為的蒙特利爾公約》，未在國際法之架構下盡力解決此事件，並施壓利比亞將此兩國民加以審判。

利比亞基於「政治犯不引渡原則」，堅持不肯將嫌犯利比亞安全情報人員埃梅格伊（A1-Abdel Basser al-Mergrahi）、法伊瑪（Al-Amin Khalifa Fahima），引渡給英美審判。根據利比

¹² Lord Advocate is the Crown's principal law officer in Scotland. He represents the Crown in legal proceedings and conducts Crown prosecutions.

¹³ Grand jury is a body of 12 persons selected according to the law and sworn to give a verdict on some matter in criminal case according to the evidence.

¹⁴ 《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第 1 條：一、任何人非法或故意為下列行為者為犯罪：對在飛行中之航空器之人為暴力行為，如該項行為可能危及該航空器之安全者；或破壞在使用中之航空器或使該航空器受到損害致無法飛行或可能危及其飛行之安全者；或不論以何種方法在使用中之航空器上，放置可能破壞該航空器，或使其遭受損害致不能飛行；或使其遭受損害致可能危及其飛行安全之器械或物質者；或破壞或損害飛航設備或干擾其活動，如此項行為可能危及飛行中航空器之安全者；或因傳送明知為不實之情報，因而危及飛行中航空器之安全者。二、任何人如有下列行為亦為犯罪：(一)企圖犯本條第一項所列之任何罪行；或(二)犯或企圖犯任何該項罪行行之從犯。

¹⁵ 《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第五條：每一締約國應採取必要措施，對下列情形之犯罪確定其管轄權：(1)當犯罪係在該國領域內發生時。(2)當犯罪係危害在該國登記之航空器或在其上發生時。(3)當發生犯罪之航空器在其領域內降落而該嫌犯仍在航空器上時。(4)當犯罪係危害或發生在出租之航空器而無機員隨機時，該承租人有主要營業地在該國或雖無該項營業地而其永久住所設在該國者。

亞之申請書已無協商此爭端之可能，因此利比亞政府基於《蒙特婁公約》第14條第1項將此爭端提交國際法院¹⁶。1892年瑞士《引渡法》第10條中，規定「政治犯不引渡」¹⁷，但同時強調，若犯罪行為的主要特徵表現出普通罪多於政治罪，此種政治犯仍應引渡，而是否構成此問題仍需由瑞士法院決定。

三、雙方辯駁

(一)利比亞之意見

利比亞要求法院判決並聲明如下：

1. 利比亞完全應允在《關於制止危害民用航空安全的非法行為的蒙特利爾公約》下所有之義務；
2. 英美分別已違背且繼續違背他們在《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第5條第2、3款¹⁸、第7條¹⁹、第8條第2款²⁰及第11條²¹對利比亞之法律義務；
3. 英美應在法律義務下立即停止此違背公約之行為及停止對利比亞使用任何武力及威脅。

幾天後，利比亞又對法院提出兩項要求，採行下列臨時辦法：

1. 禁止英美分別施壓利比亞，使其將犯人交出利比亞管轄權之外；
2. 確保利比亞關於法定程序之權利不受到任何方式之損害。

利比亞復要求法院主席在法院會議中，運用權力請求其他兩造以此種方式進行俾使利比亞所提出之臨時辦法能達成其合宜之效果。利比亞選派伊爾－科薛立（Ahmed S. El-Kosheri）為專任法官，他於1992年3月26日公聽會中發表嚴正聲明，要求採行臨時辦法。在公聽會中，法院副主席對於利比亞之要求表示，在經過對所有情勢的審慎考慮後，法院主席不適宜運用此任意之權力。

(二)美國之意見

1991年11月27日，美國特區法院的大陪審團起訴兩位利比亞國民後，英美發表聯合聲明：「英美政府今天宣稱利比亞政府必須將所有參與此犯罪的人提交審判；且利比亞的官員必須對此負責；公開此一罪行，包括罪犯的人名及所有人證、物證的採用；適當的賠償。」

1992年3月6日，美國國務院的法律顧問以信函針對利比亞所提出臨時辦法的特定要求，特別告知法院「考慮到此要求並無任何具體之行動，及安理會與秘書長對此事件正採取

¹⁶ 《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第14條第1款：如兩個或幾個締約國之間，對本公約的解釋或應用發生爭端而不能以談判解決時，經其中一方的要求，應交付仲裁。如果在要求仲裁之日起六個月內，當事國對仲裁的組成不能達成協定，任何一方可按照國際法院規約，要求將爭端提交國際法院。

¹⁷ 決定政治犯罪刑其標準有下列幾項：(1)犯罪的動機；(2)行為時的情況；(3)限縮於若干特定罪行，如叛亂或意圖顛覆政府；(4)罪行是針對一個特定的政府組織，而非平民；(5)犯罪行為必須在敵對兩派爭奪政權的情況下發生。非政治犯行為則包含：暗殺元首、無政府主義、國際罪行、恐怖活動等。1988年《聯合國禁止非法販運麻醉藥品和精神藥物公約》第3條第10款規定：「凡依照本條確定的犯罪均不得視為經濟犯罪或政治犯罪或認為是出於政治動機。」1998年聯合國《制止恐怖主義爆炸事件的國際公約》第11條規定，不將恐怖主義爆炸犯罪視為政治犯罪。

¹⁸ 《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第55條第2款：當被指稱的罪犯在締約國領土內，而該國未按第八條的規定將此人引渡給本條第1款所指的任一國家時，該締約國應同樣採取必要措施，對第1條第1款(甲)、(乙)和(丙)項所指的罪行，以及對第1條第2款：本公約於1973年1月26日生效。《蒙特婁公約》第55條第3款：本公約不排除根據本國法行使任何刑事管轄權。

