

## DEALING WITH A “ROGUE STATE”: THE LIBYA PRECEDENT

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On June 30, 2006, Secretary of State Condoleezza Rice rescinded the United States designation of Libya as a state sponsor of terrorism.<sup>1</sup> Her action ended nearly twenty-seven years of Libya's pariah status in American law and rhetoric.<sup>2</sup> The road to the rehabilitation of Libya was a long one in more than a temporal sense. During the 1980s, the country was widely perceived as the world's strongest supporter of terrorism.<sup>3</sup> The United States in particular saw Libya under the leadership of Muammar el-Qaddafi as a “rogue state”<sup>4</sup> posing a serious threat to U.S. national security interests.<sup>5</sup> This fear was confirmed by Libya's destruction of Pan Am Flight 103 in 1988. A bomb placed

\* Office of the Legal Adviser, United States Department of State. Although the author participated as a U.S. official in each of the phases of U.S.-Libya reengagement described in this article, the views expressed are personal and do not necessarily reflect those of the U.S. government.

<sup>1</sup> 71 Fed. Reg. 39,696 (July 13, 2006). The rescission ended Libya's designation as a state sponsor of terrorism under three statutes: section 6(j) of the Export Administration Act, 50 U.S.C. App. §2405(j) (continued in effect by Executive Order No. 13,222 of August 12, 2001); section 40 of the Arms Export Control Act, 22 U.S.C. §2780; and section 620A of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §2371(c) (Supp. 4 2004). Secretary Rice's action followed the completion of a forty-five-day congressional review period of President George W. Bush's certification to Congress that Libya had not provided support for any acts of international terrorism during the preceding six-month period and had given assurances that it would not support acts of international terrorism in the future. Presidential Determination No. 2006-14, Certification on Rescission of Libya's Designation as a State Sponsor of Terrorism, 71 Fed. Reg. 31,909 (June 1, 2006).

<sup>2</sup> Libya was designated as a state sponsor of terrorism under the Export Administration Act on December 29, 1979. See Letter to the Speaker of the House and the President of the Senate, Enclosure 2, pt. III, 2 PUB. PAPERS: JIMMY CARTER 2290, 2294 (Dec. 29, 1979); Revisions to Reflect Identification and Continuation of Foreign Policy Export Controls, 45 Fed. Reg. 1595, 1596 (Jan. 8, 1980) (codified at 15 C.F.R. §385.4(d) (1980)).

<sup>3</sup> MADELEINE ALBRIGHT WITH BILL WOODWARD, MADAM SECRETARY 328 (2003) (“Before Osama bin Laden, there was Libyan leader Muammar Qadhafi”); *The Nature and Extent of Libya's Direct Involvement in International Terrorism: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong. 38 (1986) (statement of Ambassador Robert B. Oakley, director, Office for Counterterrorism and Emergency Planning, U.S. Dep't of State) (Libya “far and away” most active supporter of terrorism, especially against Americans and Europeans); U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, SPECIAL REP. NO. 138, LIBYA UNDER QADHAFI: A PATTERN OF AGGRESSION (1986) [hereinafter LIBYA UNDER QADHAFI] (Libya's anti-Western activities may be surpassed only by Soviet bloc), reprinted in *id.* at 63–70. Libya's involvement in other violent incidents such as the killing of a London constable by gunfire from Libya's diplomatic mission contributed to its “rogue state” reputation. See, e.g., Rosalyn Higgins, *UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report*, 80 AJIL 135 (1986).

<sup>4</sup> It was common in the 1980s and 1990s for U.S. officials to refer to Libya as a “rogue state.” E.g., *U.S. Security Policy Toward Rogue Regimes: Hearing Before the Subcomm. on International Security, International Organization and Human Rights of the House Comm. on Foreign Affairs*, 103d Cong. (1993). This label was still in use by administration officials as recently as 2002. See John R. Bolton, *Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction* (lecture by under secretary for arms control, U.S. Dep't of State) (May 6, 2002), available at <<http://www.heritage.org/Research/NationalSecurity/HL743.cfm>>; see also ROBERT S. LITWAK, *ROGUE STATES AND U.S. FOREIGN POLICY* 3 (2000) (“The term ‘rogue state’ is an American political rubric without standing in international law that has gained currency since the end of the Cold War.”).

<sup>5</sup> For its part, Libya justified its actions as legitimate support for national liberation movements such as the African National Congress and the Palestine Liberation Organization which the United States subsequently lionized, see

by Libyan agents on board the aircraft en route to New York detonated over Lockerbie, Scotland, resulting in the deaths of 270 civilians, including 189 Americans. It was perhaps the single worst act of terrorism against the United States until the carnage of September 11, 2001.<sup>6</sup>

Secretary Rice's action signified the transformation of Libya from a country regarded by many Americans as the 1980s Al Qaeda to a hoped-for model for Iran, North Korea, and other states hostile to the United States.<sup>7</sup> This remarkable turnaround marked the first time the United States rescinded a terrorism designation under current law without a change of government.<sup>8</sup> Along the way, the United States had invoked numerous tools in an effort to change Libya's threatening behavior—military strikes, unilateral and multilateral economic sanctions, criminal prosecutions, United Nations demands, and direct diplomacy. But there was nothing inevitable about the particular tools chosen, nor their ultimate results. U.S. officials, both in the executive branch and in Congress, had to make difficult judgments, weighing the prospects for success of each option, its likely reception by international and American audiences, and its collateral effects on other U.S. foreign policy objectives. Through this process, various options used elsewhere were rejected, including international dispute resolution, interdiction of oil exports, vesting of assets, and full-scale invasion.

Whether the lengthy process leading to Libya's graduation from pariah status is seen as a success or a failure, these tactical and strategic judgments are instructive for the future. International relations do not afford the luxury of controlled experiments, so history serves as our only laboratory.<sup>9</sup>

Lally Weymouth, *The Former Face of Evil*, NEWSWEEK, Jan. 20, 2003, at 36 (interview with Colonel Qaddafi), or as the only available defensive measures it could take to counter alleged U.S. aggression, see Andrew Solomon, *Circle of Fire; Libya's Reformers Dream of Rejoining the World. Will the Hard-Liners Let That Happen?* NEW YORKER, May 8, 2006, at 44, 47 (during the presidency of Ronald Reagan, Libya was "expecting America to attack us any time—our whole defensive strategy was how to deal with the Americans," according to Qaddafi's son. Libya "used terrorism and violence because these are the weapons of the weak against the strong. I don't have missiles to hit your cities, so I send someone to attack your interests. Now that we have peace with America, there is no need for terrorism, no need for nuclear bombs.").

<sup>6</sup> The literature on the Pan Am 103 bombing is both extensive and diverse. See, e.g., SUSAN & DANIEL COHEN, PAN AM 103: THE BOMBING, THE BETRAYALS, AND A BEREAVED FAMILY'S SEARCH FOR JUSTICE (2000) (Pan Am family members); MATTHEW COX & TOM FOSTER, THEIR DARKEST DAY: THE TRAGEDY OF PAN AM 103 AND ITS LEGACY OF HOPE (1992) (investigative reporters); ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR (2001) (attorneys for Pan Am family members); R. DOUG WICKER, TERRORIST ATTACKS: THE BOMBING OF PAN AM FLIGHT 103 (2003) (for juvenile audiences).

<sup>7</sup> President Bush's justification for rescinding Libya's terrorism designation concludes: "Rescission in this case will strongly support the objectives of the state sponsor legislation. Libya has responded in good faith not only in the area of international terrorism but also in the related field of weapons of mass destruction. Libya will become a useful model to point to as we press for changes in policy by other countries—Iran, North Korea, and others—vital to United States national security interests and international peace and security." Presidential Determination No. 2006-14, *supra* note 1, at 31,914.

<sup>8</sup> Previously, countries had been removed from the terrorism list three times. South Yemen was removed when it was absorbed into North Yemen, which was not designated as a state sponsor of terrorism. See U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1990, at 32 (1991) [hereinafter PATTERNS: 1990]. The State Department's annual *Patterns of Global Terrorism* series and its successor, *Country Reports on Terrorism*, are available online at <<http://www.state.gov/s/ct>>. Iraq was removed in 1982 before the law set out a particular threshold for doing so, see U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1987, at 38 (1988), was redesignated in 1990, see PATTERNS: 1990, *supra*, at 34, and was removed a second time in 2004 on the basis of the change in government following Saddam Hussein's removal, see 69 Fed. Reg. 58,793 (2004) (presidential certification to Congress); *id.* at 61,702 (rescission of designation by secretary of state).

<sup>9</sup> See LITWAK, *supra* note 4 (case studies of U.S. policies toward Iraq, Iran, and the Democratic People's Republic of Korea). *But cf.* THE COLLECTED WHAT IF? EMINENT HISTORIANS IMAGINE WHAT MIGHT HAVE BEEN (Robert Cowley ed., 2001) (counterfactual speculations about key historical events).

The struggle to move Libya away from its terrorist past provides a particularly rich source of data for this inexact science.

In this article, I trace the challenge for the United States in dealing with Libya from the Pan Am bombing in 1988 to the present. Part I recounts the unusual strategy developed by the United States and the United Kingdom to place Libya's support for terrorism on the international agenda at the United Nations. Part II describes Libya's equally surprising response, which tried to redirect the dispute into legal channels at the International Court of Justice. Although Libya's gambit largely failed, United Nations support for the United States and the United Kingdom also proved insufficient. Part III of the article describes the unilateral measures adopted by the United States to overcome this impasse. These also proved unavailing, leading to a grand bargain in 1998 to hold the trial of the Pan Am 103 suspects in a Scottish court in the Netherlands, which is summarized in part IV.

The accommodation reached on the trial issue signaled Libya's willingness to address the other U.S.-UK demands. As described in part V, once the suspects were transferred, the United States and the United Kingdom agreed to direct talks with Libya to resolve the remaining issues on the United Nations agenda, a process that ended successfully in 2003. This achievement still left unilateral U.S. sanctions in place. Part VI describes the gradual process of lifting the U.S. sanctions in response to Libya's dramatic decision to cease pursuing weapons of mass destruction (WMD). My goal in each discussion is to highlight the choices U.S. decision makers faced in overcoming the difficult problems with Libya that had accumulated since the 1970s. The hostility between the two countries stemmed from differences in perception, as well as differences in interests, and each side faced domestic and international constraints in arriving at acceptable solutions. In the end, success was achieved, but at great financial and diplomatic cost and only after a long delay. In part VII, I draw some lessons from the choices made by U.S. officials during this high-stakes process.

## I. THE U.S. RESPONSE TO PAN AM 103

In January 1991, the United States and the United Kingdom completed one of the most complex and wide-ranging criminal investigations in history.<sup>10</sup> Fortunately for investigators, the downing of Pan Am 103 in 1988 took place over Lockerbie, Scotland, rather than the Atlantic Ocean as probably had been intended. Analysis of the meticulously collected debris provided important clues to the nature and origin of the crime, leading back to two Libyan suspects. The United States and the United Kingdom faced a choice. The targeting of a civilian aircraft might be considered an "act of war," as the United States had treated the Libyan-sponsored attack on off-duty U.S. military personnel at a Berlin nightclub, the LaBelle discotheque, in 1986. In response, U.S. military jets had carried out air strikes against Tripoli and Benghazi on the basis of an asserted U.S. right of self-defense under the UN Charter.<sup>11</sup> In the

<sup>10</sup> See, e.g., DAVID LEPPARD, ON THE TRAIL OF TERROR: THE INSIDE STORY OF THE LOCKERBIE INVESTIGATION (1991); David R. Andrews, *A Thorn on the Tulip—A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 36 CASE W. RES. J. INT'L L. 307, 308 (2004) (investigation included "15,000 interviews conducted in over twenty countries, 35,000 photos, and 180,000 pieces of evidence").

<sup>11</sup> Resort to War and Armed Force, 1981–88 CUMULATIVE DIGEST §1, at 3405–10.

case of Pan Am 103, the United States and the United Kingdom might have chosen a similar course.<sup>12</sup>

Instead, they elected to treat the bombing of Pan Am 103 as a crime under their domestic legal processes and for which Libya bore state responsibility under international law. The United States and the United Kingdom issued parallel indictments against the two Libyan suspects and pressed for their transfer for trial before a U.S. or UK court. At the same time, the two countries announced a series of further demands: that Libya accept responsibility for the crime, pay appropriate compensation, and cooperate in the criminal investigation.<sup>13</sup> In addition, they joined with France in issuing a trilateral demand that Libya concretely demonstrate its renunciation of terrorism.<sup>14</sup> Separately, France accused Libya of responsibility for the downing of French UTA Flight 772 over Chad in 1989, and called for Libya to cooperate in the French criminal investigation.<sup>15</sup> Notably, unlike the United States and the United Kingdom, France did not call for the transfer of suspects, acceptance of responsibility, or payment of compensation. The three countries presented their demands to the United Nations Security Council, along with the criminal accusations, under the implicit threat of an effort to secure Security Council sanctions if Libya failed to comply.

