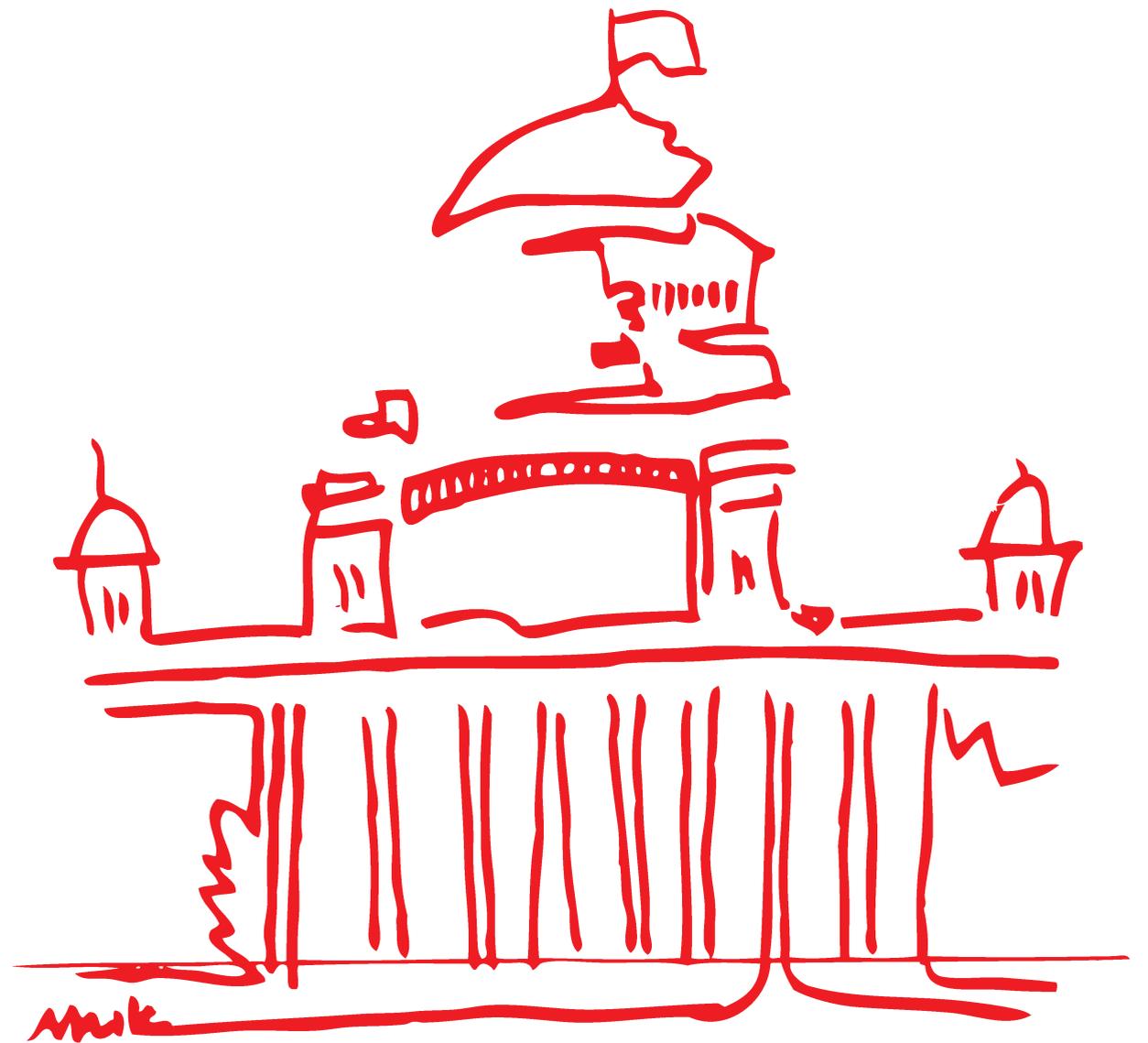


National Law School of India

# NLSIReview



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## EDITORIAL

An increasingly interconnected world order has created new challenges for the development of legal and regulatory regimes. The events of the past years – international terrorism, global recession, financial frauds and the entrenchment of globalisation, for example – have not only significantly changed our perception of global politics and economics, but have also asked new questions of law makers, policy makers and regulators and have created the need for new methodologies, justifications, responses and solutions. Last year the NLSIR made a new beginning in furthering our 20-year legacy of publishing high quality, contemporary and relevant legal writing. This year, we hope to build on this and address many questions that recent changes in the international and municipal legal, political and economic landscape have asked.

The two avenues of emerging legal scholarship that underlie this issue of the NLSIR are intricately connected to the challenges that the Indian legal system faces today. One set of articles examines aspects of recent Supreme Court jurisprudence in contentious areas, including fundamental rights adjudication. The second set of articles reflects the urgent need of the Indian legal system to address the concerns that growing internationalism has raised.

Justice Sinha sets the framework for the first limb of this enquiry with his article titled “Constitutional Challenges in the 21<sup>st</sup> Century” where he observes the new challenges the Indian legal system has had to face in current times, makes a case for judicial governance and argues that the role of the Supreme Court, in furthering the fundamental values of society, is vital in this context. In sharp contrast to Justice Sinha’s normative claim is Mrinal Satish and Aparna Chandra’s critique of the approach of the Supreme Court to terror-related adjudication in India. In their article, they carefully analyse Supreme Court jurisprudence and argue that unlike in most right-based adjudication, the apex court has adopted a minimalist approach to terror-related cases, thus not protecting the fundamental values that it is bound to. Arvind Datar provides a similarly sharp critique of the Supreme Court in his article on the use of concepts of privilege, police power and *res extra commercium* to restrict the fundamental right to trade by the Supreme Court. Through a historical and comparative analysis of these concepts, he demonstrates that these doctrines have been hitherto misinterpreted and misapplied by the Supreme Court.

