

## Libyan Payment to Families of Pan Am Flight 103 Victims



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Afghanistan,<sup>18</sup> Belgium announced that it would amend the law for a third time because the prior amendments “have proved to be insufficient.”<sup>19</sup>

In August 2003, Belgium replaced the 1993 law with one of much narrower jurisdictional scope.<sup>20</sup> The new law limits the filing of criminal complaints to situations in which the suspect is either a Belgian national or residing in Belgium, or in which the victim is either a Belgian national or has resided in Belgium for at least three years.<sup>21</sup> Once a criminal complaint is filed, a Belgian federal prosecutor retains sole and unreviewable discretion to initiate a prosecution, and may decline to do so, based on “respect for Belgium’s international obligations,” when there is an independent alternative international or national tribunal available.<sup>22</sup> Further, the law precludes the filing of complaints against sitting heads of state and foreign ministers, as well as against other individuals enjoying immunity in Belgium based on treaties.<sup>23</sup> Finally, the law prohibits acts of enforcement in furtherance of a prosecution against any person staying in Belgium either at the official invitation of Belgian authorities or in connection with an international organization based in Belgium and with which Belgium has entered into a headquarters agreement.<sup>24</sup> In September 2003, because of the new changes in the law, the Belgian Supreme Court dismissed all pending cases against U.S. officials.<sup>25</sup>

#### SETTLEMENT OF DISPUTES

##### *Libyan Payment to Families of Pan Am Flight 103 Victims*

In the early 1980s, the United States imposed unilateral export controls<sup>1</sup> and an import ban on crude oil<sup>2</sup> against Libya in response to what was perceived as Libyan support of international terrorism. Further, in 1986, following bomb attacks at the Rome and Vienna airports, and at the “La Belle” disco in Berlin, the United States froze Libyan government assets and imposed a set of comprehensive trade and financial sanctions.<sup>3</sup> In December 1988, Pan Am Flight 103, en route from London to New York, exploded over Lockerbie, Scotland, resulting

<sup>18</sup> See *New War Crimes Suits Filed Against Bush, Blair in Belgium*, DEUTSCHE PRESSE-AGENTUR, June 20, 2003; Philip T. Reeker, Dep’t of State Spokesman, U.S. Dep’t of State Daily Press Briefing at 3–6 (June 20, 2003), at <<http://www.state.gov>>.

<sup>19</sup> See Craig S. Smith, *Belgium Plans to Amend Law on War Crimes*, N.Y. TIMES, June 23, 2003, at A8; Belgian Ministry of Foreign Affairs, Press Release on the Law on Universal Jurisdiction Reviewed (June 24, 2003), at <<http://www.diplomatie.be>>.

<sup>20</sup> See Loi relative aux violations graves du droit international humanitaire, MONITEUR BELGE 40506 (Aug. 7, 2003); see also Belgian Ministry of Foreign Affairs Press Release on Conseil des Ministres: Loi de compétence universelle (July 14, 2003), at <<http://www.diplomatie.be/fr/press/default.asp>> (“La loi de 1993, modifiée en 1999 et 2003, est abrogée. Les dispositions utiles sont intégrées en droit commun. L’avant projet de loi est basé sur une étude comparative de la législation en vigueur dans une série des pays occidentaux. Cette étude a révélé que la plupart de ces pays avaient instauré une compétence universelle limitée, tout en conservant néanmoins les règles d’immunité du droit international et du droit coutumier ainsi qu’un point de rattachement personnel (auteur et/ou victime) ou territorial clair avec le pays. . . . On aboutit ainsi à une législation linéaire et transparent qui ne laisse plus de place à une appréciation politique d’opportunité des affaires. . . .”).

<sup>21</sup> Loi relative aux violations graves du droit international humanitaire, Arts. 14–16.

<sup>22</sup> *Id.*, Art. 16. If the prosecution refuses prosecution based on considerations unrelated to the merits of the complaint, however, and the facts giving rise to the complaint occurred after June 30, 2002, the minister of justice must notify the International Criminal Court.

<sup>23</sup> *Id.*, Art. 13.

<sup>24</sup> *Id.*

<sup>25</sup> See Glenn Frankel, *Belgian War Crimes Law Undone by Its Global Reach*, WASH. POST, Sept. 30, 2003, at A1.