What might explain this difference in approach from 1986, when the United States responded to the LaBelle disco attack militarily? First, the 1986 air strikes on Tripoli and Benghazi evidently had failed to deter further Libyan acts of terrorism and, indeed, may have even provoked the Pan Am 103 bombing. Moreover, the international response to the 1986 air strikes had not been favorable<sup>16</sup> and another intervention into Libya could have sparked stronger opposition, particularly because this time it took three years to assemble the evidence of Libya's responsibility.<sup>17</sup> A claim of self-defense after so much time had passed could well have encountered skepticism.<sup>18</sup> Further, the United States may have believed that placing the case

<sup>12</sup> Before joining the second Bush administration, John Bolton took this position. See *U.S. Policy Toward Libya: Hearing Before the Subcomm. on Near Eastern and South Asian Affairs of the Senate Comm. on Foreign Relations*, 106th Cong. 25 (2000) [hereinafter *U.S. Libya Policy Hearing*] (statement of John R. Bolton) (mistake to treat Pan Am 103 as a "diplomatic or judicial matter. . . . We should have followed President Reagan's example in the wake of the La Belle disco bombing."). Bolton was later to become one of the primary U.S. negotiators with Libya on the implementation of its disarmament pledges.

<sup>13</sup> Joint U.S.-UK Declaration (Nov. 27, 1991): Statement Issued by the British Government, UN Doc. A/46/826-S/23307, Annex III (1991); Statement Issued by the Government of the United States, UN Doc. A/46/827-S/23308, annex (1991).

<sup>14</sup> Declaration of the United States, France and Great Britain on Terrorism (Dec. 20, 1991), UN Doc. A/46/828-S/23309, annex (1991).

<sup>15</sup> Communiqué from the Presidency of the French Republic and the Ministry of Foreign Affairs (Dec. 20, 1991), UN Doc. A/46/825-S/23306, annex (calling upon Libya to produce evidence and documents, facilitate interviews with witnesses, and authorize its officials to respond to requests from the French examining magistrate); see notes 106–07 *infra* and corresponding text.

<sup>16</sup> The United States, the United Kingdom, and France were forced to veto a Security Council resolution condemning the air strikes as a violation of the UN Charter. See CUMULATIVE DIGEST, *supra* note 11, at 3406–07. Libya, however, was able to secure passage of a condemnatory resolution by the General Assembly. GA Res. 41/38 (Nov. 20, 1986) (condemning attack and affirming Libyan right to compensation); see also MAD DOGS: THE U.S. RAIDS ON LIBYA (Mary Kaldor & Paul Anderson eds., 1986).

<sup>17</sup> In the case of the LaBelle disco bombing, President Reagan claimed that the Libyan People's Bureau in East Berlin had confirmed Libya's role in the attack on the day it occurred; U.S. air strikes followed nine days later. See Address to the Nation on the United States Air Strike Against Libya, 1 PUB. PAPERS: RONALD REAGAN 468 (Apr. 14, 1986).

<sup>18</sup> The generally accepted purpose of self-defense under international law is deterrence rather than punishment. With the passage of time, it may be more difficult to cite incidents such as the Pan Am 103 bombing as grounds

before the international community—and the courts—rather than responding unilaterally would help ensure that the policies of Libya would receive sustained scrutiny, possibly deterring it from further acts of terrorism. Finally, the United States was now led by President George H. W. Bush, a former United Nations ambassador intrigued by the prospect of a new world order following the dissolution of the Soviet Union.<sup>19</sup> The backing for the initiative of three permanent members of the Security Council held out the promise of an unprecedented united international response to Libya's continuing threat to all nations. The Pan Am 103 and UTA 772 bombings had killed passengers from dozens of countries, and these incidents followed other Libyan-orchestrated indiscriminate attacks on civilians in Europe and elsewhere.<sup>20</sup> Whatever the definition of "international terrorism,"<sup>21</sup> Libya enjoyed little sympathy for practices that placed innocents around the world at risk.

The strategy of turning to the United Nations did work to isolate Libya, at least in the short run. In a series of resolutions beginning in 1992, the Security Council called on the government to provide a "full and effective response" to the trilateral demands and insisted that Libya renounce—and prove its dissociation from—terrorism.<sup>22</sup> When Libya failed to satisfy the Council, sanctions of increasing severity were imposed. An embargo on aviation relations and arms transfers<sup>23</sup> was followed by a freeze on Libyan assets.<sup>24</sup> As the international spotlight on Libya intensified, reports of its involvement in terrorism dropped off noticeably.<sup>25</sup>

to use force to prevent a future attack. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 209–10 (4th ed. 2005); cf. UN CHARTER Art. 51 (preserving right of self-defense "if an armed attack occurs against a Member of the United Nations").

<sup>19</sup> Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS: GEORGE H. W. BUSH 129 (Jan. 31, 1990).

<sup>20</sup> See, e.g., LIBYA UNDER QADHAFI, *supra* note 3; JOSEPH T. STANIK, EL DORADO CANYON: REAGAN'S UNDECLARED WAR WITH QADDAFI 24 (2003) ("By the early 1980s Qaddafi was providing funds, training, and logistical support to insurgent movements, opposition groups, and terrorist elements in more than thirty countries, from South America to the Philippines.").

<sup>21</sup> The Libya case was the first time the UN Security Council had imposed sanctions for support of "acts of terrorism." See Lori F. Damrosch, *The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq Precedent?* 13 EUR. J. INT'L L. 305, 319 (2002). Historically, the definition of "terrorism" has been controversial; for example, as to whether it encompasses furtherance of national liberation movements, resistance to occupation, or actions by military forces. These differences thus far have blocked the conclusion of a global convention on "terrorism" as such. Cf. U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2005, at 9 (2006) (for purposes of U.S. terrorism list, "terrorism" means "premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents," but this definition does not necessarily apply for other purposes).

<sup>22</sup> The first resolution was nonbinding but expressed deep concern over the results of the U.S.-UK and French investigations and "urged" Libya to provide a "full and effective response" to the requests of the three governments. SC Res. 731, para. 3 (Jan. 21, 1992).

<sup>23</sup> On March 31, 1992, the Council adopted Resolution 748, invoking its authority under Chapter VII of the UN Charter, to make its request in Resolution 731 binding on Libya and to decide, in paragraph 2, that "the Libyan Government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism." At the same time it imposed an aviation and arms embargo until Libya complied with these requirements. SC Res. 748, paras. 3–5 (Mar. 31, 1992).

<sup>24</sup> SC Res. 883, para. 3 (Nov. 11, 1993). The freeze applied only to assets as of that date, not to assets derived from later sales of petroleum, although they were at risk of future Security Council action.

<sup>25</sup> By 1998, the U.S. Department of State reported that Libya had not been implicated in any international terrorist acts for several years. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1998, at 33 (1999) [hereinafter PATTERNS: 1998]; see LITWAK, *supra* note 4, at 97.

Nevertheless, by linking the response to Pan Am 103 to a criminal proceeding, the United States and the United Kingdom created a tension that was never fully resolved. In a prosecution, the defendant is entitled to a presumption of innocence, and guilt must be proven by the high standard of public evidence beyond a reasonable doubt. Yet the United States was seeking the immediate satisfaction of several demands that seemed to depend upon acceptance of the accusations in the criminal indictments. A common refrain by Libya and its supporters as the period of sanctions dragged on was that it would be illogical, and even prejudicial to the accused, for Libya to accept responsibility and pay compensation prior to the completion of the judicial process.<sup>26</sup> This reasoning, in turn, suggested that failure to convict would be seen as a vindication of Libya's protestations of innocence. Indeed, an acquittal threatened to undermine the case against Libya as a terrorist-supporting state in the eyes of the world. Pegging U.S. demands to the criminal justice system also drained the U.S.-UK demands of a sense of urgency, since trials and appeals can take years, with no definitive end point.<sup>27</sup>

In this context, the international community naturally found it appealing to lend its greatest support to the demand that the suspects be brought to trial to test the U.S.-UK accusations. One result was that Libya was given an opening to challenge the U.S.-UK claim to priority of jurisdiction for conducting these proceedings.

## II. THE LIBYAN RESPONSE TO THE U.S.-UK DEMANDS

Libya publicly expressed surprise at the accusations against its officials and asserted an interest in carrying out its own investigation. It called on the United States and the United Kingdom to provide the evidence they had collected and offered public assurances that it would bring to justice any Libyans demonstrated by the evidence to have been responsible for the Pan Am 103 bombing.<sup>28</sup> When the UN Security Council was unmoved, Libya turned to a second United Nations institution for support, the International Court of Justice (ICJ). Libya claimed compulsory ICJ jurisdiction against the United States and the United Kingdom in parallel cases under the Montreal Convention on the safety of aircraft in flight, a multilateral treaty that committed parties to prevent acts of terrorism against aircraft and to bring perpetrators to justice.<sup>29</sup> Libya argued that the Convention gave priority of jurisdiction to countries in which

<sup>26</sup> JOHN P. GRANT, *THE LOCKERBIE TRIAL: A DOCUMENTARY HISTORY* 135, 141 (2004) (reprinting Libyan position paper of 1997 presented to UN members); see LORI F. DAMROSCH, *ENFORCING INTERNATIONAL LAW THROUGH NON-FORCIBLE MEASURES* 138 (1997) (describing more relaxed evidentiary and procedural requirements in Security Council than in judicial proceeding).

<sup>27</sup> On June 28, 2007, the Scottish Criminal Cases Review Commission authorized a further appeal by the convicted Libyan suspect. This appeal may extend the criminal proceedings in Scottish courts for a number of years, particularly if it results in a new trial. For the commission's summary of the grounds for allowing the appeal, see News Release, Abdelbaset Ali Mohamed al Megrahi (June 28, 2007), available at <<http://www.sccrc.org.uk/ViewFile.aspx?id=293>>.

<sup>28</sup> See GRANT, *supra* note 26, at 106–07 (reprinting application of Libya to ICJ reciting Libyan steps).

<sup>29</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, opened for signature Sept. 23, 1971, 24 UST 564, 974 UNTS 177 [hereinafter Montreal Convention]. Libya did not bring a case against France, presumably because France was not pressing for the transfer of Libyan suspects in the UTA 772 bombing. In the end, France conducted its trial, including of Libyan officials, *in absentia*. See note 82 *infra*.

alleged perpetrators are present.<sup>30</sup> To the extent that the United States and the United Kingdom were demanding that the suspects be transferred to their courts, Libya argued, they were challenging Libya's rights under the Convention. The irony that Libya—a state accused of sponsoring one of the worst acts of international terrorism in history—was claiming exclusive jurisdiction to judge its own agents (and was even demanding disclosure of sensitive information about its own activities) was not lost on observers.

Libya nonetheless requested that the ICJ urgently indicate "provisional measures" to prevent the United States and the United Kingdom from pressuring Libya into forfeiting its claimed rights under the Montreal Convention, either through the use of force, "threats," or any other "violations of the sovereignty, territorial integrity, and the political independence of Libya."<sup>31</sup> As one prominent commentator has noted, "[I]t was widely assumed that the real purpose of that request . . . was to forestall Chapter VII action by the Security Council which was already itself seized of the situation."<sup>32</sup> If so, Libya's strategy failed, since after oral argument on Libya's request for provisional measures but prior to the Court's decision, the Security Council adopted its first binding resolution requiring Libya to respond to the U.S.-UK demands.<sup>33</sup> This confluence of events set the stage for a potential conflict between the Security Council and the ICJ.

In supplemental filings Libya argued that, to the extent the Council was insisting that Libya sacrifice its priority of jurisdiction under the Montreal Convention to try the suspects, the Council had acted in an *ultra vires* fashion. Libya invited the ICJ to adjudicate Libyan rights under the Montreal Convention independently of any positions the Council may have taken on resolving the dispute.<sup>34</sup> The United States and the United Kingdom responded that under the UN Charter, the Council was expressly authorized to override treaty provisions where necessary in carrying out its exclusive function to restore international peace and security.<sup>35</sup> Although they disputed Libya's claim that rights under the Montreal Convention were at issue,

<sup>30</sup> 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) [hereinafter *Lockerbie Order*]. (ICJ documents cited in this article are available online at the Court's Web site, <<http://www.icj-cij.org>>.) Libya's argument was largely based on the inclusion in the Montreal Convention of a prosecute-or-extradite clause that obliges a party to respond favorably to an extradition request for a suspect found on its territory in the event it does not "submit the case to its competent authorities for the purpose of prosecution." Montreal Convention, *supra* note 29, Art. 7. Similar clauses are found in numerous other antiterrorism conventions. *E.g.*, International Convention for the Suppression of Terrorist Bombings, Art. 8, *opened for signature* Dec. 15, 1997, 2149 UNTS 284; International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res. 59/290, Art. 11 (Apr. 13, 2005), *opened for signature* Sept. 14, 2005. (For the major global counterterrorism conventions, see UN Treaty Collection, Conventions on Terrorism (Oct. 6, 2005), at <<http://untreaty.un.org/English/Terrorism.asp>>.) Libya's argument required the ICJ to find that the Pan Am 103 incident was a crime covered by the Convention, and that the Convention establishes a priority among parties that have overlapping claims to jurisdiction in favor of the country in which the suspect is present. Libya was also claiming a right to the evidence collected by the United States and the United Kingdom pursuant to Article 11 of the Montreal Convention, *supra* ("Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences.").

<sup>31</sup> *Lockerbie Order*, *supra* note 30, at 118, para. 7.

<sup>32</sup> SHABTAI ROSENNE, PROVISIONAL MEASURES IN INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 219 (2005).

<sup>33</sup> Resolution 748 was adopted on March 31, 1992. *See supra* note 23.