Mihir Naniwadekar and Gautam Bhatia revisit crucial debates in Indian polity while examining the approach of the Supreme Court to other constitutional values. Mihir Naniwadekar argues in favour of a new interpretation to article 39(b) of the Constitution in the context of the debate surrounding the relationship between Directive Principles and Fundamental Rights. He submits that the correct interpretation of Article 39(b) pertains to the stage of distribution of assets, not

the stage of collection of assets. Gautam Bhatia looks at the question of free speech and expression in the Supreme Court in the context of academic analysis on the nature and role of free speech in a constitutional democracy. He demonstrates the dearth of prevalent analysis in this area and advocates the development of Article 19(1)(a) jurisprudence in India.

Deepaloke Chaterjee writes on the binding value of presidential references to the Supreme Court under the Constitution and investigates Supreme Court jurisprudence in this field to conclude that while these references are significant and serve an important function, they should not have any precedential value.

This issue of the NLSIR also addresses the response of the Indian legal and regulatory system to growing internationalisation and interactions with foreign and global regimes. Geoffrey Loomer uses the Vodafone Essar tax dispute to analyse Indian law on the payment of capital gains tax as applicable to MNEs, in the context of principles of international taxation and describes the consequences of deviating from them. In an analysis of the Lockerbie trials, Hans Koechler discusses the challenges faced by the international criminal justice system in responding to questions of jurisdiction, state responsibility and personal criminal liability. These issues assume more importance when examined in the context of international terrorism. Umakanth Varottil reflects on Indian efforts to strengthen corporate governance norms in the past decade through an adoption of systems followed by the U.K and the U.S. Based on recent events in national and international finance, he argues that these systems have not been effective and suggests a model of corporate governance that is more suited to the Indian climate. Also on the theme of corporate accountability is Ananthi Bharadwaj's article on corporate criminal liability in the U.K. She analyses the recent Corporate Manslaughter and Corporate Homicide Act, 2007 to determine the impact it will have on the prosecution and deterrence of corporate crime.

We are indebted to Mr. Govindraj Hegde, Faculty Advisor, Student Advocate Committee, for his constant motivation, inspiration and support to furthering the specific aims and goals of this journal. The mandate of the NLSIR has always been to encourage legal writing and its readership, to provide a space for scholarly engagement on vital issues of law and policy, to facilitate academic debate on national and international legal practice, and to explore issues of contemporary relevance and legal importance. It has been our endeavour in this issue as well to further these goals and we hope that, in doing so, we have contributed in some way to the development of new thoughts, ideas, criticisms and, of course, solutions.

**Sanhita Ambast**

On behalf of

*The National Law School of India Review*

National Law School of India University, Bangalore.

**April, 2009.**

it is possible for the State to affect detrimentally the trade in such substances by the use of mere executive power.<sup>58</sup> *Second*, it is also possible for the State to impose unreasonable restrictions on those employed in distilleries or in lottery agencies since they have no right to be there.

## VI. CONCLUDING REMARKS

From the above discussion, the following principles emerge:

1. The theory of privilege is of English origin and cannot be linked with the concept of police power.
2. The privilege theory has no place in the Constitution of a Republic, even if it follows the Westminster model. Indeed, the privilege theory is wholly unnecessary in interpreting any part of our Constitution.
3. The police power has been referred to in the United States decisions to justify State regulation of business and other activities. In our country, the power to regulate business is not found on any theory of police power. The Central and State Legislatures have inherent right to pass laws that can regulate even the sphere of commercial or other activities. These regulations would however have to satisfy the test of legislative competence and non-violation of Part III, or other Constitutional provisions.
4. The right to trade in liquor is not the consequence of any parting of privilege. It is an activity that is permitted or regulated by the respective prohibition laws. If there is no concept of privilege in the Constitution, there is no question of parting with it.
5. Once trade in liquor is permitted, it is as much a business as any other commercial activity. Citizens who have obtained the right to trade in liquor are entitled to the protection of Articles 14, 19, and 301 to 304.
6. *Res extra commercium* does not have the remotest connection to trade in liquor. It is a maxim used in a totally different context.

<sup>58</sup> *Khoday Distilleries v. State of Karnataka*, (1995) 1 S. C. C. 574 [S. C.].

## THE LOCKERBIE TRIAL AND THE RULE OF LAW

Hans Koechler\*

*The Lockerbie trial weaves together some of the most interesting notions in municipal criminal law with public international law concepts of state responsibility and personal criminal liability. Employing it as a case study, Professor Koechler analyses the criminal justice system from the perspective of international politics. He outlines the major problems plaguing such trials by highlighting the encumbrances caused by overarching political concerns. Professor Koechler, thus, provides a compelling analysis of the Lockerbie trial effectively bringing forth the controversial issues, raised thereby, which are going to beset the criminal justice paradigm for a considerable time.*

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### I. INTRODUCTION

At the time of this writing (November, 2008) – almost twenty years after the mid-air explosion of Pan Am flight 103 over Lockerbie, Scotland – the mystery of what caused the catastrophic disintegration of the American jumbo jet on that fateful night in December, 1988 is still not resolved and the hearings of the new appeal of the only person convicted in the case are further delayed into 2009<sup>1</sup> – amidst revelations that the Appellant is terminally ill with cancer in an advanced stage.<sup>2</sup>

The trial of the two Libyan suspects at a special Scottish Court sitting in the Netherlands (which lasted from May, 2000 until January, 2001) has become an exemplary case for the evaluation of the problems and prospects of criminal justice in the framework of international politics,<sup>3</sup> especially when the issue of personal criminal responsibility is related to questions of terrorism, including

\* Professor of Philosophy at the University of Innsbruck, Austria President of the International Progress Organization International Observer, appointed by the United Nations, at the Scottish Court in the Netherlands (2000-2002)

<sup>1</sup> So far, only procedural hearings have been held (altogether nine public hearings by 28 November, 2008). As of November, 2008, the actual appeal hearings were expected to take place in spring and summer 2009.

<sup>2</sup> *Bomber appeal to be fast-tracked*. HERALD (Glasgow, U. K.), Nov. 28, 2008.