¹⁹ 《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第7條：在其境內發現被指稱的罪犯的締約國，如不將此人引渡，則不論罪行是否在其境內發生，應無例外地將此案件提交其主管當局以便起訴。該當局應按照本國法律，以對待任何嚴重性質的普通罪行案件的同樣方式作出決定。

²⁰ 《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第8條第2款：如一締約國規定只有在訂有引渡條約的條件下才可引渡，而當該締約國接到未與其訂有引渡條約的另一締約國的引渡要求時，可以自行決定認為本公約是對該罪行進行引渡的法律根據。引渡應遵照被要求國法律規定的其他條件。

²¹ 《關於制止危害民用航空安全的非法行為的蒙特利爾公約》第11條：(1)締約各國對上述罪行所提出的刑事訴訟，應相互給予最大程度的協助。在任何情況下，都應適用被要求國的法律。(2)本條第1款的規定，不應影響因任何其他雙邊或多邊條約在刑事問題上，全部地或部分地規定或將規定相互協助而承擔的義務。

之行動…利比亞之行動…是無必要且容易造成誤解。」1992年3月26、27及28日的五次公聽會中，美國與利比亞對此臨時措施之要求展開激辯。1992年4月14日的公聽會中，法院宣讀利比亞所提出臨時辦法之要求。

四、聯合國安理會第731號決議案

1992年1月21日，聯合國安理會考慮英美的聯合聲明，通過第731號決議案，對於調查結果發現利比亞政府官員涉案，表示利比亞政府應負責任；對利比亞政府尚未能有效制止恐怖主義之行為表示關切，立即呼籲利比亞政府對於這些要求應予有效之回應，以幫助國際恐怖主義之消除²²；且對受害者深表哀悼。法院表示，安理會已於1992年3月31日採行第748號決議案，在此決議案中，安理會表示：「對於利比亞政府迄未能對1992年1月21日第731號決議案之要求予以有效回應深表關切，確信國際恐怖主義之平定，對於國際和平與安全之維持是必要的。利比亞政府無法以具體之行動來遏止恐怖主義，尤其持續未能對於第731號決議案之要求予以完全及有效之回應，業已構成了國際和平與安全之威脅。」²³

依《聯合國憲章》第七章：對和平之威脅、和平之破壞及侵略行為之應付辦法下的行動：

1. 決定利比亞政府必須即刻應允第731號決議案之要求；
2. 決定利比亞政府必須承諾停止所有形式的恐怖主義活動，及對恐怖主義之組織的援助，以具體之行動遏阻恐怖主義；
3. 決定自1992年4月15日起所有國家須採行以下措施，直至安理會已確定利比亞政府依從上述1、2項要求；

4. 請求所有國家及國際組織嚴格遵行目前決議案中的條款。」

英美透過聯合國安理會，認定利比亞政府涉案，其應承擔恐怖犯罪行為的法律責任，補償受害者家屬，否則聯合國將會持續制裁。

五、國際法院之判決

國際法院發表判決聲明如下：

國際法院為符合《國際法院規約》第41條之規定²⁴，必須考慮臨時辦法所要求的情勢，但對此一議題的是非曲直，不論是基於事實或法律而言，均不能表達明確意見，而兩造對於抗辯此議題之權力必須仍不受影響；利比亞及英美均為聯合國之會員國，基於《聯合國憲章》第25條規定，有義務接受及實施安理會之決議；關於臨時辦法之程序，法院認為初步之義務包含在748號決議案中；利比亞及英美兩造在憲章下之義務，大於包括1971年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》在內之任何其他國際協定下之義務；國際法院認為姑不論採行此安理會決議之前的情勢為何，利比亞在《關於制止危害民用航空安全的非法行為的蒙特利爾公約》下所要求臨時辦法之權力並非合宜；且利比亞所要求之臨時辦法，可能損害美國在安理會748號決議案中初步享有之權利；國際法院針對臨時辦法之要求宣布判決結果，其中既不涉及本案之實質管轄權問題，亦不預斷此類問題，故不影響利比亞與美國關於此類問題之爭辯；基於這些理由，法院以11票對5票，判決在《國際法院規約》第41條情況下，不予採行臨時措施。

1. 贊成：主席甄寧斯爵士（Sir Robert Jennings）²⁵；副主席小田滋（Shigeru Oda）²⁶；法官賴切斯（Lachs），雅高（Robert

²² Terrorism is included in the Draft Code of Crimes being prepared by the International Law Commission. See draft articles on the Draft Code of Crimes against the Peace and Security of Mankind, Article 24. Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006).

²³ Cf. Sir Crispin Tickell, "The Role of the Security Council in World Affairs," *Georgia Journal of International and Comparative Law*, 18(1988), pp. 307-317.