<sup>34</sup> *Lockerbie Order*, *supra* note 30, at 126, para. 39.

<sup>35</sup> *See* UN CHARTER Art. 103.

they stressed that the relevant rights of the parties had now been determined by the Council's binding decision.<sup>36</sup>

A majority of the Court agreed with the United States and the United Kingdom that granting Libya's provisional measures request would be inappropriate given the prima facie supremacy of the Security Council's decision under Chapter VII of the UN Charter.<sup>37</sup> At the same time, in separate opinions several members of the Court demonstrated their awareness of the fundamental issue raised by Libya's pleading,<sup>38</sup> in essence the international counterpart to the U.S. Supreme Court's consideration of judicial review in *Marbury v. Madison*.<sup>39</sup> When at a subsequent stage of the proceedings the Court upheld its jurisdiction, it again shied away from deciding whether it could second-guess the Security Council's imposition of measures to restore international peace and security. Instead, the majority relied on the principle that admissibility and jurisdiction are determined by the situation at the time an application is filed, which in this case preceded binding UN Security Council action.<sup>40</sup> Later, Libya withdrew its case as part of a negotiated package with the United States and the United Kingdom,<sup>41</sup> so the Court ultimately avoided addressing the separation-of-powers issue on the merits.

For Libya, its strategy of seeking the ICJ's assistance nevertheless served two useful purposes. First, Libya could point to the pendency of the proceedings as part of its campaign to remove the Pan Am 103 issue from the Security Council's agenda and to erode support for sanctions. In fact, Libya had little difficulty obtaining numerous nonbinding resolutions by regional organizations showing sympathy for its view that a neutral body such as the ICJ should determine who had the rightful claim to try the two suspects.<sup>42</sup> Also, bringing the ICJ into the picture enabled Libya to confuse matters by suggesting as a compromise that the actual guilt or

<sup>36</sup> Lockerbie Order, *supra* note 30, at 126, para. 40.

<sup>37</sup> *Id.* at 126–27, paras. 42–44, 46. At the time, the ICJ had not yet ruled on whether its provisional measures are legally binding. In the *LaGrand* case, also involving the United States, the Court later decided that provisional measures could be binding. *LaGrand* (Ger. v. U.S.), 2001 ICJ REP. 466, 506, para. 109 (June 27). Had it accepted Libya's request, the Court might have faced the challenge of shaping interim measures that would not result in the anomaly of directing the United States (and the United Kingdom) to violate Security Council Resolution 748, while the rest of the UN membership would remain bound since the Court's ruling would not apply to them. See José E. Alvarez, *Judging the Security Council*, 90 AJIL 1, 4–7 (1996).

<sup>38</sup> Lockerbie Order, *supra* note 30, at 140–41 (Shahabuddeen, J., sep. op.) (conflict is not between Court and Security Council but between Libya's obligations under Security Council decision and any obligations it may have under the Montreal Convention); *id.* at 145, para. 7 (Bedjaoui, J., dissenting) ("grey area" in which powers of Security Council and ICJ overlap); see, e.g., Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1, 2–3 (1993) (noting that the "majority opinion thus averted a potential constitutional confrontation between two organs of the United Nations, but the concurring and dissenting opinions suggest that such a confrontation is possible in the future").

<sup>39</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, the Supreme Court resolved that under the U.S. Constitution the Supreme Court's interpretation of the Constitution prevails over that of the other branches of government, thus opening the way to judicial nullification of executive action and legislation. Whether the ICJ should play a similar role on the international plane in reviewing Security Council action is sharply disputed. Compare Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?* 86 AJIL 519 (1992) (favorable), with W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AJIL 83 (1993) (critical). See also Alvarez, *supra* note 37 (both sides—"legalists" and "realists"—wrongly assume there is a single question with a single answer).

<sup>40</sup> 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, 129–31, paras. 39–44 (Feb. 27).

<sup>41</sup> See note 109 *infra*.

<sup>42</sup> See UN Docs. S/1994/373, annex; S/1995/834, annex; S/1997/273, annex; S/1997/497, annex; S/1997/529, annex (conveying resolutions and statements made by the League of Arab States and the Organization of African Unity). Colonel Qaddafi's son has written that the Court's favorable jurisdictional ruling was particularly helpful



innocence of the two suspects might be determined by the ICJ itself.<sup>43</sup> The ICJ's lack of jurisdiction to conduct criminal proceedings was a detail that could be obfuscated in the battle for international public opinion.<sup>44</sup>

The question arises, however, why the United States and the United Kingdom did not take their own grievances against Libya to the ICJ. The demands that the United States and the United Kingdom presented to the Security Council might have been formulated as a request for relief from the Court in response to Libyan breaches of the Montreal Convention.<sup>45</sup> The Court's eventual favorable jurisdictional ruling for Libya demonstrated that the Montreal Convention might have also been available to the United States and the United Kingdom as a basis for jurisdiction. A ruling against Libya by the highest judicial body of the United Nations would have been difficult for Libya to attack on political grounds, and in the event of noncompliance, the Security Council would have had the authority to insist that Libya fulfill the Court's ruling.<sup>46</sup> Indeed, international respect for Security Council sanctions against Libya would probably have been enhanced if they were in aid of the highest UN judicial body.

Recent U.S. experience with the ICJ, however, had not been favorable, culminating in the U.S. walkout on the *Nicaragua* proceedings.<sup>47</sup> Even U.S. success during the earlier *Hostages* proceedings had not produced any measurable change in Iranian behavior.<sup>48</sup> As a result, the United States may not have viewed the Court as either a favorable or a particularly effective forum for resolving highly politicized disputes. Moreover, bringing a state-to-state judicial action against Libya would have transformed Libya's support for terrorism into a purely bilateral issue,<sup>49</sup> which could have made it more difficult to enlist the international community's

in Libya's campaign to secure supportive resolutions by the Organization of African Unity (OAU), the Non-Aligned Movement, and the Arab League. See Saif Aleslam al-Qadhafi, *Libyan-American Relations*, MIDDLE E. POL'Y, Spring 2003, at 35, 40.

<sup>43</sup> GRANT, *supra* note 26, at 138 ("Libya offered to resort to the International Court of Justice to ascertain the veracity of the accusations leveled against the two Libyan suspects.").

<sup>44</sup> The ICJ is available only to resolve interstate disputes or to render advisory opinions at the request of specified international organizations. ICJ Statute Arts. 34, 36, 65.

<sup>45</sup> The United States might have argued, for example, that Libya had failed to carry out Article 10 of the Montreal Convention, *supra* note 29, which requires parties to take "all practicable measures for the purpose of preventing the offences" covered by the Convention. In addition to seeking compensation for this breach, the United States might have argued that Libya's complicity deprived it of the option of asserting jurisdiction over the suspects.

<sup>46</sup> Under the UN Charter, the Security Council is empowered to enforce binding decisions of the ICJ. UN CHARTER Art. 94.

<sup>47</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, 17, para. 10 (June 27) (U.S. withdrawal letter). The United States claimed that the Court lacked jurisdiction and that the case was inadmissible, depriving the Court of the competence to adjudicate, notwithstanding its ruling to the contrary. See *id.*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Nov. 26); Marian Nash Leich, *Contemporary Practice of the United States*, 79 AJIL 438 (1985).

<sup>48</sup> *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP. 3 (May 24) (deciding that Iran had an obligation to secure the immediate release of the American staff). When Iran failed to comply, the United States was unable to obtain Security Council action to enforce the judgment. See Robert Carswell, *Economic Sanctions and the Iran Experience*, FOREIGN AFF., Winter 1981/1982, at 247.

<sup>49</sup> In Resolution 748, *supra* note 23, the Security Council found that Libya's failure to demonstrate its renunciation of terrorism constituted a general threat to international peace and security and decided that the Libyan government must cease all forms of terrorist action and assistance to terrorist groups, a demand that covered Libya's activities around the globe.

support for pressure on Libya. Further, once Libya had brought its own case, a U.S. counterclaim could have undermined efforts to persuade the Court to reject Libya's case in light of the Security Council's assumption of responsibility over the dispute.<sup>50</sup>

Moreover, the United States likely had practical concerns about placing its dispute with Libya in an international judicial context. This approach would have meant protracted, technical proceedings, ill suited to rapidly building a political coalition to deter further Libyan support for terrorism. Also, the ICJ proceedings themselves might have required the United States and the United Kingdom to disclose more of the evidence of Libya's culpability, compromising the criminal case and perhaps still not satisfying the ICJ of Libya's state responsibility.<sup>51</sup> The United States and the United Kingdom might also have worried that while the ICJ proceedings dragged on for years, the ability to mount an effective criminal prosecution would dissipate through loss of witnesses, increased haziness of memories, and retirement of knowledgeable personnel. The United States may have had additional concerns about the precedential effect of applying the Montreal Convention to state actors, given the risk that it would lead to interpretation of counterterrorism conventions more generally to permit challenges to U.S. military actions.<sup>52</sup>

In the end, the United States was unable to prevent some involvement by the ICJ during the key period when the Security Council was addressing Libya's support for terrorism. But by resisting the Court's use as a decision maker in the dispute, the United States delayed and ultimately avoided rulings on the merits of Libya's claims, including the Libyan challenge to the Security Council's own action. This strategy provided more time to lay the groundwork for an overall political solution.

<sup>50</sup> The Court's rules required that a counterclaim be filed by the time of the U.S. merits memorial. See ICJ, Rules of Court, *as amended* Sept. 29, 2005, Rule 80. At that point the Court had still not definitively resolved the relationship between claims under the Montreal Convention and the Security Council's Chapter VII resolutions. See note 40 *supra* and corresponding text. A U.S. counterclaim urging application of the Convention notwithstanding the Council's decisions could therefore have created difficulties in contesting the right of Libya to similar consideration of its Convention claims. The U.S. posture contrasted with the U.S. decision to file counterclaims in a later ICJ case brought by Iran—the *Oil Platforms* case—where there were no competing Security Council resolutions. See Pieter H. F. Bekker, Case Report: Oil Platforms (Iran v. United States), 98 AJIL 550, 550–58 (2004) (procedural history and decision); Sean D. Murphy, Contemporary Practice of the United States, *id.* at 597–601 (U.S. government critique of decision).

<sup>51</sup> In the Security Council, the United States and the United Kingdom limited their presentation of evidence to their two indictments. In an ICJ proceeding, far more extensive disclosures might have been required to persuade the Court that the suspects had acted at Libya's behest, which was not at issue in the criminal cases. *But see* note 79 *infra* (evidence of Libyan role). Although the ICJ has some fact-finding capabilities, its record of adjudicating complex historical events has been subject to pointed criticism. See Shabtai Rosenne, *Lessons of the Past and Needs of the Future, in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 466, 489–90 (Connie Peck & Roy S. Lee eds., 1997) (listing deficiencies in ICJ's fact-finding capabilities).

<sup>52</sup> While some of the current global counterterrorism conventions expressly exclude military activities, *see, e.g.*, International Convention for the Suppression of Acts of Nuclear Terrorism, *supra* note 30, Art. 4(2); International Convention for the Suppression of Terrorist Bombings, *supra* note 30, Art. 19; International Convention Against the Taking of Hostages, Art. 12, *opened for signature* Dec. 17, 1979, TIAS No. 11,081, 1316 UNTS 205, others, like the Montreal Convention, do not, *see, e.g.*, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 UST 1975, 1035 UNTS 167. In the *Iran Aerial Incident* case in the ICJ, before it was settled the United States argued that the Montreal Convention does not “address the actions of States against civil aircraft, and in particular clearly does not apply to the actions of a State's armed forces engaged in armed conflict.” Preliminary Objections Submitted by the United States of America, Aerial Incident of 3 July 1988 (Iran v. U.S.), 2 ICJ Pleadings 3, 167 (Mar. 4, 1991).

### III. U.S. UNILATERAL EFFORTS TO CHANGE LIBYA'S RESPONSE

As time passed, those expecting justice for the Pan Am incident were understandably frustrated. Although evidence of further Libyan acts of terrorism during the 1990s was scarce, the status quo was unacceptable to the United States, including to the U.S. Congress. Since the executive branch had already largely exhausted its own tools for penalizing Libya,<sup>53</sup> Congress chose to enact ever more punitive provisions.

U.S. legislative pressure came in two forms—sanctions against Libya and sanctions against third parties dealing with Libya. As a designated state sponsor of terrorism, Libya was automatically subject to numerous U.S. sanctions. Congress moved over the years to increase these penalties.<sup>54</sup> Most notably, in 1996 Congress abrogated the sovereign immunity of countries designated as supporters of terrorism to allow private damage actions in U.S. courts by U.S. victims.<sup>55</sup> The relatives of Americans killed on Pan Am 103 were among the most active and well-organized victims' groups who lobbied Congress for that change.<sup>56</sup> Because the U.S. government had itself demanded payment of appropriate compensation for the Pan Am 103 incident, this change created the possibility of conflict between the government and the Pan Am 103 claimants over how to satisfy this demand.