<sup>3</sup> See, the author's analysis of the Lockerbie trial in regard to the evolving concept of international criminal justice in HANS KOECHLER, GLOBAL JUSTICE OR GLOBAL REVENGE? INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS 110 (Manak Publishers 2005).

state terrorism. The complexity of the case lies in the juxtaposition of criminal proceedings (at the domestic level of Scotland) and a political controversy (at the intergovernmental level): whereas the Court dealt with the question of personal criminal responsibility of initially two Libyan suspects,<sup>4</sup> the criminal proceedings were constantly being interfered with by a dispute between three states (including the suspects' state of origin) over issues of jurisdiction as well as state responsibility (in terms of liability for compensation for the loss of life and damages caused by the incident).<sup>5</sup>

The author has followed the political dispute since its beginning and has – through the International Progress Organization (I.P.O.), an NGO in consultative status with the United Nations – made repeated proposals for a peaceful settlement, including the resolution of the question of personal criminal responsibility of the accused Libyan nationals. When, approximately four years after the incident, the Lockerbie tragedy was brought before the United Nations Security Council as an issue of international terrorism, particularly state terrorism, the I.P.O. had formed a committee of experts with the aim of analysing the international legal issues and the political controversy that unfolded between the United States, the United Kingdom and Libya over how to investigate the incident and bring to justice those responsible. At that time, we were of the opinion that the legal-political dispute should have been resolved on the basis of the “Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation”, the so-called Montreal Convention of 1971.<sup>6</sup> Concerning the judicial aspect, we had further suggested that the parties involved in the dispute “should consider submitting the question of personal criminal responsibility to an *ad hoc* international criminal tribunal”.<sup>7</sup> After a session in New York City on December

<sup>4</sup> One of the suspects was acquitted in the original trial (January 31, 2001). Since that date, the criminal proceedings (i.e. appeal proceedings) relate to only one Libyan national.

<sup>5</sup> On the issue of state responsibility, *see* letter from the Chargé d'affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations to the President of the Security Council, United Nations, (Aug. 15, 2003) (Doc. S/2003/818) and ¶ 3 of the Statement by Dr. Hans Koechler, international observer of the International Progress Organization, nominated by the Secretary-General of the United Nations, at the Lockerbie trial in the Netherlands (2000-2002), on the agreement between the United States, the United Kingdom and the Libyan Jamahiriya on the remaining issues relating to the fulfilment of all Security Council resolutions resulting from the bombing of Pan Am 103 over Lockerbie at Reykjavik, Aug. 23, 2003, available at <http://i-p-o.org/koechler-lockerbie-statement-aug2003.htm>.

<sup>6</sup> *Geneva Declaration of Legal Experts on UN Sanctions against Libya (1992)*, in THE LOCKERBIE TRIAL. DOCUMENTS RELATED TO THE I.P.O. OBSERVER MISSION – STUDIES IN INTERNATIONAL RELATIONS, XXVII 109 (Hans Koechler and Jason Subler eds., International Progress Organization 2002). *See also* Memorandum from the President of the International Progress Organization addressed to the President of the Security Council of the United Nations Doc. A746/886, S/23641 (Feb. 25, 1992).

<sup>7</sup> STUDIES IN INTERNATIONAL RELATIONS, XXVII, *supra* note 6, at 110.

1, 1994 – in the course of which we held consultations with the President of the Security Council – we further suggested, *inter alia*, that the Security Council submit the question of personal criminal responsibility of the accused Libyan nationals “to a criminal tribunal of Scottish Judges meeting at the seat of the International Court of Justice”.<sup>8</sup> At that time, in December, 1994, we also had called upon the U.S. Congress and the U.K. Parliament to hold public hearings into the Lockerbie incident and the author subsequently held a series of consultations with members of the United States Congress in Washington, D.C.

When eventually – four years later – the Security Council had welcomed the initiative for the trial of the two Libyan suspects before a Scottish Court sitting in the Netherlands,<sup>9</sup> the author reiterated the Committee's view that “a criminal tribunal on this case should either be international in its composition or should operate in an international framework such as that of the International Court of Justice”.<sup>10</sup> We also had stated that “[t]here is no reason to doubt the report of the independent experts appointed by the Secretary-General of the United Nations on the Scottish judicial system. The real issue, however, is not whether Scottish law is applied or not, but whether a tribunal consisting exclusively of Scottish judges can meet the requirement of impartiality”<sup>11</sup> – because of the political nature of the dispute which was related to a case of criminal justice, with the United Kingdom, the country of jurisdiction (via the Scottish judicial system), as a party.

The actual conduct of the trial and appeal proceedings in the rather unique extraterritorial framework on the grounds of a former NATO air force base in the Netherlands has made obvious that the concerns the author had raised in the years when these arrangements were proposed and negotiated were well justified.<sup>12</sup> One fundamental aspect must not be overlooked when it comes to these special arrangements: contrary to the widespread perception in the international public, the High Court of Justiciary sitting at Kamp van Zeist was essentially a *domestic* court, created on the basis of a decree of the Queen of the United Kingdom<sup>13</sup> that in turn was initiated by a Chapter VII resolution of the

<sup>8</sup> *New York Declaration of Legal Experts on U. N. Sanctions against Libya*, in STUDIES IN INTERNATIONAL RELATIONS, XXVII, *supra* note 6, at 112.

<sup>9</sup> S. C. Res. 1192, U. N. Doc. S/RES/1192 (Aug. 27, 1998).

<sup>10</sup> Statement by Hans Koechler on behalf of the Committee of Legal Experts on U. N. sanctions against Libya (Sept. 3, 1998) in STUDIES IN INTERNATIONAL RELATIONS, XXVII, *supra* note 6, at 116.

<sup>11</sup> STUDIES IN INTERNATIONAL RELATIONS, XXVII, *supra* note 6, at 110.

<sup>12</sup> For a documentation of the commentaries and analyses, *see* STUDIES IN INTERNATIONAL RELATIONS, XXVII, *supra* note 6.

<sup>13</sup> Letter from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and of the United States of America to the Secretary-General (Aug. 24, 1998) (Doc. S/1998/795).

Security Council (1192 [1998]) and implemented through an intergovernmental agreement between the United Kingdom and the Netherlands.<sup>14</sup>

I shall not repeat here the remarks on the trial and appeal which I have made in two comprehensive reports that were submitted to the United Nations Organization and forwarded, in turn, to the Scottish Court.<sup>15</sup> What I have learned in the course of the two years at Kamp van Zeist (2000-2002) was that, in spite of the “geographical isolation”, even conclave-like situation, in which these proceedings were conducted, it is almost a “mission impossible” for any judiciary whether from Scotland or elsewhere to meet basic standards of fairness and impartiality in the handling of a criminal case which is part of a dispute in the domain of international power politics, and even more so when this involves questions of state responsibility for acts of terrorism.