²⁴ 《國際法院規約》第41條之規定：(1)法院如認情形有必要時，有權指示當事國應行遵守以保全彼此權利之臨時辦法。(2)在終局判決前，應將此項指示辦法立即通知各當事國及安全理事會。

Ago)²⁷，斯威貝爾 (Schwebel)，倪徵噢 (Ni Zhengyu)²⁸，艾文森 (Jens Evensen)²⁹，塔拉蘇沃 (Tarassov)，吉拉恩默 (Guillaume)，薩阿布甸 (Sahabuddeen)，毛德斯利 (Aguilar Mawdsley)。

2. 反對：法官 Bedjaoui，Weeramantry，Ranjeva，Ajibola；專任法官 El-Kosheri。

副主席小田滋和法官倪徵噢均對此判決附加一聲明；法官 Evenson，Tarassov，Guillaume 及 Aguilar Mawdsley 發表聯合聲明；Lachs 和 Sahabuddeen 則附加個別意見；Badjaoui，Weeramantry，Ranjeva，Ajibola 及專任法官 El-Kosheri 則對此發表反對意見。

肆、安理會與國際法院之權限劃分

有關安理會與國際法院於「洛克比空難案」中，涉及國際爭端之法律解決與政治解決，以及國際法院與安理會之權限劃分等複雜的問題，說明如下。

一、法律解決

法律解決是指透過國際法院來解決法律爭端 (Justiciable Dispute)³⁰，在此案中為利比亞所採之解決方法。惟一項爭端究竟屬於政治爭端或法律爭端並無法非常明確區分清楚，且《聯合國憲章》及《國際法院規約》沒有對於兩者下定義，也沒有規定區分法律爭端和政治

²⁵ Robert Yewdall Jennings (1913-), born at Idle, Yorkshire, Downing College, Cambridge, received M.A. LL.B. (Cantab.) He was a Choate Fellow at Harvard University in 1937. Whewell Professorship of International Law 1955-82, He was Associate in 1957, Member in 1967, Vice-President in 1979 and President in 1981 of the Institut de Droit International, where he has been an Honourable Member since 1985. He was elected Judge of the International Court of Justice 1982-95, President 1991-94. Judge Jennings produced two classic monographs on *The Progress of International Law* (1960) and *Acquisition of Territory in International Law* (1963). Together with Sir Arthur Watts edited *Oppenheim's International Law*, 9th ed. (Harlow, Essex: Longman Group, 1993).

²⁶ Shigeru Oda (1924-), trained law at the university of Tokyo, spend three years at Yale University 1950-53, served as Associate, and then full Professor of International Law at Tohoku University in Sendai City 1959-76. He was a Delegate to all three UNCLOS Conferences 1958-75, and a Member of the UN Experts Group on Mare Science and Technology 1967-68 and of the Oceanographic Commission 1969. He was on the UN Committee on the Sea-bed and Ocean Floor 1968-73, and Legal Consultant to ESCAP on Mineral Resources 1969-75. He is a Member of the Institut de Droit International, elected Judge of the ICJ from 1976, and Vice-President 1991-94. Author of *The International Court of Justice* (1987).

²⁷ Robert Ago (1907-95), a doctor of law and political sciences from Naples, held chairs of public international law from 1934-82, at four university centres in succession: first briefly in Catania and Genoa; from 1938 in Milan; and from 1956 in Rome. He was Italy's first representative at the International Labour Organisation (ILO) for more than 30 years. He was a Member in 1956 and from 1991 President of the Institut de Droit International. As a Member and at one time Chairman of the International Law Commission (ILC). He was elected Judge of the International Court of Justice 1979-95. When he turned 80, Judge Ago was fittingly honoured by his colleagues on so many committees, broads and benches with a Festschrift, appropriately entitled *International Law at the Time of Its Codification*, to do justice to this meticulous codifier and legislator.

²⁸ 倪徵噢 (1906-)，江蘇省吳縣人。1928 年上海東吳大學 (Soochow /Dongwu University in Shanghai) 學士，1929 年美國史丹福大學法學博士 (Doctorate of Law at Stanford University Law School.)。1931-1945 年先後在上海東吳大學、大夏大學，持志大學 (Chitz University) 講授國際公法及國際私法。1946-1948 年參加東京遠東軍事法庭對日本戰犯之審判工作。1948-1954 年任上海東吳大學教授兼系主任、教務長。1956-1981 年任外交部條約法律顧問。1982 年外交部法律顧問，1981-1984 年任國際法委員會委員。1985-1994 年任國際法院法官，著有：國際法中的司法管轄權問題、船舶碰撞事件中的法律問題、關於外層空間的法律問題以及關於國家管轄豁免的理論和實踐等。

²⁹ Jens Evensen received a law degree from Oslo University and trained at the Minnesota, Columbia and obtained a Doctorate from Harvard Law School. He became an advocate at the Supreme Court, then become Director- General of the Legal Department of the Foreign Ministry 1961-73, Minister of Commerce and Shipping 1973-74 and Minister for the Law of the Sea 1974-78, Associate Member of the Institut de Droit International in 1971, Arbitrator of the Permanent Court of Arbitration (PCA) in 1978, and a Member of the International Law Commission (ILC) from 1979-84, elected Judge of the ICJ from 1985-94.

³⁰ Legal disputes are suitable for settlement by adjudication. Any dispute is justiciable provided the parties are willing to abide by a judicial determination. James Leslie Brierly, "The Judicial Settlement of International Dispute," Sir Hersch Lauterpacht and C.H.M. Waldock (eds.), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (Oxford: Clarendon Press, 1958), pp.93-107; H. Mosler, "The Area of Justiciability: Some Cases of Agreed Delimitation in the Submission of Disputes to the International Court of Justice," Jerzy Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague/Boston/ Lancaster: Martinus Nijhoff Publishers, 1984), pp. 409-421.

