

2002

The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?

Donna E. Arzt

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Arzt, Donna E. "The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?" *American University International Law Review* 18, no. 1 (2002): 163-236.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

THE LOCKERBIE “EXTRADITION BY ANALOGY” AGREEMENT: “EXCEPTIONAL MEASURE” OR TEMPLATE FOR TRANSNATIONAL CRIMINAL JUSTICE?

DONNA E. ARZT*

INTRODUCTION	164
I. THE EXTRADITION LACUNA	172
II. THE SECRETARY-GENERAL’S INTERVENTION.....	179
A. PRE-TRIAL DEVELOPMENTS	179
B. THE “GOOD OFFICES” FUNCTION	186
C. THE 17 FEBRUARY 1999 “LETTER OF UNDERSTANDING” ..	193
1. <i>Context and Cover Letter</i>	194
2. <i>The Letter’s Annex</i>	198
3. <i>The “Not Undermine” Sentence</i>	202
III. ASSESSING THE ARRANGEMENT	208
A. PRAGMATIC CONSIDERATIONS	211
B. QUESTIONS OF LEGITIMACY	219
CONCLUSION	226
ATTACHED LETTER 1	228
ATTACHED LETTER 2	229
ATTACHED LETTER 3	231
ATTACHMENT 4	234

* Bond, Schoeneck & King Distinguished Professor of Law and Director, Center for Global Law and Practice, Syracuse University College of Law. Professor Arzt also serves as the Director of the Lockerbie Trial ~ Families Project, which provided daily trial and appeal summaries and analysis on a password-protected web-site accessible to the 270 Lockerbie victim families under a grant to Syracuse University College of Law from the United States Department of Justice’s Office for Victims of Crime. See Donna E. Arzt, *The “Lockerbie Trial ~ Families Project” Website: Victim Assistance Goes Online*, 29 SYRACUSE J. INT’L L. & COM. 121 (2001). The author wishes to thank Elizabeth F. Allen, India L. Ochs, and Ruchi Thaker for their research assistance and Lisa M. MacDonald and Chris E. Ramsdell for their administrative support.

INTRODUCTION

Shortly after the verdict in the nine-month Lockerbie criminal trial was announced on January 31, 2001, Libyan leader Colonel Muammar Qadhafi proclaimed that he had stunning evidence proving the innocence of the convicted intelligence agent Abdelbaset Ali Mohamed al-Megrahi.¹ “And when I speak,” he announced, “the judges will have three choices: either to commit suicide, to resign or to admit the truth.”² Qadhafi never produced his ostensible evidence, though he continued to complain about the Lockerbie verdict, leading one writer to editorialize in a British paper, “the Colonel doth protest too much.”³ If Qadhafi possessed such evidence, why did he not present it to al-Megrahi’s defense team before the end of the trial or during the appeal so that a hearing of “fresh evidence” could have been requested? Regardless, al-Megrahi’s conviction ultimately was upheld on March 14, 2002.⁴

1. See Her Majesty’s Advocate v. Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, No. 1475/99, High Court of Justiciary at Camp Zeist, the Netherlands (explaining that Al-Megrahi was convicted of the murder of 259 persons aboard passenger aircraft Pan AM 103 and of eleven additional persons on the ground in Lockerbie, Scotland, in furtherance of the purposes of Libyan Intelligence services, while acting in concert with others, but that his co-defendant, Al-Amin Khalifa Fhimah was acquitted), *available at* <http://www.scotcourts.gov.uk/html/lockerbie.htm> (last visited Sept. 6, 2002).

2. See Neil MacFarquhar, *Qaddafi Rants Against the U.S. In a Welcoming After Bomb Trial*, N.Y. TIMES, Feb. 2, 2001, at A1 (quoting Qadhafi); see also *Lockerbie: Libyan Media’s View*, BBC NEWS, Feb. 2, 2001 (discussing the reaction of Libyan state television to the Lockerbie verdict), *available at* <http://kimjg1.hihome.com/2001/02/02/world/01Liby.html>; Neil MacFarquhar, *The Lockerbie Verdict: The Libyans; Homeland Sees Political Motive in Guilty Verdict*, N.Y. TIMES, Feb. 1, 2001 (reporting that the verdict is seen as a political statement to many Libyans); *When Will Sanctions be Lifted*, BBC NEWS, Feb. 1, 2001 (debating the proper recourse for the sanctions to be lifted against Libya).

3. See Arthur Shamis, *It Seems To Me the Colonel Doth Protest Too Much*, GUARDIAN UNLIMITED, Feb. 5, 2001 (commenting on the insistent protests of Qadhafi over the Lockerbie verdict), *available at* <http://www.lybianet.com/n06feb1a.htm> (last visited Oct. 1, 2002).

4. See Abdelbaset Ali Mohamed Al Megrahi v. Her Majesty’s Advocate, No.C104/01, Appeal Court, High Court of Justiciary, para. 252 (stating that

The world may never know if Qadhafi was motivated by a desire to end seven years of multilateral,⁵ as well as unilateral U.S. and U.K., economic sanctions against his country⁶ that supposedly have cost Libya \$25 billion,⁷ or to prove that he is now a rehabilitated “rogue who had come in from the cold.”⁸ Presumably, however, the

Megrahi was allowed to present evidence of a security breach at Heathrow Airport the night before the Pan Am 103 bombing, but the court held it was insufficient to overturn the conviction), *available at* http://www.scotcourts.gov.uk/html/lockerbie_appeal.htm (last visited Oct. 1, 2002).

5. See S.C. Res. 748, U.N. SCOR, 46th Sess., 3063rd mtg., U.N. Doc. S/RES/748 (1992) (deciding that all States shall impose on Libya sanctions regarding the use of air space, transfer and sale of weapons, and diplomacy in response to Libya’s failure to comply with the Security Council Resolution 731 issued on January 21, 1992); *see also* S.C. Res. 883, U.N. SCOR, 48th Sess., 3312th mtg., U.N. Doc. S/RES/883 (1993) (strengthening the sanctions imposed on Libya under the resolution 748). *See infra* note 47 (discussing the significance of the timing of the Security Council resolutions regarding Libya). *See generally* STERLING JOHNSON, *GLOBAL SEARCH AND SEIZURE* 85-97 (Dartmouth Publ. Co. 1994) (discussing sanctions levied over Libya with respect to the bombing of Pan Am 103); UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW (Vera Gowlland-Debbas ed., Kluwer Law International 2001) (reviewing U.N. sanctions levied on nations throughout the world). The resolutions imposed six conditions on Libya: i) hand over the two suspects in the Lockerbie bombing; ii) resolve the dispute over its role in the September 1989 bombing of French UTA flight 772; iii) cooperate with the Lockerbie investigation and disclose everything it knows about the bombing; iv) renounce all support for terrorism; v) accept responsibility for the Pan Am 103 bombing; and vi) pay compensation to the victims.

6. See 50 U.S.C.A. § 1701 (2002) (codifying the Iran and Libya Sanctions Act); *see also* 22 U.S.C.A. § 2349aa-8 (2002) (codifying the prohibitions on Libyan imports and exports, which were first enacted in 1985, three years before the Pan Am 103 bombing); 22 U.S.C.A. § 4856 (disqualifying companies doing business with Libya from receiving contracts for foreign building construction); Al-Sharq al-Aswat, *London-Based Paper Urges Libya to “Self-Restraint” to Promote Ties with UK*, BBC MONITORING, March 24, 2001 (discussing the shooting of a London policewoman inside the Libyan Embassy and the subsequent sanctions in relation to the shooting).

7. See Rod Usher, *The Law’s Long Arm; A Scottish court on Dutch soil gets a chance to try two Libyans accused of the Lockerbie bombing*, TIME, Apr. 1999 (reporting that Libya has estimated that the U.N. sanctions have cost it \$25 billion). See ALLEN GERSON & JERRY ADLER, *THE PRICE OF TERROR* 274 (Harper Collins 2001) (noting the cost between \$20 and \$30 billion).

8. See Ray Takeyh, *The Rogue Who Came in From the Cold*, FOREIGN AFFAIRS, May/June 2001 at 62 (stating that Qadhafi’s surrendering of the suspects suggests that the international pressure prompted changes in his foreign policy);

Colonel would not have agreed to any *ad hoc* arrangement to turn over the two Libyan nationals and cooperate in the investigation without at least considering the possibility that one or both of them might be convicted.⁹ If he was convinced that they would be acquitted, there would have been no need to delay the trial by six months while seeking assurances about where and how they would serve their sentences.¹⁰ Qadhafi's agreement to the arrangement was an absolute prerequisite to the commencement of the criminal trial, given the lack of an extradition agreement between either the United States and Libya or the United Kingdom and Libya.

Contrary to the Colonel's protestations, the Lockerbie prosecution was not a show trial. It operated under the strict rules and procedures long in effect for all Scottish solemn jurisdiction criminal trials;¹¹ in fact, many of the rules favor defendants.¹² Indeed,

see also Muammar Qadhafi, *Leader of Libya, Trying to Shape New Image*, 60 MINUTES II, CBS NEWS TRANSCRIPT (July 3, 2001)[hereinafter "*New Image*, 60 MINUTES II"].

9. *See* Qadhafi Vows to Accept Court's Verdict, BBC NEWS, May 3, 2000 (discussing the Libyan leader, Qadhafi's promise to accept the court's judgment), available at <http://news.bbc.co.uk/1/hi/world/734460.stm> (last visited Sept 6, 2002); *see, e.g.,* Libya condemns Lockerbie verdict, BBC NEWS, March 14, 2002 (illustrating that Libyan officials denounced and rejected the Lockerbie verdict), available at http://news.bbc.co.uk/1/hi/world/middle_east/1872578.stm (last visited Sept. 6, 2002); *see also* Libyan Statement Regarding Verdict and Sanctions, Lockerbie Trial Briefing Site, Nov. 15, 2001 (stating that the conviction issued by the Tribunal was a political decision), available at <http://www.ltb.org.uk/displaynews.cfm?nc=2&theyear=2001> (last visited Sept. 6, 2002).

10. *See infra* Parts III A and C (describing the assurances sought by Colonel Qadhafi).

11. *See* Criminal Procedure (Scotland) Act 1995 (c.46) (ascribing the procedure, including the rules, of criminal proceedings in Scotland), available at http://www.hmso.gov.uk/acts/acts1995/Ukpga_19950046_en_1.htm (last visited Sept. 27, 2002).

12. *See* Fraser Davidson, *Evidence*, in LOCKERBIE TRIAL BRIEFING HANDBOOK 27 (John P. Grant ed., 2000) [hereinafter LOCKERBIE HANDBOOK] (noting that even with the standard of proof being beyond a reasonable doubt, "it is a peculiarity of the Scottish system that no-one may be convicted without corroboration"). "That is to say that there must be evidence from more than one source to the essential elements of a crime." *Id.* Moreover, in addition to "guilty" and "not guilty" verdicts, the verdict of "not proven" may be given in Scottish criminal trials. *Id.* at 17. It is the equivalent of an acquittal. *Id.* These and other features led Alan Dershowitz, who would later be hired to assist the Lockerbie defense on appeal, to

in a 1997 independent experts' report to the U.N. Secretary-General that was completed in anticipation of a possible Scottish trial of the two accused Libyans, the Scottish judicial system was considered to be a fair system.¹³ While certain elements of the Lockerbie trial, such as its venue in a neutral third country, Holland, and its use of a panel of three Scottish judges instead of a Scottish jury, were unusual or even unprecedented, these aspects were implemented to accommodate terms insisted on by Qadhafi in discussions leading up to the trial.¹⁴ According to the highest-ranking law enforcement officer in Scotland, the Lord Advocate (equivalent to the U.S. Attorney General), two months after the trial ended:

An early decision was taken that the prosecution would, so far as possible, be conducted in exactly the same way as any other prosecution in Scotland. The case was precognosced, prepared and presented in court the same way as any other case. The principles and values of independence, impartiality and professionalism followed in the trial were no different to those followed by the prosecution in any trial in Scotland.¹⁵

Yet, the Lockerbie criminal proceeding was unprecedented in at least two respects. It was the first time that a national civilian court had ever conducted an entire criminal trial in the territory of another

conclude that Scottish criminal law is one of the most pro-defendant of any system in the world. See Ron Allen & Geraldo Rivera, *Trial of Two Libyans for Bombing of Pan Am Flight 103*, CNBC NEWS TRANSCRIPT, May 3, 2000; Niles Lathem, *Pan Am Bomber Hires Dershowitz for Appeal*, N.Y. POST, Aug. 9, 2001, at 24.

13. See Report to the Secretary-General by Dr. Enoch Dumbutshena and Professor Henry G. Schermers on the Scottish Judicial System, UN Doc. S/1997/991, available at <http://daccess-ods.un.org/doc/UNDOC/GEN/N97/373/73/IMG/N9737373.pdf?OpenElement> (last visited Oct. 31, 2002); *Lockerbie Trial 'Fair in Scotland' - U.N.*, BBC NEWS, Dec. 23, 1997 (discussing the U.N. decision that the two Libyans suspected of the Lockerbie bombing would get a fair trial in Scotland), available at <http://news.bbc.co.uk/2/hi/world/41882.stm> (last visited Sept. 6, 2002).

14. See Alistair Bonnington, *A Truly Exceptional Trial*, BBC NEWS, Jan. 19, 2001 (commenting on the extraordinary nature of the Lockerbie trial), available at <http://news.bbc.co.uk/2/hi/world/1126564.stm> (last visited Sept. 9, 2002); see also *Analysis: Legal Firsts for Lockerbie Trial*, BBC NEWS, Apr. 5, 1999 (contemplating that the Lockerbie bombing has resulted in an unprecedented legal event).

15. Colin Boyd, *Independence and Professionalism*, UPDATE: LOCKERBIE SPECIAL (Crown Office and Procurator Fiscal Service), March 2001, at 8 (on file with author).

sovereign country,¹⁶ and it was also the first time that the U.N. Security Council had pressured a state, through economic sanctions, to surrender its nationals for trial abroad.¹⁷ Moreover, two other principal U.N. organs, the International Court of Justice and the Secretariat, had been closely involved in aspects of the case.¹⁸ Thus, the trial was not merely transnational, i.e. the national trial of a crime against national law involving alleged perpetrators from a second state and victims from one or more other countries.¹⁹ The Lockerbie trial was truly international in its promotion if not in its actual jurisdiction or formal sponsorship.²⁰ British Foreign Secretary Robin Cook called the decision to hold a national criminal trial in a third country “an historic innovation in international legal practice,”²¹

16. See Robin Cook, *Robin Cook: 'If the two men are innocent they have nothing to fear from Scottish justice,'* GUARDIAN UNLIMITED, Apr. 5, 1999 (describing the unique process and circumstances of the setting of the Lockerbie trial), available at <http://www.guardian.co.uk/Lockerbie/Story/0,2763,740117,00.html> (last visited Sept. 27, 2002).

17. See Andrew Hardie, *Lockerbie – Briefing For Family Members*, Address By Lord Advocate (Aug. 23, 1999) (pointing out the unprecedented U.N. sanctions on Libya designed to bring alleged offenders before a national court) (on file with author). Cf. *Symposium: International Terrorism, Victims' Rights and the Lockerbie Criminal Trial*, 29 SYRACUSE J. INT'L L. & COM. 1, 15 (2001) [hereinafter *Symposium*] (stating that the Scottish and U.S. indictments issued on November 14, 1991, was the first time that prosecutors in two countries had commenced simultaneous criminal proceedings).

18. See *infra* Part II and Part IIIA (describing the ICJ and Secretariat's involvement).

19. See JORDAN J. PAUST ET AL, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 18-19 (2d ed., Carolina Academic Press 2000) (explaining that transnational criminal law refers to violations of national penal law involving perpetrators and/or victims of more than one nationality and/or which have effects on more than one national territory). By contrast, international criminal law normally refers to serious violations of international law, such as war crimes, genocide and crimes against humanity, for which individual responsibility has been established by international agreements such as treaties or customary international law. International crimes need not involve any transnational elements. *Id.*

20. *But cf. id.* (stating that the International Criminal Tribunals for Yugoslavia and for Rwanda have international jurisdiction because they are created by Security Council resolutions, and thus sponsored by the United Nations, for purposes of trying violators of international criminal law).

while, in the U.N. Security Council, the delegate from Costa Rica hailed it as “an intelligent legal solution to a longstanding legal problem.”²²

In order to bring about the Lockerbie criminal trial, various multilateral and bilateral negotiations and statutory changes involving the United Kingdom, the United States, the Netherlands, the United Nations, and the Libyan Arab Jamahiriya were required.²³ Some of these were legally necessary in order to establish a special Scottish Court in the Netherlands where the two Libyan defendants could be tried. Other parts of the arrangements were politically necessary in order to clear the hurdles left by the lack of a relevant extradition treaty.²⁴ Yet, even negotiated arrangements reached for entirely political reasons may, over time, take on a legalistic hue. It is therefore important to appreciate their intent, meaning, and value within the larger context of all the trial arrangements. Of the array of special pre-trial developments that laid the groundwork for the Lockerbie criminal trial,²⁵ the pivotal role played by U.N. Secretary-

21. See *Libya's Lockerbie Response Awaited*, BBC NEWS, Aug. 25, 1998 (expressing that the decision to allow a trial in a third country is historical and innovative to the international legal world), available at http://news.bbc.co.uk/2/hi/special_report/1998/08/98/lockerbie/157780.stm (last visited Sept. 27, 2002).