My conclusion – after the announcement of the trial verdict in January 2001 and again after the appeal decision in March, 2002<sup>16</sup> – was that a miscarriage of justice may have occurred,<sup>17</sup> i.e. that the Libyan national who is now serving his sentence in a Scottish prison may not be guilty as charged. In the meantime, more than six years after my first observation in this regard, the Scottish Criminal Cases Review Commission (SCCRC) has come to the same conclusion (concerning a possible miscarriage of justice).<sup>18</sup>

With the decision of the SCCRC, in June, 2007, to refer Mr. Al-Megrahi’s case back to the appeal court, the case has entered a new and politically highly complex and sensitive phase. The critical nature of the new judicial review process has become more than obvious in the issuance of a so-called Public Interest Immunity (PII) certificate by the Foreign Secretary of the United Kingdom, which is aimed at withholding certain evidence (namely secret documents originating from a foreign government) from the Defence and thus from public view. In a

<sup>14</sup> Agreement Concerning a Scottish Trial in the Netherlands Including Annexes and Exchange of Notes, U. K. - Neth. Sept. 18, 1998, Foreign & Commonwealth Office, T. S. No. 43.

<sup>15</sup> See, Report on and evaluation of the *Lockerbie Trial* conducted by the special Scottish Court in the Netherlands, Santiago de Chile, February 3, 2001 in *STUDIES IN INTERNATIONAL RELATIONS*, XXVII, *supra* note 6 at 15 and *Report on the appeal proceedings at the Scottish Court in the Netherlands, Vienna, 26 March 2002*, in *STUDIES IN INTERNATIONAL RELATIONS*, XXVII, *supra* note 6, at 25. For a complete documentation of the author’s international observer mission at the Scottish Court in the Netherlands and the worldwide debates about international criminal justice initiated by the two reports, see the dedicated web site of the International Progress Organization – [http://i-p-o.org/lockerbie\\_observer\\_mission.htm](http://i-p-o.org/lockerbie_observer_mission.htm).

<sup>16</sup> For a comprehensive documentation, including the author’s reports, see, JOHN P. GRANT, *THE LOCKERBIE TRIAL: A DOCUMENTARY HISTORY* (Oceana Publications 2004).

<sup>17</sup> *UN monitor decries Lockerbie judgement*, BBC NEWS, Mar. 14, 2002.

<sup>18</sup> Press Release, Scottish Criminal Cases Review Commission, Abdelbaset Ali Mohamed Al Megrahi, (June 28, 2007), *available at* <http://www.sccrc.org.uk/ViewFile.aspx?id=293>.

jurisdiction where the European Human Rights Convention’s rules on fair trial are scrupulously upheld, the staying of proceedings because of non-disclosure of evidence would be a real prospect.<sup>19</sup>

This dilemma makes it all too obvious that the structural problem besetting the proceedings from the very beginning – namely that this case of criminal justice is situated in the space of international politics, not law – has not been resolved in any way (in spite of the SCCRC’s decision on the referral of the case). Since the arguments advanced by the British Foreign Secretary in his PII certificate<sup>20</sup> have not been questioned by the judges – they appear resigned to accommodate his request by the appointment of a “Special Counsel”<sup>21</sup> – the Defence will effectively be denied access to important material that has, as we now know, been in the possession of the Prosecution since before the beginning of the trial in the Netherlands. How can there be equality of arms, one has to ask, if vital evidence is only made available to *one* party?<sup>22</sup> An adversarial system of criminal justice, in particular, would be an absurdity if a court has to operate on the basis of a kind of “information privilege” granted to the Prosecution over the Defence. Such a “*reductio ad absurdum*” must not be allowed to happen whatever the case may be, and under whatever circumstances. There should be no illusions about it: if a fair trial cannot be ensured, *no trial* can be conducted – because (appeal) proceedings on the basis of evidence that is withheld from one side do not belong in a court of law, but would be an exercise of authoritarian (state) power – and would thus make a mockery of the separation of powers, an indispensable principle of the rule of law.<sup>23</sup>

<sup>19</sup> See Press Release, International Progress Organization, Statement by Dr Hans Koechler, International Observer, appointed by the United Nations, at the Scottish Court in the Netherlands (Lockerbie Trial), on the withholding of supposedly secret evidence from the Defence by order of the Government of the United Kingdom, (Feb. 25, 2008), *available at* <http://i-p-o.org/Lockerbie-statement-koechler-25Feb08.htm>; Letter from Hans Koechler to the Foreign Secretary of the United Kingdom, David Miliband (July 21, 2008), *available at* [http://i-p-o.org/ipo-nr-21July2008-lockerbie\\_appeal.htm](http://i-p-o.org/ipo-nr-21July2008-lockerbie_appeal.htm).

<sup>20</sup> In a reply, dated August 27, 2008, to the author’s letter to Foreign Secretary David Miliband, the Foreign and Commonwealth Office wrote: “It is the Foreign Secretary’s assessment that the release of this material would do real and lasting damage to the U. K.’s relations with other states and the U. K.’s national security”.

<sup>21</sup> The implications of this decision are explained below in more detail.

<sup>22</sup> The *Greshornish House Accord* of September 27, 2008, co-sponsored by the author, has put special emphasis on this question in the context of Scotland’s independent judicial system: “Whilst Scotland retains an adversarial system as opposed to an inquisitorial system, the existence of a real equality of arms is crucial to the delivery of justice.” (*The Lockerbie Case – Quid nunc, Scotia? Greshornish House Accord* (Sept. 16, 2008), *available at* [http://i-p-o.org/Greshornish\\_House\\_Accord-16Sept08.htm](http://i-p-o.org/Greshornish_House_Accord-16Sept08.htm).)

<sup>23</sup> It is to be noted that the principle of the separation of powers does not have the same weight in the British system as it has on the continent.