爭端之客觀標準。實際上，國際法院所受理之爭端雖被稱為「法律爭端」，但皆具有「政治因素」，因此只要當事國願意接受國際法院之管轄，該爭端就屬法律爭端。利比亞訴請國際法院判定利比亞守約，英美違約；請法院採取臨時辦法。1971年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》、《國際法院規約》：國際法院對國家因條約釋義所引起的爭端有管轄權。但國際法院認為無在仲裁前採取臨時辦法的必要。

二、政治解決

政治解決是指透過聯合國安理會來解決政治爭端（Non-Justiciable Dispute）³¹，在本案中為英美兩國所採取的解決方法。英美訴請安理會解決爭端，而安理會通過第731號決議案譴責利比亞遂行恐怖行動及危害飛安，此乃根據《聯合國憲章》第39條：「安理會有義務斷定任何對和平之威脅、破壞及侵略行為是否存在。」安理會第748號、第883號、第1192號決議案則再次譴責恐怖主義，並因利比亞未遵循安理會第731號決議案而採取必要行動，此乃根據《聯合國憲章》第七章：「對和平之威脅、和平之破壞及侵略行為之應付辦法。」

根據《聯合國憲章》，大會與安全理事會是聯合國處理政治之機構，國際法院則是聯合

國處理司法之機關。關於「洛克比空難案」，依《聯合國憲章》第39條，安理會有義務斷定任何對和平之威脅、破壞與侵略行為是否存在。故安理會依第731號決議案，來譴責利比亞恐怖爆破行動危害飛安³²，並於第748號³³、第883號及第1192號決議案，因利比亞未遵循安理會第731號決議案，而採取必要之行動。

利比亞因受經濟制裁之威脅，故依照《國際法院規約》第40條第1款：「向法院提出訴訟案件，應按其情形將所訂特別協定通告書記官長或以請求書送達書記官長。不論用何項方法，均應敘明爭端事由及各當事國。」及第41條規定：「(一)法院如認情形有必要時，有權指示當事國應行遵守以保全彼此權利之臨時辦法。(二)在終局判決前，應將此項指示辦法立即通知各當事國及安全理事會。」及《國際法院規則》第38條第2款規定法院內的訴訟程序：

「起訴應盡可能指出法院可據以管轄之法律理由，同時指出賠償之確定性質，並附上權益主張所根據之事實及理由之簡潔說明。」訴請國際法院對國家因《關於制止危害民用航空安全的非法行為的蒙特利爾公約》解釋所生之歧異施行管轄權³⁴；判決前，應採取臨時辦法，停止安理會對利比亞之制裁。然國際法院仍認為尚無採取臨時辦法之必要。³⁵安理會因國際和平受威脅而得採取臨時辦法；³⁶國際法院為凍

³¹ Political disputes which affect the vital interests, the independence, or the honour of the two States are suitable for settlement by good offices, mediation, conciliation or negotiation.

³² The Security Council requests in S.C. Resolution 731(1992) to extradite suspected bombers to the United Kingdom or the United States.

³³ On 31 March 1992, the Security Council passed a Resolution 748 (1992) imposed a relatively restricted range of sanctions upon Libya due to the latter's refusal to renounce terrorism, and demand that the accusers be handed over two suspected bombers makes no reference to the Montreal Convention. S.C. Resolution 748, which makes no express reference to Chapter VII, is concerned with the threat to international peace and security posed by Libya's support for terrorism. The rendition of the men is only one of the steps required to be taken by Libya with the object of removing the threat to international peace. These sanctions imposed a mandatory arms and air embargo upon Libya.

³⁴ In the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United States); (Libya v. United Kingdom), (Libya v. France)*, where Libya claimed that under the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation it was entitled itself to prosecute two Libyan nationals who had been charged with responsibility for the bomb placed on the PanAm flight that exploded over Lockerbie, and that the UK, pursuant to Article 31 of the ICJ Statute and Article 37 of the Rules of Court, by pressing for surrender of the Libyans, were in breach of Libya's rights under the Convention. Geoffrey Marston (ed.), "United Kingdom Materials on International Law 1997," *British Year Book of International Law*, 68 (1997), pp. 616-24.

³⁵ Request for the Provisional Measures was refused on this basis that prevailed over other treaty rights in accordance with Articles 25 and 103 of the United Nations Charter, so that the Court's attitude to the jurisdictional issue cannot be ascertained, with the consequence that the Libyan application had to be held inadmissible.

結爭端兩造對在爭端肇始日（Critical Date）³⁷後的挑釁行為而得採取臨時辦法，並於其後由國際法院審理；安理會與國際法院兩者的管轄範圍至此並未衝突。

至於國際法院開始審理此案後，安理會是否應停止臨時辦法，亦即停止對利比亞的制裁？在《國際法院規約》第34條第3款規定：

「法院於某一案件遇有公共國際團體之組織約章，或依該項約章所締結之國際協約、發生解釋問題時，書記官長應通知有關公共國際團體並向其遞送所有書面程序之文件副本。」³⁸ 安理會第1192號決議案針對本案做出決定，俟洛克比案兩嫌犯抵達海牙蘇格蘭法庭受審後，安理會即中止對利比亞之經濟制裁行動。³⁹ 雖無清楚規定，意指各造應就此事協調之。在實際運作時，國際法院和安理會之間似有一定程度的默契。

三、安理會與國際法院之關係

根據《聯合國憲章》第92條之規範，國際法院之職權如下：國際法院為聯合國之主要司法機關，應依所附規約執行其職務。《聯合國憲章》第24條則規範安理會之職權是為保證聯合國行動迅速有效起見，各會員國將維持國際

和平及安全之主要責任，授予安全理事會，並同意安全理事會於履行此項責任下之職務時，即係代表各會員國。由《聯合國憲章》之相關規範，可發現安理會與國際法院之區別不僅僅是其職責，在其組成和行使職權之方式上仍有相當大之差異。