<sup>1</sup> See, e.g., Use of U.S.-Origin Parts for Servicing Libyan Aircraft Restricted, 46 Fed. Reg. 47,066 (Sept. 24, 1981) (codified at 15 C.F.R. pts. 373, 376, 390); Expansion of Foreign Export Controls Affecting Libya, 47 Fed. Reg. 11,247 (Mar. 16, 1982) (codified at 15 C.F.R. pts. 370, 371, 373, 376, 379, 385, 386, 399).

<sup>2</sup> Proclamation No. 4,907, 3 C.F.R. 21 (1983).

<sup>3</sup> See Exec. Order No. 12,543, 3 C.F.R. 181 (1987), reprinted in 25 ILM 173 (1986); Exec. Order No. 12,544, 3 C.F.R. 183 (1987); see also Libyan Sanctions Regulations, 31 C.F.R. pt. 550 (2001). For an overview of U.S. sanctions against Libya from 1980 to 1996, see Anne Q. Connaughton, *Exporting to Special Destinations: Terrorist-Supporting and Embargoed Countries*, 748 PRAC. L. INST. 353 (1996).

in the deaths of 270 persons, 189 of whom were U.S. nationals. Three years later, two Libyans were indicted in both the United States and the United Kingdom for their alleged participation in placing the bomb aboard the aircraft. Both countries demanded the surrender of the two Libyan nationals for trial, but Libya refused to comply, stating that it wished to see the evidence upon which the prosecutions were based.

Thereafter, the United States imposed additional unilateral sanctions<sup>4</sup> and (joined by France and the United Kingdom) also sought the imposition of global economic sanctions against Libya. During 1992–93, the UN Security Council passed three resolutions, first asking and then demanding that the Libyan government surrender the two Lockerbie suspects for trial, and requiring all states to impose economic sanctions against Libya until it complied.<sup>5</sup> Libya responded by filing cases before the International Court of Justice against the United States and the United Kingdom alleging that those states, by their actions, had violated Libya's rights under a multilateral treaty that, in cases involving acts of violence against civil aviation, permits a party either to surrender a suspect *or* to submit him or her to prosecution before that party's own authorities.<sup>6</sup>

In August 1998, the United States and the United Kingdom submitted to the UN secretary-general a proposal to conduct the trial of the two Libyan suspects before a Scottish court sitting in the Netherlands.<sup>7</sup> The UN Security Council then passed Resolution 1192, which welcomed the proposal and requested the Libyan government to cooperate with the court proceedings.<sup>8</sup> After Libya agreed to the surrender and trial of its two nationals in April 1999, the Security Council, as envisaged in the resolution, suspended economic sanctions. The United States informed Libya, however, that it would not support a final lifting of UN sanctions unless Libya fulfilled all the requirements of the relevant Security Council resolutions—namely, that it stop support for international terrorism, cooperate fully in the trial, acknowledge its responsibility for the acts of its officials, and pay compensation to the families of the victims of Pan Am Flight 103.<sup>9</sup>

The Scottish court rendered its verdict on January 31, 2001, finding one of the two Libyans guilty.<sup>10</sup> Shortly thereafter, the United States, United Kingdom, and Libya, as well as legal

<sup>4</sup> The United States' imposition of additional sanctions against Libya in the Iran-Libya Sanctions Act of 1996, 50 U.S.C. § 1701 note (2000), was partly motivated by Libya's refusal to hand over the two suspects. See H.R. REP. NO. 104-523 (II), at 9 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1312.

<sup>5</sup> See SC Res. 731 (Jan. 21, 1992); SC Res. 748 (Mar. 31, 1992); SC Res. 883 (Nov. 11, 1993).

<sup>6</sup> See Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564, 974 UNTS 177. The Court declined to issue interim measures of protection in favor of Libya. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Provisional Measures, 1992 ICJ REP. 3 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measures, 1992 ICJ REP. 114 (Apr. 14). The Court found, however, that it had jurisdiction over Libya's claims, notwithstanding the apparent conflict between them and the resolutions of the Security Council. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Preliminary Objections, 1998 ICJ REP. 9 (Feb. 27); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Preliminary Objections, 1998 ICJ REP. 115 (Feb. 27), *reprinted in* 37 ILM 587 (1998) (discussed in case report by Peter H. F. Bekker at 92 AJIL 503 (1998)).