As I had explained in my letter to the British Foreign Secretary (July 21, 2008),<sup>24</sup> there is indeed a recent precedent of such a scenario. On June 13, 2008, Trial Chamber I of the International Criminal Court in The Hague decided to stay the proceedings in the case of the *Prosecutor v. Thomas Lubanga Dyilo* because of the non-disclosure of exculpatory materials.<sup>25</sup> The judges ruled as follows: “The Chamber has unhesitatingly concluded that the right to a fair trial – which is without doubt a fundamental right – includes an entitlement to disclosure of exculpatory material ...”<sup>26</sup> They further referred to an earlier ruling by the International Criminal Tribunal for the former Yugoslavia, according to which “the public interest [...] is excluded where its application would deny to the accused the opportunity to establish his or her innocence”.<sup>27</sup>

Furthermore, it should be made clear that the appointment of a “Special Counsel” by the Court – who will be provided with a confidential summary of the evidence in question – will not in any way solve the problem. I am rather surprised that the High Court ruled on August 19, 2008 that such Counsel should be appointed at all – a decision that has not been disclosed to the public when it was issued but only was revealed through the author’s action several weeks later.<sup>28</sup> On the basis of what criteria is such Special Counsel chosen? Who will decide what information will actually be disclosed in the summary and what not? Is it the intelligence services of the UK and an unnamed “foreign country” or the Lord Advocate (Prosecutor) or the Court? In this almost Kafkaesque situation, the accused/appellant will never be allowed to know in full what specific additional information has been in the possession of the Prosecution all along; he, thus, is not only denied the basic human right (enshrined in Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms) to defend himself through legal assistance of his own choosing,<sup>29</sup> but will be deliberately kept in the dark about possible exculpatory material.

<sup>24</sup> The full text of the letter is reproduced at [http://i-p-o.org/ipo-nr-21July2008-lockerbie\\_appeal.htm](http://i-p-o.org/ipo-nr-21July2008-lockerbie_appeal.htm).

<sup>25</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01704-01/06 (Int’l. Crim. Ct. 2008).

<sup>26</sup> *Id.* at ¶ 77.

<sup>27</sup> *Prosecutor v. Krstic*, IT-98-33-A, Judgment, April 19, 2004, Par. 180 (Int’l Criminal Tribunal for the Former Yugoslavia).

<sup>28</sup> Interview by Reevel Alderson of BBC News with the author, in Glasgow (Sept. 17, 2008). See also, Press Release, International Progress Organisation, Law and Politics in the Lockerbie Case, (Sept. 22, 2008), Doc. No. 22 September 2008P/RE/20287c-is.

<sup>29</sup> For details of the Scottish judges’ ruling to appoint “Special Counsel” for Mr. Al-Megrahi see the BBC report based on an interview with the author: Reevel Alderson, *Appeal court plans Lockerbie Move*, BBC NEWS, (Sept. 17, 2008), available at [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/south\\_of\\_scotland/7622223.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/south_of_scotland/7622223.stm). See also, the letter from the Foreign and Commonwealth Office to a member of the British House of Commons (Sept. 4, 2008) (on file with author), which states, *inter*

This means that, in the phase of the second appeal – since the referral of Mr. Al-Megrahi’s case by the SCCRC in June, 2007 – the basic predicament that has characterized the trial will be even more acute, and a solution appears to be more evasive than ever: serious doubts persist about the fairness and, thus, compatibility of the Lockerbie proceedings with basic human rights standards.

Scotland’s obligations under the European Human Rights Convention would have made it imperative nonetheless that the Scottish judges order *full* disclosure of *all* evidence that has been in the possession of the Prosecution and thus reject the British Foreign Secretary’s PII certificate, a measure which, according to Scots law, would have been at the discretion of the judges. In general, fairness and impartiality do not allow any other resolution of such an issue of disclosure. What is at stake here is the integrity of the system of criminal justice. The requirements of international politics (i.e. British national interests) must not stand in the way of due process. Regrettably, the judges have decided in favour of political expediency.

Up to a certain extent, political considerations may also have influenced the work of the Scottish Criminal Cases Review Commission. The specific formulation of the decision of the SCCRC, referred to above, reveals in itself the very problem of impartiality in the operation of Scotland’s supreme judicial review body. The SCCRC’s “Press Release” of June 28, 2007, announcing the decision about the referral of Mr. Al-Megrahi’s case back to the High Court of Justiciary, does not simply give the *reasons* for such referral, but also contains a strange kind of “preventive exoneration” of Mr. Al-Megrahi’s original defence team (who represented him during the Trial and First Appeal in the Netherlands and in a manner that was less than adequate) and of Scottish investigators (in connection, *inter alia*, with accusations of manipulation of key forensic evidence in the period preceding the trial). In spite of Mr. Al-Megrahi’s repeated complaints about inadequate representation by his own Defence team,<sup>30</sup> the

*alia*: “...the court ruled on 19 August that special counsel should be appointed to assist the court and safeguard Mr Megrahi’s interests in relation to this issue. Once appointed, the special counsel will be provided with a confidential summary of the submissions made by the Advocate General at the last hearing. The U. K. government supports this ruling in the interests of ensuring the trial is fair.”

<sup>30</sup> In several conversations with the author in the period 2001/2002 (who, in his capacity as U. N. - appointed International Observer, had visited him at Her Majesty’s Prison Zeist in the Netherlands) and in a letter from Barlinnie Prison in Glasgow, received on 6 December 2002 and addressed to the author, Mr. Al-Megrahi bitterly complained about the lack of adequate representation by his Defence team. In the letter, he expressed his bewilderment at “the failure of my lawyers in handling some important issues and their disregard of my remarks during the trial and their not giving the correct advice...” In the prison conversations in the Netherlands he had confided to the author that his Defence lawyers had, repeatedly and against his express will, signed “Minutes of Agreement” with the Prosecution.