The second legislative innovation was even more controversial. Having largely exhausted the possibilities for unilateral sanctions against Libya, Congress attempted to pressure third parties into curtailing their own dealings with Libya and other state sponsors of terrorism. For example, new provisions threatened third countries with a cut-off of U.S. military equipment if they supplied lethal military equipment to countries on the terrorism list.<sup>57</sup> Similarly, U.S. foreign assistance was to be withheld if beneficiaries provided assistance to such countries.<sup>58</sup> Congress also began enacting provisions in U.S. foreign assistance legislation to deny aid to countries that

<sup>53</sup> The State Department closed the U.S. embassy in Tripoli in 1980 and required Libya to close its mission in the United States the following year. By 1986, the executive branch had established a comprehensive ban on trade and financial transactions with Libya under the authority of the International Economic Emergency Policy Act. *See* Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 9, 1986), *reprinted in* 50 U.S.C. §1701 note (repealed 2006) (embargo on trade and financial transactions); Exec. Order No. 12,544, 51 Fed. Reg. 1235 (Jan. 10, 1986), *reprinted in* 50 U.S.C. §1701 note (repealed 2006) (blocking Libyan assets); Exec. Order No. 12,538, 50 Fed. Reg. 47,527 (Nov. 19, 1985), *reprinted in* 19 U.S.C. §1862 note (repealed 2006) (ban on oil imports).

<sup>54</sup> When the terrorism list was created in 1979, the consequence was limited to restrictions on certain sensitive exports. Over time this was supplemented by prohibitions on arms exports, *see* Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, sec. 509(a), 100 Stat. 853, 874, and foreign assistance, *see* Antiterrorism and Arms Export Amendments Act of 1989, Pub. L. No. 101-222, 103 Stat. 1892.

<sup>55</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 221, 110 Stat. 1214, 1241 (amending 28 U.S.C. §1605(a)) [hereinafter AEDPA]. The amendment had two principal effects on state sponsors of terrorism. Immunity was no longer available for acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, and related material support, even if the actions occurred abroad, 22 U.S.C. §1605(a)(7). Previously, Pan Am 103-related cases against Libya had been dismissed because the aircraft's destruction occurred outside the United States. *Compare* *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996) (dismissing), *cert. denied*, 520 U.S. 1204 (1997), *with* *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998) (upholding jurisdiction under amended Act). Second, under the amendment, commercial assets of state sponsors of terrorism could be attached and executed upon to satisfy judgments, even if the assets had no connection to the underlying claim, *see* 22 U.S.C. §1610(a)(7).

<sup>56</sup> Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS: WILLIAM J. CLINTON 628-30 (Apr. 24, 1996).

<sup>57</sup> E.g., sec. 326 of AEDPA, *supra* note 55, adding sec. 620H to Foreign Assistance Act of 1961, as amended [hereinafter FAA], 22 U.S.C. §151.

<sup>58</sup> Sec. 325 of AEDPA, *supra* note 55, adding sec. 620G to FAA.

failed to comply with UN sanctions against Libya.<sup>59</sup> And, most significantly, in 1996 Congress included Libya in the Iran and Libya Sanctions Act (ILSA), a far more robust effort to induce third parties to stop supporting Libya.<sup>60</sup> ILSA targeted private companies that invested in Libya or Iran's oil sector.<sup>61</sup> If companies invested more than \$40 million, they faced U.S. sanctions ranging from denial of U.S. exports to ineligibility for U.S. government contracts.<sup>62</sup> Because U.S. sanctions already prohibited economic dealings by U.S. companies with Libya, ILSA's effect was focused on foreign companies.<sup>63</sup>

ILSA was controversial because it reversed the traditional U.S. opposition to secondary boycott legislation.<sup>64</sup> ILSA in effect blacklisted foreign firms for their activities in Libya (and Iran) similarly to the way the Arab League blacklists U.S. firms that ignore its boycott by dealing with Israel. In response, some countries enacted their own "anti-ILSA" legislation to prohibit their firms from complying with what they regarded as impermissible U.S. assertions of extraterritorial jurisdiction.<sup>65</sup> Many of these countries were the very allies the United States looked to for cooperation in dealing with Libya (and Iran). Thus, while perhaps changing the business calculations of some firms, ILSA also risked diverting attention from Libya by creating a new dispute over perceived U.S. unilateralism.

#### IV. A POLITICAL COMPROMISE ON CRIMINAL VENUE

By the late 1990s, it seemed clear that the U.S.-UK resort to the Security Council had stalled. Proposals to tighten sanctions to include an oil embargo failed to garner international support.<sup>66</sup> Meanwhile, compliance with the existing sanctions, particularly on air traffic, was becoming increasingly frayed.<sup>67</sup> Unilateral U.S. sanctions were also not proving effective, and

<sup>59</sup> See, e.g., Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 105-118, sec. 582, 111 Stat. 2386, 2435 (1997).

<sup>60</sup> Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. §1701 note) [hereinafter ILSA]; see also *infra* note 62.

<sup>61</sup> The statute was originally aimed only at Iran, but was expanded in the Senate without debate to cover Libya as well. See 142 CONG. REC. S7917 (daily ed. July 16, 1996); LITWAK, *supra* note 4, at 68.

<sup>62</sup> ILSA, *supra* note 60, sec. 5(b)(2), 110 Stat. at 1543. In 2001 the investment threshold triggering sanctions was reduced to \$20 million for Libya, to match that of Iran. ILSA Extension Act of 2001, Pub. L. No. 107-24, sec. 2, 115 Stat. 199, 199. In 2006 the Act was transformed into the Iran Freedom Support Act, and all references to Libya were removed. Pub. L. No. 109-293, 120 Stat. 1347.

<sup>63</sup> ILSA also imposed sanctions on companies violating UN sanctions on Libya. ILSA, *supra* note 60, sec. 5(b)(1), 110 Stat. at 1543.

<sup>64</sup> The United States has stringent legislation prohibiting cooperation with the Arab League's secondary boycott of Israel and imposes sanctions on foreign countries that enforce it. See, e.g., Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, sec. 564, 108 Stat. 382, 484 (1994), as amended by Act of Oct. 25, 1994, Pub. L. No. 103-415, sec. 1(I), 108 Stat. 4299, 4301 (codified as amended at 22 U.S.C. §2751 note (2000)). U.S. legislation to isolate Cuba, however, has some features akin to a secondary boycott. See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §6021 (2000)) (especially titles III and IV); Cuban Democracy Act, Pub. L. No. 102-484, sec. 1704, 106 Stat. 2576 (1992) (codified at 22 U.S.C. §6003 (2000)).

<sup>65</sup> LITWAK, *supra* note 4, at 68; see European Council Regulation 2271/96, Art. 5, 1996 O.J. (L 309) 1 (prohibiting compliance by European persons with ILSA "extraterritorial" requirements).

<sup>66</sup> See *Pan Am Flight 103 and U.S. Foreign Policy: Hearing Before the Subcomm. on International Security, International Organization and Human Rights of the House Comm. on Foreign Affairs*, 103d Cong. 8-9 (1994) (testimony of Barbara K. Bodine, acting coordinator for counterterrorism, U.S. Dep't of State).

<sup>67</sup> ALBRIGHT, *supra* note 3, at 330; *U.S. Libya Policy Hearing*, *supra* note 12, at 4 (testimony of Ronald Neumann, deputy assistant secretary, U.S. Dep't of State) (little support to upgrade or even maintain UN sanctions); see also

as time passed the prospects for a successful criminal prosecution receded. Although Libya was still holding out against the U.S.-UK demands, it too was suffering under the isolation of the UN sanctions. The dissolution of the bipolar world had left Libya without a big-power champion. Its economy was flagging and its leadership began looking for a way out. The ground had been laid for a remarkable compromise.

Libya's various proposals for a neutral trial venue for the Pan Am 103 suspects had come to include a vague reference to a possible trial by Scottish judges at the ICJ or in The Hague where the Court sits.<sup>68</sup> The U.S. and UK officials could not tell exactly what this allusion meant, and whether it was simply a ruse to buy time by persuading other countries that Libya was acting in good faith. The two countries decided to call Libya's bluff. Their demands had not specified a location for trial, so a Scottish court sitting in the Netherlands was theoretically possible if it could operate in accordance with UK procedures.<sup>69</sup> The Dutch government quietly expressed its willingness to host such an extraterritorial Scottish court,<sup>70</sup> and UK authorities concluded that the court could function normally but without a jury.<sup>71</sup> A venue for the trial was also decided upon—Camp Zeist, an abandoned U.S. air force base outside The Hague.

To increase pressure on Libya, the United States and the United Kingdom agreed to the suspension of UN sanctions once Libya transferred the two suspects.<sup>72</sup> This move did not reflect an abandonment of their other demands. Security Council resolutions called for the reimposition of sanctions if Libya failed to satisfy those demands after the suspects were transferred.<sup>73</sup> But since the reimposition was not to be automatic, the United States and the United Kingdom ran the risk that the UN sanctions would not be applied again even in the event of a conviction.<sup>74</sup> The U.S.-UK offer may thus have reflected a realization that the international community would not support pressure on Libya to pay compensation or accept responsibility until a successful judicial proceeding took place.

Jaleh Dashti-Gibson & Richard W. Conroy, *Taming Terrorism: Sanctions Against Libya, Sudan, and Afghanistan*, in *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S*, at 107, 118 (David Cortright & George A. Lopez eds., 2000) (OAU decision to defy the flight ban "jolted" the United States and the United Kingdom into offering compromise).

<sup>68</sup> The 1997 Libyan position paper, see GRANT, *supra* note 26, at 139, mentioned the idea of a "trial of the two suspects by Scottish judges, at the seat of the International Court of Justice, under Scottish law."

<sup>69</sup> The State Department legal adviser who participated in the negotiations on the trial arrangements notes that a U.S. trial was ruled out because of likely international objections, particularly to the death penalty. See Andrews, *supra* note 10, at 312.

<sup>70</sup> The Netherlands required an agreement with the United Kingdom, specifying use of their bilateral extradition agreement for the handover of the suspects to the Scottish court, as well as provisions on the jurisdiction of the court and its privileges and immunities. Andrews, *supra* note 10, at 315; Agreement Concerning a Scottish Trial in the Netherlands, Neth.-UK, Sept. 18, 1998, 38 ILM 926 (1999). The Netherlands also needed a binding UN Security Council resolution to insulate the Scottish court on its territory from Dutch legal process. See SC Res. 1192, para. 7 (Aug. 27, 1998).

<sup>71</sup> An order in council revising Scottish procedures to permit a bench trial abroad before three judges with a right of appeal to a panel of five judges was enacted in September 1998. GRANT, *supra* note 26, at 163–70.

<sup>72</sup> SC Res. 1192, *supra* note 70, para. 8. The Security Council had already expressed its intention to consider this in an earlier resolution. SC Res. 883, *supra* note 24, para. 16.

<sup>73</sup> Resolution 1192, *supra* note 70, paragraph 8, reaffirmed paragraph 16 of Resolution 883, *supra* note 24, which expressed the Council's resolve to terminate the suspension after ninety days if Libya had not complied with the remaining provisions of Resolutions 748 and 883. In the event, sanctions were not reimposed, although Libya did not meet the remaining requirements for more than three years. See SC Res. 1506 (Sept. 12, 2003).

<sup>74</sup> ALBRIGHT, *supra* note 3, at 330 (importance of retaining at least a "cloud over Libya" while other demands remained unfulfilled).

The U.S.-UK proposal placed Libya in a difficult diplomatic position since it tracked Libya's own suggestions. Also, the other members of the Security Council were eager to see the Lockerbie issue resolved and a third-country venue for trial represented a significant compromise by the United States and the United Kingdom.<sup>75</sup> Libya responded by engaging in protracted discussions through the UN secretary-general to clarify the terms of the proposal. Libya said it was concerned, for example, whether in the event of an acquittal the suspects would be safely returned to Libya. Moreover, to ensure the impartiality of the trial, Libya pressed for international observers. The United States and the United Kingdom were willing to accommodate these requests.<sup>76</sup>

After another seven months of diplomatic efforts and intense international pressure, Libya finally agreed in April 1999 to arrange the transfer of the two suspects by the United Nations from Tripoli to the Netherlands. Once there, they were immediately extradited from Dutch to United Kingdom jurisdiction for purposes of the Scottish trial.<sup>77</sup> Witnesses were brought to Camp Zeist and a formal trial commenced on May 3, 2000. The Scottish prosecutors introduced evidence of the intricate plot that had resulted in the destruction of Pan Am Flight 103. Although they stressed Libya's role in the affair, proof of the charges did not require establishment of state responsibility or the naming of other Libyan officials. The proceeding was, instead, a murder trial of two individuals; proof focused on how they had procured the matériel necessary for the bombing and gained access to the luggage compartment of the aircraft. The defense sought to create doubt by pointing to other theories for the disaster, and by impeaching key prosecution witnesses. But neither of the defendants took the stand in his own defense; nor did they account for many of the actions alleged by the prosecution. Many of the relatives of the victims attended all of the more than yearlong proceedings or watched them on closed-circuit television arranged for by the U.S. and UK governments.

On January 30, 2001, the Scottish court issued its verdict. One of the two suspects, Abdelbaset Ali Mohamed al-Megrahi, was convicted of murder, and the other was found not guilty and immediately returned to Libya.<sup>78</sup> The three-judge panel unanimously ruled that Megrahi had arranged for a bomb to be placed on flights from Malta via Frankfurt and London to New York City. The bomb exploded over Lockerbie, Scotland, bringing down the plane. For context, the court said that there was Libyan involvement in the crime, but that this was not an

<sup>75</sup> See UN Doc. S/1998/795 (U.S.-UK letter to UN secretary-general, Aug. 24, 1998), reprinted in GRANT, *supra* note 26, at 144.