<sup>7</sup> Letter Dated 24 August 1998 from the Acting Permanent Representative of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary General, UN Doc. S/1998/795 (1998).

<sup>8</sup> SC Res. 1192 (Aug. 27, 1998). For background on the discussions preceding the trial, and a summary of the verdict and the court's reasoning, see SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW: 1999–2001, at 359–66 (2002).

<sup>9</sup> See Judith Miller, *In Rare Talks with Libyans, U.S. Airs View on Sanctions*, N.Y. TIMES, June 12, 1999, at A4; see also Colin L. Powell, Secretary of State, U.S. Dep't of State Press Release on Press Remarks with British Foreign Secretary Robin Cook (Revised) (Feb. 6, 2001), at <<http://www.state.gov/secretary/rm/2001/522.htm>>.

<sup>10</sup> Her Majesty's Advocate v. Megrahi, No. 1475/99, slip. op. (High Ct. Judiciary at Camp Zeist Jan. 31, 2001), *reprinted in* 40 ILM 582 (2001). The conviction (and sentence to life in prison) was affirmed in March 2002 by the Scottish High Court of Justiciary. See Megrahi v. Her Majesty's Advocate, No. C104/01, slip. op. (Appeal Court, High Ct. Justiciary, Mar. 14, 2002). Both judgments are available online at <<http://www.scotscourts.gov.uk>>.

counsel for the relatives of the victims of the Pan Am bombing, reportedly began what proved to be a series of protracted negotiations. In May 2002, the relatives' attorneys announced a Libyan offer to pay compensation in exchange for the lifting of sanctions, although the Libyan government at the time publicly denied any such offer.<sup>11</sup> The principal sources of contention in the negotiations were, it was reported, the U.S. government's insistence on a Libyan statement accepting responsibility for the bombing, the amount of compensation to be paid, the scope of the sanctions to be lifted, and Libya's willingness to cooperate with continuing investigations into the Pan Am 103 bombing.<sup>12</sup> In the spring of 2003, settlement negotiations gained momentum,<sup>13</sup> and on August 15, 2003, Libya sent a letter to the United Nations, stating:

I am pleased to inform you that the remaining issues relating to the fulfilment of all Security Council resolutions resulting from the Lockerbie incident have been resolved. . . .

The Libyan Arab Jamahiriya has sought to cooperate in good faith throughout the past years to bring about a solution to this matter.

In that context and out of respect for international law and pursuant to the Security Council resolutions, Libya as a sovereign State:

- Has facilitated the bringing to justice of the two suspects charged with the bombing of Pan Am 103 and accepts responsibility for the actions of its officials.
- Has cooperated with the Scottish investigating authorities before and during the trial and pledges to cooperate in good faith with any further requests for information in connection with the Pan Am 103 investigation. . . .
- Has arranged for the payment of appropriate compensation. To that end, a special fund has been established and instructions have already been issued to transmit the necessary sums to an agreed escrow account within a matter of days.

The Libyan Arab Jamahiriya, which during the last two decades has, on numerous occasions, condemned all acts of terrorism in its correspondence to the General Assembly and to the Security Council, reaffirms its commitment to that policy.<sup>14</sup>

The letter then listed various examples of Libya's condemnation of terrorism, including its support for Security Council Resolution 1373,<sup>15</sup> General Assembly Resolution 55/158,<sup>16</sup> and the Declaration on Measures to Eliminate International Terrorism,<sup>17</sup> as well as its adherence to global, regional, and bilateral conventions against terrorism.<sup>18</sup>

The compensation settlement reportedly contemplated a Libyan payment of U.S.\$2.7 billion to an escrow account at the Bank of International Settlements in Basel. Each victim's family

<sup>11</sup> See Peter Slevin and Glenn Kessler, *Libya Disavows Offer to Pay Families of Flight 103 Victims*, WASH. POST, May 30, 2002, at A20; see also Peter Slevin, *Pan Am 103 Settlement Is Elusive; Cultural, Legal Issues Stall Lawyers' Negotiations with Libya*, WASH. POST, July 8, 2002, at A13.