Commission bluntly stated that it “did not consider the allegations to be well-founded”.<sup>31</sup> The SCCRC apparently wanted to have these questions as to the fairness and impartiality of Mr. Al-Megrahi’s trial and (First) Appeal excluded from a new appeal. Another remarkable feature of the SCCRC’s News Release was that it kept one of the six grounds for the referral secret.<sup>32</sup>

A further dispute between the Crown Office (Prosecution) and Defence over the scope of the new appeal underlines the serious concerns about fairness and impartiality which the author has repeatedly raised since the beginning of the Lockerbie trial:

- (a) The Prosecution wanted to restrict the “reasons” of appeal to the six reasons enumerated in the referral decision of the SCCRC. Can an appeal be fair – or at all meaningful – if the Defence is prevented from developing the argument on the basis of additional reasons (not mentioned by the SCCRC) why Mr. Al-Megrahi may have suffered a miscarriage of justice?<sup>33</sup>
- (b) The more general question is what specific evidence will be admitted in the new appeal hearings. Will the Defence be in a position to use material that has become available in the time that has passed since the original verdict (in January, 2001) – contrary to the expressed position of the Prosecution? As matters stand now, the government of the United Kingdom will effectively be in a position to interfere into the proceedings by determining that certain material, due to its “sensitive” nature in terms of national security, cannot be disclosed to the Appellant.<sup>34</sup>

<sup>31</sup> Press Release, Scottish Criminal Cases Review Commission, *supra* note 18, at 7. In spite of all these well documented complaints, the SCCRC found it appropriate to issue a “clean bill of health” for the defence team. The question which has to be asked is why the S. C. C. R. C. considered it necessary to issue such an exoneration when it would have been sufficient for the Commission to give the actual reasons for the referral. On the lack of adequate defence, *see also* Hans Koechler, *Report on the appeal proceedings at the Scottish Court in the Netherlands (Lockerbie Court) in the case of Abdelbaset Ali Mohamed Al Megrahi v. H. M. Advocate*, (Mar. 26, 2002) at ¶ 10-12, available at [http://i-p-o.org/koechler-lockerbie-appeal\\_report.htm](http://i-p-o.org/koechler-lockerbie-appeal_report.htm).

<sup>32</sup> *See* Press Release, International Progress Organisation, Statement by Dr Hans Koechler, international observer appointed by the United Nations to the Lockerbie Trial in the Netherlands (2000-2002), on the referral of the case of Abdelbaset Ali Mohamed Al Megrahi by the Scottish Criminal Cases Review Commission to the High Court of Justiciary (June 29, 2007) (Doc. No. 29 June 2007/P/HK/20429).

<sup>33</sup> In the meantime, this issue has been resolved by the appeal judges in favour of the Defence’s position: “The court’s conclusion is ... that the appellant is entitled to have his stated grounds of appeal decided by the court on their respective merits,” (*Abdelbaset Ali Mohamed Al Megrahi against Her Majesty’s Advocate, Scope of the Appeal, Summary*, October 15, 2008.)

<sup>34</sup> This is essentially what the British Foreign Secretary claimed in his Public Interest Immunity (PII) certificate issued in February 2008. *See*, Press Release, International Progress Organization, *supra* note 19.

How the problem of the “Special Counsel” (with the issue of partial disclosure of evidence to a person not chosen by the Appellant) is finally handled by the Court<sup>35</sup> will further reveal how far a Scottish Court is prepared to go in compromising the fairness of an appeal in favour of accommodating requirements set by the executive branch. Such a case of the state authority demanding non-disclosure of evidence is indeed without precedent in Scotland. (There have only been cases in England in connection with terror-related prosecutions.) Since the United Kingdom has ratified the *Convention for the Protection of Human Rights and Fundamental Freedoms* (which also applies to the Scottish jurisdiction), the meaning of the “rule of law” and the primacy of “human rights” in the European legal space will be under special scrutiny.

## II. CONCLUSIONS IN TERMS OF THE CRIMINAL JUSTICE SYSTEM

At this point in time (towards the end of 2008), one can only speculate about the final outcome of the appeal process triggered by last year’s decision of the Scottish Criminal Cases Review Commission; it is impossible to say, at this stage, how the political scenario will eventually affect the legal domain; nonetheless, some conclusions – in terms of criminal procedure – can be drawn from the handling of the Lockerbie case by the Scottish judiciary so far.

What follows from my observations is a rather gloomy scenario for the future of international criminal justice – in particular as regards the prospects of the ICC (as the only permanent institution in that field) and the doctrine of universal jurisdiction (which goes beyond the ICC’s complementary jurisdiction). The experience with the Lockerbie review process during the last few years has, to a considerable extent, confirmed the doubts about the sustainability of the project of international criminal justice which I had raised in my book “Global Justice or Global Revenge?” (2003) – especially as regards the highly politicized environment in which proceedings have to be conducted.<sup>36</sup>

Fairness of a trial requires independence (a) in the *conduct* of the proceedings (which have to be free from political interference, whether domestic or

<sup>35</sup> At the time of this writing (November, 2008), the issue is still not resolved. At a procedural hearing on November 28, 2008 in Edinburgh, the Court of Criminal Appeal again deferred a decision on the details of the appointment of a security-vetted “special counsel” to a later date.

<sup>36</sup> On the question of independence and integrity of the judicial process in an international political context, *see*, R. K. Raghavan, *Rendering Criminal Justice Globally* 21(05) *FRONTLINE* (2004) – *c.f.* Siddharth Varadarajan, *When Power Subverts the Law*, *THE HINDU*, Jan. 10, 2006.

international) and (b) of the *mind* on the part of all protagonists (first and foremost, the judges). Neither the first nor the second requirement was met in the Lockerbie trial and appeal in the Netherlands – neither was independence in the above sense ensured in the functioning of the SCCRC (in the years after the first appeal decision of 2002) nor will it be ensured in an eventual second appeal.