22. Transcript of Security Council meeting, UN Doc. S/PV.3920 (Aug. 27, 1998).

23. See Boyd, *supra* note 15, at 5. During the investigation of the case and the trial itself, cooperative agreements between the Scottish Crown or Scottish police and countries such as Germany, Sweden, Switzerland, Jordan, Japan, Senegal and Malta were also needed. The Lockerbie case was the largest criminal investigation in Scottish history, involving the greatest number of personnel, not even counting the assistance of agents from the FBI and other countries.

24. See *infra* Part II (discussing the extradition lacuna).

25. See Draft Agreement Between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in the Netherlands, art. 3(1), available at <http://www.ltb.org.uk/trialtreaty.cfm> (last visited Sept. 9, 2002) [hereinafter Neth-UK Treaty] (describing the conditions of the trial and special provisions each government must adopt); United Kingdom Statutory Instrument No. 2251, the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 [hereinafter “Order in Council”]; see also *Symposium, supra* note 18, at 19-20 (discussing article 3(1) of the treaty and its provisions); United Kingdom Statutory Instrument No. 3918, the High Court of JUSTICIARY (Proceedings in the NETHERLANDS) (United Nations) (Variation) Order 2001

General Kofi Annan and his designees in bridging the diplomatic gaps between the United Kingdom, the United States, and Libya has received little scholarly attention.²⁶

After reviewing in Part II why a special arrangement needed to be reached in lieu of extradition, this article concentrates in Part III on the role of Secretary-General Annan and the language of his letter of February 17, 1999, to Colonel Muammar Qadhafi: specifically, the letter's annex, "Understanding on the Issues Outstanding from the Point of View of the Libyan Arab Jamahiriya" ("Understanding"), is discussed in detail. Part IV then assesses to what extent the combination of special Lockerbie trial arrangements, including the agreement facilitated by Kofi Annan,²⁷ was purely an "exceptional measure"²⁸ or to what extent might it serve as a model for future trials in the field of transnational criminal law. Was the Lockerbie criminal trial an early presage of future trends or was it "ad hoc justice" -- an ill-considered example of the "privatisation of the legal

(technical amendment only). See generally Anthony Aust, *Lockerbie: The Other Case*, 49 INT'L & COMP. L.Q. 278 (2000); Caroline Morgan, *The Trial of the Lockerbie Suspects in the Netherlands*, 7 AFR. Y.B. INT'L L. 255 (1999) (contemplating the process and provisions of the Lockerbie trial).

26. See Statement by Secretary of State Madeleine K. Albright on the Hand-over of the Pan Am 103 Suspects (April 5, 1999) (describing the role played by South African President Nelson Mandela, Saudi Arabia's Crown Prince Abdullah, and others as intermediaries to persuade Libya to trust the joint U.S. and U.K. invitation), available at <http://usinfo.state.gov/topical/pol/terror/99040508.htm> (last visited Sept. 30, 2002); see also John Roberts, *Britain-Libya: Nelson Mandela Breaks Impasse on Lockerbie Duo*, INTERPRESS NEWS SERVICE, Oct. 28, 1997 (discussing the impartiality of a Scottish court). See generally WILLIAM SHAWCROSS, *DELIVER US FROM EVIL* 352 (Simon & Schuster 2000) (illustrating the diplomatic measures taken by U.N. Secretary-General Kofi Annan in extraditing the suspects of the Pan Am flight 103 bombing).

27. As explained later in this article, the "extradition by analogy" agreement is not legally binding and therefore is not a treaty. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679, 680-81 (1969) (defining a treaty to be an international agreement concluded between States in written form and governed by international law).

28. See Letter Dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, para. 3 [hereinafter Letter Dated 24 August 1998] (describing the trial as an "exceptional measure"), available at <http://www.ltb.org.uk/trialletter.cfm> (last visited Oct. 1, 2002); see also *infra* notes 62 - 65 and accompanying text (discussing the role of this letter).

order?”²⁹ This final section includes a comparison of the Lockerbie hand-over to another high profile case, the extradition of Slobodon Milosevic to the International Criminal Tribunal in the Hague, that involved political and economic considerations.

Much has been made of one sentence in the Annan-to-Qadhafi letter’s annex: “The two persons will not be used to undermine the Libyan regime.”³⁰ Alarmed that a “secret immunity deal for Qadhafi” had been made, many Lockerbie victim family members and media pundits pointed to this sentence or to rumors of this sentence, before the letter and annex were released publicly.³¹ However, as argued

29. See *The Lockerbie Trial: Legal Questions at the Commencement of the Trial: Report of the Seminar at Slot Zeist on May 23, 2000*, Amsterdam Center for International Law [hereinafter *Legal Questions at the Commencement*] (stating that Professor Kamminga considered the Lockerbie trial as an example of the “privatization of legal order”), available at http://www.jur.uva.nl/acil/Lockerbie_Trial.htm (last visited Oct. 4, 2002). Professor Kamminga went on to compare it to privatized prisons, police and armies. But these comparisons are inapt, as the Lockerbie trial was negotiated and fully conducted by governments, not private contractors. Perhaps a more accurate though less elegant term than “privatisation” would be “ad hocization.”

30. Letter from Kofi Annan, U.N. Secretary General, to Col. Muammar Al-Qadhafi, Leader, Socialist People’s Libyan Arab Jamahiriya (Feb. 17, 1999) [hereinafter Attached Letter 3] (on file with AUILR and available at page 231 of this article). The letter and annex have no official UN Document Number. Anthony Goodman, *Annan’s U.N. Lockerbie Letter to Libya Released*, REUTERS, Aug. 25, 2000 (reporting that the United Nations, the United States, and Britain released the Annan’s letter), available at http://www.turkishdailynews.com/old_editions/08_27_00/for2.htm#f22 (last visited Oct. 12, 2002); see also *infra* Part III.C.3 (analyzing the meaning of this sentence).

31. See Goodman, *supra* note 30; see also *Trial and Error*, THE NEW REPUBLIC, May 15, 2000, at 11 (discussing the supposed secret deal for Qadhafi); Bruce McKain, *Swire Says Claims of Secret Deal are Harmful; Lockerbie Relatives’ Spokesman Says Trial is Priority Number One*, THE (GLASGOW) HERALD (Jan. 7, 2000) at 12. See generally Michael P. Scharf, *A Preview of the Lockerbie Case*, ASIL INSIGHTS, May 2000 (reviewing the pre-trial factual developments and previewing the positions of each party) available at <http://www.asil.org/insights/insigh44.htm> (last visited Oct. 2, 2002); Ashour Shamis, *Lockerbie: A Sour Pill for Libya*, BBC NEWS, Jan. 28, 2002 (discussing the Libyan perspective and hopes for the Lockerbie case), available at http://www.news.bbc.co.uk/2/hi/in_depth/1786608/stm (last visited Sept. 9, 2002); Daniel Benjamin & Steve Simon, *Seeking Justice for Pan Am 103*, THE CHRISTIAN SCIENCE MONITOR, June 5, 2000 (rejecting the notion that the sentence at issue meant a guarantee of immunity for the defendants).

below, this particular sentence was never intended to preclude further prosecutions of other possible co-conspirators within the Qadhafi regime to include the Colonel himself. Read in its context, it was merely an assurance that the trial will be a legitimate one and that the two suspects, if they were convicted, would not be exploited for political propaganda. Moreover, as explained below, any promises within the Annan letter were not legally binding on either Scottish or U.S. law enforcement officials. At any rate, whether further Lockerbie-related prosecutions will be pursued is a matter within the independent discretion of national officials, both Scottish³² and American,³³ based on their evaluation of available evidence and the policy implications of doing so.

I. THE EXTRADITION LACUNA

Extradition is the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the country where he is located to the authorities of another country for the purpose of either criminal prosecution or execution of a sentence in the latter country. Under international law, the duty to extradite depends on the existence of a bilateral or multilateral treaty establishing the prerequisites for and exceptions to such an obligation.³⁴ Otherwise,

32. See *New Lockerbie Trial Ruled Out*, BBC NEWS, Feb. 1, 2001 (stating that Scotland's most senior legal official ruled out the possibility of any further criminal action in the Lockerbie bombing case), available at <http://www.new.bbc.co.uk/2/hi/world/1148151.stm> (last visited Sept. 9, 2002); see also SUSAN R. MOODY & JACQUELINE TOMBS, PROSECUTION IN THE PUBLIC INTEREST 56 (Scottish Academic Press 1982) (1982) (discussing the role of the prosecutor in Scotland and the criteria which are used in deciding whether or not to prosecute).

33. See *US Insists Kadhafi Not Immune From Lockerbie Prosecution*, AGENCE FRANCE PRESS, Feb. 13, 2001 (quoting U.S. State Department spokesperson Richard Boucher as stating that the U.S. position is to "follow the evidence wherever it leads").

34. See Ninth United Nations Congress on the Preservation of Crime and the Treatment of Offenders, International Cooperation and Practical Technical Assistance for Strengthening the Rule of Law: Promoting the United Nations Crime Prevention and Criminal Justice Programme, U.N. ESCOR, 9TH SESS. AT 5, UN DOC. A/CONF.169/8 (1995) [hereinafter *Ninth U.N. Congress*] (stating the purpose and evolution of extradition and international cooperation), available at <http://www.sas.ab.ca/unconf/Documents/c1698.html> (last visited Sept. 9, 2002); see also Torsten Stein, *Extradition*, in 2 ENCYCLOPEDIA OF PUB. INT'L L. 327 (Rudolf

there is no customary international duty to extradite. Moreover, “customary international law contains no limitations on a State’s freedom to extradite, except for fundamental human rights. . . . Whether, beyond that restriction, extradition is admissible in the absence of a treaty is decided solely under domestic law.”³⁵

In lieu of a relevant treaty, a state may rely on less formal policies, such as comity or reciprocity, to decide how to respond to individual extradition requests, or national legislation may specify what occurs in the absence of a treaty. For instance, under U.S. law “in the exercise of comity” and upon certification of certain conditions, a non-national who has committed violent crimes in a foreign country against U.S. nationals may be surrendered by the U.S. without regard to the existence of a treaty.³⁶ The U.S. has bilateral extradition treaties with about 110 countries; there are no such treaties with over eighty countries such as Libya, Algeria, Kuwait, and Saudi Arabia.³⁷ The United Kingdom has bilateral as well as multilateral extradition arrangements with about 180 countries and its own dependencies.³⁸

Bernhardt ed., 1995) (giving a historic overview of extradition along with outlining the substantive law and issues surrounding extradition).

35. See *Ninth U.N. Congress, supra* note 34, at 6 (stating that international law contains no limitations on a State’s freedom to extradite except for fundamental human rights issues).

36. See 18 U.S.C. § 3181 (2002) (listing the existing extradition treaties between the United States and other countries); see also UNITED STATES DEPARTMENT OF JUSTICE – U.S. ATTORNEY’S MANUAL, TITLE 9-15.000, *International Extradition Matters* (Oct. 1997) [hereinafter U.S. ATTORNEY’S MANUAL] (outlining the process of international extradition and related matters), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm (last visited Sept. 9, 2002).

37. See 18 U.S.C. § 3181(2002) (interpreting extradition decisions); see also UNITED NATIONS CRIME AND JUSTICE INFORMATION NETWORK, *Database on Bilateral Agreements on Extradition, Legal Assistance, Control of Narcotic Drugs and Prisoner Transfer, USA* (July 1996) (charting all countries and noting if there is a treaty with the United States when it was signed and when it was effective), available at <http://www.uncjin.org/Laws/extradit/usa.pdf> (last visited Sept. 9, 2002).

38. See, e.g., Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter Montreal Convention] (counting Libya as one of the 180 due to its being a party to this treaty). See generally IVOR STANDBROOK & CLIVE

Extradition treaties almost invariably set out specific conditions under which surrender will and will not be granted. These conditions often include the requirements of dual criminality and specialty as well as exclusions for political offenses, capital punishment, or *in absentia* convictions.³⁹ Some countries, however, choose never to extradite their own nationals and to incorporate this policy in their constitution or legislation. For example, Article 16(2) of the German Constitution states that “[n]o German may be extradited to a foreign country,” and Article 5(LI) of Brazil’s Constitution prohibits extradition of native-born and naturalized Brazilians unless it involves a drug offense or a common crime committed before naturalization.⁴⁰ Article 493 of the Libyan Code of Criminal Procedure provides that Libya may extradite offenders insofar as “the extradition does not relate to a Libyan citizen.”⁴¹ Traditionally,

STANDBROOK, THE LAW AND PRACTICE OF EXTRADITION (Barry Rose, LTD 1980) (surveying the law of extradition).

The United Kingdom’s decision to adopt multilateral conventions aimed at combating terrorism to serve as extradition arrangements with foreign countries which are not already bound to it by formal extradition treaties may prove embarrassing The implications of offering extradition arrangements gratuitously, on a wide scale, without regard to the integrity of the foreign legal systems involved, may not have been fully appreciated. This is especially the case where the government of the requested country may itself be involved in the alleged crime.

Id. at 335. This statement is directly followed by references to Libya and Lockerbie. *Id.*

39. See, e.g., *id.* at 19-87, 150-155; see also *Ninth U.N. Congress*, *supra* note 34, at 11 - 20.

40. See BRAZ. CONST. art. 5 (LI) (stating that no Brazilian may be extradited, except for natural Brazilians in the case of a common crime committed before naturalization, or proven involvement in the unlawful traffic of narcotics and similar drugs, as set forth in the law), available at http://www.uni-wuerzburg.de/law/br00000_html (last visited Sept. 28, 2002); see also F.R.G. BASIC LAW, art. 16(2) (contending that no German may be extradited to a foreign country), available at <http://www.jura.uni-sb.de/law/GG/ggl.htm> (last visited Sept. 9, 2002). But see 18 U.S.C. § 3196 (2000) (stating that in the United States, if an applicable treaty or convention does not obligate the government to extradite citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender of a U.S. citizen whose extradition has been requested by that country if the other requirements of the treaty or convention are met).

41. See Morgan, *supra* note 25, at 256 n.3 (quoting Libyan law regarding extradition of its citizens); see also Letter from the Permanent Representative of the Libyan Arab Jamahiriya, to the President of the Security Council, United

sovereigns have expressed four possible reasons for not extraditing nationals:

first, the fugitive ought not to be withdrawn from his natural judges; secondly, the State owes to its subjects the protection of its laws; thirdly, it is impossible to have complete confidence in the justice meted out by a foreign State, especially with regard to a foreigner, and fourthly, it is disadvantageous to be tried in a foreign language, separated from friends, resources and character witnesses.⁴²

The United States and the United Kingdom issued a joint demand on November 27, 1991, approximately two weeks after their joint issuance of indictments, for the surrender of the two Libyan nationals for trial either in the United States or the United Kingdom.⁴³ Libya refused. It contended that it was not required to extradite and stated that, in accordance with the customary international law principle of *aut dedere aut judicare* (“extradite or prosecute”), it would conduct its own prosecution of its two accused nationals⁴⁴ pursuant to the Montreal Convention 1971 that Libya, the United States, and United Kingdom had signed.⁴⁵ The British and U.S. joint demand was then backed by a series of Security Council resolutions that Libya challenged in the International Court of Justice (“ICJ”) on March 3, 1992, by filing parallel cases against the United Kingdom and United States.⁴⁶ Libya argued that by making these demands, the two

Nations, UN Doc. S/23441 (Jan. 18, 1992) [hereinafter Libya Letter to Security Council] (outlining grounds for refusal of extradition and describing initiation of Libya’s own domestic judicial proceedings to take the two suspects into custody).

42. See *Ninth U.N. Congress*, *supra* note 34, para. 62 (citing Royal Commission on Extradition, *Report of the Commissioners*, 1878 (C.2039) at 908). The non-extradition of nationals has been criticized by a number of writers, for example JEAN-CLAUDE LAINBOIS, *DROIT PENAL INTERNATIONAL* No. 458 (1971), and Hans Schultz, *The Principles of The Traditional Law of Extradition*, in *LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES*, No. 9 at 19-20 (Council of Europe, 1970)).

43. See Morgan, *supra* note 25, at 256.

44. Cf. *supra* note 38 (indicating the fragility of international extradition treaties).

45. See Montreal Convention, *supra* note 38.

46. See *supra* note 5 (discussing the Resolutions of the U.N. Security Council). Significantly, Resolution 731 was adopted on January 21, 1992, only three days

permanent members of the Security Council had breached their legal obligations under the Montreal Convention.⁴⁷ The Court denied Libya's request for provisional orders, but six years later, in two separate judgments on the respondents' preliminary objections, the Court decided that it had jurisdiction to hear the disputes on the basis of Article 14, paragraph 1 of the Convention, which concerns the settlement of disputes over the interpretation or application of the Convention's provisions.⁴⁸ The Court also found the Libyan claims admissible.⁴⁹ The two cases are still pending on the ICJ's docket, despite the completion of the Lockerbie criminal trial.⁵⁰

after Libya had formally rejected the U.K. and U.S. requests, strongly suggesting that the two countries had already planned on seeking Security Council intervention. Resolution 748 was adopted on March 31, 1992, less than a month *after* Libya had filed its International Court of Justice cases against the United Kingdom and the United States, but *before* the Court rendered its decision on Libya's request for provisional measures. Resolution 1192 was adopted on August 27, 1998, exactly six months after the ICJ's judgment on preliminary objections, from which one can infer an indirect role by the ICJ in encouraging all the parties to finally reach an arrangement that would lead to the criminal trial.