<sup>12</sup> See, e.g., Steven R. Weisman, *U.S. Will Keep Penalties Against Libya, Officials Say*, N.Y. TIMES, Aug. 14, 2003, at A12 (reporting that Libya initially insisted on the lifting of all UN and U.S. sanctions upon payment, and citing an administration official that in June and July, 2003, "[H]ard-liners in the State and Defense Departments sought to oppose the lifting of United Nations sanctions even if Libya met the conditions set. In the end, . . . the administration decided that it would be 'changing the goal posts' to add conditions for the lifting of United Nations sanctions.")

<sup>13</sup> See Alan Sipress and John Mintz, *Libya Accepts Responsibility for Bombing over Lockerbie*, WASH. POST, May 1, 2003, at A12; Matthew L. Wald, *Libya Is Offering to Pay \$2.7 Billion for Pan Am Blast*, N.Y. TIMES, May 29, 2003, at A1.

<sup>14</sup> Letter Dated 15 August 2003 from the Charge d'affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/2003/818 (Aug. 15, 2003).

<sup>15</sup> See SC Res. 1373 (Sept. 28, 2001).

<sup>16</sup> See GA Res. 55/158 (Jan. 30, 2001).

<sup>17</sup> See GA Res. 49/60, annex (Dec. 9, 1994).

<sup>18</sup> See Letter Dated 15 August 2003, *supra* note 14, at 1-2; see also Letter Dated 28 December 2001 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-terrorism Addressed to the President of the Security Council, UN Doc. S/2001/1323, annex (Dec. 31, 2001) (containing a letter from Libya to the committee regarding Libya's counterterrorism efforts).

would receive U.S.\$10 million, of which U.S.\$4 million per family would be paid upon termination of the UN sanctions, another U.S.\$4 million upon lifting of the U.S. sanctions, and the final U.S.\$2 million upon the removal of Libya from the State Department list of state sponsors of terrorism.<sup>19</sup> If the U.S. sanctions remained in place, however, the settlement reportedly provided that Libya could pay an additional U.S.\$1 million per family and then retrieve the remaining funds in the escrow account (that is, U.S.\$1.35 billion).<sup>20</sup>

On August 15, the United States indicated that once the Libyan funds were transferred to the escrow account, the United States would not oppose a UN resolution to terminate UN sanctions against Libya, but that U.S. sanctions would remain in place.<sup>21</sup> According to U.S. Secretary of State Colin Powell:

We remain deeply concerned about other aspects of Libya's behavior, including its poor human rights record and lack of democratic institutions; its destructive role in perpetuating regional conflicts in Africa; and, most troubling, its pursuit of weapons of mass destruction and their related delivery system. Libya also remains on the state sponsors of terrorism list, which carries its own sanctions. Libya must address the concerns underlying these bilateral measures. Libya must continue to take definitive action to assist in the fight against international terrorism.<sup>22</sup>

On August 22, Libya transferred the U.S.\$2.7 billion to the escrow account at the Bank of International Settlements.<sup>23</sup> Thereafter, the United Kingdom asserted that it was willing to sponsor a Security Council resolution to terminate the UN sanctions, but France announced that it would seek to renegotiate compensation for the families of the victims of a separate aerial bombing attributed to the government of Libya (concerning a 1989 French UTA flight).<sup>24</sup> France wanted the previously agreed compensation for those families to be brought into line with the compensation paid in relation to Pan Am Flight 103. Until those negotiations were completed satisfactorily, France threatened to veto a UN resolution terminating that organization's sanctions against Libya.<sup>25</sup> The French position met with strong protests from the families of the Pan Am Flight 103 victims,<sup>26</sup> as well as from the U.S. government,<sup>27</sup> and resulted

<sup>19</sup> See Peter Slevin, *Libya Takes Blame for Lockerbie Bombing*, WASH. POST, Aug. 16, 2003, at A01.

<sup>20</sup> *Id.*

<sup>21</sup> See U.S. Dep't of State Press Release, U.S. Secretary of State Colin L. Powell on Libya—Pan Am 103 (Aug. 15, 2003), at <<http://www.state.gov>>.

<sup>22</sup> *Id.*; see also Peter Slevin, *U.S. Still Wary of Gaddafi's Intentions; Any Lifting of Sanctions Isn't Near, Experts Say*, WASH. POST, Aug. 14, 2003, at A16 (reporting on concerns in the U.S. administration and Congress over Libya's pursuit of weapons of mass destruction).