在爭端之解決部分，根據《聯合國憲章》第34條之規範，安全理事會得調查任何爭端或可能引起國際爭端之任何情勢，以斷定該項爭端或情勢之繼續存在是否足以危及國際和平與安全之維持。然雖安理會可對爭端進行調查，但根據《聯合國憲章》第36條之規定，安全理事會按照本條作成建議時，理應注意凡具有法律性質之爭端，在原則上，理應由當事國依國際法院規約之規定提交國際法院。然安理會第748號決議並非依照上述之《聯合國憲章》下之爭端解決相關規範，而是依照《聯合國憲章》第七章「對於和平之威脅和平之破壞及侵略行為之應付辦法」此一法源提出。在第七章中，為讓各國可於集體應對和平之威脅或侵略行為下可快速做出反應，因此並未提及有關法律性質之爭端建議提交國際法院之規定。

《聯合國憲章》中並未表明安理會與國際法院之關係中，何者受到限制，而根據過去國

³⁶ 《聯合國憲章》第40條規定，當國際上發生對於和平之威脅、和平之破壞及侵略行為時，為防止情勢之惡化，安全理事會在依憲章第39條規定作成建議或決定辦法前，得促請關係當事國遵行安全理事會所認為必要或合宜之臨時辦法。此項臨時辦法並不妨礙關係當事國之權利、要求或立場。安全理事會對於不遵行此項臨時辦法之情形，應予適當注意。

³⁷ The term critical date is that there is a distinction between the date for the rules on acquisition of title and the date of adjudication, though the concept it connotes has always been implicit in territorial disputes, if not in all litigated matters, appears to have been derived from the terminology employed by Max Huber, the arbitrator, in the *Island of Palmas Arbitration* (1928) 2 RIAA 829 at 845, In the *Legal Status of Eastern Greenland Case* (1933) PCIJ Ser. A/B, No. 53 at 45, where the term indicates the date as at which the rights of the parties are to be determined and actions subsequent to which are, for the purpose of the proceedings, irrelevant. The item indicates the date as at which the right of the parties are to be determined and action subsequent to which are, for the purpose of the proceedings. L.F.E. Goldie, "The Critical Date", *International and Comparative Law Quarterly*, 12 (1963), pp. 1251-84; Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Cambridge University Press, 1993), Vol. 1, pp. 260-284.

³⁸ 《國際法院規約》第34條第3款為法院與訴訟當事國以及與公共國際團體的關係之規定。

³⁹ After the proceedings had been instituted, the Security Council adopted what purported to be a binding decision under Chapter VII of the Charter calling upon Libya to surrender the two accused. The Court noted that the Parties to the two cases, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter. Moreover, in accordance with Article 103 of the United Nations Charter, the obligations of the Parties prevail over their obligations under any other international agreement, including the Montreal Convention. ICJ Reports, 1992, p. 15, paras. 39-40; pp. 126-27, paras. 42-43. S.C. Resolution 1192 (1999): 利比亞滿足以下條件：(1)停止支持所有恐怖主義活動；(2)洛克比空難情況全面解密；(3)提供遇難者家屬賠償。中國現代國際關係研究所反恐研究中心編著，《國際重大恐怖案例分析》，北京：時事出版社，2006年，頁200-206；傅旋，〈洛克比案的國際法運用〉，92/07/01。中華民國國際法學會網站：<http://www.csil.org.tw/student/>。檢視日期：2009/10/06。

際法院之司法實踐，也確認當安理會正在處理某一爭端時，安理會與國際法院得同時各自依法行使其職權。⁴⁰ 在「南非繼續留在納米比亞時其他國家的法律效果案」(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (諮詢意見)⁴¹ 中，費茨摩里斯 (Sir Gerald Fitzmaurice) 法官表示，聯合國本身是一個國際法主體，安理會和其他成員國一樣，應遵守國際法原則。⁴² 在「洛克比空難案」，儘管安理會按照憲章第七章之規範正在處理該爭端，既然《聯合國憲章》中並未明文規定限制國際法院之管轄，法院和安理會可同時對該事件行使其各自但相輔相成之職權。由此可見，國際法院和安理會之間不存在上下隸屬關係，而是必須相互合作，相互尊重各自之職責。

四、司法審查

國際法院在諮詢案件和訴訟案件兩種情況下可進行司法審查。在諮詢案件中，國際法院之諮詢意見只具有諮詢性質，在這類案件中，國際法院認定某機構決議無效時，對該機構無拘束力。訴訟案件中，安理會的決議是國際法院應適用之法律之一。國際法院在考慮和決定是否適用該決議時，就應審查該決議是否有效

並確信安理會在通過該決議時並未逾越其權限。在「洛克比空難案」中，國際法院在確定應適用的法律時，須考量安理會第 748 號決議及該決議對利比亞請求臨時保護措施權利的可執行性產生之影響。國際法院可對安理會之決議進行審查，並不表示國際法院享有較安理會為高之權利，而是因安理會第 748 號決議成為國際法院審查該案時適用的法律。惟國際法院適用安理會之決議同時，仍必須遵從「聯合國某些開支案」[Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)]⁴³ 和「南非繼續留在納米比亞時其他國家的法律效果案」中所確立之「推定有效原則」，即在訴訟程序之初始階段不審查聯合國有關決議之合法性，並推定其為合法，至訴訟程序之實體審理階段才對聯合國之決議合法性予以審查。

國際法院之職能主要是確認和維護國家的法定權利和義務，而安理會之決議有可能侵犯國家之法定權利和義務，因此，國際法院有權審查安理會決議是否違反法律原則。法院作為一個法律機構，不能對一個明顯無效、違反《聯合國憲章》規則或違反法律原則之決議予以合作。基於《聯合國憲章》第 103 條「聯合國會員國在本憲章下之義務與其依任何其他國際協定所負之義務有衝突時，其在本憲章下之義務應居優先。」⁴⁴ 國際法院確定憲章下之義

⁴⁰ Jan Kolasa, "Some Remarks on the Concept of A Resolution and Decision of International Organizations," Jerzy Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague/Boston/ Lancaster: Martinus Nijhoff Publishers, 1984), pp.493-499; Jan Kolasa, "The International Court of Justice on the Implied Powers of International Organizations," Jerzy Makarczyk (ed.), *ibid.* pp.501-529; Vera Gowlland-Debbas, "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case," *American Journal of International Law*, 88 (1994), pp. 643-77.