47. See International Court of Justice, Press Communiqué 2000/27, Sept. 13, 2000 [hereinafter Press Communiqué 2000/27], available at <http://www.icj-cij.org/icjwww/idocket/iluk/iluk2frame.htm> (last visited Oct. 5, 2002). Quoting Libya as stating:

[T]he Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie, that there was no other convention concerning international criminal law in force which was applicable to such issues between itself and the United Kingdom, nor between itself and the United States, and that, in accordance with the Montreal Convention, it was entitled to try the alleged offenders itself").

Id.

48. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie Libya (Libya v. U.K.), 1992 I.C.J. 3 (April 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie Libya (Libya v. U.S.), 1992 I.C.J. 114 (April 14) (requesting in both cases the indication of provisional measures).

49. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libya v. U.K.), 1998 I.C.J. 9, at 54 (Feb. 27) (preliminary objections).

50. See Press Communiqué 2000/27, *supra* note 47 (noting that the time-limit for the filing of rejoinders by the United Kingdom and the United States in the two cases concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie was set for August 3, 2001). Still to be determined on the merits is the "constitutional" issue of whether

Thus, to transport the suspects to the Scottish trial court, two voluntary transfers had to be effected. The first transfer was from Libya to the Netherlands, and the second was from the Netherlands into Scottish custody at Camp Zeist, a former NATO airbase in Soesterberg outside of Utrecht. By a treaty between the United Kingdom and the Netherlands, signed on September 18, 1998, the Dutch government agreed to turn part of its territory over to Scottish judicial authorities “for the sole purpose, and [only] for the duration, of the [Lockerbie criminal] trial.”⁵¹ Under Article 16(1) of the same agreement:

At the time of the arrival of the accused in the host country [the Netherlands], the Government of the United Kingdom shall, in accordance with the relevant treaties, request the Government to transfer the accused to the premises of the Scottish Court for the purpose of the trial and to detain them pending their transfer, having regard to the requirements of United Nations Security Council Resolution (1998).⁵²

the U.N. Security Council has the power, through its resolutions, to trump pre-existing treaty obligations. See John Dugan, *Judicial Review of Sanctions*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 6 at 83; Thomas M. Franck, *The “Powers of Appreciation”: Who is the Ultimate Guardian of U.N. Legality?* 86 AM. J. INT’L L. 519 (1992).

51. *Neth-UK Treaty*, *supra* note 25, art. 3(1). The agreement also states that the jurisdiction of the “Scottish Court” is limited to this one trial. *Id.* art. 3(2). Article 1 defines the specific territory turned over as “the complex of buildings and land, including installations and facilities, made available by the host country and maintained, occupied and used for the purpose of the trial, including detention of the accused.” *Id.* art. 1(o). See generally Donald G. McNeil, Jr., *Camp Zeist Journal: The Dutch are Unfazed by a Scottish Incursion*, N.Y. TIMES, Aug. 1, 2000, available at 2000 WL 25027959; Gerard Seenan, *World’s Gaze Turns to Camp Zeist*, GUARDIAN UNLIMITED, April 25, 2000, available at 2000 WL 19678353; Kathleen Nutt, *How a Military Complex was Turned into the Courtroom of the World*, SUNDAY HERALD, April 30, 2000, available at 2000 WL 4103049; *Symposium*, *supra* note 17, at 21-22 (providing details regarding the origination of Camp Zeist and the rationale for its location).

52. *Neth-UK Treaty*, *supra* note 25, art. 16(1); see S.C. Res. 1192, U.N. SCOR, 53rd Sess., 3920th mtg., U.N. Doc. S/Res.1192, paras. 3, 7 (1998) (explaining that the two countries must take steps necessary to implement the “initiative” for the trial and requires the Dutch government to detain the two accused, upon their arrival in the Netherlands, “pending their transfer for the purpose of the trial before the court.”). Although the resolution is dated August 27, 1998 and the Neth-UK Treaty was signed on Sept. 18, 1998, the treaty was in fact negotiated and drafted over a three-day period in July of that year. See *Symposium*, *supra* note 17, at 17-

The agreement here uses the word “transfer” rather than “extradite.” Nonetheless, some specialists in Dutch and Scottish law have referred to this short helicopter ride (from outside the Hague, where the two defendants first landed in a U.N. plane, to Camp Zeist, about 50 miles away)⁵³ as having been either an actual extradition or an “extradition by analogy.”⁵⁴ The “relevant treaties” referred to presumably include the 1957 European Convention on Extradition and the 1977 European Convention on the Suppression of Terrorism; the United Kingdom and the Netherlands are parties to both treaties.⁵⁵ Moreover, the two defendants formally waived their right to contest extradition while briefly in Dutch custody on the afternoon of April 5, 1999, and they were transferred to Scottish authorities later that evening. The following day they were arraigned before a Scottish Sheriff at Camp Zeist.⁵⁶

This explains how the two suspects were transferred from the Netherlands to Camp Zeist, “the little part of Holland that [was]

18; see also *infra* notes 58-79 and accompanying text (discussing the drafting and negotiating of the treaty).

53. See Reevel Alderson, *Flight to Disaster*, BBC NEWS, April 21, 2000 (providing background information regarding the pre-trial events and the trial), available at <http://news.bbc.co.uk/2/low/world/721674.stm> (last visited Sept. 29, 2002); see also *Symposium, supra* note 17, at 18 (explaining that “[i]t would make it clear that there was required to be an extradition process for the transfer of the accused to Scottish custody”).

54. See *Legal Questions at the Commencement, supra* note 29 (crediting Professor Swart with creating the phrase “extradition by analogy,” and noting that Professor Nollkaemper explained that while the accused and any witnesses needing to be detained were within the jurisdiction of the Scottish court, they would be unable to apply to a Dutch court for habeas corpus).

55. See *European Convention on Extradition*, Dec. 13, 1957, 359 U.N.T.S. 273 (setting forth the Council of Europe’s guidelines regarding the extradition of individuals charged with crimes), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm> (last visited Oct. 4, 2002); *European Convention on the Suppression of Terrorism* (explaining the Council of Europe’s desire to end terrorism in the region), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/090.htm> (last visited Oct. 4, 2002); see also *Neth-UK Treaty, supra* note 25, art. 25 (stating that “nothing in this Agreement shall prejudice the application of treaties on legal co-operation in criminal matters, except in so far as otherwise provided in this Agreement”).

56. See *Symposium, supra* note 17, at 20 (indicating that the Sheriff Principal who performed these duties was Graham Cox).

briefly Scotland.”⁵⁷ Facilitating the first transfer, from Libya to the Netherlands, however, would require much more than just a bilateral agreement between two members of the European Union.

II. THE SECRETARY-GENERAL’S INTERVENTION

The intervention of U.N. Secretary-General Kofi Annan that resulted in the delivery of the two Libyan nationals to the Scottish Court in the Netherlands will be examined from three perspectives: 1) the temporal context—that is, the events, resolutions, and discussions that resulted in Mr. Annan’s involvement in arranging for the surrender of the two men; 2) the legal context in which any international official, particularly the Secretary-General, engages in the activity known as “good offices”; and 3) the text itself, an analysis of the two-part document sent by Annan to Qadhafi.

A. PRE-TRIAL DEVELOPMENTS

After six years of stalemate since the mandatory U.N. sanctions were first imposed on Libya,⁵⁸ events in 1998 would slowly coalesce

57. Hardie, *supra* note 17; *see also Neth-UK Treaty, supra* note 25, arts. 5-10, 15-21, 23 (stating that the Scottish Court situated on the Dutch territory, along with associated personnel including lawyers, were granted 1) inviolability; 2) physical protection and public services; 3) immunity; 4) exemption from taxes and duties; and 4) unimpeded entry, exit, and movement within the Netherlands for all required persons including witnesses and court personnel) “No law or regulation of the host country which is inconsistent with a regulation of the Scottish Court shall, to the extent of such inconsistency, be applicable within the premises of the Scottish Court.” *Id.* art. 6(3).

58. *See supra* note 5 and accompanying text (describing the sanctions). *Cf. Legal Questions at the Commencement, supra* note 29 (noting that between 1992 and 1998, the only significant development in the effort to put on trial the two Libyans occurred in 1993, when the head of the Libyan defense team came up with the idea of a trial in a neutral country before a panel of international judges applying Scottish law). Libya endorsed the idea while the United States and United Kingdom rejected it, insisting instead on a trial in a national court in either the United States or Scotland. *Id. See generally* RODNEY WALLIS, LOCKERBIE: THE STORY AND THE LESSONS 167 (2001) (discussing the aspects of a trial in a neutral country); SUSAN & DANIEL COHEN, PAN AM 103: THE BOMBING, THE BETRAYALS, AND A BEREAVED FAMILY’S SEARCH FOR JUSTICE 249-250, 260 (2000) (explaining that variations on the proposal regarding a trial in a neutral country were promoted over the years by Dr. James Swire, the father of a British medical student who died aboard Pan Am 103).

to cause a breakthrough on the question of how to get the two Libyans into custody and before a criminal court. In late February of that year, the ICJ granted jurisdiction over Libya's challenge to the Security Council resolutions.⁵⁹ In April, Libyan officials, including Qadhafi, told one of the victim's family members, who had flown to Tripoli to meet with them, that they were willing to hand over the two suspects for a trial conducted under Scottish law but held in a third country. Previously, Libya had insisted on an international court or a court of Muslim judges.⁶⁰ The newly elected Labor government led by Tony Blair apparently was determined to break the impasse; furthermore, African states increasingly were breaching the air embargo against Libya.⁶¹

59. See *supra* note 47 and accompanying text (discussing the decision of International Court of Justice).

60. See *Qadhafi Says Lockerbie Suspects Must be Tried Before an Islamic Court*, BBC SUMMARY OF WORLD BROADCASTS, Feb. 18, 1994. Cf. Barnaby Mason, *Analysis: Lockerbie's Long Road*, BBC NEWS, Jan. 31, 2001 (analyzing the political tensions and diplomatic strategies that caused the case to span a twelve year period); *Lockerbie Relative to Meet Gaddafi*, BBC NEWS, April 20, 1998 (discussing the meeting between Dr. Swire and Qadhafi); *Libya's Acceptance of Trial Offer Causes Disputes Among Lockerbie Victim Families*, ARABIC NEWS, April 23, 1998 (reporting the concerns of the plaintiffs' lawyer regarding the proposed trial in a neutral state), available at <http://arabicnews.com/ansub/Daily/Day/980423/1998042357.html> (last visited Sept. 6, 2002).

61. See *Clinton confirms New Lockerbie Move*, BBC NEWS, July 21, 1998 (explaining new strategy by the United States to support a trial in the Netherlands), available at <http://news.bbc.co.uk/2/hi/world/136990.stm> (last visited Sept. 29, 2002); see also Mason, *supra* note 60 (discussing the shift in U.S. policy regarding jurisdiction and venue); *Symposium, supra* note 17, at 17-18 (discussing the selection of the host nation). See generally *1998 World History*, INFORMATION PLEASE (2002) (listing the following events that occurred in 1998, some of which may have been directly influential in convincing the countries to reach a compromise: Ramzi Ahmed Yusef was sentenced to life for the 1993 World Trade Center bombing (January); the Unibomber, Ted Kaczynski, was sentenced to four life terms (May); Terry Nichols was convicted of the Oklahoma City bombing (June); a treaty to establish a permanent International Criminal Court was adopted (July); U.S. Embassies in Kenya and Tanzania were bombed and the United States struck back at targets in Afghanistan and Sudan (August); Augusto Pinochet was arrested in London, pending extradition to Spain on charges of crimes against humanity (October); and Scottish devolution went into effect), at <http://www.infoplease.com/ipa/A0777541.html> (last visited Sept. 29, 2002). See also *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998) (affirming that subject matter jurisdiction exists under the 1996 amendment

On August 24, 1998, the U.S. and U.K. ambassadors to the United Nations circulated a joint letter to the U.N. Secretary-General among all members of the Security Council, requesting it to be forwarded it to Libya. The letter formally proposed, “as an exceptional measure,” a trial in the Netherlands before a panel of three Scottish High Court judges.⁶² Two documents that demonstrated the seriousness of their offer were attached. These were a draft of the treaty between the U.K. and the Netherlands that would facilitate the transfer of the suspects to the *ad hoc* court facility,⁶³ as well as a draft of U.K. legislation (formally called an Order in Council) that would confer authority on the Scottish High Court of Justiciary to sit in the Netherlands for purposes of this one trial.⁶⁴ U.S. Secretary of State Madeleine Albright stated publicly at the time that the proposal in the letter was not subject to negotiation or change.⁶⁵

to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7), and allowing litigation brought by Lockerbie victim families to proceed).

62. See Letter Dated 24 August 1998, *supra* note 28, para.2 (indicating that justice, peace, and security require that a trial be held in Scotland or the United States). The letter also referred to the imprimatur of fairness, which the United Nation’s own independent experts had given Scotland’s judicial system and reiterated a “profound concern” at Libya’s continuing disregard of the Security Council’s demands. *Id.* Finally, the two Ambassadors wrote that “[n]evertheless, in the interest of resolving this situation in a way which will allow justice to be done, our Governments are prepared, as an exceptional measure, to arrange for the two accused to be tried before a Scottish court sitting in the Kingdom of the Netherlands.” *Id.* para. 3.

63. See Neth-UK Treaty, *supra* note 25, art. 16 (explaining the procedure for the transfer of the accused to the Scottish Court in the host country).

64. See Order in Council, *supra* note 25 (calling upon the government “to take certain actions to facilitate the conducting of criminal proceedings under Scots law in the Netherlands”); see also John P. Grant, *Trial Arrangements*, in LOCKERBIE TRIAL BRIEFING HANDBOOK 28-29 (John P. Grant ed., University of Glasgow 2000) (noting that the order confers authority on the Scottish Court to sit in the Netherlands for the purpose of trying the accused).

65. See *Anglo-US Agreement on Lockerbie Trial*, BBC NEWS, Aug. 24, 1998 [hereinafter *Anglo-U.S. Agreement*] (quoting Madeleine Albright as stating that “[t]he plan the US and the UK are putting forward is a ‘take it or leave it’ proposition”), available at http://news.bbc.co.uk/2/hi/special_report/1998/08/98/lockerbie/157536.stm (last visited Oct. 4, 2002). The article also quotes U.K. Foreign Secretary Robin Cook as stating that “[i]t is a way forward that holds out the prospect of lifting the hardship of sanctions on the people of Libya - and ending the long wait for justice of the relatives of those who were murdered.” *Id.* Foreign Secretary Cook

The joint letter was followed three days later by Security Council Resolution 1192, welcoming the joint initiative and calling on all states, particularly Libya, to cooperate promptly with it. Additionally, it requested the Secretary-General, after consultation with the Dutch government, to assist the Libyan government with physical arrangements for the safe transfer of the two defendants.⁶⁶ In the Security Council session before the resolution was unanimously adopted, the representative of Libya described his government's fears and concerns about the proposal, but he also stated that Libya "accepts that the two suspects should be tried in a Scottish court in the Netherlands by Scottish judges, according to Scots law. . . . This is a serious, irreversible position."⁶⁷

It would, however, take seven months for Kofi Annan, Hans Corell, the U.N. Under-Secretary-General for Legal Affairs, and other intermediaries to resolve all the legal and technical details (including transportation to the Netherlands via an aircraft provided by the Italian government) before attaining Libya's full agreement.⁶⁸ By mid-September, the United States was concerned enough to warn Libya that the compromise offer was not open indefinitely; if the tenth anniversary of the Pan Am 103 bombing passed on December 21, 1998, with no progress, the United States and Britain would move to impose additional sanctions.⁶⁹ For most of the fall, secret

dismissed suggestions that the timing of the letter was linked in any way with the acts of terrorism earlier in the month against U.S. embassies in Africa. *Id.*

66. See S.C. Res. 1192, *supra* note 52, paras. 2, 4-5 (stating that the Security Council (1) welcomes the initiative for the trial of the accused before a Scottish Court sitting in the Netherlands; (2) decides that all states should cooperate to this end; and (3) requests the Secretary-General to assist the Libyan Government with the physical arrangements for the safe transfer of the accused). The Resolution also invited the Secretary-General to nominate international observers for the trial and indicated that the Security Council would consider additional sanctions if Libya did not promptly turn over the accused. *Id.* paras. 6, 8. See also *infra* notes 164-165 and accompanying text (discussing the issue of suspending and lifting sanctions once Libya satisfies the conditions in all relevant resolutions).

67. Transcript of Security Council Meeting, *supra* note 22, at 4.

68. See, e.g., Aust, *supra* note 25, at 293, n. 54 (indicating that Italy, according to the arrangement made with the Netherlands, provided the aircraft to the United Nations).

69. See *Lockerbie Campaigner Flies to Libya for Talks*, BBC NEWS, Sept. 20, 1998, available at http://news.bbc.co.uk/2/low/world/middle_east/175703.stm (last visited Oct. 5, 2002); *Lockerbie Suspects' Lawyers "Sacked," Lockerbie Trial*

discussions took place in New York City between Corell and a Libyan legal team headed by Libya's ambassador to the United Nations, Abuzeid Dorda. Among the issues debated was Libya's concern about how its two nationals would be treated should they be convicted.⁷⁰ The Libyan legal team wanted them to serve any potential sentences in Libya due to fears of prejudicial treatment in the British prison system.

With the tenth anniversary of the bombing approaching, the United Kingdom agreed to some concessions on the subject of Scottish imprisonment. These compromises included visits by the defendants' family members, U.N. observers, and Libyan officials, and accommodations for observing the Islamic faith.⁷¹ In early

Briefing Site, Sept. 25, 1998 (reporting that the Libyans' defense counsel had been changed, leading to speculation that Gadhafi wanted to ensure that the two suspects agree to the trial in the Netherlands so as to ensure the lifting of sanctions), *available at* <http://www.ltb.org.uk/displaynews.cfm?nc=8&theyear=1998> (last visited Oct. 5, 2002).

