Sanctions related to International Air Transport and International Law

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I. Introduction : Sanctions in International Law

Sanctions are generally defined under international law as responsive measures (taken by States) which give rise to disadvantages against another State which has committed an internationally wrongful act. From the viewpoint of international aviation, the relationship between causal acts(internationally wrongful acts) and responsive measures(sanctions) are classified according to the following four categories;

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A. internationally wrongful acts involved in the air transport sector --- sanctions related to the air transport sector
B. internationally wrongful acts involved in the air transport sector ---sanctions not releted to the air transport sector
C. internationally wrongful acts not involved in the air transport sector ---sanctions related to the air transport sector
D. internationally wrongful acts not involved in the air transport sector ---sanctions not related to the air transport sector

In this paper, categories A and B are analysed in Section Ⅱ and category C is taken up in Section Ⅲ. Interdiction of flights, which is one of the major sanctions involved in air transport, is dealt with in Section Ⅳ. Category D is outside the ambit of this paper. A recent case on sanctions concerning air transport is considered in Section Ⅴ. Lastly, sanctions under the WTO-GATS regime is analysed in section Ⅵ.

The involvement of the air transport in sanctions is not self-contained (category A) but extends to other fields (categories B and C). This is nothing but the result of the linkage of norms under international law, which assures its unity (1).

In international law, there are some special terms related to sanctions, such as retorsions, reprisals, countermeasures and enforcement measures. Retorsions are responsive measures which are unfriendly but per se legal under international law against an internationally wrongful act or an unfriendly act. Retorsions are, of course, legal and the problem of legality does not occur, although the principle of good faith is and should be applied to even these discretionary measures. Reprisals are measures which are per se illegal but whose illegality is precluded under certain conditions because they are taken as responsive measures against internationally wrongful acts. Measures of export/import prohibitions are

classified as reprisals when there is a commercial treaty, such as GATT or a bilateral FCN (friendship, commerce and navigation) treaty, in force between the imposing State(s) and the target State, because export/import prohibitions are in conflict with non - discriminatory or MFN (most - favoured nations) provisions contained in these treaties. When there are no such treaty relationships between the two States, these responses are classified as retorsion. Armed or military reprisals are completely prohibited under modern international law (2) and only non-military replisals are permitted. The concept of countermeasures appeared in the arbitral award of the Case concerning the Air Service Agreement between the USA and France (1978) to be mentioned later. The ILC(International Law Commission) defines countermeasures in Art. 30 of the Draft Articles on State Responsibility (Part One) as one of the circumstances precluding wrongfulness, which provides : "The wrongfulness of an act of a State not in conformity with an obligation of that stat towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State." The core of countermeasures is considered to be non-military reprisals. Enforcement measures are those for the purpose of collective security under the chapter 7 of the UN Charter.

What is important when we study sanctions from the viewpoint of international law is not simply the definition itself but also to clearify what kinds of sanctions are or are not permitted under what conditions. In this regard, the important distinctions are the following three; 1 the distinction between measures taken unilaterally by States and those taken in accordance with UN resolutions, 2 the distinction between measures taken by the directly injured State and those taken by third States, and 3 the distinction between measures against a grave violation of international law detrimental to the international community as a whole and those against other internationally wrongful acts.

I have come to the following conclusions on the legality of non-military sanctions, based on a series of studies on this subject. Only the essence is cited here.

A. As far as measures in accordance with UN resolutions are concerned, they are entitled to the opposability, which means that the target State cannot raise an objection as to the legality of the measures. In addition, some of the measures taken in accordance with the Security Council Resolutions are compulsory for all the member States of the UN to take.

B. The legality of measures taken unilaterally (outside the framework of UN) by States can be summarized as follows. Firstly, as to measures taken by the directly injured State, they are characterized as reprisals and their wrongfulness of can be precluded if they satisfy some conditions for the legality of the reprisal. (3) Secondly, on the other hand, measures taken by third States (= not directly injured States) are more controversial, but my conclusion is that only when the causal act constitutes an international crime of a State (4) or violation of obligation erga omnes (5) even third States can taken some kind of economic measures unilaterally because the international community as a whole has the legal interest to intervene in order to preserve this most important norm. The measures that States can take in this case include per se legal measures such as export-import prohibitions and interdiction of flights, but does notinclude per se illegal measures such as freezing or confiscation of assets because these result in unjust enrichment on the part of the imposing States.(6)

How to apply the above-mentioned general conclusions to the field of aviation will be dealt with in Section II and Section III.

Ⅱ. Reactions against *Internationally Wrongful Acts Involved in Air Transport*

Here, internationally wrongful acts involved in air transport are causal acts. Included in this category are such acts as A. violation of another State's territorial air, B. shooting down a civil aircraft which violates the territorialair, C. aerial terrorism such as hijacking, destruction of an aircraft, attacks against an airport, and D.violation of air service agreement.

Reactions thereto are either involved in air transport or not involved in air trasport. The latter (reactions not involved in air transport) includes J. prohibition of service other than the air transport sector, K. export-import prohibi-tion, L. freezing or confiscation of assets, and M. diplomatic measures such as expelling diplomats, recalling ambassadors, breaking diplomatic relations. The former (reactions involved in air transport) includes P. scramble, interception and forced landing, Q. shooting down, R. setting prohibitive area from flying, S.interdiction of flights, T. prohibition of overflights, U. termination or suspension of an air service agreement, V. suspension of supply of aircraft or aircraft components and related services, W. non-recognition of the validity ofthe certification of airworthiness, X. prohibition of the operation of the airline offices, Y. freezing or confiscation of aircrafts and airline assets, and Z. extradition or prosecution of the offender.

Following are brief comments on these measures.

1. J(prohibition of service other than the air transport sector), K(export-import prohibition) can be resorted to by the directly injured Stateas as a non-military reprisal against an internationally wrongful act. Third states can also take K against A violation of obligation erga

omnes. L(freezing or confiscation of assets) can be taken only by the directly injured States. M(diplomatic measures) can be resorted to as retorsion even when there is no internationally wrongful act.