⁴¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, (Advisory Opinion), ICJ Reports 1971, p. 16.

⁴² Dissenting Opinion of Judge Sir Gerald Fitzmaurice. ICJ Reports 1971, p. 16; J.G. Merrills, *Judge Sir Gerald Fitzmaurice and the Discipline of International Law: Opinions on the International Court of Justice, 1961-1973* (The Hague/London/Boston: Kluwer Law International, 1998), pp.291-297.

⁴³ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion), ICJ Reports 1962, p. 151.

⁴⁴ The Court found that the obligations of States under article 103 of the UN Charter prevailed over their obligations under any other international agreement, including the Montreal Convention, and that all States were obliged to accept and carry out the decision contained in resolution 748(1992) in accordance with article 25 of the Charter. The Court thus found that the circumstances of the case were not such as to require the exercise of its powers under Article 41 of the Statute to indicate provisional measures. Marc Weller, "The Lockerbie Case: A Premature End to the 'New World Order'," *African Journal of International and Comparative Law*, 4 (1992), p.321; 許光建主編，劉大群、薛捍勤副主編，黃惠康執行副主編《聯合國憲章詮釋》(Commentary on Charter of United Nations)，太原：山西教育出版社，1999，頁 646-48。

務，包括安理會有拘束力的決議所產生之義務。法院指出，依憲章的 25 條規定，利比亞與美國均為聯合國之會員國，皆有履行安理會決議之義務；在審查臨時措施程序，法院認為這種義務應當擴大到安理會第 748（1992）號決議案所包含的決定；據憲章第 103 條規定，會員國的憲章義務優先於其依任何其他國際協定所負擔之義務，包括《關於制止危害民用航空安全的非法行為的蒙特利爾公約》在內。⁴⁵ 憲章第 103 條所規定的憲章下之義務，至少包括以下三個方面：(1) 憲章所規定之義務；(2) 依安理會決議所承擔之義務；(3) 依國際法院判決所承擔之義務。當聯合國會員國承擔這些義務與其依任何國際協定所負之義務相衝突時，此等義務應居優先。⁴⁶

聯合國會員國應一秉善意（*bona fides*）⁴⁷，履行其依憲章所負之義務，以保證全體會員國加入聯合國組織而產生之權益。聯合國會員國之憲章義務與其條約義務相衝突，憲章義務應居優先；聯合國安理會決議與聯合國會員國之條約義務相衝突，安理會決議之義務應居優先；惟安理會決議之義務不能改變習慣國際法上國家所承擔之義務。⁴⁸ 安理會決議之拘束力源自於其必須符合安理會職權所規定之限制，

因此一旦發現某一決議不符合安理會職權之限制，則此決議對於國家就不具有拘束力。

國際法院可對安理會決議之合法性進行司法審查之標準有三：(一) 鑒於安理會在《聯合國憲章》第七章下享有廣泛之權力，安理會任何決議都應受到審查以確定是否違法；(二) 安理會在做出決議時必須合乎合法之程序規則；(三) 安理會無權改變國家之「領土權利」，領土權利受國際法保護，不能消滅，安理會任何旨在消滅國家的領土權利的決議都沒有法律效力。儘管國際法院對安理會之決議有審查權，但此審查權之效果仍有其限制。根據《國際法院規約》第 59 條規定：「法院之裁判除對於當事國及本例外，無拘束力。」即使國際法院宣布安理會之某決議案無效，但此一宣布並不具有普遍拘束力。⁴⁹

伍、國際恐怖主義之管轄權衝突、法律責任、國際刑事協助問題

一、國際恐怖主義之管轄權衝突問題

「洛克比空難案」，犯罪行為發生在蘇格蘭洛克比機場上空，根據屬地主義，英國有管轄權；犯罪行為人是利比亞安全情報人員，根

⁴⁵ ICJ Reports, 1992, p.126. 安理會通過之決議，並非都對聯合國會員國產生義務，安理會有拘束力之決議，僅限於安理會根據憲章第七章所做出之決議，憲章下之義務優先地位，不能擴張適用於國際習慣法或強行法（*jus cogens*）。

⁴⁶ 古雪祖，柳磊，〈聯合國憲章第 103 條適用的法律問題〉，中國社科院國際法研究中心主辦，《國際法研究》，北京：中國人民公安大學出版社，2009 年 4 月，頁 100-102。

⁴⁷ *Bona fides*, made in good faith; without fraud or deceit, one of the fundamental principles of international law which touches every aspect of international law, and is one of the general principles of law as specified in Article 38 (1) of the Statute of the ICJ. See, for examples, the Preamble and Article 2 (2) of the UN Charter, require States to fulfill all obligations arising under it in good faith. Article 26 and the Preamble to the Vienna Convention on the Law of Treaties 1969 noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized. In the law of treaties, treaties must be observed in good faith. States have a responsibility to implement their treaty obligation in good faith. The expectation good faith in performance of treaties obligation, contracting parties will do nothing to frustrate the purpose of a treaty. This duty is breached if a combination of acts or omissions has the overall effect of rendering the fulfillment of treaty obligations obsolete, or defeat the object and purpose of a treaty. Likewise, treaties must be interpreted in good faith. In *Nuclear Tests Cases* (Australia v. France; New Zealand v. France), ICJ Reports 1974, p. 254 at 267, where the Court said that one of the basic principles governing the creation and performance of legal obligations, whatever their sources, is the principle of good faith. Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Cambridge University Press, 1993), Vol. 2, pp. 609-615.