70. See SHAWCROSS, *supra* note 26, at 344-45 (explaining that the Libyan government did not want the suspects serving sentences in Britain); *see also* Morgan, *supra* note 25, at 262 (stating that "[o]ne of the contentious issues had been the place where a sentence, if any, was to be served" and that the Libyan request for any sentence to be served in a third county to avoid prejudice against the suspects was denied); *Gadhafi Journeys to Egypt for talks on Lockerbie Suspects*, CNN, March 5, 1999 (indicating that Libya was apparently also concerned that the suspects would be "interrogated by U.S. authorities or taken to the United States once they were outside of Libya"), *available at* <http://www.cnn.com/WORLD/meast/9903/05/egypt.libya/> (last visited Nov. 1, 2002); *Legal Questions at the Commencement*, *supra* note 29 (discussing a comment by Robert Black about the Libyan concern that "the accused might be removed from Scottish territory by special forces of other states or that their safety was otherwise not guaranteed").

71. See SHAWCROSS, *supra* note 26, at 345 (explaining that one such concession was to fully accommodate the suspects Islamic faith); *see also* *Q&A: Life in a Scottish Jail*, BBC NEWS, March 15, 2002 (reporting that like all convicted prisoners in Scotland, the suspect would be able to practice his religion, enjoy family visits, and benefit from the prison's welfare program), *available at* <http://news.bbc.co.uk/2/hi/Scotland/1873886.stm> (last visited Oct. 5, 2002); *'Irony' of Bomber's Jail Treatment*, BBC NEWS, March 14, 2002 (describing that although the conditions in Barlinnie have been called "appalling" the suspects are expected to receive better treatment than other inmates in Scottish jails), *available at* <http://news.bbc.co.uk/2/low/world/1868930.stm> (last visited Oct. 4, 2002); Marcello Mega, *Lockerbie Bomber Cooks Up Libyan Meals*, SCOTLAND ON SUNDAY, March 24, 2002 (reporting that after one week in Barlinnie prison,

December 1998, as Kofi Annan prepared to go to Tripoli to meet personally with Qadhafi and Libyan Foreign Ministry officials, both British Foreign Secretary Robin Cook and U.S. Secretary of State Madeleine Albright reminded the Secretary-General that he had no authority to negotiate and that he should make no "package deals."⁷² Annan was reportedly "at pains not to get involved in a negotiation; he merely passed on questions and answers."⁷³

According to one of eight journalists who accompanied the Secretary-General on the trip, Annan assured Libyan officials that the Americans were not going to kidnap the two suspects and take them to the United States. Annan also told them that Great Britain had a "strong legal tradition" and Scottish "prosecutors and judges will not want to embarrass themselves."⁷⁴ The Libyans continued to insist that Libya be the place of detention instead of Scotland. Annan reportedly responded:

On that I have no room for maneuver. We have had assurances that the imprisonment will be open and transparent, and you and the [suspects'] families can visit. What we can ask for is fair treatment. Once you've taken the major step of accepting a Scottish trial, the rest follows. A lot of governments which have supported you will be very disappointed if you allow it to stick now.⁷⁵

Megrahi had been cooking his own special foods and making unlimited phone calls home), *available at* 2002 WL 8201757.

72. See SHAWCROSS, *supra* note 26, at 346 (quoting Madeleine Albright, "[w]e do not want a package"); see also Hardie, *supra* note 17, at 5 ("We would not negotiate, directly or indirectly, with accused persons or the government which allegedly employed them as to the kind of trial which they would find appropriate. . . I would not have agreed to any deals with Libya or the accused which affected the trial.").

73. Aust, *supra* note 25, at 293 (explaining that Kofi Annan largely relayed the responses of the British, the Dutch, the French, and the U.S. governments to legal and practical questions that Libya raised during its interaction with the U.N. Legal Counsel).

74. SHAWCROSS, *supra* note 26, at 348. Shawcross's description of the trip depicts Annan's finesse in flattering Qadhafi, who ended their meeting by telling the U.N. executive that "I am prepared to try to work this out with you, not because you are the secretary general or because of threats against us, but because of the man you are, a brother African from a friendly state." *Id.* at 351.

75. *Id.* at 349 (quoting Kofi Annan in response to the Libyan Foreign Minister's concerns about the two men's place of detention).

The Secretary-General described the purpose of the visit as “confidence building.”⁷⁶ After leaving Libya on December 10th, Annan met with Saudi Crown Prince Abdullah and South African President Mandela to ask formally for their involvement in resolving the continuing impasse.⁷⁷

Although a jet had been waiting on standby in Italy while Annan was in Libya, it would take another five months before the Secretary-General and his staff would oversee the actual transfer of the two suspects to the Netherlands on April 5, 1999.⁷⁸ Libya’s parliament, the People’s Congress, ratified the agreement in principle in mid-December, but the issue of where the sentences would be served and related details remained in contention.⁷⁹ The precise problems can be

76. *See id.* at 351 (noting that Libyan officials and lawyers dealing with the situation agreed with Annan’s assessment and the foreign ministry described settlement as “close” after the talks).

77. *See* Transcript of Press Conference by Secretary-General Kofi Annan at Headquarters, U.N. Doc. SG/SM/6944 (April 5, 1999) [hereinafter Press Conference Transcript].

78. *See* Stephen Breen, *Jet on Standby for Lockerbie Suspects Deal*, THE SCOTSMAN, Dec. 5, 1998 (explaining that the jet on stand by was an Italian jet, and because Libya and Italy enjoy good relations, Libya would not want to hand over the suspects to the United States), available at 1998 WL 23225493; *see also* Secretary-General Holds Meeting with Muammar al-Qadhafi on Question of Possible Transfer of Lockerbie Suspects, U.N. Doc. SG/T/2161 (Dec. 9, 1998); *Libya “Studying” Proposed Handover of Lockerbie Suspects*, CNN, March 1, 1999 [hereinafter *Libya Studying Proposed Handover*] (reporting that at the end of February 1999, the United States and United Kingdom gave Libya a thirty-day deadline, under the threat of further sanctions), available at <http://www.cnn.com/WORLD/africa/9903/01/un.libya/index.html> (last visited Nov. 1, 2002).

79. *See* Abdelaziz Barrouhi, *Libyan Congress Oks Lockerbie Trial*, REUTERS, Dec. 15, 1998 (noting that the 500-member Congress sets policy guidelines, and stating that “[a]lthough Libya’s Political Structure stresses the weight of grassroots opinion, the system as a whole generally keeps step with Gadhafi’s semi-official guidance”); *see also* *No Lockerbie Jail Deal*, BBC NEWS, Dec. 21, 1998 (explaining that at the same time, U.K. Foreign Secretary Robin Cook continued to insist that there would be no compromise on where the two suspects, “if convicted, should serve their sentence in a Scottish prison), available at <http://news.bbc.co.uk/2/hi/uk/239597.stm> (last visited Nov. 1, 2002). Continuing, “[a]fter all, this offense took place in Scottish jurisdiction.” *Id.* *See also* *Lockerbie: “Any Jail Term Must be Served in Scotland*, BBC NEWS, Feb. 8, 1999 [hereinafter *Any Jail Term*] (reporting that Foreign Secretary Cook’s position is that there is “no alternative” to a prison term in Scotland), available at http://news.bbc.co.uk/2/hi/uk_politics/275519.stm (last visited Nov. 1, 2002).

inferred from the text of the letter and its annex that Kofi Annan sent to Muammar Qadhafi on February 17, 1999. Before turning to that, it is useful to understand the scope, status, and parameters of the Secretary-General's power to mediate an international dispute.

B. THE "GOOD OFFICES" FUNCTION

When a diplomat, an international civil servant, an organization, or a state or a group of states acts quietly behind the scenes to attempt to prevent or resolve an international crisis by peaceful means, they are exercising the function of "good offices." The concept of good offices, a term of art within international law, has been defined as, "[a]n effort by a state, or by an international organization or other entity, not itself involved in the dispute, to stimulate the process of settlement in such a dispute between two or more other states."⁸⁰ Good offices usually are directed at opening channels of communication between the disputing parties, "thus paving the way for direct, bilateral diplomacy It differs from adjudication and arbitration in that its object is to stimulate diplomatic dialogue between the contending parties and not to stipulate settlement provisions or to provide means for their implementation."⁸¹ Good offices also differ from mediation in that it involves active participation of the third party in the negotiation process between the two disputants.⁸²

In that sense, the good offices mission may be closer to conciliation, which "presupposes that the conciliator is impartial, has no direct interests of his own at stake in the dispute, and will not itself intervene to alter the calculus of the parties."⁸³ Moreover, good offices are voluntary on the part of the participants. "There is no obligation to offer the service or to accept the tender of good offices. The technique of good offices may be exercised only with the

80. CHARLES W. FREEMAN, JR., *THE DIPLOMAT'S DICTIONARY* 126 (1997); see also JAMES F. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 128 (1997) ("friendly efforts on the part of a third state or international organization to try to encourage disputing states to enter into or resume negotiations").

81. GRAHAM EVANS & JEFFREY NEWNHAM, *THE PENQUIN DICTIONARY OF INTERNATIONAL RELATIONS* 206-207 (1998).

82. *See id.*

83. FREEMAN, *supra* note 80, at 51.

consent of both parties to the dispute.”⁸⁴ Likewise, the good offices function constitutes the giving of advice; its results never have binding force.⁸⁵

Although good offices are voluntary, their mandate was laid out in Articles 4 through 8 of both the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.⁸⁶ These articles are virtually identical in both conventions, and they cover “good offices and mediation” together, even though some of the individual provisions mention only one or the other function. After indicating that Contracting Parties to either Convention have the right to offer good offices or mediation to states that are engaged in or are about to go to war, the Conventions provide:

Article 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6

Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never have binding force.⁸⁷

84. FOX, *supra* note 80, at 128.

85. See EVANS & NEWNHAM, *supra* note 81, at 207.

86. See Hague Conventions for the Pacific Settlement of International Disputes, 32 Stat. 1779 (1899), 54 L.N.T.S. 435 (1907) (setting forth the requirements for good offices).

87. See *id.* at 1785-86.

Articles 7 and 8 deal specifically with mediation during, or right before, the outbreak of military hostilities. Later articles of the 1899 Convention address other methods of peaceful dispute settlement, including commissions of inquiry and international arbitration.⁸⁸

During the latter part of the twentieth century, the U.N. Secretary-General, alone and through his designees, was one of the most prominent employers of the good offices function. The U.N. public information web-site describes the Secretary-General's good offices, conducted both publicly and privately, as "one of the most vital roles [he] plays," thus "drawing upon his independence, impartiality and integrity, to prevent international disputes from arising, escalating or spreading."⁸⁹ In the words of Javier Pérez de Cuéllar, the Secretary-General in office during the Pan Am 103 bombing, the general political functions of the world's leading civil servant position depend on "courage, prudence and fidelity to the aims of the [U.N.] Charter. This elasticity, if I may call it that, is not peculiar to this office: in varying degrees, it occurs in any institution which has to respond to the complexity of human affairs."⁹⁰ Good offices have been described as "informal, loosely structured and, to a large extent, depend on the flexibility, sensitivity and imaginativeness of the good officer. The successful good officer thus usually demands the authority to operate within a wide margin of discretion."⁹¹ Ideally, the Secretary-General can be a "catalyst for

88. See generally ARTHUR EYFFINGER, THE 1899 HAGUE PEACE CONFERENCE: "THE PARLIAMENT OF MAN, THE FEDERATION OF THE WORLD" 358-359 (1999) (discussing alternative dispute resolution practices, including good offices and mediation).

89. *The Role of the Secretary-General*, at http://www.un.org/News/press/docs/2002/sg_office.html (last visited Oct. 1, 2002); see also *Secretary-General Sets Course for Long-Awaited UN Revitalization: General Assembly Fully Supportive of Reforms* (discussing future changes to the United Nations, including "[i]n the area of peace and security, supporting the efforts by the Secretary-General and the Security Council to prevent conflicts and to enhance the Organization's information-gathering and rapid deployment capacity"), at <http://www.un.org/reform/focus.htm> (last visited Oct. 1, 2002).

90. Javier Pérez de Cuéllar, *The Role of the UN Secretary-General*, in UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS 125-26 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

91. Thomas M. Franck & George Nolte, *The Good Offices Function of the UN Secretary-General*, in UNITED NATIONS, DIVIDED WORLD 143, 174 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

compromise, a formulator of structures for their implementation, and a resource that enables the parties, when agreement has been reached, to present it to disaffected parts of their domestic constituencies as the product of an irresistible global consensus.”⁹²

Although the Secretary-General’s good offices mission has been described as “one of the most important functions of the U.N.”⁹³ and has expanded since the end of the Cold War,⁹⁴ the phrase “good offices” does not appear in the U.N. Charter. It is not listed in Article 33 (1) that notes seven other specific methods of settling disputes peacefully.⁹⁵ The Secretariat is mentioned in Article 7 as one of the six principal organs of the United Nations, and the Secretary-General is given discreet functions in Articles 12(2), 20 and 73(e). However, the Organization’s chief job position is not described

92. *Id.* at 179.

93. *Id.* at 143.

94. *See id.* at 144-72 (listing seventeen separate international conflicts between 1988 and 1992 in which the Secretary-General or his staff contributed to the easing of tensions, including Afghanistan, Cyprus, the Falkland Islands/Malvinas, Namibia, the Rainbow Warrior dispute, and the Iran-Iraq war, and describing only a handful of such interventions between 1946 and 1987); *see also* Security Council Adopts Resolutions Regarding Secretary-General’s Mission of Good Offices in Cyprus and UNFICYP Mandate, U.N. Doc. SC/6694 (June 29, 1999); CAMERON R. HUME, A PATH TO PEACE: ENDING MOZAMBIQUE’S WAR, THE ROLE OF MEDIATION AND GOOD OFFICES 118-124 (1994); RAYMOND R. PROBST, “GOOD OFFICES” IN THE LIGHT OF SWISS INTERNATIONAL PRACTICE AND EXPERIENCE 81-83 (1989); ERIK JENSEN, THE SECRETARY-GENERAL’S USE OF GOOD OFFICES AND THE QUESTION OF BAHRAIN (1985); B.G. RAMCHARAN, HUMANITARIAN GOOD OFFICES IN INTERNATIONAL LAW 35-36 (1983) (providing other descriptions of the exercise of good offices by the Secretary-General and others). Good offices have been exercised by U.N. bodies other than the Secretary-General, such as the Committee on the Elimination of Racial Discrimination, and by other international bodies such as the Conference on Security and Cooperation in Europe. *See* Anti-Discrimination Committee Decides on Process of Consultation with Bosnia and Herzegovina: To Resume Good Offices on Kosovo, U.N. Doc. RD/868 (Mar. 14, 1996); *Miriam Sapiro*, ASIL Insights: Dispute Resolution: General Methods and CSCE Mechanisms, AM. SOCIETY INT’L. L. NEWSLETTER, Sept. 1994; *Miriam Sapiro*, The OSCE: An Essential Component of European Security (Mar. 1997), available at <http://www.asil.org/insights/insight8.htm> (last visited Oct. 1, 2002).

95. *See* U.N. CHARTER, art. 33, para. 1 (stating that “[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”).

comprehensively until Articles 97 to 101 in chapter XV.⁹⁶ Most of these articles, however, address the position's administrative functions. Only Articles 99 and 100 come close to alluding to the political and discretionary role of the Secretary-General:

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.⁹⁷

The Secretary-General thus has, to some degree, an over-lapping jurisdiction with the Security Council to monitor international peace and security. But unlike the individual members of the Council, the Secretary-General is an international official responsible to the Organization itself and not to any particular government. Moreover, as head of one of the U.N.'s principal organs, he is "co-responsible" with the other five bodies "for achieving the organization's aims and purposes."⁹⁸ Pérez de Cuéllar explains that, due to the break-down between permanent members of the Security Council during the Cold War, the Secretary-General had to improvise ways to keep channels

96. *See id.*, art. 12, para. 2, art. 20, art. 73, para. e (setting forth some of the functions of the Secretary-General).

97. *Id.* arts. 99-100.

98. Pérez de Cuéllar, *supra* note 90, at 127.

of communication and conflict resolution open.⁹⁹ Thus, the good offices function grew organically from context and necessity, as part of the Secretary-General's "evolving constitutional role within the U.N. system."¹⁰⁰ Interstices of Charter Articles 33 and 99, Security Council and General Assembly resolutions, and "an emanation of his inherent powers, or by agreement of disputatious parties" also can be credited for developing the Secretariat's good offices function.¹⁰¹

Pérez de Cuéllar has stated that the Secretary-General's multilateral diplomacy differs from traditional state-to-state diplomacy in the following respect:

As it is conducted in accordance with the principles of the [U.N.] Charter, it does not place the weaker party in an unfavorable position. It seeks an objective and lasting settlement of a dispute and not merely one which responds to the expediencies of the day. . . . When states are in conflict, the Secretary-General has to try to understand the roots of insecurity, the fears and resentments and the legitimate aspirations which inspire a people or a state to take the positions they do. International conflicts often occur when one party and its supporters ignore the fears of the other. If a third party is to succeed in resolving the conflict, he has to address the fears of each with empathy and imagination.¹⁰²

The current occupant of the office, Kofi Annan, also has stated that:

the Secretary-General's office will have the potential to advance the interests of all states only so long as it does not appear to serve the narrow interests of any one state or group of states. This is the precarious balance

99. *See id.* at 131-33. The former Secretary-General notes that Article 99 of the Charter uses the broader term "matter" rather than "situation" or "dispute," which therefore "covers all developments which 'could have serious political implications remediable only by political action'." *Id.* at 131.