Examples of reactions not involved in the air transport include freezing of funds and the ban on supply of oil-refinement equipment against Libya in accordance with Security Council Resolution 883 (see V (Sanctions in the Case of PanAm Flight 103 and UTA Flight 772)) and the arms embargo by the European Community against Syria which allegedly was involved in the attempted destruction of an El Al aircraft in 1986.

2. P(scramble, interception and forced landing) and Q(shooting down) are considered to be reactions against A (violation of another State's territorial air). The point here is that P can be taken against A, whereas Q is a violation of international law at least when the transgressing aircraft is a civil aircraft.

(7) Today, Article 3 bis. of the Chicago Convention clearly forbids the use of force against a civil aircraft. (8) To take Q against B(shooting down a civil aircraft against which violates the territorial air) is armed reprisal and illegal under modern international law. In the case of the destruction of the KAL 007 by the USSR in 1983, some Western States suspended Aeroflot landing from two weeks to 60 days. (9) This comes under S(interdiction of flights).

3. An example of R(setting prohibitive area from flying) can be found in the territorial air of Iraq after the Gulf War. In April 1991, the USA, UK and France prohibited flights in the territorial air of northern Iraq (north of 36 N.L.). In August 1992, the three States extended the prohibitive area to the territorial air of southern Iraq (south of 32 N.L.).

These were aerial blockades and any aircraft which dares to neglect the prohibition can be shot down.(10)

On this point, the Security Council Resolution 670 (1990) is sometimes called the aerial blockade resolution, but this is not correct. The contents of the resolution are S(interdiction of flights) and T(prohibition of overflights), which mean that it does not permit Iraq to enjoy the privilege of the freedom of the air but which do not include the prohibition of flights from and to Iraq even by force if necessary.

4. S(interdiction of flights) is the main reaction in the field of air transport and will be studied in Section Ⅳ.

5. As to U(termination or suspension of an air service agreement), when U is taken against D (violation of air service agreement), the legality is evaluated in accordance with the Article 60 of the Vienna Convention on the Law of Treaties. (11) U against causal acts other than D is characterized as non-military reprisal or countermeasure.

6. V(suspension of supply of aircraft or aircraft components and related services), W(non-recognoition of the validity of the certification of airworthiness) and X(prohibition of the operation of the airline offices) were taken against Libya in accordance with the Security Council Resolution 748 (1992) paragraph 4(b) and 6(b). The Security Council Resolution 883 (1993) paragraph 6(a) extended X into the closure of Libyan Arab Airlines offices. Y(freezing or con-fiscation of aircrafts and airline assets) is a part of L(freezing or confiscation of assets).

7. Z(extradition or prosecution of the offender) is a treaty commitment (Article 7 of the (Hague) Convention for the Suppression of Unlawful Seizure of Aircraft and Article 7 of the (Montreal) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) owed by the State in the territory of which the alleged offender is found. When

the State does not extradict nor prosecute the alleged offender, the problem of sanction against the State can be posed (See Section Ⅵ).

8. C(aerial terrorism) is most apt for sanctions in the air transport. On C, see Section Ⅴ.

Ⅲ. Reactions in the Air Transport Sector against Internationally Wrongful Acts not Involved in Air Transport

There are some precedents which internationally wrongful acts not involved in the air transport have brought about reactions in the air transport sector.

These causal acts include E. agression, F. suppression of the right of self-determination of peoples, G. maintenance by force of colonial domination, H. apartheid, i. genocide in the name of ethnic-cleansing. These acts come underinternational crimes of States (see Section Ⅰ).

As to E(agression), two examples can be cited here. Firstly, when Iraq invaded Kuwait in 1990, the UN Security Council in Resolution 670 paragraph 3 and 4 decided that all States shall take S(interdiction of flights) and T(prohibition of overflights). Secondly, when the USSR invaded Afganistan in the end of 1979, the US reduced the number of flights of Aeroflot between the two States (12).

This comes under a part of S.

As to F(suppression of the right of self-determination of peoples), the following two are well-known. Firstly, against the unilateral independence of the Southern Rhodesia and its governance by the minority regime since 1965, the Security Council in Resolution 253(1968) paragraph 6 decided that all States Members shall take S(interdiction of flights). The Security Council Resolution 277(1970) paragraph 9(b) decided that Member States shall immedeately interrupt any existing means of

transportation to and from Southern Rhodesia and this is a confirmation of taking S, as far as the air transport is concerned. The Security Council Resolution 333(1973) paragraph 6 called upon States to pass legislation forbidding insurance companies under their jurisdiction from covering these air flights. This is considered to be a kind of V(suspension of related services). (13) Secondly, when Poland declared martial law in 1981, the US banned all flights to and from the US by the Polish airline LOT. (14) The US also barred Aeroflot flights between the US and the USSR on the grounds that the latter was involved in Poland's martial law. (15) As to G(maintenance by force of colonial domination), the UN General Assembly in its Resolution 2107 (1965) urged all States to take S(interdiction of flights)and T(prohibition of overflights) against Portugal.

As to H(apartheid), the UN General Assembly in its Resolution 1761(1962) requested member States to take S and T.

As to I(genocide in the name of ethnic-cleansing), the UN Security Council decided in its Resolution 757(1992) paragraph 7 (a) that all States shall take S and T against the Federal Republc of Yugoslavia (Serbia and Montenegro).

In addition, the Security Council decided in the same Resolution paragraph 7 (b) that all States shall take V(suspension of supply of aircraft or aircraft components and related services) and W(non-recognition of the validity of the certification of airworthiness). (16)

Reactions in the air transport sector against internationally wrongful acts not involved in air transport is made possible because of the linkage of norms under international law mentioned in Section Ⅰ.