⁴⁸ As regards the United Kingdom all rules of customary international law as are either universally recognised or have at any rate received the assent of this country are *per se* the law of the land. Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law*, 9th ed. (Harlow, Essex: Longman Group, 1993), pp. 56-57.

⁴⁹ 李薇薇，〈從「洛克比空難案」透視國際法院與安理會的關係〉，《中國國際法年刊 1998》，頁 39-57。Bailey and Daws, *The Procedure of the UN Security Council*, 3rd ed. (Oxford: Clarendon Press, 1998), pp. 317-20.

據屬人主義，利比亞有管轄權；空難事件受害者（包括英國在內許多國家之國民），根據屬人主義，受害者的國籍國也有管轄權；泛美航空公司（Pan-Am.）是在美國登記的公司，且被炸毀的 103 號班機（Pan Am Flight 103）登記的國籍國也是美國，根據航空器登記的國籍國，美國有管轄權。在刑事管轄權方面，因犯罪行為人已逃回其本國—利比亞，使該案不僅涉及管轄權的衝突問題，也涉及 1970 年《關於制止非法劫持航空器的海牙公約》的引渡或起訴原則與 1971 年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》的解釋與適用。⁵⁰管轄權之衝突乃係各國立法保護主義所造成，解決辦法應從有效原則及實際利益受害國考量。

二、國際恐怖主義之法律責任歸屬問題

在美國紐約發生的 911 事件⁵¹，行為發生地和行為結果地都在美國，根據屬地主義，美國法院有刑事管轄權；犯罪行為人為外國國民，根據屬人主義，該犯罪行為人的國籍國亦有管轄權；事件受害者是美國人及在美國的外

國人，根據屬人主義，受害者的國籍國亦有管轄權。由於機毀人亡，犯罪行為人業已死亡，其行為之具體政治目的已無從考證，亦無相當之證據足以證明該行為與外國或外國組織 [阿富汗支持的蓋達（Al-Qaida）基地組織] 有關。除非有證據足以證明該行為是由外國或外國組織所策劃，否則就只能視為係發生在美國境內的涉外刑事案件。倘若犯罪行為人沒有死亡，而是逃回本國或他國，就會產生國際間法律責任之歸屬問題。關於「洛克比空難案」之法律責任歸屬，英美國家最終透過聯合國安理會，認定利比亞政府涉案，而應承擔相關法律責任。⁵²

三、國際反恐怖主義之國際刑事協助問題

將國際恐怖份子繩之以法，使國際法得以實現，始能確實達到預防犯罪之效果。國內刑法不足以有效懲罰，因各國對待恐怖份子各有考量⁵³。若欲對國際犯罪者予以追訴及審判，有賴於國際反恐怖主義犯罪的整個司法過程，故應將國際恐怖主義犯罪納入國際刑事法院管

⁵⁰ Cf. Lord McNair (Arnold Duncan McNair), "Extradition and Extraterritorial Asylum," *British Year Book of International Law*, 28 (1951), p. 172.

⁵¹ On 11 September 2001, the terrorist organization bases in Afghanistan, Al Qaeda, orchestrated a series of airplane hijackings in the United States, which led to the collapse of the World Trade Center and extensive damage to the Pentagon. The United States first unsuccessfully demanded that the de facto government of Afghanistan (the Taliban) hand over the terrorists, but then exercised its right of self-defence under Article 51 of the United Nations Charter by pursuing a military campaign in Afghanistan against both the terrorist organization and the Taliban. In its report to the Security Council explaining why it was exercising its right of self-defence, the United States asserted: "The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to the used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad." U.N. Doc. S/2001/946 (2001). The reaction of the international community to this resort to self-defence was largely supportive. The Security Council passed two resolutions prior to the U.S. military response declaring that the terrorist attacks threatened international peace and security, and expressly recognizing in this context the right of self-defence. S.C. Res. 1368 (2001); S.C. Res. 1373 (2001). After the attacks of 9/11 Americans asked, 'Why do they hate us so much?' The answer has been framed in terms of a range of clashes of emotions, particularly humiliation in the Middle East. Khaled Fattah & K. M. Fierke, "A Clash of Emotions: The Politics of Humiliation and Political Violence in the Middle East," *European Journal of International Relations*, 15(2009), pp. 67-93. Moreover, the unsuccessful plot to blow up airliners over the Atlantic Ocean in 2006 was aimed at disrupting the global air-transportation network.

⁵² Under S.C. Res. 11506 (2003), sanctions on Libya were formally revoked on the surrender of the two Libyan indictees for trial, and on the Libyan government's acceptance of responsibility for the Pan Am 103 bombing, its renunciation of terrorism and the payment of appropriate compensation to the victim's families.

⁵³ Terrorism is included in the Draft Code of Crimes being prepared by the International Law Commission. See draft articles on the Draft Code of Crimes against the Peace and Security of Mankind, Article 24. Terrorists groups such as Hezbollah and al Qaeda have cells in multiple countries, often operating without the active support of any government but still capable of committing attacks with global impact. See A. E. Evans and J.F. Murphy, *Legal Aspects of International Terrorism* (Lexington, Mass.: American Society of International Law, 1978); David Freestone, "Legal Responses to Terrorism," J. Lodge (ed.), *Terrorism: a Challenge to the State* (London: Martin Robertson, 1981), pp. 195-244; A. Sofaer, "Terrorism and the Law," *Foreign Affairs*, 64 (1986), p. 901; A. Cassese, "The International Community's 'Legal' Response to Terrorism," *International and Comparative Law Quarterly*, 38 (1989), p. 589..