100. Franck & Nolte, *supra* note 91, at 144.

101. *Id.* at 172-73, citing VRATISLAV PECHOTA, *THE QUIET APPROACH* (1972).

102. Pérez de Cuéllar, *supra* note 90, at 133-34. Chester A. Crocker similarly suggests that the most important reason for a mediator to take the initiative "is to block the parties' unilateral options and discredit their wishful thinking." FREEMAN, *supra* note 80, at 166 (quoting CHESTER A. CROCKER, *HIGH NOON IN SOUTHERN AFRICA* (1992)).

to which any Secretary-General owes his office, his strength, his effectiveness and his moral authority.¹⁰³

Moreover, if the Secretary-General loses the appearance of impartiality in one instance, it will compromise his ability to be trusted in other instances.

The particular method of intervention chosen by someone seeking to contain an international dispute will probably depend in part on the nature of the dispute itself. If it involves a legal question, arbitration or adjudication may be the best approach. If it consists of "a sensitive political issue that involves factual comparisons with international practice but few international legal norms," then good offices or mediation are probably more appropriate.¹⁰⁴ The choice of methods and even the degree of maneuverability within the methods also may depend on the political climate of the time. In 1992, Security Council asked the newly installed Secretary-General Boutros Boutros-Ghali to seek the Libyan government's cooperation in extraditing the two Lockerbie suspects as well as the Libyan nationals accused of bombing the French UTA plane.¹⁰⁵ At that time, the good offices role effectively was confined to mere letter-carrying on behalf of three Western powers.¹⁰⁶ Libya, thus, had little to lose by rejecting all demands and overtures.

In contrast, by the fall and winter of 1998-99, six years of sanctions had taken their toll on the Libyan economy, leaving Secretary-General Annan in a better position to act like a conciliator. He addressed Libyan fears and bolstered the parties' confidence that the transfer of the suspects eventually would be arranged to each side's satisfaction. He was neither negotiating with Libya nor mediating a negotiation between the United Kingdom, the United

103. Kofi Annan, *Walking the International Tightrope*, N.Y. TIMES, Jan. 19, 1999, at A19.

104. Sapiro, *Dispute Resolution*, *supra* note 94.

105. *See supra* note 5.

106. *See* Franck & Nolte, *supra* note 91, at 176-80 (criticizing this reduced role). "[I]n so far as [the Secretary-General's] success in performing any and all good offices functions is based on his appearance of impartiality, such 'letter-carrier' assignments are costly. . . . When he is perceived as a letter carrier doing the bidding of powerful states, that undermines his credibility as a true mediator." *Id.* at 176, 180.

States, and Libya. A mediator steps into the middle of an existing (or inchoate but intended) negotiation, whereas a conciliator gives non-binding advice about how to achieve the objectives and conditions already laid out. Madeleine Albright and Robin Cook reminded Annan that there was nothing to negotiate; he had no agency power, no authority to arrange any “package deals,” and was only allowed to work out the technical details of the exchange.¹⁰⁷

Even without binding powers, the diplomat’s exercise of good offices can play as crucial a function as a more formal role in the resolution of disputes. In certain instances, good offices are perhaps more crucial. In the final analysis, it was the Secretary-General’s office, instead of the ICJ or the Security Council, that managed to bring the two Libyans into the jurisdiction of the Scottish Court. Moreover, without a rulebook to follow, good offices certainly require perspicacity, patience, and finesse. In the very period that the Secretary-General and his deputy, Hans Corell, were engaged in their Lockerbie conciliation efforts, Annan published some reflections about his role in world affairs. Without specifically naming names, he wrote:

I have at times been as skeptical of a leader’s true intentions as anyone. . . . [b]ut I have persisted, because I must deal with the world not as I would wish it to be, but as it is. I must confront it with a sense of reality about how far a leader can be pushed by peaceful means, and how long it will take to bring peace where a state of war exists.¹⁰⁸

C. THE 17 FEBRUARY 1999 “LETTER OF UNDERSTANDING”

The two-part document that Kofi Annan sent to Muammar Qadhafi on February 17, 1999, will now be analyzed on three levels: 1) the context leading up to its delivery (and later publication) and the cover letter portion of the document; 2) the substantive annex to the letter that is titled, “Understanding on the Issues outstanding

107. See *supra* note 106 and accompanying text. Note that political figures often use the word “negotiation” in a non-technical sense when they in fact are referring to mediation or conciliation.

108. Annan, *supra* note 103; see also SHAWCROSS, *supra* note 26, at 351-52 (noting that before meeting with Qadhafi, Annan had already in his then two-years in office been out-manuevered by dictators Saddam Hussein and Laurent Kabila).

from the point of view of the Libyan Arab Jamahiriya;" and 3) the meaning and effect of the controversial sentence from the annex, "The two persons will not be used to undermine the Libyan regime."

1. Context and Cover Letter

As already described, by the end of December 1998, the Secretary-General's staff reportedly had been able to allay all of the Libyan concerns except for one. The Libyans still were concerned about where the defendants would be imprisoned if they were convicted. With the United States and United Kingdom adamant that it had to be Scotland, various measures were employed to convince Libya that "this was an offer made in good faith and without a hidden agenda," recalled U.K. Foreign Secretary Robin Cook.¹⁰⁹ Kofi Annan already had traveled to Libya and envoys from other countries with influence in Libya, including South Africa and Saudi Arabia, tried to persuade Colonel Qadhafi that it was in his country's best interests to consent to the arrangement.¹¹⁰ The envoys apparently conveyed questions and concerns in one direction and provided assurances, clarifications, and answers in the other.¹¹¹

109. Cook, *supra* note 16 ("For a while it looked as if negotiations would break down over the demand by Libya that if convicted the two suspects should not serve their sentence in Scotland. That was a point of principle on which we could not compromise."). Note that the term "negotiations" is most likely used here in the non-technical sense, as Cook himself had already insisted that there was to be no negotiation.

110. See *supra* note 26 and accompanying text (listing not only Nelson Mandela and Saudi Prince Bandar as delegates to Colonel Qadhafi but also President Mandela's director-general, Jukes Gerwel). In addition, two British parliamentarians, Lord Steel and Sir Cyril Townsend, met with the Libyan Foreign Minister, Omar Montassar, in Libya. See also *Any Jail Term*, *supra* note 79; *Headlines*, Lockerbie Trial Briefing Site (tracking the early developments of the Lockerbie Bombing Trials), available at <http://www.ltb.org.uk/headlines.cfm?year=1999> (last visited Oct. 1, 2002).

111. See *infra* notes 117-120 and accompanying text (noting that some of the events described in this section of this article are taken from a letter dated August 22, 2000, from Kofi Annan to Jeremy Greenstock, British Ambassador to the United Nations, which was released to the public at the same time as the February 17, 1999 letter, on August 25, 2000). The former letter encloses the latter letter and describes some of the surrounding circumstances. See also Letter from Kofi Annan, U.N. Secretary-General, to Jeremy Greenstock, British Ambassador to the United Nations (Aug. 22, 2000) [Attached Letter 2] (on filed with AUILR and available at page 229 of this article). Hans Corell gave U.S. Ambassador to the

It is not known if Kofi Annan's original intent was to give Libya assurances in writing; however, by the middle of February 1999, he had received information from British authorities that responded to "necessary clarifications" sought by Libya about "various aspects of the implementation" of Security Council Resolution 1192 (1998).¹¹² On the afternoon of February 17th, an official letter from Annan to Colonel Qadhafi was given to Abuzed Dorda, Libya's U.N. ambassador.¹¹³ The five paragraph letter itself was more or less *pro forma*, invoking the protocols of title ("Your Excellency") and courtesy ("I am deeply conscious and appreciative of your own personal efforts. . ."). It referenced an annexed document (the Understanding analyzed in detail in the next two sections of this article) that, according to Annan, was said to set forth agreements reached in meetings between His Excellency Colonel Qadhafi and envoys from South Africa and Saudi Arabia.

Significantly, Annan's letter to Qadhafi stated, "After reviewing this [attached] document, the Governments of the United Kingdom and the United States have confirmed to me that they share the understanding reflected therein." However, the letter did not contain the signature of anyone from either of those governments. Nevertheless, Annan hinted that the United States and United Kingdom were ready to use their veto power to back up their "shared understanding," by indicating that the Secretary-General would be reporting to the Council about these developments at the time the Security Council would be reviewing the Libyan sanctions. Therefore, Annan stated that "it would be most helpful if the practical arrangements *already agreed upon* between the Libyan

U.N., Richard Holbrooke, both letters on August 22, 2000. See Letter from Hans Corell, U.N. Under-Secretary-General for Legal Affairs, to Richard Holbrooke, Permanent Representative of the United States of American to the United Nations (Aug. 22, 2000) [hereinafter Attached Letter 1] (on file with AUILR and available at page 228 of this article).

112. See Attached Letter 2, *supra* note 111; see also S.C. Res. 748, *supra* note 5.

113. See Attached Letter 3, *supra* note 30; *UN Writes to Libya with Assurances, Lockerbie Trial Briefing Site, available at* <http://www.ltb.org.uk/headlines.cfm?year=1999> (last visited Sept. 17, 2002).

legal team and my own Legal Counsel could be set in motion before that date.”¹¹⁴

Although it is somewhat difficult to discern who the corresponding parties were, the purpose of the letter was to memorialize the details of a final agreement already reached by the relevant governments of Libya, the United Kingdom and the United States through the assistance of the United Nations, South Africa, Saudi Arabia, and others. That the letter was intended to “lock in” Libya is demonstrated by public comments made a week before February 17, 1999, by Robin Cook’s office and nine days after February 17th made by Kofi Annan himself. A British Foreign Office spokesperson announced that Libya “has received comprehensive clarifications” on the initiative and, in reference to the Libyan suspects, “their rights of consular access and respect for Islamic culture would be protected, [and] they would not be manipulated or used in any way to undermine the Libyan government.”¹¹⁵ After reporting to the Security Council that he was “cautiously optimistic” about Libyan consent, the Secretary-General said, “In my judgment, we’ve given all the explanation and clarifications that have been demanded by the Libyan authorities. We are waiting for the [Libyan] decision.”¹¹⁶

It would still take another month for Libya to hedge and to balk some more, but by March 19, 1999, well before the March 26 “take it or leave it” deadline imposed by the United States and United Kingdom, Nelson Mandela announced that the two Libyans would be handed over in less than two more weeks; and, indeed, they were transferred on April 5, 1999.¹¹⁷ The Secretary-General’s letter,

114. *Id.* (emphasis added).

115. *Any Jail Term, supra* note 79. The announcement was made after a meeting in London between Cook and South African official Jakes Gerwel. The phrase “not . . . undermine the Libyan regime” would be echoed in the Annan letter’s annex. *See Attached Letter 3, supra* note 30.

116. *See U.S., Britain Give Libya More Time to Turn Over Bombing Suspects*, (CNN television broadcast, Feb. 26, 1999).

117. *See Mandela Announces Handover Plan*, Lockerbie Trial Briefing Site (noting that some of Qadhafi’s last maneuvers included an announcement in late February that the proper venue for the trial was the International Court of Justice), available at <http://www.ltb.org.uk/displaynews.cfm?nc=40&theyear=1999> (last visited Oct. 1, 2002); *see also Libya “Studying” Proposed Handover, supra* note

however, would not be released publicly¹¹⁸ for another seventeen months, causing rumors about “secret deals” and “guarantees of immunity.”¹¹⁹ U.N. Legal Counsel Hans Corell explained to the media at the time of release that the annex to the letter “was elaborated by the governments involved and the only role the Secretary-General had here was to convey this message. . . to the Libyan authorities.”¹²⁰ This is supported by the careful use of the words “clarifications,” “explanations” and “understandings” in written and verbal announcements by U.N. and U.K. officials. Terms such as “negotiation,” “offer” and “counter-offer” are avoided, except in less formal, non-contemporaneous, verbal contexts. In other words, the Secretary-General’s intervention was not only *not* a negotiation, it was barely even a conciliation.

79 (noting the thirty-day deadline imposed on Libya). Of course, the ICJ has no jurisdiction over individuals or criminal proceedings.

118. See Attached Letter 2, *supra* note 111 (indicating no initial public release). Public release occurred on August 25, 2000, but only after the legal team representing the two Libyan suspects made a request for the letter to the Scottish Lord Advocate on April 3, 2000, exactly one month before the trial began. This Defense request was apparently not conveyed to the Secretary-General until July 24, 2000, although he may have been apprised earlier of requests for it by Lockerbie victim families. See also Goodman, *supra* note 30. The circumstances of this highly unusual release are spelled out in the Annan-Greenstock Letter. See Attached Letter 2.

119. See *supra* note 31 and accompanying text (explaining the nature and reaction to the rumors). Lockerbie victim family members had made strenuous efforts to obtain the letter, writing to the U.S. State Department, the U.K. Foreign Office, and the Scottish Lord Advocate, and asking Congressman Benjamin Gilman and Senators Kennedy, Torricelli and Lautenberg to intervene. See also GERSON & ADLER, *supra* note 7, at 275-77; COHEN & COHEN, *supra* note 58, at 267-68; *Prosecutor Vows Politics-Free Lockerbie Trial*, Reuters, Jan. 6, 2000; *Judge Pressed for Lockerbie Assurance*, BBC NEWS, (television broadcast, Jan. 6, 2000); *Foreign Office Denies Lockerbie Deal*, Lockerbie Trial Briefing Site, Oct. 21, 1999, available at <http://www.ltb.org.uk/displaynews.cfm?nc=11&theyear=1999> (last visited Oct. 1, 2002). Family members were able to read the letter on the morning of April 25, 2000, on the Lockerbie Trial ~ Families Project website, which is operated by the present author. See also *infra* notes 139-140 (discussing the families and the letter).

120. Goodman, *supra* note 30. The Annan-Greenstock Letter also refers to the Secretary-General’s role in the matter as “limited to providing assistance with the transfer arrangements of the two accused to the Scottish court and to nominating international observers.” Attached Letter 2, *supra* note 111.

2. *The Letter's Annex*

The annex to Annan's letter contains the heading, "Understanding on the Issues outstanding from the point of view of the Libyan Arab Jamahiriya." This is somewhat ambiguous. Does "issues outstanding" mean "issues not yet resolved" or is it an inadvertent reversal of "outstanding issues," as in "prominent" or "important issues?" The cover letter had described an "understanding reached on outstanding issues," implying that they already had been resolved. The ambiguity may not matter, as these issues would certainly be important to Libya, whether or not they were still unresolved. Nevertheless, one would have expected a more balanced heading such as "Understanding between the Libyan Arab Jamahiriya, the United Kingdom, and the United States on the Remaining Issues" if, as the cover letter attests, the latter two governments "share the understanding reflected therein."

The annex contained seven paragraphs, the substance of which can be summarized as follows: 1) transfer from Libya to Netherlands for trial; 2) consequences if convicted or not convicted; 3) intentions and non-intentions; 4) Scottish prison facility with international designation; 5) rights and conditions of imprisonment; 6) right to make representations to the United Kingdom; and 7) suspension of Security Council sanctions if transferred. Each of these paragraphs, quoted in full below, is followed by brief comments.¹²¹

As provided for in Security Council resolution 1192 (1998) the two persons concerned will be transferred from Libya to the Netherlands and tried under Scottish law before a Scottish court sitting in the Netherlands.¹²²

This paragraph described the basic contours of the "extradition by analogy" agreement that had been reached in principle months earlier, on August 27, 1999.¹²³

121. Most comments on the controversial third paragraph will be presented in the next sub-section of this article.

122. Attached Letter 3, *supra* note 30.

123. See *supra* notes 66-67 and accompanying text (explaining the agreement in principal).

If found guilty, after any necessary appeals process, they will serve their prison sentence in Scotland. If the two are not convicted, they will be free to return to Libya unimpeded.¹²⁴

This is a statement of the most recent addition to the agreement, as of mid-February 1999, concerning where the terms of imprisonment would be served if the two were convicted; this was a condition of which the United States and United Kingdom were unwilling to compromise.¹²⁵ With the exception of the seventh paragraph, every subsequent sentence and paragraph in the Understanding was, in essence, an elaboration on this new point. This second paragraph itself contained an assurance that was reported to have worried Qadhafi. As in any normal Scottish trial, acquitted defendants are free to go. They will not, for instance, be “kidnapped” and taken to the United States.¹²⁶

There is no intention to interview them, or to allow them to be interviewed, about any issue not related to the trial. There will be no deviation from Scottish law which provides that the two persons have the right to refuse to see any police or intelligence officers. The two persons will not be used to undermine the Libyan regime.¹²⁷

As explained more fully in the next section of this article, this paragraph followed from the previous one. It set out assurances as to their treatment in Scottish prison if the two men were convicted. More precisely, it described what would *not* happen to them. The reference to Scottish law implied that they would be treated the same as any other Scottish prisoners, i.e. their right to remain silent as to any crime other than the one they were convicted of would be respected.¹²⁸

124. Attached Letter 3, *supra* note 30.

125. See *supra* note 79 and accompanying text (noting the United Kingdom and United States’ unwillingness to compromise).

126. See *supra* note 71-73 and accompanying text (detailing Scottish law and accommodations with respect to the Libyan suspects).

127. Attached Letter 3, *supra* note 30.

128. The indictment of Megrahi and Fhimah originally contained three charges—conspiracy to murder, murder, and violation of sections 2(1) and 5 of the Airline Security Act of 1982. See Clare Connelly, *The Charges and the Indictment*, in LOCKERBIE HANDBOOK, *supra* note 12, at 6-10.