However, in some special cases where the so-called self-contained regime prevails, reactions are limited in the same field as the causal act. For example, against the abuse of diplomatic immunity by the sending State, the receiving State can react only with diplomatic measures.(17) What is more controversial is the reactions against trade violations. Now

that the WTO has been established, reactions against a violation of the WTO agreements must be in accordance with these agreements, because the WTO regime can be considered self-contained. This does not mean that reactions in the air transport sector against causal acts not involved in air transport are totally prohibited. Even under the WTO regime, cross-sectoral retaliations and cross-retaliations are permitted under strict conditions.(18) On the GATS Annex on Air Transport Services, see Section Ⅵ.

Non-military reactions in the field of air transport, namely S(interdiction of flights), T(prohibition of over-flights), U(termination or suspension of air service agreement), V(suspension of supply of aircraft or aircraft components and related services), W(non-recognition of the validity of the certification of airworthiness), X(prohibition of the operation of the airline offices) and Y(freezing or confiscation of aircrafts and airline assets), are in conflict with the air service agreement between the target and the imposing State.

But, firstly, the wrongfulness can be precluded when the reactions meet conditions of non-military reprisal (see note (3)) as far as the imposing State is the directly injured State. Secondly, as to the reaction by third States, they can take per se legal measures, namely S to X when the causal acts are international crimes of States just mentioned above. Thirdly, measures in accordance with UN resolusions are presumed to be legal. On the other hand, forthly, per se illegal measures, namely Y, cannot be taken unilaterally by third States (see Section Ⅰ).

Ⅳ. Evaluation of Interdiction of Flights under International Law

Interdiction of flights is one of the major reactions in the field of air transport against both internationally wrongful acts involved in the air transport (Section Ⅱ) and those not involved in it (Section Ⅲ).

The measure S(interdiction of flights) itself is in conflict with air service agreement because it negates freedoms of the air(in particular the third and the fourth freedom (19)), but the wrongfulness is precluded under certain conditions when it is taken as a response to an internationally wrongful act.

S is one *per se* legal measure, On per se legal measures, see Section I and Section Ⅳ. To be added here are following points.

1. The case concerning the air service agreement between the USA and France (1978) is something related to S. The arbitral award recognized the legality of unilateral countermeasure in the form of S by the US, when it said :

81. Under the rules of present-day international law, and unless the contrary resuls from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organizations, each State establishes for itself its legal situation vis-a-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "counter-measures".(20)

This is a famous paragraph and the arbitral award contributed very much to the clarification of the customary rule of countermeasures.

2. The arbitration clause contained in most of the bilateral air service agreements is not an absolute bar to unilateral measures, particularly S, because of the following two reasons. Firstly, the clause usually stipulates that disputes between the two States relative to the interpretation or application of the agreement are submitted to arbitration. This follows that reactions against internationally wrongful acts not involved in the

air tranport sector (Section Ⅲ) cannot be the object because the causal act-sanction relationship cannot be self-contained in this situation. Secondly, even if the aggrieved party State makes an offer to submit the dispute to arbitration, the other party State might refuse the offer or take a delay move. In these *non volumus or non possumus* situations, it is reasonable to think that the former can take countermeasures in spite of the arbitration clause.

3. S(interdiction of flights) can pose an interesting question when the target airline is a so-called multinational one (21) or the target flight is in the form of a joint operation. If one of the party States of a multinational airlineor a joint operation commits an internationally wrongful act, can other States take S against the multinational airline state or the joint operation flight ?

The problem here is that reprisals must not injure innocent third States (21).

Thus when S is extended to the above-mentioned airline or flight and the damage follows, the imposing States have to pay compensation to the innocent third States or their airlines in proportion to the share.

4. Strictly speaking, S should be distinguished from the ban of using aircraft for the export/import of goods. The latter does not prohibit the flights and only cargo service is banned. For example, against Haiti where the legitimate regime could not regain power after the coup-d'etat, the UN Security Council in its Resolution 917 (1994) paragraph 7 decided that all States shall take the ban in order to secure compliance with the export/import prohibition, but S itself was not included in the Resolusion. After the Resolusion, the US took S unilaterally.

5. There are some exceptions even when S is imposed as a sanction. Of importance in this context is that imposing States should refrain from

taking S when the air transport at issue is for the supply of food or medicine to innocent people of the target State or for other humanitarian purposes. Humanitarian considerations cannot be neglected and a series of the UN Security Council Resolutions on S exempts this kind of transport from the prohibition (22). A related interesting qusetion is whether a pilgrimage (Hajj) is included in this exception based on humanitarian considerations. On this particular point, on 19 April 1995, the UN Security Council Committee monitoring the implementation of sanctions against Libya gave approval for Egypt air to carry 6,000 Libyan pilgrims to Saudi Arabia on 45 flights, in a response to Egypt's request. The probative value of this practice is not clear yet.

6. S(interdiction of flights) can be a reaction against hijacking. At the Bonn Summit in 1978, the Statement on Air-Hijacking was adopted. It provided :

"The Heads of State and Government, concerned about terrorism and the taking of hostages, declare that their governments will intensify their joint efforts to combat international terrorism. To this end, in cases where a country refuses extradition or prosecution of those who have hijacked an aircraft/or do not return such aircraft, the Heads of State and Government are jointly resolved that their government shall take immediate action to cease all flights to that country. At the same time, their governments will initiate action to halt all incoming flights from that country or from any country by the airlines of the country concerned. They urge other governments to joint them in their commitment."

According to this Bonn Declaration, S is taken against a State where the hijacker is found when the State neither extradites nor prosecutes the offender, a violation of the obligation aut dedere aut judicare provided

in Article 7 of the (Hague) Convention for the Suppression of Unlawful Seizure of Aircraft.

The Bonn Declaration is a kind of non-legal agreement (23) without binding force. However, this does not mean that it is devoid of any legal effect. It has the legal effect of opposability, which means that one of the declaring States (the G-7 States) cannot make an objection to S in accordance with the Declaration.

7. The Bonn Declation is a joint statement from the viewpoint of the G-7 States, but from the viewpoint of other States it is only unilateral in character.

If a non G-7 State neither extradites nor prosecutes the hijacker, can the G-7 States take S against the state in accordance with the Bonn declaration ?