The lack of judicial independence has become painfully obvious in two basic respects:

- (1) During the proceedings in the Netherlands, vital evidence could not be made available because, for its provision, the Court had to depend on a reluctant executive branch, including foreign governments. Since the “Scottish Court in the Netherlands” (in spite of its extraterritorial setup and a Chapter VII resolution of the Security Council having triggered the process towards its creation) was essentially a domestic court, those governments were – and (as regards the forthcoming second appeal in Scotland) still are – under no legal obligation to produce certain material required as evidence in the course of the trial. (Security Council resolution 1198 [1998] does not constitute an obligation on the part of governments to co-operate with the Court on such matters.)
- (2) (a) The judges produced an inconsistent verdict based on flawed arguments – something which cannot simply be explained by their lack of analytical skills, but is most likely to be attributed to the political scenario in which the trial was situated.<sup>37</sup> (b) The Prosecution appeared to depend, to a considerable extent, on two American FBI officers who were present in most sessions and were seen frequently interacting with members of the prosecution team.<sup>38</sup> (c) The Defence, on its part, repeatedly signed “Minutes of Agreement” with the Prosecution against the express will of the first accused Mr. Al-Megrahi, the only convicted Libyan national.<sup>39</sup>

<sup>37</sup> For details, see, STUDIES IN INTERNATIONAL RELATIONS, XXVII, *supra* note 15.

<sup>38</sup> See, Article 4 of the above report:

The two state prosecutors from the U. S. Department of Justice were seated next to the prosecution team. They were not listed in any of the official information documents about the Court’s officers produced by the Scottish Court Service, yet they were seen talking to the prosecutors while the Court was in session, checking notes and passing on documents. For an independent observer watching this from the visitors’ gallery, this created the impression of ‘supervisors’ handling vital matters of the prosecution strategy and deciding, in certain cases, which documents (evidence) were to be released in open court or what parts of information contained in a certain document were to be withheld (deleted).

<sup>39</sup> See, Mr. Al-Megrahi’s letter, *supra* note 30 and Hans Koechler, *supra* note 31, at Article 25.

Altogether, the actions of the Prosecution and Defence often appeared co-ordinated, somehow following an external (non-judicial) strategy,<sup>40</sup> and created the impression of a scripted procedure (whereby the “script” was followed at least to a certain extent) and of a *negotiated outcome*. For an independent observer, from outside the Scottish judicial establishment, there was simply no other way to explain the strange kind of “Solomonic judgment” which three Scottish law lords had unanimously reached at the end of the trial and five other law lords had confirmed by unanimously rejecting the (First) Appeal; in the author’s evaluation, this judgment was more the child of political (i.e. diplomatic) convenience than of sound legal reasoning. How could one otherwise have explained that the first suspect was found “guilty” while the second suspect was found “not guilty”<sup>41</sup> – both on the basis of an indictment the main argument of which was a rather complicated explanation, almost exclusively based on inferences, how the two Libyan suspects had acted together to ingest a bomb, hidden in a brown Samsonite suitcase (that was supposed to travel as unaccompanied luggage to Frankfurt and from there on to Heathrow), at Luqa airport in Malta?

In this unique case of hybrid domestic-international statutes and arrangements, the Scottish judiciary could simply not evade the “structural predicament” that resulted from external influences at different levels and of different nature. Although, since the Act of Union of 1707, Scotland has had its own judicial system within the United Kingdom of Great Britain and Northern Ireland, the Lockerbie court and the officials dealing with the judicial review have had to operate under conditions which the government of the United Kingdom, partly in tandem with foreign governments such as that of the United States, has determined to such an extent that the separation of powers, a fundamental requirement of the rule of law, was put in jeopardy:

- (a) The Lockerbie court was set up as special court by Royal Decree (*High Court of Justiciary [Proceedings in the Netherlands] Order 1998*) the rationale of which was derived from the binding nature, acknowledged by the United

<sup>40</sup> See, Article 14 of the author’s trial report of February 3, 2001 “Seen from the final outcome, a certain coordination of the strategies of the prosecution, of the defence, and of the judges’ considerations during the later period of the trial is not totally unlikely.”

<sup>41</sup> The judgment for Mr. Fhimah, the second accused, was not “not proven”, as had been erroneously stated on the web site of the British Foreign Office until this information was corrected at the author’s initiative. *C.f.* Press Release, International Progress Organisation, Lockerbie case: British Foreign Office corrects information on its Libya web site and affirms the Scottish Court’s right to order disclosure of ‘sensitive’ material (Sept. 1, 2008), available at <http://i-p-o.org/IPO-nr-Lockerbie-FCO-01Sept08.htm>.

Kingdom, of a Chapter VII resolution of the Security Council, the supreme executive – and definitely not the judicial – organ of the United Nations Organization.<sup>42</sup>

- (b) Certain evidence had to be procured through the government of the United Kingdom, including requests that had to be addressed to foreign governments by way of the British Foreign Office. Because of the lack of co-operation of certain foreign governments, substantial evidence could never be made available in court.
- (c) More recently, the British Foreign Secretary, as explained above in more detail, has issued a so-called “Public Interest Immunity certificate” which orders the non-disclosure of certain material (from a foreign government) to the Defence.

It is obvious that especially the latter measure makes a fair trial (i.e. new appeal) impossible. As we have stated earlier, the appointment of a security-vetted “Special Counsel” to represent Mr. Al-Megrahi in regard to the “secret” documents covered by the PII certificate will not alleviate the situation in any way, but will make the eventual new appeal proceedings even more appear like measures that are part of a political process, not a court of law. Such “extraordinary” measures indeed resemble an intelligence operation that serves the political interests of the state(s) involved in it, and are incompatible with the independence of the judiciary and the fairness of judicial proceedings as a supreme public interest.<sup>43</sup>

### III. CONCLUSIONS IN TERMS OF LAW AND (INTERNATIONAL) POLITICS

The Lockerbie case has exposed the fundamental, almost insurmountable, difficulties faced by any system of criminal justice when administered in a context of international politics:

- The principle of the separation of powers, indispensable for the legitimacy of judicial proceedings and for the rule of law in general, cannot be upheld if a state’s foreign policy interests are directly affected not only by the

<sup>42</sup> For details, see, HANS KOEHLER, *supra* note 3, at 110.

<sup>43</sup> See also, Press Release, International Progress Organisation, Lockerbie trial: an intelligence operation? BBC interview of Dr. Hans Koechler – New revelation about financial offer to a key witness from Switzerland, (Oct. 5, 2007), available at <http://i-p-o.org/IPO-nr-Lockerbie-5Oct07.htm>.

outcome, but by the very conduct of a particular trial (criminal prosecution) within that state’s jurisdiction, something which almost unavoidably implies that the respective proceedings will be prone to interference by intelligence services, whether domestic or foreign.