<sup>23</sup> See Philip T. Reeker, Deputy Spokesman, U.S. Dep't of State Daily Press Briefing at 16 (Aug. 25, 2003), at <<http://www.state.gov>>.

<sup>24</sup> UTA Flight 772 was en route from Brazzaville to Paris when it exploded over Nigeria on September 21, 1989, killing 170, among them 54 French, 7 U.S., and 4 UK citizens. Following an agreement between French President Chirac and Libyan leader Gaddafi in 1996, and a court trial in France in March 1999, in which six Libyans were sentenced in absentia for the carrying out of the attack, the court ordered Libya to pay U.S.\$34 million in compensation, of which less than U.S.\$200,000 was paid to each of the families of the victims, with the rest of the funds going to the French airline company and its insurer. Some critics in France accused the French government of agreeing to a small compensation payment to increase the prospects of oil contracts for French companies in Libya. See Felicity Barringer, *U.N. Council Postpones Vote on Libya Penalties*, N.Y. TIMES, Sept. 10, 2003, at A3; Elaine Sciolino, *Libya and Families in Accord on Payment in '89 Bombing*, N.Y. TIMES, Sept. 2, 2003, at A7; Colum Lynch, *Lockerbie Families Protest French Resistance*, WASH. POST, Aug. 31, 2003, at A18.

Separately, in October 2002, relatives of the U.S. victims who were killed aboard UTA Flight 772 filed a lawsuit against Libya in U.S. federal court. For a copy of the complaint, see <<http://news.findlaw.com/hdocs/docs/terrorism/pughlibya101602cmp.pdf>>.

<sup>25</sup> See Felicity Barringer, *U.N. to Weigh Proposal to End 1988 Penalties Against Libya*, N.Y. TIMES, Aug. 19, 2003, at A11.

<sup>26</sup> See, e.g., Colum Lynch, *Lockerbie Families Protest French Resistance*, WASH. POST, Aug. 31, 2003, at A18.

<sup>27</sup> See Philip T. Reeker, Deputy Spokesman, U.S. Dep't of State Daily Press Briefing at 16 (Aug. 25, 2003), at <<http://www.state.gov>> (stating that the United States has "certainly made clear our deep concern over any possible actions by France or any other country that would impede the settlement," and stating that the United States "continue[s] to support compensation for all victims of terrorism, of course, but the Council's consideration of lifting the Libya sanctions should be based solely on Libya meeting the requirements of the UN Security Council resolutions"); Philip T. Reeker, Deputy Spokesman, U.S. Dep't of State Daily Press Briefing at 14 (Aug. 27, 2003), at <<http://www.state.gov>>.

in a delay in the vote to terminate the UN sanctions.<sup>28</sup> After reaching a preliminary agreement with Libya for additional compensation to be paid to the families of the victims of the UTA flight,<sup>29</sup> France announced that it would no longer oppose a resolution terminating the UN sanctions against Libya. On September 12, the Security Council adopted Resolution 1506 terminating those sanctions.<sup>30</sup> The United States, however, maintained its own sanctions.<sup>31</sup> Further, on September 10, Libya's cases at the International Court of Justice against the United Kingdom and United States were withdrawn at the joint request of the parties in each case.

[www.state.gov](http://www.state.gov)> ("As we have made quite clear, we would like to see that done as quickly as possible."); Philip T. Reeker, Deputy Spokesman, U.S. Dep't of State Daily Press Briefing at 13 (Sept. 3, 2003), at <<http://www.state.gov>> (stating that the lifting of sanctions "has been a matter of high-level discussion among a number of governments").

<sup>28</sup> See Felicity Barringer, *U.N. Council Postpones Vote on Libya Penalties*, N.Y. TIMES, Sept. 10, 2003, at A3.

<sup>29</sup> See Craig S. Smith, *Libya and France Reach Agreement on Victim Compensation*, N.Y. TIMES, Sept. 12, 2003, at A11.

<sup>30</sup> SC Res. 1506 (Sept. 12, 2003). The vote was thirteen in favor, with two abstentions (France and the United States).

<sup>31</sup> See Peter Slevin, *U.N. Vote Removes Sanctions on Libya*, WASH. POST, Sept. 13, 2003, at A14.