The prisoners would be held in a distinct portion of a Scottish prison to provide maximum security. All necessary measures will be taken to ensure the safety and well-being of the two persons, if convicted. This facility will be given a special international designation, and special arrangements will be introduced to provide for a role for the United Nations in monitoring the treatment of the two persons concerned. These arrangements, which will be subject to discussions with the United Nations, will be regularly reviewed by the British Government to ensure that they worked effectively and satisfied the legitimate concerns of all parties.¹²⁹

This paragraph added some of the recent accommodations that the United Kingdom reportedly had agreed to in the early weeks of 1999 in order to persuade Libya to accept the non-negotiable condition of imprisonment in Scotland.¹³⁰ Note, however, that even though these accommodations brought the United Nations back into the picture, the United Kingdom retained the right to oversee what the United Nations would be doing. This was an implicit reminder that even though the Secretary-General was the author of this document, was mainly was serving here as a scribe and not as the administrative head of an organization desiring to carve out a special role for itself.

The two prisoners would have unfettered access to legal and diplomatic representatives. An official Libyan presence in Scotland for that purpose will be allowed. Pursuant to the conditions of imprisonment set out in the relevant Scottish law, religious, health and dietary requirements of the two prisoners would be fully met. Visits by clerics and the supply of religious books would be arranged.¹³¹

This paragraph continued elaborating on the U.K.'s newly agreed to accommodations. Like the previous reference to Scottish law, it indicated that the two Libyans would otherwise be afforded the same rights given to all Scottish prisoners.¹³²

129. Attached Letter 3, *supra* note 30.

130. See *supra* note 115 and accompanying text (describing the announcement made after a meeting in London).

131. Attached Letter 3, *supra* note 30.

132. See Michael Binyon, *Libya's Rehabilitation Starts on the Beaches*, LONDON TIMES, Apr. 7, 1999 (stating that the government recently permitted Libya to establish a consulate in Scotland); see also Marcello Mega, *Lockerbie*

The two prisoners or their representatives will have the right to make representations to the authorities of the United Kingdom if they consider that some aspect of their place of imprisonment was contrary to humanitarian concerns. Any such representation would be very carefully considered by the United Kingdom authorities.¹³³

This too reflected the recent accommodations, with the added assurance that the United Kingdom was taking and would continue to take this whole matter quite seriously. Moreover, the prisoners would be allowed to make their own representations if they desired, without having to rely on the United Nations and Libyan observers who also were accessible. In that sense too, it was implied, the Libyans would be afforded the same rights as other Scottish prisoners.

With reference to the measures set forth in Security Council resolutions 748 (1992) and 883 (1993), these measures shall be suspended immediately if the Secretary-General reports to the Council that the two persons concerned have arrived in the Netherlands for the purpose of trial before the Scottish court sitting in the Netherlands. These measures could only be reimposed by a new decision of the Council taken by an affirmative vote of nine Members of the Council, including the concurring votes of all the Permanent Members.¹³⁴

Unlike paragraphs one through six, this one addressed the concerns of Libya as a whole rather than those of the two suspects. It was the impact of six years of sanctions that brought Libya to the table,¹³⁵ so it was not unexpected that Qadhafi would therefore try to bargain for their termination if he agreed to surrender the two men. Note, however, that Libya was given suspension, rather than termination, of the international sanctions, along with the assurance that they would not be re-imposed in some irregular fashion (such as by unilateral or bilateral pressure by the United States or United Kingdom).

Bomber to Get Services of Interpreter, SCOTLAND ON SUNDAY, Apr. 21, 2002 (detailing that the consulate in Scotland will be opened to meet Megrahi's needs).

133. Attached Letter 3, *supra* note 30.

134. *Id.*

135. See *supra* note 7 and accompanying text (stating that the U.N. sanctions had cost Libya \$25 million); see also *infra* notes 171-174 and accompanying text (discussing the matter of the sanctions' suspension).

Before examining more closely the meaning and effect of paragraph three, it is already apparent that the major purpose of the annexed Understanding was to address what would occur if the two suspects were convicted and sentenced to prison terms in Scotland. The next section will demonstrate further that Kofi Annan's letter was in no way intended to nor could it interfere with further criminal investigations and prosecutions relating to the Lockerbie bombing.

3. The "Not Undermine" Sentence

"The two persons will not be used to undermine the Libyan regime." Considered in isolation, it might be reasonable to believe that this sentence constitutes a guarantee that after the trial of the two suspects, no additional leads or evidence will be followed that might implicate any other members of the Libyan government. However, there are at least two reasons why this would be an erroneous interpretation. The first explanation involves reading the sentence in its full context within the paragraph and the object and purpose of the entire Understanding supplemented by contemporaneous and subsequent commentaries by related parties.¹³⁶ Also, it is useful to appreciate why Muammar Qadhafi, or even the two suspects themselves, would have asked for such an assurance. The second explanation involves the legal status (or lack thereof) of the entire Understanding, in relation to the independent authority of Scottish law enforcement officials.

The clause in question is clearly part of a paragraph pertaining to the rights of the two Libyans, if imprisoned in Scotland, to refuse to speak with anyone such as prison officials, police, prosecutors, other Scottish, British or American officials, or even journalists against their will. This is reinforced by the broader context of the entire Understanding: paragraph three is one of five paragraphs, out of a total of seven, that address post-conviction rights. The textual meaning is reinforced further by reference to the temporal context: the Understanding memorializes a series of assurances recently given by the United Kingdom after almost six months of efforts to reach an agreement. As already quoted, the U.K. Foreign Office had

136. See Vienna Convention on the Law of Treaties, *supra* note 27, arts. 30-31 (modeling the contextual interpretation of the Understanding, while not a treaty itself, on the treaty interpretation rules contained in the Vienna Convention).

announced one week before the Annan letter and Annex had been sent to Qadhafi that Libya had been assured that the accused would not be “manipulated or used in any way.”¹³⁷ As another British official explained at the time the two documents were released to the public, paragraph three draws an implicit distinction between using the two Libyan prisoners with the specific aim of undermining Qadhafi’s regime, and following the evidence in the case wherever it might lead.¹³⁸

Knowing that many of the Lockerbie victim families were worried about the implications of the “not undermine” sentence, the U.S. State Department and U.K. Foreign Office prepared a 650 word document called “Questions and Answers on the Release of the UN Secretary General’s February 17, 1999, Letter and Annex” (“Q. and A.”); this paper accompanied the documents in the package given to the families on August 25, 2000.¹³⁹ The Q. and A. confirms that the Annex covers clarifications of the criminal justice system in Scotland and the rights and safeguards that are afforded to the accused in a Scottish criminal trial.¹⁴⁰ Specifically addressing the “not undermine” language, the Q. and A. explains:

137. See *supra* note 115 and accompanying text (noting the announcement was made after the British government met with South African official Jakes Gerwel).

138. See Goodman, *supra* note 30; see also *No Deal Pledge Over Lockerbie*, BBC NEWS, Jan. 6, 2000 (noting that months before it was released publicly, U.N. spokesman Fred Eckhard also said that there was nothing in the letter that would constrain the judges, and that the trial would “go in whatever direction the evidence takes it”).

139. See Questions and Answers on the Release of the UN Secretary-General’s February 17, 1999 Letter and Annex to Libyan Leader Mu’ammur Qadhafi Prepared by the Foreign and Commonwealth Office, London, and the U.S. Department of State, Aug. 25, 2000 [hereinafter Attachment 4] (on file with AUCLR and available at page 234 of this article). The entire package was posted that morning, simultaneously with the public release of the Annan letter, Annex, and related letters, on the password-protected website created for the families and operated by the present author.

140. The Q. and A. goes on to describe why the United States and United Kingdom were unable to disclose the letter when the American families first asked the State Department about it in 1999. Explaining that only the U.N. Secretary-General can release his own correspondence and that communications between him and leaders of member states are sensitive and normally confidential, the Q. and A. notes that once the Lord Advocate and the Defense team announced that they would prefer the letter and annex to be released, the two governments

Q - Is the promise that the two suspects would not be used to undermine the Libyan regime an assurance that the prosecution will not target higher-ranking Libyan officials?

A - No, the phrase in question has to be read in context - it is part of a paragraph that clarifies the Libyan suspects' right to refuse to see anyone. This phrase spells out this right in response to Libyan concern that the U.S. and U.K. intended to somehow coerce the two suspects in an effort to undermine the Libyan regime. The right to remain silent is afforded to all suspects tried under Scottish domestic law. U.S. law affords the same protections.

— The phrase in question also makes clear that this trial is an independent, legitimate trial of the two accused. The Scottish judicial process cannot be pressured by governments for political purposes. That would be absolutely contrary to the British constitution. The trial underway in the Netherlands is not a show trial intended to “undermine” the Libyan regime.

— The statement does not limit in any way the prosecutors' freedom to follow the evidence wherever it leads.

— As Lord Advocate Colin Boyd stated, the Secretary General's letter does not inhibit him in any way from the prosecution of this crime. He has publicly made clear that he considers it his duty to follow any evidence that comes to light.

Q - If the two suspects decided to cooperate with the prosecution and provide evidence against higher-ranking Libyan officials, would the phrase in question prevent the prosecutors from indicting such officials, on the grounds that this would “undermine” the Libyan regime?

A - No, the statement in question does not in any way limit the prosecution's ability to follow the evidence wherever it leads.

approached the Secretary-General and asked him to consider “these exceptional circumstances, and he agreed.” See Attachment 4, *supra* note 139.

Former Secretary-General Pérez de Cuéllar has written that “if a third party is to succeed in resolving [an interstate] conflict, he has to address the fears of each [state] with empathy and imagination.”¹⁴¹ What Libyan fears might Kofi Annan have been addressing in his “not undermine” sentence? A few possibilities come to mind. For instance, the prisoners might be pressured into turning state’s evidence against a higher official in the Libyan Intelligence Services or government who was connected with the bombing. Or they would be coerced into giving information (whether true or not) about some other aspect of the Libyan regime in order to protect their rights or status in prison. Perhaps that they might be exploited for anti-Libyan propaganda purposes once they arrive in Scotland. Or even if acquitted, they might be held as bargaining chips to extract ransom-like concessions from Libya.

It should not come as a surprise that these would be among Colonel Qadhafi’s concerns. After all, in Libyan prisons, detainees frequently are subjected to indefinite *incommunicado* detention, forced confessions, and other unlawful treatment. In August 1999, the 30th anniversary of the revolution that brought Qadhafi into power, Amnesty International [AI] announced:

After three decades of gross human rights violations, even the most basic safeguards have yet to be put in place. . . . [AI] remains deeply concerned about the detention of prisoners of conscience and hundreds of political prisoners. . . . [AI] continues to receive reports of torture, deaths in custody and incidents of houses being demolished as a collective punishment on political grounds. The organization has recently written to the Libyan authorities asking for clarification of the circumstances surrounding the deaths in custody of two political prisoners.¹⁴²

141. Pérez de Cuéllar, *supra* note 90, at 134.

142. See *Libya: 30 Years On – Time for Action*, AMNESTY INTERNATIONAL NEWS SERVICE, AI INDEX MDE 19/06/99 (Aug. 31, 1999) (identifying two prisoners as Mohammad Ali Bakoush and Al-Wafi Nbiyya, a former ambassador), available at http://library.amnesty.it/isdocs/aidoc_everything.nsf/Index/MDE190061999 (last visited Oct. 1, 2002); see also Reporters Sans Frontiers, *Libya: 2000 Annual Report* (describing the plight of a Libyan journalist, Abdullah Ali al-Sanssi al-Darrat, who has been detained without being charged or tried since 1973, longer than any other journalist anywhere in the world), available at <http://www.rsf.fr/uk/rap2000/mo/libya.html> (last visited Sept. 9, 2002).

In the two-year period leading up to the surrender of the Lockerbie suspects, AI reported about Libya that “torture is routinely applied to detainees during interrogation to extract confessions,”¹⁴³ that “scores of political detainees have been held without charge or trial, some for at least 15 years,”¹⁴⁴ and that, among other cases, three members of one family were serving life in prison following a retrial on charges for which they had previously been acquitted.¹⁴⁵ In June and July 1998, over one hundred Libyan doctors, engineers, students and businessmen were arrested under a 1972 “Incrimination of Party Activism” law that carried an automatic death sentence for anyone who calls for the establishment of any group that is “based on a political concept opposed in its aims or means to the principles of the September [1969] revolution.”¹⁴⁶

143. See *Libya: No Chance for Dissenting Voices*, AMNESTY INTERNATIONAL NEWS SERVICE, AI INDEX MDE 19/008/1998 (July 2, 1998) (detailing methods of Libyan torture that include beatings on the soles of the feet, hanging by the wrists from a ceiling or high window, electric shocks, burning with cigarettes and attacks by aggressive dogs), available at <http://web.amnesty.org/ai.nsf/Index/MDE190081998?OpenDocument&of=COUNTRIES%2FSCLIBYA> (last visited Oct. 1, 2002). Forms of psychological torture and ill-treatment include death threats and threats of abuse against the prisoner’s family, particularly female relatives. *Id.* See also *Libya: Gross Human Rights Violations Amid Secrecy and Isolation*, AMNESTY INTERNATIONAL, AI INDEX MDE 19/008/197 (June 25, 1997) (detailing Libya’s horrific human rights abuses), available at <http://www.amnesty.org/ailib/aipub/197/SUM/51900897.htm> (last visited Sept. 18, 2002).

144. *Libya: From Acquittal to Life Imprisonment, in State Injustice: Unfair Trials in the Middle East & North Africa – Appeals Cases*, AMNESTY INTERNATIONAL, AI INDEX MDE 01/003/1998 (Jan. 3, 1998) available at <http://www.amnesty.org/ai.nsf/print/MDE010031998?OpenDocument> (last visited Oct. 1, 2002).

145. See *SIJILL: International Condemnation of the Gaddafi Regime, Political Prisoners and Detainees in Libya* (identifying 45 prisoners by name), available at <http://members.tripod.com/sijill/prison> (last visited Sept. 9 2002). Reports by country specific organizations about Libyan political prisoners include the al-Fitouri family who were among scores of persons arrested on suspicion of attempting to overthrow the government and propagating subversive ideas. *Id.*; see also The Libyan Union for Human Rights Defenders, Annual Report (outlining atrocities and human rights abuses by the Libyan government), available at <http://www.libyahumanrights.com> (last visited Sept. 9 2002).

146. See Law No. 71 of 1972(2), arts. 2-3, noted in Human Rights Solidarity, Press Release: Mass Trial of 98 Prisoners of Conscience will be Held in Tripoli (May 30, 2001) (punishing with death any form of group activity based on political

A second basis for supporting the non-controversial interpretation of the “not undermine” sentence lies in the legal status of the Understanding. Simply put, it has none. The Secretary-General has no authority to bind U.N. Member States; only the Security Council can do so as long as it has identified a threat to international peace and security and it is operating pursuant to its Chapter VII powers.¹⁴⁷ Moreover, in this particular instance, the Secretary-General was careful to stress that he was doing no more than working out the technical transportation details and serving as a conduit of messages.

Even if the Understanding purported to be more than it is (such as an implied promise on the part of the U.K. Foreign Office or the U.S. State Department), it would not force the hand of Scottish law enforcement officials. Lord Advocate Andrew Hardie, the chief law enforcement officer of Scotland at the time, issued a statement in January 2000 reassuring the Lockerbie victim families:

I have, on a number of occasions, both in the United Kingdom and the United States, given my personal reassurance to the relatives of the Lockerbie victims that I have not seen any document, nor would I have been party to any document, that would inhibit me in the exercise of my duties in relation to the prosecution and investigation of crime in Scotland, in particular in relation to the forthcoming trial at the Scottish Court in the Netherlands.

The purpose of this trial is to determine the guilt or innocence of the two Libyans accused of the Lockerbie bombing. So far as the

ideology), *available at* <http://www.libyanet.com/050/nwsc.html> (last visited Oct. 1, 2002); *see also* U.S. Dept. of State, Libya, 1999 Country Reports on Human Rights Practices (Feb. 25, 2000) (detailing the arrest of a group of defendants arrested in a wave of mass arrests that took place in major cities in Libya in June 1998), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/libya.html (last visited Oct. 1, 2002).

147. *See* U.N. CHARTER arts. 39-42, *quoted in* Office of the Spokesman for the Secretary-General, Use of Sanctions Under Chapter VII of the UN Charter (detailing information on Security Council sanctions), *available at* <http://www.un.org/News/oss/sanction.htm> (last visited Oct. 1, 2002).

publication of any letter issued by the UN Secretary-General is concerned, that is a matter entirely for the UN.¹⁴⁸

The Lord Advocate's office is characterized by a 500 year-old tradition of independence that is now even more entrenched since Scottish devolution went into effect in 1998.¹⁴⁹ Independence is a double-edged sword; the Lord Advocate is autonomous from political pressure to exploit or abuse prisoners as well as from outside pressure to refrain from following investigatory leads. From a defendants' rights perspective, the Lockerbie bombers could not have "selected" a better country over which to have exploded Pan Am 103.¹⁵⁰ Colonel Qadhafi, on the other hand, may feel differently.

III. ASSESSING THE ARRANGEMENT

Deciding whether to go ahead with the Lockerbie criminal trial and, therefore, the "extradition by analogy" agreement, was elementary for the Lord Advocate:

148. See "No Deal" Pledge Over Lockerbie, *supra* note 138 (disavowing any potential conflict that would prevent the chief law enforcement officer of Scotland from zealously pursuing the terrorists); see also *Symposium, supra* note 17, at 17 (confirming that the Lord Advocate was adamant and "that whatever model was devised he could not be handicapped in his prosecution of the case").