The Bonn Declaration has in itself no opposability to non G-7 States and the problem should be judged from the point of general international law.

According to general international law, third States can take S against an international crime of a State or a violation of obligation erga omnes (See Section Ⅰ). So the problem to be solved is whether the violation of the obligation aut dedere aut judicare provided in the Article 7 of the Hague Convention is such a serious violation of international law. The non-performance is not terrorism itself but an aid or assistance to it at best. It is not clear that even State-sponsored terrorism comes under this category (24), still less the aid or assistance to terrorism, whether State-sponsored or not. So it has to be said that the legality of S against an offending State against the obligation aut dedere aut judicare is not devoid of any doubt.(25)

8. The Bonn Declaration includes the transit flights as well, and the nationality of the aircraft is irrelevant.(26) Thus it prohibits flights of

airlines belonging to a third States between a G-7 State and the target State. This is in conflict with the fifth-freedom enjoyed by the third State under the air service agreement with the G-7 State. Is it justified under international law ?

The following is on the assumption that S(interdiction of flights) against the aircraft of the offending State is legal (on this point, see 7).

Schwenk considers the following three possible justifications, namely; ① the third State which does not cut off air services encourages the defaulting State and thus gives indirect support to the hijackers, ② in view of the principle of fair and equal opportunity, the balance in the air transport is disturbed if the third State carries on the fifth freedom traffic, whereas the G-7 State stops the services of its own airlines, ③ the measure is justified on the principle of peaceful self-preservation. He concludes that ① cannot be upheld, ② can be a justification and ③ has to be judged case by case (27).

I consider that the Bonn Declaration has to be subject to the conditions of non-military reprisals, in particular "6. non-injury to innocent third States" (see note (3)). Thus it is difficult to negate unilaterally the fifth freedom enjoyed by the third State and even if the measure is justified, the imposing State has to pay compensation to the third State for the loss caused by the non-operation.

9. The following two cases are considered to be relating to the Bonn Declaration.

① Against the hijacking in March 1981 of a Pakistan International Airlines aircraft to Afganistan, the Ottawa Summit Statement on Terrorism in July 1981 provides;

"3. The Heads of States and Government are convinced that, in the case of hijacking of a Pakistan international Airlines aircraft in March,

the conduct of the Babrak Karmal regime of Afganistan, both during the incident and subsequently in giving refuge to the hijackers, was and is in flagrant breach ofits international obligations under the Hague Convention to which Afganistan is a party, and constitutes a serious threat to air safety. Consequently, the Heads of State and Government propose to suspend all flights to and from Afganistan in implementation of the Bonn Declaration unless Afganistan immediately takes steps to comply with its obligations. Furthermore, they call upon all states which share their concern for air safety to take appropriate action to pursuade Afganistan to honour its obligation."

This statement was communicated to Afganistan but there was no reply. Thus in November 1981, France, West Germany and the UK, on whose territories Ariana Afgan Airlines flew, decided to denounce their air service agreements with Afganistan and the denounciations took effect in November 1982.(28) This measure was not the immediate S(interdiction of flights) but U(termination or suspension of air service agreement) in accordance with the denounciation clause contained in the agreements and required one year to take effect. In this sense, this some what mistimed action might not be a strict application of the Bonn Declaration.

The reason why the three State did not take S immediately is presumably because they wanted to avoid any legal problems that the application of the Bonn Declaration against Afganistan might cause (See 7). Anyway, the measure was in accordance with spirit of the Bonn Declaration.

② Against a group of South African-based mercenaries who hijacked an Air India aircraft from the Seychelles after a failed coup attempt there in November 1981, South Africa at first refused to prosecute the hijackers. But in January 1982, South Africa changed its mind and prosecuted the hijackers in a response to growing international criticism

and the possibility of the US and other States taking S against it.(29) South Africa feared the application of the Bonn Declaration.

10. In 1987 the scope of application of the Bonn Declaration was extended.

Namely, the Annex on Statement on Terrorism in the Venice Summit provided ;

"The Heads of States or Government recall that in their Tokyo statement on International Terrorism they agreed to make the 1978 Bonn declaration more effective in dealing with all forms of terrorism affecting civil aviation. To this end, in cases where a country refuses extradition or prosecution of those who have committed offenses described in the Montreal convention for the Suppression of Unlawful Acts against the safety of Civil Aviation and/or does not return the aircraft involved, the Heads of State or Government are jointly resolved that their governments shall take immediate action to cease flights to that country as stated in the Bonn Declaration. At the same time, their governments will initiate action to halt incoming flights from that country or from any country by the airlines of the country concerned as stated in the Bonn Declaration."

11. The principle that a hijacked aircraft should be allowed to land and the principle that it should not be permitted to take off have been provided as follows.

As to the former principle, in 1986, the ICAO Assembly adopted Resolution A26-7 Appendix E, which provided; "3. The Assembly urges each contracting States to provide, as it may find practicable, such means of assistance to an aircraft subjected to an act of unlawful seizure, including the provision of navigationalaids, air traffic services and permission to land, as may be necessiated by the circumstances."

As to the latter principle, the ICAO Council in 1988 adopted a policy

statement, which provided ; "4 The Council urges each Contracting State to take measures, as it may find practicable, to ensure that an aircraft subjected to an act of unlawful seizure which has landed in its territory is detained on the ground unless that its departure is neccesitated by the overriding duty to protect human life." Paragraph 13 of the Political Declaration of the Tronto Summit in 1988 welcomed this declaration. The ICAO Assembly Resolution A27-7 (1989) Appendix E paragraph 4 is the same content as the above-mentioned policy statement. These paragraphs later developed into Annex 17, paragraphs 5.1.4 and 5.1.5. of the Chicago Convention. (30)

The aim of these two principles is securing human lives and resolving the incident. The former principle is not easy for States to accept when they actually face the hijacking incident because they do not want to be involved in it. The distinction of the formulation between the two principle (namely, the permission to land is obligatory only when necessiated by the circumstances, whereas the detention is obligarory unless the departure is and neccesitated by the overriding duty to protect human life) must be the result of this consideration.