- If criminal justice in a particular case (such as that of the Libyan Lockerbie suspects) can only be practiced by the protagonists’ following a political script and, ultimately, the judges’ committing a kind of “judicial” *sacrificium intellectus*, compromising their reputation and independence on the altar of “national interests” that are never clearly specified (and carefully hidden from the public anyway), such practice of the law will be intrinsically *flawed* and ultimately *counterproductive* in terms of the fundamental goal of international criminal justice, namely the promotion of the *international rule of law* and, through it, *peace* among nations.<sup>44</sup> As stated earlier, such practice does equally not bode well for the ambitious contemporary project of *universal jurisdiction* or the only permanent institution, so far, for the administration of criminal justice at the transnational level, the ICC.

The final chapter of the Lockerbie trial is not yet written. What can be said at this stage, however, is that a hybrid arrangement for an extra-territorial *domestic* court – such as the one for a Scottish Court sitting in the Netherlands – cannot overcome the “judicial predicament” caused by the involvement of the respective country’s executive in an international dispute that is directly related to the criminal case in question. So far, the conduct of the trial and appeal proceedings by the Scottish judiciary has set a negative example; it has alerted us about the problems and pitfalls of criminal justice in the international domain and – regrettable as it may be, depending upon one’s approach towards international affairs – has done disservice to the cause of introducing “universal jurisdiction,” whether exercised by domestic or *ad hoc* international courts, into the body of contemporary international law.<sup>45</sup>

Apart from criminal justice and the (international) rule of law, the concerns which the author has repeatedly raised as International Observer of the proceedings at Kamp van Zeist in the Netherlands also relate to basic issues of international security. The handling of the Lockerbie case by the Scottish judiciary will have far-reaching implications for what some governments call the “global

<sup>44</sup> See, HANS Kelsen, *PEACE THROUGH LAW* (University of North Carolina Press 1944).

<sup>45</sup> On the notion of universal jurisdiction, see, HANS KOEHLER, *supra* note 3, at 33.

war on terror".<sup>46</sup> Only a just and convincing resolution (in terms of arguments and legal procedure) of the question of personal criminal responsibility will enable the countries involved in the dispute, first and foremost the United Kingdom and, subsequently, the "international community", to draw the appropriate lessons for a credible and sustainable counter-terrorist strategy. There can be no justice without truth – and no efficient measures to protect a country's citizens can be taken if political (in particular foreign policy) interests prevent a proper and thorough investigation into the causes of – and possible criminal responsibility for – an incident such as the explosion of the Pan Am jet over Lockerbie in December, 1988.

After an involvement of over more than 15 years in the observation and analysis of the legal and political disputes<sup>47</sup> between the United Kingdom, the United States and the Libyan Jamahiriya, essentially over an issue of criminal jurisdiction in a suspected case of international terrorism, the author has summarized his conclusions in remarks at the Law Awards of Scotland 2008:

Whether those in public office like it or not, the Lockerbie trial has become a test case for the criminal justice system of Scotland. At the same time, it has become an exemplary case on a global scale that its handling will demonstrate whether a domestic system of criminal justice can resist the dictates of international power politics or simply becomes dysfunctional as soon as "supreme state interests" interfere with the imperatives of justice. Fairness of judicial proceedings is undoubtedly a supreme and permanent public interest. If the rule of law is to be upheld, the requirements of the administration of justice may have to take precedence over public interests of a secondary order, such as a state's momentary foreign policy considerations or commercial and trade interests. The internal stability and international legitimacy of a polity in the long term depend on whether it is able to ensure the supremacy of the law over considerations of power and convenience. Contrary to what skeptics and the advocates of the supremacy of realpolitik try to make us believe, the basic maxim of the rule of law is not *fiat justitia, pereat mundus* but *fiat justitia ne pereat mundus* – 'let justice prevail so that the world does not perish.'<sup>48</sup>

<sup>46</sup> See, THE "GLOBAL WAR ON TERROR" AND THE QUESTION OF WORLD ORDER – STUDIES IN INTERNATIONAL RELATIONS, XXX (Hans Koechler ed., International Progress Organization 2008).

<sup>47</sup> For the political implications in the triangle Libya-United States-United Kingdom, see, KHALIL I. MATAR AND ROBERT W. THABIT, LOCKERBIE AND LIBYA: A STUDY IN INTERNATIONAL RELATIONS (McFarland 2003). (Robert W. Thabit was the second observer of the International Progress Organization nominated by the Secretary-General of the United Nations for the Scottish Court sitting in the Netherlands.)

<sup>48</sup> Hans Koechler, Keynote Address at Law Awards of Scotland 2008 in association with Registers of Scotland (Sept. 18, 2008).

## SANJEEV COKE, A CRITIQUE – AN EVALUATION OF ARTICLE 39(B)

Mihir Naniwadekar\*

*This paper seeks to look at the Directive Principle enshrined in Article 39(b) of the Constitution of India and analyze it in light of the Fundamental Rights enshrined in the Constitution. The author shall demonstrate that the Supreme Court of India has been mistaken in its analysis of the scope of Article 39(b); particularly in relation to Article 31C, and generally in relation to Part III of the Constitution. The interpretation placed by the Court in Sanjeev Coke is currently being reviewed by a larger Bench of nine judges. This paper attempts to posit the argument that Article 39(b) should not be deployed towards the nationalization of private property or the collection of assets/resources by the State, but must, instead, be interpreted such that it applies to the stage of distribution, as distinct from the stage of collection, of assets.*

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### I. INTRODUCTION

*When Article 39(b) refers to material resources of the community, it does not refer only to resources owned by the community as a whole but also to resources owned by individual members of the community. Resources of the community do not only mean public resources, but include private resources as well.<sup>1</sup>*

The content of the "socialist" philosophy which is said to permeate our Constitution has consistently evoked great debate. Much of this debate has had to do with the interpretation of Part IV of the Constitution of India, and its

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<sup>1</sup> *Per* Chinappa Reddy J., Sanjeev Coke Manufacturing Co. v. Bharat Coking Limited, A. I. R. 1983 S. C. 239 [S. C.] [hereinafter "Sanjeev Coke"].