<sup>76</sup> Libya also sought and received clarifications and assurances, including that "the two persons will not be used to undermine the Libyan regime." GRANT, *supra* note 26, at 170 (reprinting secretary-general's letter of Feb. 1999). This was probably a reference to an ostensible Libyan concern that the suspects would be pressured or induced to implicate other Libyan officials falsely.

<sup>77</sup> Andrews, *supra* note 10, at 317. In conformity with its historic position that its constitution barred extradition of its nationals, Libya maintained that the suspects had voluntarily accompanied the UN legal counsel to The Hague on a UN aircraft. See generally UN Doc. S/1999/378 (secretary-general's report to Security Council on arrival of suspects), reprinted in GRANT, *supra* note 26, at 171.

<sup>78</sup> Her Majesty's Advocate v. Al Megrahi (High Ct. Judiciary at Camp Zeist Jan. 31, 2001), 40 ILM 582 (2001), reprinted in GRANT, *supra* note 26, at 231; see also Sean D. Murphy, Contemporary Practice of the United States, 95 AJIL 405-07 (2001). For a critical summary of the court's reasoning by a lawyer associated with the defense, see Julian Knowles, *The Lockerbie Judgments: A Short Analysis*, 36 CASE W. RES. J. INT'L L. 473 (2004).

element of offense.<sup>79</sup> No other Libyan officials were specifically named, nor was a motive established for the crime. The court sentenced Megrahi to the equivalent of life imprisonment.<sup>80</sup> Libya complained that the proceeding was unfair, a claim supported in an unsolicited report by one of the UN-appointed observers at the trial.<sup>81</sup> But the international community did not generally take up Libya's grievances. Libya had agreed to a Scottish proceeding, and flaws in the process could be examined on appeal. Some measure of closure had been achieved in the decade-long pursuit of justice.

Nevertheless, the split verdict highlighted the risk the United States and the United Kingdom had taken in linking their international initiative against Libyan support for terrorism to a criminal trial. While the trial exposed troubling evidence of Libya's likely role in the destruction of Pan Am 103,<sup>82</sup> acquittal of both suspects would surely have been seized upon by Libya to support its claims of innocence and to resist the reimposition of the suspended UN sanctions for failure to meet the other outstanding demands.<sup>83</sup> Moreover, the general credibility of the United States and the United Kingdom would probably have suffered a severe blow, in turn producing greater skepticism in 2003 when they presented the case to the Security Council for hidden Iraqi weapons of mass destruction.<sup>84</sup>

## V. DIRECT NEGOTIATIONS TO SATISFY THE OTHER U.S.-UK DEMANDS

With the transfer of the two suspects for trial, Libya had satisfied only one of the five demands presented by the United States and the United Kingdom to the Security Council.

<sup>79</sup> "The clear inference which we draw from this evidence is that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin." *Al Megrahi*, *supra* note 78, 40 ILM at 610, para. [82]. The court found no evidence to support involvement of other terrorist groups on whom the investigation had originally focused. *Id.*

<sup>80</sup> The court recommended that Megrahi serve at least twenty years before being considered for release. Subsequently, when the requirement of a determinate sentence under the European Convention on Human Rights was applied to Scotland, Megrahi was sentenced to a minimum of twenty-seven years. GRANT, *supra* note 26, at 225.

<sup>81</sup> UN Security Council Resolution 1192 invited the secretary-general to send international observers to the trial. SC Res. 1192, *supra* note 70, para. 6. He appointed five people for that purpose on April 26, 2000, *see* UN Doc. S/2000/349. One observer on his own initiative—Dr. Hans Kochler, president of the International Progress Organization—prepared a critical report on both the trial, *reprinted in* GRANT, *supra* note 26, at 280, and the appeal, *id.* at 434.

<sup>82</sup> Two other criminal proceedings for acts of international terrorism during the same period also implicated Libya: in 1999 a French court convicted six Libyan intelligence agents *in absentia* for placing a bomb on board the 1989 UTA 772 flight, *see* U.S. DEP'T OF STATE, PATTERNS: 1998, *supra* note 25, at 33; and in 2001 a Berlin regional court found Libyan officials guilty of helping to orchestrate the 1986 attack on the LaBelle disco, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 2001, at 35–36 (2002), a verdict subsequently affirmed on appeal, *id.*: 2003, at 91 (2004).

<sup>83</sup> The United States and the United Kingdom would presumably have tried to counter that the acquittals were attributable to such factors as the difficult logistics of a third-country trial after ten years, Libya's failure to cooperate more fully in the investigation, and the exacting evidentiary and proof standards of a criminal trial.

<sup>84</sup> In November 2002, the Security Council found that Iraq was in material breach of its obligations under the Gulf war cease-fire resolutions for not cooperating with international inspections and gave it a "final opportunity" to comply. SC Res. 1441, para. 2 (Nov. 8, 2002). Subsequently, U.S. secretary of state Colin Powell presented selected pieces of U.S.-acquired intelligence in an effort to persuade the Council that Iraq was hiding ongoing WMD programs. The Council, however, was unable to agree on a further resolution, and the United States with a small number of allies invaded Iraq in March, invoking authority under the Security Council's 1990 use-of-force resolution, SC Res. 678, para. 2 (Nov. 29, 1990). *See* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AJIL 557 (2003). Subsequently, U.S. inspectors, like their international predecessors, were unable to confirm U.S. and UK preinvasion claims of a resumed Iraqi WMD program. David E. Sanger, *Arms Move to Syria 'Unlikely,' Report Says*, N.Y. TIMES, Apr. 26, 2005, at A10.

Libya still needed to respond to the demands that it renounce terrorism, accept responsibility for the actions of its officials, pay appropriate compensation, and cooperate in the Pan Am 103 investigation.<sup>85</sup> Although the UN sanctions were suspended and the threat of further Security Council action remote, Libya desired to remove the Lockerbie issue from the Council's agenda. For its part, the United States also made clear that there was no prospect for improvement in bilateral relations and the lifting of U.S. unilateral sanctions until Libya addressed the remaining demands satisfactorily.<sup>86</sup>

At this point, the United States and the United Kingdom opened a tentative dialogue with Libyan representatives to see how the remaining requirements could be met. The trilateral talks intensified in October 2001 in the wake of Al Qaeda's attacks on the United States the previous month. These attacks prompted adoption by the Security Council of Resolution 1373, a binding measure requiring all states to cooperate to prevent and suppress acts of terrorism.<sup>87</sup> Libya had reacted to the events of September 11 by expressing sympathy for the United States and reminding the world that it had been the first country to call for prosecution of Osama bin Laden.<sup>88</sup> As an extremist Sunni movement, Al Qaeda represented a threat to the Libyan regime, as it did to the safety of Americans. Unexpectedly, U.S. and Libyan interests in fighting terrorism now converged.

The trilateral discussions extended over nearly two years. Finding a formula for Libya to renounce terrorism proved relatively straightforward, given the evolution in Libyan policy over the preceding decade. In the letter that Libya eventually submitted to the Security Council, it recalled the provisions of Resolution 1373 and other UN resolutions and drew from them in affirming its commitment not to support acts of international terrorism.<sup>89</sup> It also moved forward by adhering to all the international conventions against terrorism.<sup>90</sup>

The demand for payment of appropriate compensation proved more difficult. By this time, the American victims' families had filed suit in the United States and their lawyers requested the opportunity to resolve compensation as an out-of-court settlement of their cases. This proposal presented some difficult policy issues for the U.S. and UK governments. First, would compensation to the families alone suffice? Other claims were being brought against Libya for the Lockerbie incident—by Pan Am's liability insurer (which had paid the families some \$500 million),<sup>91</sup> by the aircraft's hull insurer, and by Pan Am's trustee in bankruptcy.<sup>92</sup> Tremendous

<sup>85</sup> The French government had already advised the UN secretary-general that its separate demand for cooperation in the UTA 772 investigation "had been met." UN Doc. S/1999/378, *supra* note 77, at 2, GRANT, *supra* note 26, at 172.

<sup>86</sup> For example, ILSA, *supra* note 60, did not permit the termination of its provisions on Libya until the president certified to Congress that Libya had fulfilled the requirements of the UN resolutions. See note 129 *infra*.

<sup>87</sup> SC Res. 1373, pmb. (Sept. 28, 2001).

<sup>88</sup> See, for example, Scott Anderson, *The Makeover*, N.Y. TIMES, Jan. 19, 2003, §6 (Magazine), at 29:

[Qaddafi] was among the first Arab leaders to denounce the Sept. 11 attacks, and he lent tacit approval to the American-led invasion of Afghanistan. To the astonishment of other Arab leaders, he reportedly shared his intelligence files on Al Qaeda with the United States to aid in the hunt for its international operatives.

<sup>89</sup> UN Doc. S/2003/818 (Aug. 15, 2003).

<sup>90</sup> Libya is now a party to all the major conventions. See *supra* note 30.

<sup>91</sup> *Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, Civ. No. 98-3096 (TFH), 1999 U.S. Dist. LEXIS 15035 (D.D.C. Sept. 22, 1999).

<sup>92</sup> The claims of the hull insurer and the trustee in bankruptcy were consolidated in a single action brought by Equitas, a subsidiary of Lloyd's of London, in the Scottish Court of Session in 2003. See Norman Silvester, *Lockerbie Bomber and Libya Sued by Insurers for Bust US Airline Pan Am*, SUNDAY MAIL (Scot.), Nov. 30, 2003, available in



costs had also been incurred by the U.S. and UK governments in conducting a Scottish trial in the Netherlands at Libya's insistence. On this issue, the two governments decided on humanitarian grounds to give priority to the relatives of those killed. The other private claims would need to be addressed by the courts or through settlements over time, but not as a precondition for satisfying the UN resolutions. Governmental costs would also have to be absorbed to ensure the appearance of impartiality in the trial, as is ordinarily the case. A second problem was that U.S. legislation generally did not permit suit against Libya by the estates of the foreign victims.<sup>93</sup> The private attorneys resolved this issue by devising a global settlement in which all the estates could participate. A third challenge was that no one knew what proportion of the families might support any settlement terms worked out privately with Libya. In the end, this point also proved to be moot. Two hundred sixty-nine of the 270 estate representatives accepted the settlement.<sup>94</sup>

More fundamentally, however, the United States and the United Kingdom faced the key policy question of whether private parties should be allowed to control the outcome of a matter of national and international importance. Should the governments permit private tort lawyers to negotiate with a terrorist state over a UN-backed compensation demand?<sup>95</sup> If so, how much time should they be given? Would the governments exercise any control over the final terms? Even if the terms were acceptable, would the governments play any role in their implementation? In deference to the wishes of the families, the United States and the United Kingdom in the end agreed that the families' legal representatives could try to reach a settlement directly with Libya, without excluding the possibility that the governments might need to reenter the picture. Thus, the governments were not privy to the course of the negotiations except to the extent that the lawyers or the Libyans chose to inform them.

As a result, when the Libyan and family representatives reached agreement on a settlement structure in October 2002, the governments came in for a surprise. The proposed settlement was described by the parties as tying the families' compensation to the lifting of sanctions against Libya.<sup>96</sup> If the UN sanctions were terminated, the family estates would each receive \$4 million. If specified U.S. economic sanctions were also lifted, the estates would receive an additional \$4 million. And if the United States rescinded Libya's designation as a state sponsor of terrorism, the estates would receive \$2 million more, for a total of \$10 million. These three

2003 WL 9416555. The parties reached a settlement on February 18, 2005, which was approved by the bankruptcy judge a month later. See Vinnee Tong, *In Its Last Act, Pan Am Ex-employees Get Paid, 15 Years Late*, AP, Sept. 21, 2006.

<sup>93</sup> The Foreign Sovereign Immunities Act, as amended, permitted suit only if the victim or claimant was an American citizen. See 28 U.S.C. §1605(a)(7) (2000).

<sup>94</sup> The one estate representative who declined to participate continued to litigate against Libya. See *Cummock v. Socialist People's Libyan Arab Jamahiriya*, Civ. No. 96-1029 (CKK) (D.D.C. dismissed with prejudice June 25, 2007).

<sup>95</sup> Executive branch officials had originally suggested that the government might set the compensation figure, but that policy changed when the Pan Am 103 families objected. See *U.S. Libya Policy Hearing*, *supra* note 12, at 18–19 (testimony of Ronald Neumann, deputy assistant secretary, U.S. Dep't of State). Libya may also have seen advantages to approaching compensation through discussions with the private claimants because it delayed the U.S. legal proceedings, including discovery demands. Another possibility is that Libya hoped to avoid accepting responsibility by portraying an out-of-court settlement as the result of efforts by Libyans in the private sector to hasten the lifting of economic sanctions.

<sup>96</sup> As of this writing, the settlement documents remain under court seal, but they have been widely reported in the press. See, e.g., Bradley Graham, *Libya Says It Needn't Finish Payments to Flight 103 Victims' Families*, WASH. POST, June 27, 2006, at A17 (describing parties' conflicting interpretations of the settlement).

events were required to take place within a specified time for the families to receive the entire amount from an escrow account funded by Libya. Libya's representatives apparently saw setting a deadline for the escrow as a way to maximize pressure for the lifting of sanctions since the families would have a financial incentive to support these steps and the administration would presumably want to help them recover. The families seem to have seen it the opposite way, that Libya would feel under pressure to satisfy the requirements for lifting the sanctions before the deadline to avoid turning the families into powerful opponents of lifting the sanctions when they no longer stood to gain.