12. S (interdiction of flights) is not so powerful in itself as it is not easy to make the target State cease the wrongful act or change its policy by imposing S only. But if nothing is imposed against a State who committed an internationally wrongful act, the State might commit another wrongful act or another State might commit one in a similar situation. Thus, sanctions have not only remedial but also preventive or punitive function and they contribute to the defense of the international legal order. The effectiveness of S, as one of the major measures of sanctions, should be evaluated from this point. (31)

V. Sanctions in the Cases of the Pan Am Flight 103 and UTA Flight 772

These cases are well-known. Namely, in the cases of the destruction of Pam Am Flight 103 in the terrirorial air of the UK on 21 December 1988 and of UTA Flight 772 in the terrirorial air of Niger on 19 September 1989, the Libyan government's involvement was suspected and the Security Council, in Resolution 731 of 21 January 1992, although in an indirect expression, called upon Libya to surrender the suspects (Libyan nationals) to the concerned States (the UK or USA in the Pan Am case and France in the UTA case)(32). On 31 March, the Security Council in Resolution 748, determining that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests of Resolution 731 constitute a threat to international peace and security, decided that all States shall take the following measures.

① to deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need by the Sanctions Committe (paragraph 4 (a))

② to prohibit the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of airworthiness for Libyan aircraft, the payment of new claims against existing insurance contracts and the provision of new direct insurance for Libyan aircraft (paragraph 4 (b))

③ to prohibit any provision to Libya of arms and related material of all types, including the sale or transfer of weapons and amunition,

military vehicles and equipment, paramilitary police equipment and spare parts for the aforementioned, as well as the provision of any types of equipment, supplies and grants of licensing arrangements, for the manufacture or maintenance of the aforementioned (paragraph 5 (a))

④ to prohibit any provision to Libya of technical advice, assistance or training related to the provision, manufacture, maintenance, or use of the items in ③ (paragraph 5 (b))

⑤ to withdraw any of their officials or agents present in Libya to advise the Libyan authorities on military matters (paragraph 5(c))

⑥ to reduce significantly the number and the level of the staff at Libyan diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain (paragraph 6(a))

⑦ to prevent the operation of all Libyan Arab Airlines offices (paragraph 6(b))

⑧ to take all appropriate steps to deny entry to or expel Libyan nationals who have been denied entry to or expelled from other States because of their involvement in terrorist activities (paragraph 6(c))

These measures were made effective on 15 April 1992 (paragraph 3). ① corresponds to S(interdiction of flights) and T(prohibition of overflights), ② to V(suspension of supply of aircraft or aircraft components and related services) and W(non-recognition of the validity of the certification of airworthiness), ⑦ to X(prohibition of the operation of the airline offices). These are reactions involved in air transport. The other measures are reactions not involved in air transport. ③ corresponds to K(export-import prohibition), ④ to J(prohibition of service other than the air transport), ⑥ to M (diplomatic measures). ⑤ and ⑧ relate to the prohibition of intercourse.

The non-military measures against Libya under Article 41 of the UN

Charter were strengthened by the Security Council Resolution 883 of 11 November 1993. Here, the Security Council decided thet all states shall take the following actions.

⑨ to freeze funds and financial resources owned or controlled by the Government or public authorities of Libya or any Libyan undertaking (paragraph 3)

⑩ to prohibit any provision to Libya of mediam or large capacity pumps, equipment designed or apt for use in crude oil export terminals, refinery equipment and spare parts of them (paragraph 5 and the annex)

⑪ to require the immediate and complete closure of all Libyan Arab Airlines offices within their territories (paragraph 6 (a))

⑫ to prohibit any commercial transactions with Libyan Arab Airlines (paragpaph 6 (b))

⑬ to prohibit the entering into or renewal of arrangements making available, for operation within Libya, any aircraft or aircraft components or for the provision of engineering or maintenance servicing of any aircraft or aircraft components within Libya (paragraph 6 (c))

⑭ to prohibit the supply of any materials destined for the construction, improvement or maintenance of Libyan civilian or military airfields and associated facilities and equipment, or of any engineering or other services or components destined for the maintenance of any libyan civil or military airfields or associated facilities and equipment, except emergency equipmemt and equipment and services directly related to civilian air traffic control (paragraph 6(d))

⑮ to prohibit any provision of advice, assistance, or training to Libyan pilots, flight engineers, or aircraft and ground maintenance personnel associated with the operation of aircraft and airfields within Libya (paragraph 6 (e))

⑯ to prohibit any renewal of any direct insurance for Libyan aircraft (paragraph 6 (f)) ⑨ corresponds to L(freezing or confiscation of assets) and ⑩ to K(export-import prohibition). They are reactions not involved

in the air transport. The others are reactions involved in the air transport. ⑪ and ⑫ correspond to X(prohibition of the operation of the airline offices) , ⑬ to V(suspention of supply of aircraft or aircraft components and related services). ⑭, ⑮ and ⑯ are prohibition of other services relating to air transport.

The legal points involved in this Libyan Case are the following three, namely, [1] Does Libya have to surrender the suspects ?, [2] Are sanctions against Libyalegal under international law? and [3] The strengthening of the Montreal Convention regime.

[1] Does Libya have to surrender the suspects ? (33)

It is of no doubt that the causal acts (the explosions) come under offences of Article 1 Paragraph 1 (b)(destroys an aircraft in service or causes damage to such an aircraft in flight if that act is likely to endanger the safety of that aircraft) and/or (c)(places or causes to be placed on an aircraft in service, by any means what so ever, a device or substance which is likely to endanger its safety in flight) of the Montreal Convention (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) of 1971.

Jurisdiction in the USA and France can be established in accordance with Article 5 Paragraph 1(b)(when the offence is committed against or on board an aircraft registered in that State), while that of the UK in accordance with Article 5 Paragraph 1(c)(when the aircraft on board which the offence is committed lands in its territory with the alledged offender still in board).