轄範圍，統一交由國際刑事法院審理。

陸、結 論

1988 年 12 月 21 日，「洛克比 (Lockerbie) 空難案」⁵⁴發生在蘇格蘭洛克比機場上空，根據屬地主義 (Territorial Principle)，英國有管轄權；犯罪行為人是利比亞安全情報人員埃梅格伊 (Al-Abdel Basser al-Mergrahi) 與法伊瑪 (Al-Amin Khalifa Fahima)，根據屬人主義 (Nationality Principle)，利比亞有管轄權；空難事件受害者 270 人 (包括英國在內許多國家之國民)，根據屬人主義，受害者的國籍國也有管轄權；泛美航空公司 (Pan-Am.) 是在美國登記的公司，且被炸毀的泛美航空第 103 號班機 (Pan Am Flight 103) 登記的國籍國也是美國，根據航空器登記的國籍國，美國有管轄權。在刑事管轄權方面，因犯罪行為人已逃回利比亞，故利比亞亦有管轄權。該案不僅涉及管轄權的衝突問題，也涉及 1970 年《關於制止非法劫持航空器的海牙公約》與 1971 年《關於制止危害民用航空安全的非法行為的蒙特利爾公約》之引渡或起訴原則。

安理會與國際法院於「洛克比空難案」，涉及包含國際爭端之法律解決與政治解決，以及國際法院與安理會之權限劃分問題，以及國際恐怖主義之管轄權衝突、法律責任、國際刑事協助問題。關於「洛克比空難案」之法律責任歸屬，因犯罪行為人逃回利比亞，使該案不僅涉及管轄權的衝突問題，對國際犯罪者予以追訴及審判，端賴國際反恐怖主義犯罪的整個司法過程，故應將國際恐怖主義犯罪納入國際刑事法院管轄範圍，統一交由國際刑事法院審理。英美國家最終透過聯合國安理會，認定利

比亞政府涉案，而應承擔相關法律責任。

安理會及國際法院同時處理「洛克比空難案」，引起各國對於安理會與國際法院之管轄等職權之討論。「洛克比空難案」再次確認國際法院在「聯合國某些開支案」和「南非繼續留在納米比亞時其他國家的法律效果案」中所確立之「推定有效原則」，即在訴訟程序階段不審查聯合國有關決議之合法性，並推定其為合法。直至審理在訴訟案件實體階段，只有當一國主張援引安理會決議而另一國請求司法審查時，國際法院才對聯合國之決議合法性予以審查，始有權宣告安理會的決議是否有效，蓋國際法院和安理會之間不存在等級隸屬關係，而是必須相互合作，相互尊重各自之職責。安理會決議之拘束力源自於其必須符合安理會職權所規定之限制，因此國際法院一旦發現某一決議不符合安理會職權之限制，則此決議對於國家就不具有拘束力；即使國際法院宣布安理會之某決議案無效，但此一宣布並不具有普遍拘束力。「洛克比空難案」默認了司法審查權，惟尚未創設出一套嚴格之審查標準，既未明確地授予國際法院司法審查權，亦未達到認可國際法院位階高於聯合國其他機構之程度。

2009 年 8 月 20 號，英國蘇格蘭司法部門宣佈，釋放因「洛克比空難案」而正在英國服刑的利比亞特工埃梅格伊，蓋其已被確認患有末期前列腺癌，最多只有 3 個月生命，基於人道考量，蘇格蘭司法部門廣泛徵求各方意見後，決定讓其回到利比亞與家人團聚。雖然部分英國遇難者家屬支援蘇格蘭當局的決定，認為可以釋放已經病入膏肓的埃梅格伊，惟更多的美國遇難者家屬很難接受這個決定。2009 年 10 月 26 日，蘇格蘭警方宣布，將重新審查導

⁵⁴ The Aerial Incident at Lockerbie Cases (Libyan Arab Jamahiriya v. U.K.) [1992] ICJ Reports 14; [1998] ICJ Reports 9; (Libyan Arab Jamahiriya v. U.S.A.) (Provisional Measures) [1992] ICJ Reports 115; [1998] ICJ Reports 114. See M. Weller, "The Lockerbie Case: a Premature End to the New World Order?" *Revue Africaine de Droit International et Compare*, 4 (1992), p. 302; F. Beveridge, "The Lockerbie Affair," *International and Comparative Law Quarterly*, 47 (1992), p. 907; Sally J. Cummins & David P. Stewart (eds.), *Digest of United States Practice in International Law 2001* (Washington, D.C.: International Law Institute, 2002), pp. 98-99.

致 270 人死亡的「洛克比空難案」件調查過程中搜集的證據。蘇格蘭檢控方表示，唯一因此事件被判罪的埃梅格伊，並非單獨製造這宗爆炸案。由於埃梅格伊被釋，使得重新審查洛克比空難事件成為可能，希望新的調查能釐清空難事故真相。惟埃梅格伊獲釋一年後，卻仍然在利比亞自由健康地生活著，使各界人士質疑英國當初之決定。2010 年 8 月 24 日，英國外交部披露一封外交大臣致美國國會參議院外交委員會信函，承認釋放埃梅格伊是一個「錯誤」決定且「受到誤導」。

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