The U.S. administration faced a dilemma. It had agreed to allow private settlement talks but had not anticipated a linkage between the private settlement and the public policies of the United States toward Libya. As it became evident, however, that the overwhelming majority of the families was willing to accept the settlement terms, the United States chose not to intervene. Instead, it explained to the UN Security Council that its acceptance of this arrangement as "appropriate compensation" did not mean that it would abandon its other requirements for lifting the U.S. sanctions against Libya.<sup>97</sup> The United States also informed the families that the terms of their settlement would not be a factor in decisions on terminating the sanctions. That would depend upon U.S. legal requirements, Libyan behavior, and the national interest.<sup>98</sup> This posture had the added benefit of protecting the families against accusations that the settlement required them to lobby for the lifting of sanctions.

The remaining U.S.-UK demands of Libya were acceptance of responsibility and cooperation in the criminal investigation. On the former, a formula was developed based upon the precise wording of the demands and the principles of state responsibility. In a letter to the Security Council, Libya stated that "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."<sup>99</sup> By the time this statement was made, the Scottish courts had upheld Megrahi's conviction on appeal.<sup>100</sup> In this context, Libya's statement was widely understood as acceptance of state responsibility for Megrahi's actions.<sup>101</sup> On the demand for law enforcement cooperation, Libya's letter "pledge[d] to cooperate in good faith with any further requests for information in connection with the Pan Am 103 investigation. Such cooperation would be extended in good faith through the usual channels."<sup>102</sup> This statement made clear that, in

<sup>97</sup> To make this clear, the linkage between compensation and the lifting of sanctions was cited by the administration as one reason for its abstention on the Security Council resolution lifting UN sanctions. See Explanation of Vote, USUN Press Release No. 134 (03) (Sept. 12, 2003) (U.S. deputy permanent representative to the United Nations, Amb. James B. Cunningham), available at <[http://www.un.int/usa/03print\\_133.htm](http://www.un.int/usa/03print_133.htm)>.

<sup>98</sup> Letter of July 22, 2002, from William J. Burns, assistant secretary for Near Eastern affairs, U.S. Department of State, to James P. Kreindler (chair of Pan Am 103 steering committee of family lawyers) (on file with author).

<sup>99</sup> UN Doc. S/2003/818, *supra* note 89, at 1.

<sup>100</sup> Megrahi's appeal was denied on March 14, 2002. GRANT, *supra* note 26, at 298.

<sup>101</sup> See, e.g., Solomon, *supra* note 5, at 56 ("Libya long denied any wrongdoing but eventually accepted that it had to admit to it, as a pragmatic matter, though Libyan officials see it as a forced confession. Qaddafi never accepted personal guilt."). Libya's acceptance of responsibility for the actions of its officials was consistent with the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) (Articles 5-7 attribute responsibility to a state for acts by those exercising governmental authority or who act under the instructions or direction or control of that state).

<sup>102</sup> UN Doc. S/2003/818, *supra* note 89, at 1.

responding to their inquiries, Libya would communicate directly with the United States and the United Kingdom rather than insist upon an intermediary such as the United Nations.

Libya's satisfaction of the various demands was brought to closure through a complex series of diplomatic steps. On August 15, 2003, the Libyan representative to the United Nations delivered his government's letter to the president of the Security Council containing the required assurances, including reference to an escrow account that was being established to fund the settlement of the Pan Am 103 family claims.<sup>103</sup> The United States and the United Kingdom responded with a joint letter confirming that once Libya had funded the escrow, they were prepared to allow the permanent lifting of the UN sanctions. They also emphasized that Libya had "pledged before the Council to cooperate in the international fight against terrorism and to cooperate with any further requests for information in connection with the Pan Am 103 investigation. We expect Libya to adhere scrupulously to those commitments."<sup>104</sup> A week later the escrow was funded.<sup>105</sup> Adoption of a final resolution was then held up because the French government insisted on additional compensation from Libya for the UTA incident, threatening to veto the lifting of sanctions otherwise.<sup>106</sup> Once Libya had agreed to meet the new French requirement,<sup>107</sup> the Security Council, on September 12, 2003, adopted Resolution 1506, which lifted the sanctions and removed the Lockerbie issue from the Council's agenda.<sup>108</sup> In parallel, by mutual agreement, Libya's ICJ cases against the United States and the United Kingdom were also terminated.<sup>109</sup>

This package solution clearly reflected compromises on all sides. For the United States and the United Kingdom, trial of the two Libyan suspects was made possible only by their willingness to use a Scottish court in the Netherlands, with all the uncertainties and extra expense that entailed. In addition, part of the compensation paid by Libya was contingent on the further lifting of U.S. sanctions. For some, Libya's acceptance of responsibility was also disappointing since it fell short of an apology or a specific confirmation of the complicity of its officials. Finally, the cooperation that Libya provided in the criminal investigation did not match

<sup>103</sup> *Id.*

<sup>104</sup> UN Doc. S/2003/819 (Aug. 15, 2003).

<sup>105</sup> Libya arranged for \$2.7 billion to be deposited at the Bank for International Settlements in Basel, Switzerland, which served as the escrow agent. See Lynette Clemetson, *Lockerbie Victims' Relatives See Glimmer of Hope*, N.Y. TIMES, Aug. 16, 2003, at A6.

<sup>106</sup> Unlike the United States and the United Kingdom, France had not presented a demand for compensation to the UN Security Council, and it had already informed the United Nations that its demands underlying the Security Council resolutions had been met. See note 85 *supra*. Moreover, Libya had honored the outstanding French court judgments against Libyan officials by paying some \$35 million. However, in light of the larger amounts of the Lockerbie settlement, France apparently decided that it was indefensible domestically for it to allow the lifting of sanctions without insisting on additional compensation. See Sean D. Murphy, *Contemporary Practice of the United States*, 97 AJIL 990-91 (2003).

<sup>107</sup> Eventually, in January 2004, the Qaddafi Foundation, a charitable association managed by one of Colonel Qaddafi's sons, agreed to provide \$1 million for each UTA death (\$171 million). Joint Franco-Libyan Declaration Signed by Dominique de Villepin, Minister of Foreign Affairs, and his Libyan Opposite Number, Abdel Rahman Muhammad Shalgam (Jan. 9, 2004), available at <[http://www.ambafrance-us.org/printfriendly/statemnts2004/francolibyan\\_010904\\_pf.asp](http://www.ambafrance-us.org/printfriendly/statemnts2004/francolibyan_010904_pf.asp)>; U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM: 2004, at 89 (2005). The families of the seven U.S. passengers chose not to participate in this arrangement and instead continued to pursue their legal remedies against Libya in U.S. court. See *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F.Supp.2d 54 (D.D.C. 2003), *appeal dismissed*, 112 F. App'x 756 (D.C. Cir. 2004).

<sup>108</sup> SC Res. 1506, *supra* note 73. The United States abstained on the resolution.

<sup>109</sup> On September 9, 2003, the United States, the United Kingdom, and Libyan agents informed the Court that they had agreed to discontinue the proceedings and wished them to be removed from the Court's list of active cases. The Court issued an order for that purpose the following day. See ICJ Press Release 2003/29 (Sept. 10, 2003).

the precise terms of the original U.S.-UK demand,<sup>110</sup> nor did it lead to further indictments in what most observers believe must have been a broader conspiracy.

Libya, too, had been required to make concessions. It turned over its own citizens to antagonistic governments for trial. The escrow it established for the Pan Am 103 families was enormous—\$2.7 billion. It formally acknowledged the results of the Scottish trial and the state responsibility that flowed from it, and committed itself to the Security Council to honor future requests for cooperation in the investigation. Libya also forfeited any future leverage of its ICJ proceedings. Even with these steps, moreover, Libya would still be subject to the vast array of U.S. unilateral sanctions.

In explaining the U.S. abstention on the resolution lifting UN sanctions, the U.S. representative highlighted a different threat posed by Libya, which had to be addressed before a normal bilateral relationship would be possible:

Libya has now addressed the remaining UN requirements related to the Pan Am 103 bombing. . . .

In recognition of these steps, and to allow the families' settlement to go forward, the United States has not opposed the formal lifting of the United Nations sanctions on Libya. . . .

Our decision, however, must not be misconstrued by Libya or by the world community as tacit U.S. acceptance that the Government of Libya has rehabilitated itself. The United States continues to have serious concerns about other aspects of Libyan behavior, including its poor human rights record, its rejection of democratic norms and standards, its irresponsible behavior in Africa, its history of involvement in terrorism, and—most important—its pursuit of weapons of mass destruction and their means of delivery. Libya is actively pursuing a broad range of WMD, and is seeking ballistic missiles. In those efforts, it is receiving foreign assistance—including from countries that sponsor terrorism. Libya's continued nuclear infrastructure upgrades raise concerns. Tripoli is actively developing biological and chemical weapons. The United States will intensify its efforts to end Libya's threatening actions. This includes keeping U.S. bilateral sanctions on Libya in full force.<sup>111</sup>

## VI. FINISHING THE JOB

The threatening tone of the U.S. explanation of vote in the Security Council hardly prepared the world for a breakthrough just four months later that would clear the way to ending Libya's pariah status under U.S. law. On December 19, 2003, the leaders of Libya, the United States, and the United Kingdom issued parallel announcements confirming a dramatic change of Libyan policy on weapons of mass destruction and a reciprocal willingness of the

<sup>110</sup> The United States and the United Kingdom had demanded that Libya disclose all it knew about the crime and make available the remaining timers Libya was believed to have acquired for carrying out attacks such as Pan Am 103. See Joint U.S.-UK Declaration, *supra* note 13.

<sup>111</sup> Explanation of Vote, *supra* note 97. The reference to Libya's "irresponsible behavior in Africa" presumably alluded to its support for groups threatening the stability of neighboring states. See, e.g., Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AJIL 434, 439–43 (2004) (allegations of Libyan support for Chadian opposition groups in the Aouzou Strip notwithstanding ICJ decision in favor of Chad's claim over the territory).

United States and the United Kingdom to respond positively as that policy was implemented.<sup>112</sup> In the wake of the seizure of a shipment of illicit nuclear equipment en route to its shores,<sup>113</sup> Libya said it was prepared to disclose and dismantle its nascent nuclear weapons development program.<sup>114</sup> It also agreed to end its work on chemical weapons<sup>115</sup> and eliminate missiles that exceeded the range and payload thresholds established under the Missile Technology Control Regime.<sup>116</sup> Further, Libya indicated its readiness to demonstrate that it was not pursuing a biological weapons capability.<sup>117</sup> In short, Libya declared its renunciation of both weapons of mass destruction and the means for their delivery, just as the United States had called for in its United Nations vote.

The next phase of United States and United Kingdom engagement with Libya focused on turning these pledges into reality.<sup>118</sup> Libya joined the applicable arms control treaties to which it was not yet a party<sup>119</sup> and, with assistance from the United States and the United Kingdom, worked with the relevant treaty bodies to come into compliance with its international obligations.<sup>120</sup> Meanwhile, U.S. and UK experts satisfied themselves that Libya was not retaining

<sup>112</sup> George W. Bush, Remarks on the Decision by Colonel Muammar Abu Minyar al-Qadhafi of Libya to Disclose and Dismantle Weapons of Mass Destruction Programs, 39 WEEKLY COMP. PRES. DOC. 1835, 1836 (Dec. 29, 2003) ("As the Libyan Government takes these essential steps and demonstrates its seriousness, its good faith will be returned. Libya can regain a secure and respected place among the nations, and, over time, achieve far better relations with the United States."); Sean D. Murphy, *Contemporary Practice of the United States*, 98 AJIL 195–97 (2004).

<sup>113</sup> See Ron Suskind, *The Tyrant Who Came in from the Cold*, WASH. MONTHLY, Oct. 2006, at 19, 23 (a shipment of centrifuge equipment was intercepted en route from Dubai to Libya). It has been reported that in late 2003 the United States also showed Libya intercepted communications between the head of Libya's nuclear weapons program and its illicit nuclear supplier, A. Q. Khan. Judith Miller, *How Gadhafi Lost His Groove: The Complex Surrender of Libya's WMD*, WALL ST. OPINION J., May 16, 2006, at <<http://www.opinionjournal.com/editorial/feature.html?id=110008381>>.

<sup>114</sup> As a party to the Non-proliferation Treaty, Libya was already obligated not to seek to develop nuclear weapons, as well as to submit its nuclear program to safeguards administered by the International Atomic Energy Agency. Treaty on the Non-proliferation of Nuclear Weapons, Arts. II, III, July 1, 1968, 21 UST 483, 729 UNTS 161.

<sup>115</sup> Previously, Libya had denied reports that it was using the Rapta pharmaceutical complex for chemical weapons development. See Saif al-Qadhafi, *supra* note 42, at 43; Weymouth, *supra* note 5 (quoting Colonel Qaddafi).

<sup>116</sup> The Missile Technology Control Regime (MTCR) is a set of parallel commitments by participating members to exercise restraint in exports to nonmembers that might contribute to the acquisition of defined missile capabilities. See The Missile Technology Control Regime, at <<http://www.mtcr.info/index.html>>. Libya was not a member, nor was it suspected of exporting missile technology. However, Libya stated its willingness to restrict its own missile development activities to the limits embodied in the MTCR.