The problem is the interpretation and application of Article 7, which provides;

"The Contracting State in the territory of which the alleged offender is found shall, if it doed not extradite him, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.---"

This provision imposes to the State an obligation in the territory of which the alleged offender is found, the selective obligation of aut dedere aut judicare (to surrender or to prosecute). In accordance with this, Libya does not have to surrender the offenders if it prosecutes them to its domestic court.

But in these cases, the following should be taken into consideration. Namely, the direct involvement of the Libyan Government to them is highly suspected (34).

Based on this presumption, these are considered to be State-sponsored terrorism and the fair trail in Libya cannot be expected. Therefore, the principle of nemodebet esse judex inpropria sua causa (no one can be a judge in its own case), which is considered to be one of the general principles of law recognized by civilized nations, can be applied in these cases. Thus Libya,instead of prosecuting the offenders in its court, has to surrender them to the States concerned (UK, USA and France). This is the legal reasoning behind the Security Council Resolution 731.

[2] Are sanctions against Libya legal under international law ?

A series of measures taken against Libya, namely ①-⑯ mentioned in [1] are in accordance with the Security Council Resolutions 748 and/or 883. They are non-military enforcement measures in accordance with Article 41 of the UN Charter. Some of these are otherwise in conflict with treaty obligations. For example, ①(to deny permission to any

aircraft to take off from, land in or overfly their territory if it is destined to or has taken off from the territory of Libya) is in conflict with bilateral air transport service agreements with Libya. ⑨(to freeze funds and financial resources owned or controlled by the Government or public authorities of Libya or any Libyan undertaking) is otherwise in conflict with the customary rule of respect for the free disposal of property. But the wrongfulness of these measures is precluded because of the Article 103 of the UN Charter, which provides : "In the event of the a conflict between obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail."

Member states of the UN have to implement these measures because the Security Council, based on the determination of the threat to the peace in Article 39, decides that all States shall take these measures. (35)

As to the competence of the Security Council, it can handle such matters as the request for the surrender of the suspects, even if the matter is also submitted to the International Court of Justice. The strict dichotomy between legal questions and political ones is only academic and the ICJ itself does not adopt such a position when it stated in the Iranian Hostages Case ;

"Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. --If the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the roleof the Court in the peaceful solution of international disputes." (36)

Also in the Judgenment of the Nicaragua Case (jurisdiction), it said :

"The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events." (37)

Additionally, the Security Council should have some flexibility in its actions in order to perform its primary responsibility for the maintenance of international peace and security (Article 24 paragraph 1 of the UN Charter). As State-sponsored terrorism is a direct threat to international peace and security, the Security Council can and should deal with it. Therefore, the ultra vires problem does not occur in these resolutions. (38)

3 The strengthening of the Montreal Convention Regime

The strengthening of the Montreal Convention (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) regime was implemented in the two following ways.

1. In June 1989, about six month after the Pan Am Lockerbie Case, the Security Council adopted Resolution 635 which urged ICAO to intensify its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection. ICAO, having elaborated the draft convention on this subject-matter in accordance with this Resolution, adopted, on 1 March 1991, the Convention on the Marking of Plastic Explosives for the Purpose of Detection.(39) This Convention obliges each State party to take the necessary and effective measures to prohibit and prevent the manufacture in or the movement into or out of its territory of unmarked explosives (Articles 2 and 3). It

also obliges each State Party to take the necessary measures to ensure that all stocks of explosives not marked(introduced into an explosive a detection agent) are destroyed or consumed (with exceptions, Article 4). In order to evaluate technical developments relating to the manufacture, marking and detection of explosives, the International Explosives Technical Commission was established (Articles 5 and 6). The object of this Convention is to prevent explosives from being loaded on board and to detect them earlier and easily when loaded on board, by marking the plastic explosives. This Convention is to strengthen the Montreal Convention regime from the technical point of view.

2. In order to prevent and punish so-called airport terrorism which is not covered by the 1971 Montreal Convention, ICAO on 24 February 1988 adopted the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. This Protocol adds airport terrorism as an offence under the Montreal Convention and broaden the scope of the Convention, a strengthening of its regime.

Ⅵ. GATS Annex on Air Transport Services and Sanctions

The General Agreement on Trade in Service (GATS) adopted in 1994 provides most-favored-nation treatment as a general obligations (Article 2) and market access and national treatment as specific commitments (Articles 16 and 17).

But as to the air transport services, Annex on Air Transport Services provides as follows ;

"2. The Agreement, including its dispute settlement procedures, shall not apply to measures affecting : (a) traffic rights, however granted ; or (b) services directly related to the exercise of traffic rights, except as

provided in paragraph 3 of this Annex.

3. The Agreement shall apply to measures affecting : (a) aircraft repair and maintenance services; (b) the selling and marketing of air transport services ; (c) computer reservation system (CRS) services."

Thus, except for some soft rights, the existing regime based mainly on bilateral agreements is maintained in the air transport sector.(40)

What should be studied here is the implications of GATS and the Annex for sanctions. The followings can be pointed out.

1. The causal acts can be classified as follows; ① acts in the air transport sector not mentioned in paragraph 3 of the GATS Annex on Air Transport Services, ② acts mentioned in paragraph 3 of the GATS Annex on Air Transport Services, ③ acts not in the air transport sector nor a breach of the GATT or GATS, ④ acts not in the air transport sector but a breach of the GATT or GATS.

2. The responses(sanctions) can be classified as follows ; ①′ acts in the air transport services not mentioned in paragraph 3 of the GATS Annex on Air Transport Services, ②′ acts mentioned in paragraph 3 of the GATS Annex on Air Transport Services, ③′ acts not in the air transport sector nor a breach ofthe GATT or GATS, ④′ acts not in the air transport sector but a breach of the GATT or GATS.