149. See Stephen Young, *Devolution in the United Kingdom: A Revolution in Online Legal Research* (June 1, 2001) ("Since 1998 the constitutional structure of the United Kingdom has undergone dramatic changes. Through the process of devolution certain powers formally vested in the U.K. Parliament have been transferred to new legislative bodies located in Scotland, Northern Ireland and Wales."), available at <http://www.llrx.com/features/devolution.htm> (last visited Oct. 1, 2002); see also The Scotland Act 1998, United Kingdom Statute 1998, ch. 46, pt. II, sec. 48(5) (1999) ("Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person."); Hardie, *supra* note 17 (explaining the office of the Lord Advocate).

150. See Marcello Mega, *Error that Sealed the Fate of Lockerbie*, SCOTLAND ON SUNDAY (Mar. 17, 2002) (explaining that this statement is meant ironically as the terrorists probably intended the bomb to explode while the plane was over the Atlantic so that evidence could not be found), available at <http://www.scotlandonsunday.com/index.cfm?id=295572002> (last visited Oct. 1, 2002). Scottish investigators believe that whoever set the bomb's timer probably forgot to adjust for the one-hour time difference between Malta and London. *Id.*

Faced with a choice of bringing to trial suspects of the worst mass murder in Scottish legal history or closing the book and giving up was no choice at all. . . . [T]he alternative of a Scottish trial in a third country or no trial at all—I had no doubt as to where the public interest lay.¹⁵¹

The more demanding task is to assess, from the post-trial and post-appeal perspective, whether the special arrangements made for the Lockerbie trial, including the physical and juridical creation of a special court and prison facility in the Netherlands and the many person-hours invested in arranging the “extradition by analogy,” should be considered purely a one-time exceptional series of measures, or whether they can serve as a template on which other contentious transnational prosecutions might be based.¹⁵² This is an appraisal that involves issues of both practicality and legitimacy. These are not necessarily mutually exclusive concepts, though this

151. See Hardie, *supra* note 17; see also *Anglo-US Agreement*, *supra* note 65 (quoting Hardie as stating, “I am satisfied that without an initiative of this sort, there is no prospect of these men being tried before a Scottish court”). But Hardie also noted that, “what we were contemplating would be controversial and could be depicted as a sell-out to Libya or alleged terrorists.” *Id.* Indeed, some of the Lockerbie victim families opposed the entire idea of a neutral country trial on grounds similar to these. See e.g. Rosemary Wolfe, *Gadhafi’s Deal is No Deal at All*, WASH. POST, Oct. 26, 1997; COHEN & COHEN, *supra* note 58, at 249-273 (noting that on the day that the two suspects arrived in Netherlands, Susan Cohen was quoted as saying that Qadhafi will see sanctions lifted and not be held accountable). She continued, “[t]his is sickening to see this passed off as justice.” *Id.* See also *Mixed Emotions for Many Families of Pan Am 103 Victims*, CNN, Apr. 5, 1999, available at <http://www.cnn.com/US/9904/05/us.lockerbie.families/> (last visited Sept. 9, 2002). Some non-American family members criticized the trial after it was over, under the belief that Libya was not actually behind the bombing. See *Relative’s Doubts Over Lockerbie Case*, BBC NEWS, Oct. 15, 2001 available at <http://www.news.bbc.co.uk/1/hi/world/1600588.stm> (last visited Sept. 9, 2002); Tim Reid, *Lockerbie Families Cast Doubt on the Conviction*, TIMES (LONDON), Feb. 2, 2001; Reevel Alderson, *Lockerbie: A Long Search for the Truth, the Conviction*, BBC NEWS, Mar. 14, 2002, available at <http://www.news.bbc.co.uk/1/hi/world/1871049.stm> (last visited Sept. 9, 2002).

152. Cf. Peter Ford, *Lockerbie Success as New Model*, CHRISTIAN SCIENCE MONITOR, Feb. 1, 2001 (analyzing the success of the Lockerbie trial model). This analysis will assess only the pre-trial arrangements themselves. Whether the defendants were given a fair trial, or whether the one guilty and one not guilty verdict were the proper result, is beyond the scope of this article. Similarly, this is not a judgment about whether the trial was “worthwhile,” as that is a subjective matter that each participant and observer must answer for herself, and may not even be possible to judge for many more

article will for utility purposes discuss each under separate headings. In other words, will or should a trial along the same lines ever be undertaken again?

This analysis assumes that the very compromise at the heart of the whole arrangement, the decision to hold a Scottish trial in the Netherlands instead of in Scotland, was an indispensable incentive for Qadhafi, and therefore an absolute prerequisite for holding a trial at all, as the Lord Advocate's "clear choice" declaration suggests. It also assumes that in the future there will be transnational crimes that are not within the jurisdiction of the permanent International Criminal Court ("ICC") and for which there is no pre-existing extradition treaty between the states where the crime occurred and where the suspects reside. Certainly, terrorist cases likely fall into this situation, as the ICC's jurisdiction currently is limited to a very narrow spectrum of war-related crimes.¹⁵³ This is important because terrorists often take refuge in countries that do not engage in mutual criminal assistance with likely target states.¹⁵⁴ Other prototypical transnational crimes such as trafficking in narcotics, firearms, or women and children; money-laundering; theft of intellectual and cultural property; or bribery of public officials, are also likely prospects for similar reasons.¹⁵⁵ Finally, this analysis assumes that

153. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), arts. 5-8 (defining genocide, crimes against humanity, and war crimes very carefully, and tailoring them to cover very specific situations). For a terrorist act to constitute genocide, the prosecution must prove the defendant's "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *Id.* art. 6. To constitute a crime against humanity, the attack must be "part of a widespread or systematic. . . course of conduct involving the multiple commission of acts. . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." *Id.* art. 7(1), 7(2)(a). War crimes are "committed as a part of a plan or policy or as part of a large-scale commission of such crimes" within the context of an international or internal armed conflict. *Id.* art. 8(1). The burden of proof of any of these three crimes in cases of terrorism, when evidence of planning and specific intent is likely to be concealed, would be enormous. *Cf.* Steven W. Krohn, Comment, *The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism*, 8 IND. INT'L & COMP. L. REV. 159 (1997).

154. See United Nations Crime and Justice Information Network, *supra* note 37 (pointing out that as of 1996, states such as Iraq, The Philippines and Uganda each had entered into extradition treaties with only two other states).

the options under consideration are consistent with international law; state-sponsored, transborder abduction of the defendant, for instance, is excluded.¹⁵⁶

A. PRAGMATIC CONSIDERATIONS

Although the Lord Advocate considered it a “no choice at all” decision, certain economic, legal, and political factors would naturally be taken into account by any national law enforcement officials who may be considering the “Lockerbie model” of a third-country trial in a future case. Given the renown and notorious long-standing impasse over the Lockerbie indictments, money may have been “no object” in the search for a solution, but officials in future cases may not be able to ignore financial considerations. The cost of the Lockerbie trial and appeal has been estimated to be an extraordinary \$106 million (£74.5m), including \$16 million (£11.2m) in capital outlays for converting the NATO base into the Camp Zeist court and prison complex, and over \$62 million (£44m) in operating costs, some of which would not have been incurred had the trial been held in Scotland,¹⁵⁷ making it the most expensive trial in British

155. See U.S. Department of Justice, *International Crime Control Strategy* (May 1998) (outlining other crimes that would need to fall under the scope of the ICC’s jurisdiction), available at <http://www.usdoj.gov/criminal/press/iccindex.pdf> (last visited Sept. 9, 2002).

156. See, e.g., Michael J. Glennon, *International Kidnapping: State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT’L L. 746 (1992) (criticizing the Supreme Court’s opinion in *United States v. Alvarez-Machain*, for failing to recognize state-sponsored abduction as violating customary law and sovereignty); Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939 (1993); Andrew L. Strauss, *A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court’s Abduction Decision in Alvarez-Machain*, 67 TEMP. L. REV. 1209 (1994); Douglas J. Sylvester, *Comment: Customary International Law, Forcible Abductions, and America’s Return to the “Savage State,”* 42 BUFF. L. REV. 555 (1994). But see U.S. Attorney’s Manual, *supra* note 36, at 9-15.610 (noting the position of the U.S. Department of Justice).

157. See Jim McBeth, *Today, We Give Our Decision*, SCOTSMAN, Mar. 15, 2002; see also *Lockerbie Trial in Statistics*, GUARDIAN UNLIMITED, Feb. 1, 2001 (involving special expenses including transportation to and from Scotland and room and board for the 200 police and prison service employees who guarded Camp Zeist). Presumably, if the trial had been in Scotland, an existing facility could have been used, through technological upgrades for the courthouse and security enhancements for the jail may have been needed. *Id.* The \$106 million

history.¹⁵⁸ Although the Camp Zeist facility has been returned to the Dutch government, one hopes it will remain intact so it can be used for other international or transnational cases.¹⁵⁹

The possibility of restrictions on the national court's ancillary powers when it is operating outside of its normal jurisdiction is another factor to be considered by national law enforcement officials. Under the 1999 bilateral treaty that facilitated the creation of the Scottish Court in the Netherlands, the Court was granted the power to hold persons in contempt and to detain witnesses who were at risk of absconding or committing an offense within the premises of Camp Zeist.¹⁶⁰ The special U.K. legislation that created the Court also

figure does not include the estimated \$426 million (£300m) in preparing and prosecuting the case, most of which would have been incurred in a Scotland-based trial. *Id.* See generally *Lockerbie Question that Remains Unanswered*, SCOTSMAN, Mar. 15, 2002 (citing the impossibility of even estimating the additional costs incurred by the United Nations and other governments in conciliating the extradition impasse). If it had been a jury trial, transportation, room and board in Holland for a larger number of triers of fact would have been required, though that still may have been less than the costs associated with four trial judges (three plus and alternative) instead of one and five appellate judges instead of three. *Id.*

158. See Andrew Buncombe & Kim Sengupta, *Verdict Does Little to End Bitterness and Suspicion*, THE INDEPENDENT, Mar. 15, 2002.

159. See *Uncertain Future for Camp Zeist*, BBC NEWS (Mar. 14, 2002) (acknowledging that although the location of the Camp Zeist facility is not literally in the Hague, it would still be ideal for the International Criminal Court.); see also *Lockerbie Trial Venue Handed Back*, BBC NEWS (Apr. 16, 2002).

160. See Neth-U.K. Treaty, *supra* note 25, art. 3(3) ("The Government permits the detention of the accused for the purposes of the trial, and, in the event of conviction, pending their transfer to the United Kingdom, within the premises of the Scottish Court in accordance with Scots law and practice.")

The enforcement of all other sanctions involving the deprivation of liberty of persons within those premises is not permitted, except in so far as the Scottish Court orders: (a) the temporary detention of witnesses transferred in custody to the premises of the Scottish Court; (b) the temporary detention of witnesses in the course of their evidence; (c) the temporary detention of persons who may have committed offences within the premises of the Scottish Court, including contempt of court; and (d) the imprisonment of persons found guilty summarily of contempt of court.

Id. See also Order in Council, *supra* note 25, art. 13 ("The High Court of Judiciary shall have jurisdiction in relation to any contempt of court or other offence committed in the course of, or in relation to, proceedings being conducted by virtue of this Order, whether at the premises of the court or elsewhere in the Netherlands."); Symposium, *supra* note 17, at 18 ("It was, however, a tribute to the legal and practical arrangements put in place by all agencies that his transfer

authorized it to issue warrants for the arrest of any witnesses in the United Kingdom who would not voluntarily appear at the court.¹⁶¹ However, for witnesses “outwith the United Kingdom,” the Court only had the power to cite them to appear and to serve them with overseas process.¹⁶² If they refused to appear voluntarily, the Court had no power to order them into custody. This disability may in fact have hindered the prosecution of the second Lockerbie defendant.¹⁶³

The national officials would also need to take political considerations into account, perhaps weighing public perception of the government’s commitment to the particular law enforcement issue against perceptions that might arise from the effort to negotiate and to undertake an overseas trial. As one observer commented on the Lockerbie arrangement, “Politically, acceptance of the proposal might appear to some to give to those accused of terrorism a choice as to where and how they should be tried. It might also be seen as acknowledgement that the accused would not get a fair trial *in* Scotland.”¹⁶⁴ Similarly, it might have been perceived as an admission

(twice) to and from the Court was carried out efficiently and without fuss, although the specific arrangement was unprecedented”); Aust, *supra* note 25, at 288-89 (explaining that other than the two accused, the Court only needed to detain one additional person, the witness Abu Talb, who was serving a life sentence in Sweden for terrorist bombings in Denmark).

161. See Order in Council, *supra* note 25, art. 12(2) (“Any warrant for the arrest of a witness shall be authority for him to be transferred, under arrangements made in that regard by the Secretary of State, to the premises of the court.”).

162. See *id.* art. 12(3) (“It shall be competent for witnesses who are outwith the United Kingdom to be cited to appear before the High Court of Judiciary sitting in the Netherlands in the same way as if the court had been sitting in Scotland and, accordingly, subsection (1)(b) of section 2 of the Criminal Justice (International Co-operation) Act 1990 . . . shall have effect as if the reference to a court in the United Kingdom included the High Court of Judiciary sitting, by virtue of this Order, in the Netherlands.”).

163. See *Witnesses Pull Out of Lockerbie Trial*, BBC NEWS, July 12, 2000, (reporting that in the Lockerbie trial, some witnesses who worked at Luqa airport in Malta reportedly refused to come to the Netherlands to testify after lengthy negotiations), available at <http://news.bbc.co.uk/2/hi/world/830250.stm>. These witnesses may have offered testimony implicating the acquitted defendant, Lamem Fhimah, who was the Libyan Airlines station manager at Luqa.

164. See Aust, *supra* note 25, at 283 (noting that Libyan sanctions were being increasingly flouted and the resolve of other Security Council members to maintain them appeared to be sagging); see also *id.* (expressing an opinion that wild accusations were flying about an official cover-up of the evidence of who was

that Scottish prisons are inadequate if the United Kingdom had conceded to Libya's demand that prison sentences be served in Libya or a third country.¹⁶⁵ Foreign policy, national security, trade policy, and other such considerations inevitably will be factored into any transnational prosecution.¹⁶⁶ Each of these kinds of political factors will be unique to each case.

Any country that is asked, in the absence of an extradition treaty, to surrender voluntarily its nationals or other suspects within its territory will have to weigh its own legal, political, and possibly economic factors to include the cost of continued sanctions, if any are in place. Agreeing to surrender in one case risks the potential creation of an undesirable legal precedent, both domestically and internationally. On the other hand, a state or government that is undergoing a transition from one kind of regime to another may want to demonstrate its new-found commitment to joining the "international rule of law community" and its willingness to accept any outcome of a trial to which it was not legally obligated to consent. Such "self-rehabilitation" may have been one of Qadhafi's motives in agreeing to turn over the Lockerbie suspects.¹⁶⁷ However,

really behind the Pan AM 103 bombing, and it was thought that only a trial could put them to rest).

165. The existence of an internationally operated prison might have shortened the protracted discussions leading to the transfer of the two Libyans to Camp Zeist. To date, no such international prison exists. See Gabrielle McDonald, *Practice Direction on the Procedure for the International Tribunal's Designation of the State in Which a Convicted person is to Serve His/Her Sentence of Imprisonment*, July 9, 1998 (declaring that the President of the International Tribunal determines the State where the accused will serve his imprisonment sentence), at <http://www.un.org/icty/basic/detention/IT137.htm> (last visited Sept. 9, 2002).

166. See U.S. Attorney's Manual, *supra* note 36, at 9-15.700 (4) (stating that in the United States, the Department of State makes the final determination as to whether to surrender a fugitive to a requesting state, even after a court has determined in a hearing under 18 U.S.C. 3184 that he is extraditable); see also *id.*, art. 9-15.100 (determining that generally in the United States extradition may be granted in accordance with a treaty, but some other countries can grant extradition without a treaty). Law of extradition varies from country to country and is subject to foreign policy considerations. *Id.*

167. See Sarah El Deeb, *Gadhafi Becoming More Pragmatic*, ASSOCIATED PRESS, Aug. 4, 2001 (stating that according to Cambridge University's Saad Djabbar, "Libya is no longer on the side of movements challenging existing regimes"), available at <http://www.lafa.org/News-Auguat2001.htm> (last visited Sept. 7, 2002). Continuing, Djabbar, stated, "It's more on the side of the status

skeptical observers may judge the Colonel's post-conviction ranting and raving about the judges needing to "commit suicide" as evidence of contrary schemes.¹⁶⁸ On the other hand, might the conviction and rejected appeal of the one Lockerbie defendants now deter other would-be Qadhafis from following his lead (particularly if the Colonel continues to insist that the trial was "political")? At any rate, they have less reason to worry, now that the ICJ has ruled that it is a violation of customary international law for a national court to fail to respect the immunity from criminal prosecution, even for crimes against humanity, of another country's incumbent Minister of Foreign Affairs.¹⁶⁹

quo." *Id.* See also *New Image*, 60 MINUTES II, *supra* note 8 (stating that Qaddafi intends to "make peace with the West" and that imposed sanctions have cost Libya more than \$30 billion); Takeyh, *supra* note 8, at 62 (recommending that the United States utilize economic, political, and diplomatic tools to reintegrate Libya in the international community).