<sup>117</sup> Libya was already party to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 UST 571, 94 LNTS 65, and to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST 583, 1015 UNTS 163.

<sup>118</sup> This cooperative endeavor stood in stark contrast to the U.S.-UK response to Iraq's suspected WMD program only months before. See *supra* note 84.

<sup>119</sup> On nuclear issues, Libya confirmed its intention, on February 18, 2004, to conclude an additional protocol to its safeguards agreement and its intention to act as if it had entered into force on December 29, 2003. IAEA, ANNUAL REPORT FOR 2004, at 9, 64–65 [hereinafter IAEA REPORT], available at <[http://www.iaea.org/Publications/Reports/Anrep2004/anrep2004\\_full.pdf](http://www.iaea.org/Publications/Reports/Anrep2004/anrep2004_full.pdf)>. On January 6, 2004, Libya ratified the Comprehensive Nuclear Test Ban Treaty, opened for signature Sept. 24, 1996, GA Res. 50/245 (Sept. 10, 1996), available at <<http://www.ctbto.org/>>. On January 6, 2004, Libya also acceded to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature Jan. 13, 1993, S. TREATY DOC. NO. 103-21 (1993), 1974 UNTS 45.

<sup>120</sup> See IAEA REPORT, *supra* note 119, at 64–65; REPORT OF THE OPCW IN 2004, Doc. C-10/4, at 15 (2005).

hidden WMD or missile programs.<sup>121</sup> In this respect, Libyan officials probably recognized that their burden of proof was high, given U.S. skepticism about the performance of international inspectors in Iraq and Libya's previous success in masking its own programs.

This level of cooperation with the United States and the United Kingdom entailed an enormous political risk for the Libyan leadership. Libya's WMD and missile programs were presumably intended primarily as a deterrent against threats from countries like the United States, yet it was to the United States and the United Kingdom that the programs were being disclosed. Moreover, the equipment, facilities, and materials in these programs were being dismantled and in some cases removed from the country altogether.<sup>122</sup> This step not only made Libya more vulnerable militarily, including to its neighbors, but also risked appearing to the Libyan public and the region as a capitulation. Dissension from Libya's own military might have resulted, given the abandonment of several prestige weapons programs and the potential loss of jobs by those responsible for, or in training to use, the weapons. Even Libya's national identity might have been thrown into question. For the world's former chief sponsor of liberation movements to cooperate with the allegedly worst "colonial" powers was a policy reversal without any obvious parallels.

Some observers have characterized the decision as a simple calculation by Libya that it would lose its WMD programs through preemptive military action as had occurred in Iraq, so it was merely making the best of a bad situation, trying to buy some goodwill and preserve the regime.<sup>123</sup> The program was also costly and had failed to reward Libya with anything of substance in return. A broader economic interpretation stresses Libya's need for Western investment, particularly to refurbish its oil sector. Although Libya's satisfaction of the UN terrorism demands had ended the UN sanctions, only by squarely addressing the West's WMD concerns could Libya be assured of stable access to the foreign technology and advisers it needed to jumpstart its economy and avoid domestic unrest.<sup>124</sup> Another explanation that has been offered focuses on the authoritarian nature of the regime. The unique ability of Qaddafi to guide the country in dramatically new directions had already been demonstrated by Libya's reversal on terrorism. He may have become convinced of the need for a similar reversal on WMD, inducing him personally to spearhead a new vision of how best to advance Libya's vital national interests in a changed international environment.<sup>125</sup>

<sup>121</sup> See *U.S. Relations with Libya: Hearing Before the Senate Comm. on Foreign Relations*, 108th Cong. 8–16 (2004) (testimony of Paula A. DeSutter, assistant secretary for verification and compliance, U.S. Dep't of State) [hereinafter *2004 Senate Hearing*].

<sup>122</sup> *Id.* at 9.

<sup>123</sup> Vice President Cheney reportedly subscribes to this view. See Eben Kaplan, *How Libya Got off the List*, COUNCIL ON FOREIGN RELATIONS BACKGROUNDER, updated July 25, 2007, available at <<http://www.cfr.org/publication/10855/>>. Another former Bush (and Clinton) administration official who worked on the issue disagrees, noting that Libya had signaled its willingness to disarm in 2001, only to be told that it had to settle the Lockerbie case first. Flynt Leverett, Op-Ed, *Why Libya Gave up on the Bomb*, N.Y. TIMES, Jan. 23, 2004, at A23 (former senior director of the National Security Council and State Department Policy Planning Office member).

<sup>124</sup> Kaplan, *supra* note 123, at 2–3 (views of Martin Indyk, a Clinton administration official who opened direct talks with Libya in 1999); see Dashti-Gibson & Conroy, *supra* note 67, at 109 (although sanctions had "modest impacts" on the economy, the hardship that did result along with diplomatic isolation motivated Libya's desire for relief).

<sup>125</sup> See Miller, *supra* note 113; Suskind, *supra* note 113, at 23 (attributing decision to Qaddafi's desire to eliminate Libya's isolation but only if he could "save face"); see also Dafna Hochman, *Rehabilitating a Rogue: Libya's WMD Reversal and Lessons for U.S. Policy*, PARAMETERS (U.S. Army War College), Spring 2006, at 63 (attributing decision

Whatever Libya's motives, there were high stakes for the United States and the United Kingdom in responding to this dramatic opportunity. UN sanctions had already been lifted, which now limited positive incentives to Libya to bilateral measures. The key question was how far and how quickly the two Western countries could go in normalizing their relationship with Libya in return for progress on eliminating its WMD and missile programs. Standing in the way were several concerns. Libya remained an oppressive regime with significant human rights problems. Its policies on regional disputes, particularly in Africa, were cause for serious concern. And confidence in its repudiation of terrorism might require a longer period of testing.

The United States sought to balance these interests by offering improved relations incrementally, reserving a full-fledged relationship to satisfaction of these broader issues.<sup>126</sup> To each Libyan step to fulfill its WMD/missile commitments, the United States responded with a package of reciprocal gestures. The first phase in February 2004 was limited to permitting the use of American passports for travel to Libya,<sup>127</sup> authorizing U.S. oil companies with historical holdings in Libya to begin discussions about return, and establishing a U.S. Liaison Office in Tripoli.<sup>128</sup> These measures were followed shortly afterward by a second phase in which ILSA sanctions were terminated<sup>129</sup> and U.S. businesses were generally authorized to return to Libya.<sup>130</sup> A third phase in September 2004, when Libya had substantially completed its WMD and missile elimination, saw the termination of the national emergency underlying Treasury Department controls,<sup>131</sup> the release of Libya's frozen assets,<sup>132</sup> the initiation of U.S.

to five factors and concluding there is no clear formula for prescribing the rehabilitation of rogue states but that policy tools appropriate to each case must be determined).

<sup>126</sup> In announcing the WMD breakthrough, President Bush said:

Should Libya pursue internal reform, America would be ready to help its people to build a more free and prosperous country.

Great Britain shares this commitment, and Prime Minister Blair and I welcome today's declaration by Colonel Qadhafi. Because Libya has a troubled history with America and Britain, we will be vigilant in ensuring its Government lives up to all its responsibilities. Yet, as we have found with other nations, old hostilities do not need to go on forever. And I hope that other leaders will find an example in Libya's announcement today.

Bush, *supra* note 112, at 1836.

<sup>127</sup> Pursuant to 22 U.S.C. §211a (2000), the secretary of state may prohibit use of U.S. passports for travel to countries if necessary to protect the health and safety of U.S. travelers. In February 2004, this restriction was terminated for travel to Libya. 69 Fed. Reg. 10,806 (Mar. 8, 2004). U.S. travelers were also authorized to pay travel-related expenses that were otherwise prohibited under the financial transaction restrictions on Libya. See Office of the Spokesman, U.S. Dep't of State, Fact Sheet: Significant Events in U.S.-Libyan Rapprochement (May 15, 2006), available at <<http://www.state.gov/r/pa/prs/ps/2006/66242.htm>> [hereinafter Rapprochement].

<sup>128</sup> Rapprochement, *supra* note 127. Diplomatic relations with Libya had never been formally broken despite the closure of diplomatic missions, but U.S. interests were represented only through the Belgian embassy. On June 24, 2004, the United States reopened a diplomatic mission in Tripoli denominated a "Liaison Office," and on May 31, 2006, this office was upgraded to an embassy. See About the Embassy, at <<http://libya.usembassy.gov/>>.

<sup>129</sup> ILSA provided that its provisions would no longer apply to Libya if the president certified that Libya "has fulfilled the requirements of" the UN sanctions resolutions. ILSA, *supra* note 60, sec. 8(b), 110 Stat. at 1546. The president submitted this certification to Congress on April 23, 2004. Presidential Determination 2004-30, Determination and Certification Under Section 8(b) of the Iran and Libya Sanctions Act, 69 Fed. Reg. 24,907 (May 5, 2004).

<sup>130</sup> Dep't of Treasury, Office of Foreign Assets Control, Recent OFAC Actions (Apr. 23, 2004), available at <<http://www.treasury.gov/offices/enforcement/ofac/actions/2004.shtml>>.

<sup>131</sup> Exec. Order No. 13,357, 69 Fed. Reg. 56,665 (Sept. 22, 2004).

<sup>132</sup> The release of the frozen assets opened the way for payment of over \$1 billion to the Pan Am 103 families under their settlement with Libya. Rapprochement, *supra* note 127. See *supra* note 96 and corresponding text regarding the terms of the settlement. This action, however, deprived other claimants of potential assets under U.S.

government programs to facilitate U.S. business in Libya,<sup>133</sup> and the waiver of sanctions triggered by Libya's former nuclear weapons program.<sup>134</sup> Finally, after a hiatus of a year and a half, on June 30, 2006, the United States rescinded Libya's designation as a state sponsor of terrorism, removing the bulk of the remaining statutory sanctions on Libya.<sup>135</sup>

This graduated approach probably helped to accustom American public opinion to the dramatic transformation underway in U.S.-Libyan relations. In the midst of a "global war on terrorism," it may have seemed anomalous that the United States was warming its ties with Libya.<sup>136</sup> Moreover, some influential constituencies feared that easing the sanctions would eliminate U.S. leverage over Libya to induce change in its domestic or international policies, or to provide compensation to U.S. victims of past Libyan acts of terrorism.<sup>137</sup> Indeed, some argued that the push by the Bush administration for reform in the Middle East and its global "Freedom Agenda" would be undermined if exemptions could be purchased by renouncing illicit weapons programs, whether by Libya, Iran, or North Korea.<sup>138</sup>

jurisdiction to enforce judgments they might obtain against Libya. To address this potential concern, the administration announced that, in connection with the unblocking of the assets, it had obtained Libya's assurances that it had "a policy and practice of carrying out agreed settlements and responding in good faith to legal cases brought against it, including court judgments and arbitral awards." Statement by the White House Press Secretary (Sept. 20, 2004), at <<http://www.whitehouse.gov/news/releases/2004/09/>>.

<sup>133</sup> By executive and legislative action this initiative led to the restoration of foreign tax credits for U.S. businesses in Libya, *see* Presidential Determination 2005-12, 70 Fed. Reg. 1785 (Jan. 10, 2005) (waiving section 901(j)(1) of the Internal Revenue Code with respect to Libya), authorization for Commodity Credit Corporation programs in Libya, *see* Presidential Directive 2004-49, 69 Fed. Reg. 58,035 (Sept. 29, 2004) (waiving section 908(a)(1) of the Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, tit. IX, 114 Stat. 1549A-67, 1549A-70, with respect to Libya), and permission for the Export-Import Bank to begin supporting trade with Libya, *see* Presidential Directive 2006-11, 71 Fed. Reg. 12,119 (Mar. 9, 2006) (waiving sec. 620A of the FAA, *supra* note 57, and making the finding required by sec. 113 in div. J of the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 3341, 3346, to terminate restrictions in appropriations legislation).

<sup>134</sup> *See* Presidential Determination 2004-44, 69 Fed. Reg. 56,153 (Sept. 20, 2004) (waiving sanctions under secs. 101 and 102(b) of Arms Export Control Act notwithstanding nuclear enrichment and weapons-design-related imports, and making sec. 2(b)(4) of Export-Import Bank Act inapplicable to Libya despite such imports); *see also* U.S. Dep't of State, Pub. Notice 4856, 69 Fed. Reg. 60,450 (Oct. 8, 2004) (determination that Libya had "materially violated" nuclear safeguards agreement).

<sup>135</sup> The secretary of state also determined that Libya should not be subject to separate sanctions as a country "not fully cooperating with U.S. antiterrorism efforts" under section 40A of the Arms Export Control Act. U.S. Dep't of State, Pub. Notice 5411, 71 Fed. Reg. 28,897 (May 18, 2006).

<sup>136</sup> For example, an advertisement purchased by one of the Pan Am 103 family groups was headlined "President Bush Betrays Murdered Americans for Big Oil, Undermining the War on Terrorism," and began with:

Imagine President Bush forgiving Osama bin Laden and forgetting about 9/11 at the behest of Big Oil!

Ridiculous? President Bush engaged in a similar act of betrayal on May 12th, signing an Executive order to Congress removing Libya from the State Sponsors of Terrorism list, effective on June 26, 2006.

WASH. POST, June 26, 2006, at A14.