3. Thus 12 types of combinations between the causal acts and sanctions can be counted (③-③′, ③-④′, ④-③′ and ④-④′ do not relate to air transport services at all). Out of these, as to the combinations ① -①′, ①-②′, ①-③′, ①-④′, ③-①′ and ③-②′, the relationship between the causal acts and sanctions are provided by general international law and/or bilateral agreements and the existing rules mentioned in this

paper is maintained. As to ④-①′ and ④-②′, the relationship is provided by GATT and/or GATS. The possibility of cross-sectoral retaliation or cross-retaliation cannot be excluded if they meet the conditions and procedures contained in the Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. As to ②-①′, ②-②′, ②-③′ and ②-④′, the relationship is provided by the GATS and the Annex on Air Transport Services. What has to be mentioned is that the dispute settlement procedures of the GATS may be invoked only where obligations or commitments have been assumed by the Members concerned and where dispute settlement procedures in bilateral and other multilateral arrangements have been exhausted (paragraph 4 of the Annex on Air Transport Services). Therefore, the possibility of unilateral measures is not excluded when the dispute settlement procedure is not invoked. The procedures are in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes and unilateral measures are prohibited during the procedures. But after they were exhausted, the possibility of retaliation revives in accordance with Article 22 of the Understanding.

Notes

* Made possible by the Inamori Foundation and the Murata Science Foundation

(1) W.Wengler, La crise de unité de l'ordre juridique international, Mélanges offerts à Charles Rousseau (1974), p.332, K.Nakatani, The Functions and the Legality of Economic Sanctions under International Law (2)(in Japanese), Kokka Gakkai Zassi(The Journal of the Association of Political and Social Sciences), vol.100 no.7/8 (1987), pp.91-92.

(2) States have a duty to refrain from acts of reprisal involving the use of force.' (UN GA Res. 2625(XXV) which is called the Declaration on Principle of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations)

(3) These conditions include; 1. prior existence of an internationally wrongful act, 2. proportionality between causal act and response, 3. prior demand of redress, 4. specialization of response as concerns some specified causal acts, 5. interdiction of some measures as response, 6. non-injury to innocent third States and 7. cessation of measures in case satisfaction is made. K.Nakatani, Non-Military Sanctions Taken Unilaterally by states (in Japanese), Kokusaiho Gaiko Zassi(The Journal of International Law and Diplomacy), vol.89, no.3/4 (1990) pp.15-24.

(4) Art.19 of the Draft Articles on State Responsibility (Part 1) by the International Law Commission, ILC Yearbook 1976, vol.2, part 2, pp.95-122. Aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the sea are cited as examples.

(5) Judgement of the Case concerning the Barcelona Traction, Light and Power Company, Limited, ICJ Reports 1970, p.32. Aggression, genocide, slavery and racial discrimination are cited as examples.

(6) K. Nakatani, Economic Sanctions and International Public

Interests(in Japanese), Kokusaihou to Kokunaihou (Essays in Honour of Prof. Soji Yamamoto), 1991, pp. 535-561. Some oppose the legality of unilateral measures by third States because of the lack of procedure, that is to say, a prior authoritative qualification on the causal act and the response. But in a case of reprisal by a directly injured State, no such strict condition exists. The same logic should prevail in the former situation as well when we see the reality of the international community, which means that the third-party qualification cannot always be expected.

(7) The shooting down of the KAL007 by the USSR in 1983 is considered to be illegal, whether the airplane violated the territorial air of the USSR by fault or by intention, because the existence of many innocent passengers make it an excessive response.

(8) Article 3 bis, which was adopted on 10 May 1984 at the ICAO Assembly, provides; "(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft and that, in the case of interception, the lives of persons on board and the safety of aircraft must not be endangered." On Article 3 bis, see B. Cheng, The Destruction of KAL Flight KE 007, And Article 3 Bis of the Chicago Convention, Air Worthy, 1985, pp.47-74, and K.Hirobe, The Chicago Convention, Article 3 bis (in Japanese), Kuho (Journal of Air Law), No.32 (1991), pp.83-101.

(9) Cheng, ibid., p.55.

(10) The legality of these measures against Iraq can be controvercial. The three States base them on Security Council Resolution 688(1991), whose paragraph 6 provides that the Security Council appeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts.

(11) The relevant paragraph of Article 60 is paragraph 1, because most of the air service agreements are bilateral treaties. Paragraph 1 provides; "A material breach of a bilateral treaty by one of the parties entitles

the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." The definition of a material breach is given in paragraph 3, which provides:

"A material breach of a treaty, for the purposes of this article, consists in : (a) a repudiation of the treaty not sanctioned by the present Convention, (b) the violation of a provision essential to the accomplishment of the object or the purpose of the treaty."

(12) G.E.Davidson, United States' Use of Economic Sanctions, Treaty Bending, and Treaty Breaking in International Aviation, Journal of Air Law and Commerce, vol. 59 (1993) p.297.

(13) On the implementation of these resolutions, see H.R.Struck, Sanctions The Case of Rhodesia, 1978, pp.183-189.

(14) M.E.Malamut, Aviation: Suspension of Landing Rights of Polish Airlines in the United States, Harvard International Law Journal, vol.24 (1983), pp.190-198;

Davidson, op.cit., pp.300-307. The Polish government requested arbitration in accordance with the air service agreement between the two States. The two States appointed each arbitrator but the two arbitrators could not agree on the third arbitrator. Malamut, ibid., p.195.

(15) Davidson, op.cit., P.299.

(16) In the paragraph 7 (b), the Security Council decided : "All States shall prohibit the provision of engineering and maintenance servicing of aircraft, the certification of airworthiness and the payment of new claims against insurance contracts and the provision of new direct insurance for such aircraft."

(17) Judgement of the Case concerning the United States Diplomatic and Consular Staff in Teheran, ICJ Reports 1980, p.40.

(18) Understanding of Rules and Procedures Governing the Settlement of Disputes, 22.3, International Legal Materials, vol.33, no.1 (1994), pp.126-127.

(19) The third freedom is the right of an airline of the target State to

carry traffic from the target State to the sanction-imposing State. The fourth freedom is the right of an airline of the target State to carry traffic from the sanction-imposing to the target State. These traffic rights recognized under the air service agreement between the target State and the sanction-imposing State are denied by S(interdiction of flights). Sometimes S relates to the negation of the second freedom (the right of the technical landing). When the third and fourth freedom are negated, the fifth freedom (the beyond right) cannot be enjoyed by an airline of the target State. Thus S results in the negation of the fifth freedom as well. Note that T(prohibition of overflights) is the negation of the first freedom.

(20) Reports of the International Arbitral Awards, vol.18, p.443.

(21) Gulf Air, Air Afrique and Scandinavia Air System are famous examples of so-called multinational airlines.

(22) See Resolution 670 paragraph 3 and 4 against Iraq, Resolusion 748 paragraph 4(a) against Libya, Resolution 757 paragraph 7(a) against Federal Republic of Yugoslavia (Serbia and Montenegro). In these Resolutions, the approval of the particular flight is given by the each sanction committee.

(23) J.J.Busuttil, The Bonn Declaration on International Terrorism - A Non-Binding agreement on Aircraft Hijacking, International and Comparative Law Quarterly, vol.31 (1982), pp.474-487.

(24) State-sponsored terrorism is cited neither as an exsample of international crimes of States in Art.19 of the ILC Draft Articles on State Responsibility (see (4)) nor as an example of violations of obligations erga omnes in the ICJ judgement of the Barcerona Traction Case (see (5)). But it does not mean that State-sponsored terrorism and other non-cited acts cannot come under these categories.

(25) On the other hand, if a G-7 State is directly injured State, which means that its aircraft and/or nationals are hijacked, then the State can take S against the offending State by reason of reprisal.

(26) W. Schwenk, The Bonn Declaration on Hijacking, Annals of Air and Space Law 1979, p.310.

(27) Ibid., pp. 319-321.

(28) K.Chamberlain, Collective Suspension of Air Services with States which Harbour Hijackers, International and Comparative Law Quqrterly, vol.32 (1983) pp.627-628.

(29) Busuttil, op.cit., pp.474-475; Keesing's Contemporary Archives pp.31513-31514.

(30) M.Mukai, A study on the Principles that Hijacked Aircraft Should Be Allowed to Land and that It Should not Be Permitted to Take Off (in Japanese), Gaimusho Chosa Geppo (Monthly Report of the Ministry of Foreign Affaires), 1989 no.2, pp.1-48. Paragraph 5.1.4 provides ; "Each contracting States shall provide, as itmay find practicable, such means of assistance to an aircraft subjected to an act of unlawful seizure, including the provision of navigational aids, air traffic services and permission to land, as may be neccessiated by the circumstances." Paragraph 5.1.5 provides ; "Each Contracting State shall take measures, as it may find practicable, to ensure that an aircraft subjected to an act of unlawful seizure which has landed in its territory is detained on the ground that its departure is neccesitated by the overriding duty to protect human life, recognizing the importance of consultations, wherever practicable, between the State where that aircraft has landed and the State of the operator of the aircraft.

(31) K.Nakatani, The Functions and the Legality of Economic Sanctions under International Law (6)(in Japanese), Kokka Gakkai Zassi (The Journal of the Association of Political and Social Sciences), vol.101, no.5/6 (1988), pp.96-102.

(32) In the paragraph 3 of the Resolution, the Security Council urges the Libyan Government to immediately provide a full and effective responses to those requests (emphasis by thre author) so as to contribute to the elimination of international terrorism. Those requests by

the three States (S/23306, S/23307, S/23308, S/23309 and S/23317) includes the surrender of the suspects.

(33) On [1] and [3], see K. Nakatani, The Response of the International Community to tha Attacks against Pan American Flight 103 and Union de transport aériens Flight 703 (in Japanese), Jurist No.998 (1992), pp. 82-86.

(34) As to the Pan Am Case, UK and US reaches the conclusion that the accused were two Libyan nationals who are officers of the Libyan Intelligence Services. (S/23307 and S/23317). As to the UTA Case, France reaches the conclusion that the accused were several Libyan nationals (S/23306).

(35) Article 25 of the UN charter provides; "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter" . But what should be mentioned here is that not all the resolutions of the Security Council are binding on member States. The binding character has to be decided paragraph by paragraph, "having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council" (ICJ reports 1971, p.53). At least as to the paragraph that begins with the verb "decide" in a resolution under which the exsistence of threat to the peace, breach of the peace or act of agression under Article 39 is determined, the binding force upon member States is upheld. As to the binding force upon non-Member States, see Article 2 paragraph 6 of the Charter.

(36) ICJ Reports 1980, p.20.

(37) ICJ Reports 1984, p.435.

(38) Whether the Security Council acted ultra vires in its resolutions should be evaluated, in general, taking into consideration the following positive and negative factors. The positive factors for limiting the

discretionary competence of the Security Council are ① compatibility with the purposes and principles of the United Nations, ② proportionality between the causal act and the response, ③ procedual conditions such as the second sentence of the Article 27 paragraph 3 of the Charter and ④ policy consideration that the Security Council (and particularly the US) alone determines is in contravention with the democratization of the international community. The negative factors are that ① the principle of competence-competence (each organ should determine its own competence), ② the principle of implied powers, ③ Article 24 paragraph 1 of the Charter (Members confer primary responsibility for the maintenance of international peace and security) and ④ policy consideration that limiting the competence of the Security Council will lead to an undesirable conclusion because it makes States inclined to take unilateral measures outside the framework of the UN.

(39) On this convention, see J.V. Augustin, The Role of ICAO in Relation to the Convention on the Marking of Plastic Explosives for the Purpose of Detection, Annals of Air and Space Law 1992 (Part 2), pp.33-69; M.Mukai, Convention on the Making of Plastic Explosives for Purpose of Detention (in Japanese), Kuho(Journal of the Air), No.33 (1992), pp.105-135.

(40) On the implications of GATS for Air Tranport Services, see A.M. von Zebinsky, The General Agreement on Trade in Services: Its Implication for Air Transport, Annals of Air and Space Law 1993, pp.359-405.