<sup>137</sup> With respect to claimants against Libya, this concern was reflected in legislative initiatives to keep pressure on Libya to provide additional compensation. For example, a dispute arose between Libya and the Pan Am 103 families over whether a final \$2 million payment would be due upon the rescission of Libya's designation as a state sponsor of terrorism notwithstanding the expiration of the escrow account established by Libya. *See supra* note 96. The Senate passed a nonbinding resolution calling on the president not to accept diplomatic credentials from Libya unless it was working in good faith to resolve these differences. S. Res. 504, 109th Cong. (2006).

<sup>138</sup> *See, e.g.,* Guy Dinmore, *Neo-cons Question Bush's Democratisation Strategy*, FT.COM (Fin. Times), May 29, 2006 (resumption of diplomatic relations with Libya viewed by neoconservative commentators as "final blow" to Bush's freedom doctrine); Vance Serchuk & Thomas Donnelly, *Beware the "Libyan Model,"* in NATIONAL SECURITY OUTLOOK (AEI Online, Washington, D.C.), Mar. 1, 2004, at 6 ("The core truth behind the Bush Doctrine is that the character of a regime matters as much, if not more, than its armaments.")



Against these concerns, the Libyan case presented an opportunity to demonstrate that U.S. sanctions are designed for a particular purpose. If a foreign state like Libya responded constructively to the concerns motivating the sanctions and yet received no relief in response, the sanctions could lose their value as an incentive to change. More generally, the message to other proliferators or supporters of terrorism might be that nothing short of regime change would open the door to improved relations with the United States. Some have pointedly asked whether the United States, in fact, responded quickly and dramatically enough to Libya's change of policies.<sup>139</sup> Libya's formal renunciation of terrorism occurred in August 2003, and elimination of its WMD and missile programs had been substantially completed by September 2004. Yet removal from the terrorism list—widely viewed as the crucial step to end Libya's pariah status—did not occur until June 2006.

The great symbolic importance and emotional resonance of the terrorism designation may help to explain the Bush administration's caution in giving Libya a clean bill of health. Because Libya had been responsible for numerous American deaths and had never shown contrition, the presidential certification to Congress that was a prerequisite to ending Libya's terrorist designation was certain to receive extraordinary scrutiny.<sup>140</sup> Moreover, designation on the terrorism list is a blunt instrument that does not lend itself easily to accommodating the complexities of an evolving relationship like that between the United States and Libya.<sup>141</sup> The verdict is not yet in on whether this final stage in Libya's rehabilitation was handled in a way that will successfully lock in Libya's broad-ranging policy changes while establishing an appealing precedent for other countries.

## VII. LESSONS FOR THE FUTURE

From the low point of the 1988 destruction of Pan Am Flight 103, U.S.-Libyan relations have improved to the point that Libya now has the distinction of being the first country under current

<sup>139</sup> See Miller, *supra* note 113 ("[S]ome critics of the Bush Administration now argue that Washington's temporizing toward Libya has undermined its nonproliferation victory and has reinforced rogue-state conviction that disarmament will not get one far with Washington."); Solomon, *supra* note 5, at 44, 58–59.

<sup>140</sup> Public speculation on the delay also focused on reports that Libya had been involved in a suspected assassination plot against the Saudi crown prince in 2003. On June 30, 2004, an American Muslim activist Abdurahman Alamoudi pleaded guilty to violations of U.S. sanctions on Libya, and in connection with his plea agreement alleged that Libya had been directly involved in supporting the aborted plot. See U.S. Dep't of Justice, Abdurahman Alamoudi Sentenced to Jail in Terrorism Financing Case (Oct. 15, 2004), at <[http://www.usdoj.gov/opa/pr/2004/October/04\\_crm\\_698.htm](http://www.usdoj.gov/opa/pr/2004/October/04_crm_698.htm)>. By May 2006, after the crown prince had become king of Saudi Arabia and pardoned the accused conspirators, Libya and Saudi Arabia announced that the issue was resolved and restored normal diplomatic relations. See U.S. Dep't of State, On-the-Record Briefing, Issues Related to United States Relations with Libya (May 15, 2006) (C. David Welch, assistant secretary for Near Eastern affairs), at <<http://www.state.gov/p/nea/rls/rm/2006/66268.htm>>.

<sup>141</sup> In this regard, it is noteworthy that Congress has turned increasingly to statutes that require the executive branch to designate countries publicly for failing to meet various U.S. foreign policy objectives, in some cases resulting in automatic sanctions as with the terrorism list. See FAA, *supra* note 57, sec. 490(h) (drug production and trafficking); Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464 (codified as amended at 22 U.S.C. §7101 note (2000 & Supp. 4 2004)) (trafficking in persons); International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (codified as amended at 22 U.S.C. §6401 (2000 & Supp. 4 2004)) (religious discrimination or repression). See generally LITWAK, *supra* note 4, at 9–12 (criticizing U.S. policy for responding to "rogue states" because of its equation of international relations with a moral struggle, failure to tailor responses to the circumstances of each country, the political difficulty it creates for removing sanctions once they are imposed, its tendency to put the United States at odds with key allies, and the false dichotomy it often creates between containment and engagement when an intermediate course is often more productive).

law to be removed from the U.S. terrorism list without a change in regime. The United States can claim a diplomatic success in helping to end Libyan support for terrorism and the pursuit of WMD. In return, Libya has benefited from the lifting of both UN and U.S. sanctions. While each situation is unique, it is still possible to draw some lessons from this record for dealing with a “rogue” nation.

First, multilateral mechanisms can have a restraining effect even if sanctions implementation is imperfect. The most important priority in U.S.-Libyan relations in the wake of the Pan Am 103 attack was to deter further Libyan support for terrorism. Bringing Libya’s record to the UN Security Council enabled the United States, the United Kingdom, and France to focus the international community’s attention not only on their individual grievances but also on the danger posed by Libya more generally. This spotlight seems to have served as a deterrent even though the implementation of UN sanctions eroded over time.<sup>142</sup>

Second, multilateral institutions can provide useful cover for difficult changes in policy. Libya was able to point to UN decisions to help explain its acceptance of Western terrorism demands. On WMD, Libya had the benefit of working with the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons in terminating its nuclear and chemical weapons programs, and it could acknowledge the role of the Missile Technology Control Regime and the Biological Weapons Convention in introducing new restrictions on its missile and biological research programs. Had the United States been willing, Libya indicated that it would have also accepted an ICJ role in deciding where the Lockerbie suspects should be tried. In each case, the availability of international institutions allowed Libya to diminish the optic that it was simply capitulating to U.S. pressure.

Third, and despite the first two lessons, direct engagement may nevertheless be indispensable for achieving results. Libya had a legitimate need to understand what the U.S.-UK Lockerbie requirements meant: Transfer of the suspects to whom and under what conditions? Payment of compensation to whom and how much? Acceptance of responsibility for what and with what legal consequences? Performance of all these steps simultaneously or in sequence? By opening a direct channel to Libya, the United States and the United Kingdom were able to clarify how these demands could be convincingly met, and provide confidence that doing so would yield positive results. The two countries used a similar approach in working out transparent procedures for Libya to demonstrate the elimination of its WMD and missile programs. In both cases, it was crucial to establish a single, authoritative channel of communication, given the absence of normal diplomatic relations. If left to its own devices, Libya might well not have known how to meet U.S.-UK expectations or whether and how it would be rewarded for doing so.

Fourth, linking a diplomatic initiative to criminal proceedings may increase its credibility but also risks loss of support if, for example, jurisdictional demands appear unreasonable, legal proceedings are protracted, or a trial results in acquittal. The U.S.-UK demand for the transfer of the two Pan Am 103 suspects gave the Lockerbie dispute a concrete content and perhaps helped offset suspicions that the initiative was politically motivated. Whether, in the post-Iraq-war environment, the international community will act on similar accusations before the completion of trial is unclear. Also, Libya’s success in insisting on an ad hoc trial venue may

<sup>142</sup> See, e.g., Dashti-Gibson & Conroy, *supra* note 67, at 120 (the greatest effect of the UN sanctions was to restrain Libya from further support for terrorism).

lend support to future such efforts where there is a standoff over competing jurisdictional claims.<sup>143</sup>

A fifth lesson that can be gleaned from the Libyan experience is that the executive branch needs to be sensitive to Congress's interest in playing a visible role. The time gap between the executive branch's success in securing UN support in 1992 and the transfer of the Lockerbie suspects in 1999 was filled by various congressional initiatives that constrained the executive branch's flexibility and created frictions with allies. Since strong constituent interests can often be expected in dealing with "rogue states," the executive risks losing control if it does not find a supportive role for Congress. This is a difficult task, given that legislation by its nature is generic and tends to be inflexible, as with the current terrorism restrictions.

Sixth, the interests of private parties can be expected to diverge from other national priorities. The Pan Am families and other private claimants against Libya were a large and well-organized constituency with a passionate dedication to pursuing justice on behalf of their deceased relatives. Their activism took many forms, including effective advocacy with Congress for legislation they believed would best advance their cause. The executive branch managed in some respects to accommodate their views; for example, by turning the compensation issue over to the Pan Am 103 families' lawyers. But there is an inherent tension between private citizens who organize around a specific set of concerns and national leaders who must attend to a broader set of interests, interests that may also evolve over time. Libya's willingness to work with the United States against Al Qaeda after September 11, 2001, and to cooperate in the elimination of its own WMD and missile programs after December 19, 2003, introduced new factors into U.S. policymaking that of necessity focused more on future cooperation than historical grievances.

Seventh, major changes in foreign policy may have to be developed slowly, but gradualism can also place their success at risk. Libya's evolution from a chief sponsor of terrorism in the 1980s to an ally in confronting terrorist threats could not have happened overnight. Time was needed for Libya to put its new policies into effect and for U.S. officials to develop a reliable channel of communication to build mutual confidence in the fragile new relationship.<sup>144</sup> Skeptical U.S. audiences also needed time to be persuaded that a substantive change was under way that would advance national interests. The phase-by-phase strategy adopted by the executive branch served this purpose well and the ultimate rescission of its terrorism designation encountered very little opposition. This gradualism, however, may have reduced the value of the Libya precedent for other countries. They may draw the lesson that the United States will be slow and grudging in reciprocating their progress in meeting U.S. demands.

Finally, trial and error may be the only choice. Debates about foreign policy can be particularly intense in dealing with "rogue states." Typically, these countries are responsible for the

<sup>143</sup> A standing international tribunal for prosecuting "terrorist" offenses does not yet exist, *see* GRANT, *supra* note 26, at xxxi–xxxv, but the UN Security Council has established an ad hoc tribunal in connection with the assassination of former Lebanese prime minister Rafik Hariri, *see* SC Res. 1757 (May 30, 2007) (describing assassination as involving international terrorism and deciding, under Chapter VII, that the provisions of an agreement between the United Nations and Lebanon to establish the tribunal will enter into force notwithstanding a failure by Lebanon to ratify the agreement).

<sup>144</sup> Moreover, efforts to prove the negative, that a country has ceased "all" support for international terrorism, are unlikely to yield crystal-clear results, even if U.S. legislation requires a clean record for only six months. *See, e.g., supra* note 140.

deaths of many Americans and may still pose a threat. Politically influential American constituent groups may lobby Congress and the executive branch against seeking to normalize relations with them, or not to do so until those groups' agendas have been met, which can range from payment of claims to regime change. The United States is also not likely to have significant ties to such countries or particular insight into how their decision making takes place. Indeed, it may be unclear whether simply engaging bilaterally will be perceived as a sign of weakness, undermining whatever unilateral or multilateral pressure has been created for change.<sup>145</sup>

Against this backdrop, in dealing with Libya in the aftermath of the Pan Am 103 tragedy, U.S. decision makers faced a wide array of choices: they could have responded militarily, as with the LaBelle disco incident; they could have taken the dispute to the ICJ, as with the Iran hostage crisis; they could have pressed harder for an oil embargo or worked actively to overthrow the Libyan regime, as with Iraq; they could have proposed a compensation settlement figure, as in many previous reconciliation processes; and they could have insisted on more internal reforms before lifting bilateral sanctions, as Congress has directed for some of the other targets of U.S. sanctions.<sup>146</sup> Though none of these options was pursued, each had its passionate proponents.

No one can know what the world would look like today if these or other options had been chosen. In the end, most would probably agree on the value of the objectives that were achieved. But Libya's removal from the terrorism list, culminating the restoration of normal relations, took place only after an arduous eighteen-year period in which different tools were tried and U.S. policy evolved considerably. Perhaps this is the final lesson of the Libya experience. Flexibility, creativity, and patience, coupled with firmness on basic principles, enabled the United States to overcome differences with a country once considered the worst outlaw regime on the planet. That should at least inspire hope for dealing with other "rogue states," and ideally promote greater civility in the debate over how to address the national security threats they present.

<sup>145</sup> *But see* JAMES A. BAKER III ET AL., THE IRAQ STUDY GROUP REPORT 37 (2006), available at <[http://www.usip.org/isg/iraq\\_study\\_group\\_report/report/1206/index.html](http://www.usip.org/isg/iraq_study_group_report/report/1206/index.html)> (recommending direct engagement by the United States with Syria and Iran "much as it did successfully with Libya").

<sup>146</sup> *See, e.g.*, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, *supra* note 64; Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178 (codified as amended at 22 U.S.C. §2151 note (2000 & Supp. 4 2004)).

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