168. See Gerson & Adler, *supra* note 7, at 277 ("Was Kaddafi backed into a corner by his own rhetoric, compounded by economic desperation? Or did he just accept what he had wanted all along, secure in the belief that after all these years the evidence had grown stale, and the prosecution would never be able to prove its case under the exacting standards of Anglo-Saxon justice?"). See *supra* notes 2-4 and accompanying text (noting the comments of Qadhafi relating to the judges have the choice between committing suicide, resigning, or admitting the truth). Perhaps Qadhafi's rants and raves were just public posturing for an at-home constituency that he had not been honest with.

169. See *Arrest Warrant of 11 April 2000 (Democratic Rep. of the Congo v. Belg.)* para. 75 (Feb. 14, 2002) (holding that Belgium must cancel the arrest warrant, because it disregards the immunity of the Foreign Minister of Congo from criminal prosecution), available at http://www.icj-cij.org/icjwww/idocket/ICJBE/icobejudgment/icobe_ijudgment_20020214.PDF (last visited Oct. 31, 2002); see also Pieter H.F. Bekker, *World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister*, AM. SOC'Y INT'L L. Feb. 2002 (reporting that according to the International Court of Justice, Belgium must cancel the arrest warrant, because it violates the principle of sovereign equality among states), available at <http://www.asil.org/insights/insigh82.htm> (last visited Sept. 9, 2002); Frederic Kirgis, *French Court Proceedings Against Muammar Qadhafi*, AM. SOC'Y INT'L L., Oct. 2000 (mentioning that a French appeals court held that Qadhafi could be prosecuted in France for the Lockerbie bombings and rejected the defense of incumbent head-of-state immunity), available at <http://www.asil.org/insights/insigh56.htm> (last visited Sept. 1, 2002). The ICJ ruling should now put a stop to that prosecution, which French prosecutors in fact had opposed all along.

The bottom-line factor for the surrendering state is trust. Regimes that lack extradition treaties with each other probably do not trust each other in the first place. So, would any “rogue” state again be willing to try this type of *ad hoc* arrangement, given its probable perception that promises are unlikely to be kept? One revealing incident involves Nelson Mandela’s response to the conviction of Lockerbie defendant al-Megrahi. Mandela had been involved in brokering the “extradition by analogy” arrangement two years earlier.¹⁷⁰ In February 2001, the former South African president claimed that the United States and United Kingdom had recanted on their agreement to lift U.N. sanctions against Libya. He claimed that the two countries had “moved the goal posts,” by favoring suspension of sanctions and imposing new conditions for their complete dismissal, rather than their mere suspension.¹⁷¹ The Tony Blair and George W. Bush administrations insisted that sanctions would be lifted only when the Libyan government admitted its official responsibility for the Pan Am 103 bombing, disclosed all it knew about the crime, permanently renounced support for terrorism, and paid compensation to the victim families.¹⁷² The relevant

170. See *supra* note 26 (discussing the benefits of the impartiality of the Scottish court).

171. See Anthony Sampson, *Mandela Says UK Must Drop Libya Sanctions*, THE INDEPENDENT, Feb. 9, 2001 (detailing that Mandela had Professor Jakes Gerwel talk with Qadhafi as his personal representative two years ago); see also Chris McGreal, *Mandela Questions Lockerbie Verdict*, GUARDIAN UNLIMITED, Apr. 10, 2001.

172. See *Compensation Plea for Lockerbie Relatives*, BBC NEWS, Mar. 14, 2002 (stating that Libya’s obligation to pay compensation was not contingent on the outcome of the appeal), available at <http://news.bbc.co.uk/2/hi/uk/1872440.stm> (last visited Sept. 17, 2002); see also S.C. Res. 731, U.N. SCOR, 3033th mtg. at 51, U.N. Doc. S/Res/731 (1992) (according to paragraph 3, the government of Libya must give a “full and effective response” to the requests to take responsibility for the terrorist acts). Only the second and third of these four Blair and Bush conditions, disclosure of the facts about the crime and renunciation of terror, were conditions explicitly mentioned in the relevant U.N. Security Council sanction resolutions. See *id.* The word “compensation” and the phrase “accept responsibility” do not appear in the resolutions, only the vaguely worded “provide a full and effective response.” See *id.*, para. 3; see also Symposium, *supra* note 17, at 16 (clarifying that Libya had been on notice of the importance of the first of the four conditions since at least November 27, 1991, when the United States and the United Kingdom included it in their joint demand for surrender of the accused). Moreover, by a letter dated March 19, 1999, from the Libyan Foreign Minister,

Security Council resolutions, in fact, ensured only the immediate suspension of sanctions upon confirmation of the arrival of the two suspects in the Netherlands that had already occurred. The resolutions specified that sanctions would not be lifted until the Security Council concluded that Libya had complied fully with all the requests and decisions made in the first two 1992 Lockerbie resolutions.¹⁷³

Was Mandela hinting about broken promises made in a “secret deal” between the United States, the United Kingdom, and Colonel Qadhafi, of the type that the Lockerbie families had suspected all along? That is unlikely. The annex to Kofi Annan’s February 17, 1999, letter stated that sanctions “shall be suspended”—not “lifted”—upon his report that the two persons had arrived in the

Omar al-Muntasser, to Kofi Annan, Libya had agreed to pay compensation “if the accused are found guilty.” See Aust, *supra* note 25, at 295, citing UN Doc. S/1999/311; see also *UN Maintains Sanctions*, Lockerbie Trial Briefing Site, July 10, 1999, (briefing that the United States vetoed the permanent lifting of sanctions when the issue came up in the Security Council after the two Libyans arrived in the Netherlands) at <http://www.ltb.org.uk/displaynews.cfm?nc=20&theyear=1999> (last visited Oct. 1, 2002).

173. See S.C. Res. 883, *supra* note 5, para. 4 (stating that the U.N. Security Council declares its readiness to lift sanctions against Libya once the country complies fully and effectively with the requests in resolutions 731 and 748). Paragraph 16 of S/RES/883 required the Secretary-General to report to the Security Council within 90 days of suspension whether full compliance had occurred. *Id.* See also S.C. Res. 1192, *supra* note 52, at 2, para. 8 (noting the measures in resolutions 748 and 883 remain binding on all U.N. member states); *Annan Says He Can’t Recommend Lifting Sanctions on Libya*, BBC NEWS, July 2, 1999 (reporting that according to Kofi Annan’s report, the U.N. Secretary-General could not recommend lifting sanctions at that time due to the inability to assess compliance with one condition: cooperation with the Lockerbie investigation and trial through the prompt provision of evidence and witnesses), available at <http://www6.cnn.com/WORLD/africa/9907/02/libya.un/> (last visited Sept. 17, 2002). At a press conference on the day the two suspects arrived in the Netherlands, Mr. Annan stated that Libya would have to demonstrate that it no longer backed terrorism and that it would honor “compensation requirements, were the two to be found guilty.” See Press Conference Transcript, *supra* note 77. The latter could obviously not occur until after the trial. As for assessing whether Libya had actually abandoned its support for terrorism, William Shawcross notes, “This was a strange commission to give to the secretary general because the UN has no intelligence arm. It was almost impossible for Annan to make a judgment.” Shawcross, *supra* note 26, at 345. To date, the sanctions are still under suspension but have not been lifted.

Netherlands.¹⁷⁴ What seemed especially surprising, nonetheless, was not the differing interpretations of the Security Council resolutions, but something that Mr. Mandela said publicly a few days after the verdict:

The condition that Qadhafi must accept responsibility for Lockerbie is totally unacceptable. As President [of South Africa] for five years I know that my intelligence services many times didn't inform me before they took action. Sometimes I approved, sometimes I reprimanded them. Unless it's clear that Qadhafi was involved in giving orders, it's unfair to act on that basis.¹⁷⁵

It is difficult to discern whether or not someone as sophisticated as Nelson Mandela could believe that the Libyan Intelligence Services would bomb an American aircraft without Qadhafi's knowledge and authorization.¹⁷⁶ As a lawyer, former head-of-state, and anti-apartheid activist, Mr. Mandela surely understands the difference between personal responsibility and state responsibility. Under international law, the state, as represented by its government, is responsible for acts or omissions by any of its officials, agencies, or any person acting under color of law. Therefore, every act by a state or its agents that is wrongful under international law imposes international responsibility on that state.¹⁷⁷ Even where a state's agents have acted beyond their authority (*ultra vires*), the state bears

174. See Attached Letter 3, *supra* note 30.

175. See Roberts, *supra* note 26 (describing Mandela's endorsement of the proposal that the Lockerbie trial should take place in a neutral country, and that a single country could not be "complainant, the prosecutor and the judge at the same time").

176. See GERSON & ADLER, *supra* note 7, at 263 (asserting that Mandela is undoubtedly grateful for Qaddafi's support of the African national Congress during the anti-apartheid struggle).

177. See *Report of the International Law Commission*, United Nations International Law Commission, 48th Sess., Supp. 10(A/51/10), arts. 1, 3, 4, 17, 18 (1996) (defining the responsibility of states and crimes against humanity); see also Montreal Convention, *supra* note 38 (specifying that any person who performs unlawfully and intentionally an act of violence against another person, destroys an aircraft, or places on aircraft a device that causes damage commits an offence). See generally Scott Evans, *The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine*, 18 MD. J. INT'L L. & TRADE 21 (1994) (stating that the acts of the two accused Libyans constitute offenses that violate the Montreal Convention).

responsibility for all their acts that fail to conform to international legal standards.¹⁷⁸ Compensation is the usual form of reparation in such cases.¹⁷⁹ It too is another cost to be factored into a decision of this kind.¹⁸⁰

B. QUESTIONS OF LEGITIMACY

Although there are many types of “legitimacy questions” that could be posed about the compromise that allowed the Lockerbie criminal trial to happen, only three will be raised here. They are: first, whether the United States and United Kingdom gave away too many concessions, thereby compromising justice; second, whether a “voluntary transfer” that is influenced by economic pressures undermines the trial’s outcome; and third, whether a one-time-only trial can ever be roundly considered as legitimate. The responses given here to each of these questions are intended only as initial reflections. Jurisprudential specialists undoubtedly will have much more to say.

The first question is perhaps easier asked than answered, as there is no objective measure of what is “too many.” Surely, if Qadhafi had in fact been given an actual “immunity deal” for himself and other high Libyan officials, that would have crossed the line under any form of measurement. If there had been such a deal, then the entire arrangement could be dismissed as a travesty that impeded

178. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 423-28 (Clarendon Press: Oxford, 2d ed. 1973) (stating that in international law, a state is liable for both intentional and negligent acts of its “morally responsible persons”).

179. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 901(d) (1987) (stating that compensation is a common remedy for monetary damage and that sometimes it might be required even though no monetary damage has occurred).

180. See *Libya Pays \$30M + French Compensation*, July 16, 1999, (reporting that Libya managed to pay compensation to 170 families who died in the 1989 French UTA bombing for which six Libyans, including Qaddafi’s brother-in-law, were convicted in absentia), at <http://www.ltb.org.uk/displaynews.cfm?nc=18&theyear=1999> (last visited Sept. 2, 2002); see also *Trial in Absentia Begins for Libyan Suspects in French Jet Bombing*, CNN, Mar. 8, 1999 (mentioning that Qaddafi’s brother-in-law was at the time of the bombing the second highest person in Libya’s intelligence agency), at <http://www.cnn.com/WORLD/europe/9903/08/france.libya/?related> (last visited Sept. 2, 2002).

accountability for the worst terrorist act against civilians before September 11, 2001. However, this article has demonstrated that the early fears of some of the victim families¹⁸¹ concerning the Annan-Qadhafi agreement were misplaced. In terms of the other concessions made for the Lockerbie trial, were they truly that different than those sought, and often granted, to common criminal defendants in more typical contexts? Plea bargaining often results in the defendant dictating some of the conditions of his trial and sentence, including venue, and crime victims rarely approve of it.¹⁸² Plea bargaining, however, is much less common outside the United States, particularly in Continental systems, whose prosecutors are granted much less discretion than in adversarial systems.¹⁸³ Similarly, the concessions concerning post-conviction made by the United Kingdom, including access to the prison by Libyan and U.N. officials, are not particularly unusual given the political sensitivity of most transnational cases.¹⁸⁴ In fact, most dispute resolution in international law is the result of arbitration or negotiation that by

181. See *supra* note 31 and accompanying text (noting the widespread rumors and fears over whether a special immunity deal for Qadhafi had been reached).

182. See WALLIS, *supra* note 58, at 168-69 (asserting that Qaddafi would have sought assurances from Annan and his envoys that sanctions would not be reimposed at a later date).

183. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 433 (1992) (stating that plea bargaining is generally not allowed by the European continental legal system in serious cases); see also Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1003-11 (1983) (asserting that in American criminal procedure the defendant is a "subject," while in a European trial, the defendant almost never remains silent); John Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443 (1974) ("What the Germans have largely done, and the Americans largely not done, is to devise means to regulate the prosecutor's monopoly"); Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468, 468 (1974) (arguing that the discretion of the German prosecutor is limited by the German Code of Criminal procedure and by the courts).

184. See ICRC *Visits to Persons Deprived of their Liberty: An Internationally Mandated Task, Implemented Worldwide* (declaring that it is a standard practice of the International Committee of the Red Cross ("ICRC") to visit prisoners, monitor their condition, and resolve problems raised by prisoners concerning their treatment), at
<http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList265/4C2DE1E5ED3C7C9DC1256B660061123E> (last visited Oct. 1, 2002).

definition involves compromise. The Iran-U.S. Claims Tribunal is a prime example of international claims resolution.¹⁸⁵

To those who believe that no compromises should ever be made with terrorists, there are two responses. One answer that undoubtedly will sound glib to hard-liners is that the suspects were alleged terrorists, not convicted terrorists, when the pre-trial discussion were taking place. Additionally, to paraphrase Lord Advocate Hardie,¹⁸⁶ the only plausible alternative to the Lockerbie trial was no trial at all. Would a “no trial” situation really be a victory, and, if so, for whom?

The second legitimacy question could be answered facily by a further analogy to common criminals who at times may be persuaded by economic considerations into accepting a plea bargain. However, the comparison would be inapt, reflecting not merely a difference of magnitude but also of kind. When long-term, multilateral economic sanctions are imposed on a country, more than just one defendant and his dependants are involved; an entire population is affected. Moreover, negotiations over extradition, or “voluntary transfer” in the case of Lockerbie, are never conducted with the accused person. The decision belongs to the state, not the suspect. Thus, factors that may influence a state to surrender him are distinguishable from factors that may weigh into an individual suspect’s own decision to plead guilty.¹⁸⁷

185. See WAYNE MAPP, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: THE FIRST TEN YEARS 1981-1991* 25 (1993) (stating that the use of international arbitration has a long history in international law); CECILIA ALBIN, *JUSTICE AND FAIRNESS IN INTERNATIONAL NEGOTIATION I* (2001) (defining negotiation as a decision-making process where parties reach a mutually beneficial agreement); DAVID CARON & JOHN CROOK, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION*, 369 (2000) (noting that the Iran-U.S. Claims Tribunal has made an important impact on the process of international claims resolution); VICTOR KREMENYUK, *INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES I* (2002) (stating that the scope of issues negotiated has increased nowadays).

186. See Hardie, *supra* note 17 and accompanying text (briefing the Lockerbie victim’s families on the status of the litigation).

187. Given that Libya’s prohibition on extradition of nationals is statutory, not constitutional, and is not required by international law, the two suspects in the Lockerbie case could probably not claim a violation of their human rights when Libya finally agreed to their “voluntary transfer.” Libya has claimed, nonetheless, that the suspects themselves, with advice from their lawyers, made the actual choice to go to the Netherlands for the trial. See LOCKERBIE HANDBOOK, *supra*

Perhaps a comparison to another recent “voluntary transfer,” the case involving the former President of Yugoslavia, Slobodan Milosevic, to the International Criminal Tribunal (“ICT”) in the Hague, is instructive.¹⁸⁸ Milosevic, whose trial for war crimes commenced two days before the end of the Lockerbie appeal, was swept out of office in October 2000 and arrested by Serbian republic authorities in early April 2001. Existing Yugoslav law, however, did not permit extradition of nationals. Furthermore, the newly elected President, Vojislav Kostunica, a constitutional law scholar committed to his country’s rejoining the international community, wanted Milosevic tried first domestically for corruption and abuse of power. Like Qadhafi’s pronouncement that U.K. and U.S. national courts were prejudiced against Libyans, Kostunica also had stated publicly that the ICT was biased against Serbs. When efforts to pass a federal extradition statute failed in Parliament, the Yugoslav government, whose Prime Minister, Zoran Djindjic, favored Milosevic’s transfer, enacted a decree authorizing it. This was suspended on June 29, 2001, by the federal Constitutional Court; not surprisingly, all of its members were appointed by Milosevic. Later that same day, Serbian cabinet officials signed an order repudiating the Court’s decision and authorizing the republic’s Justice Ministry to extradite Milosevic immediately. With the assistance of British

note 12, at 3. It is not known what, if any, pressures the Libyan government may have put on the two to influence their “choice.”

188. Differences between the two cases are conspicuous, though not necessarily dispositive. Milosevic was extradited to a pre-existing international tribunal, with which all members of the United Nations are obligated to cooperate. Security Council Resolution 827, S/RES/827 (1993), para. 4. In contrast, the Lockerbie suspects were transferred to a specially created, one-time-only national court that Libya had no pre-existing legal obligation, prior to the issuance of the mandatory Security Council resolutions, to respect. However, Security Council Resolution 1192, *supra* note 52, also required all states to cooperate with future Lockerbie trial arrangements.) Milosevic himself had formally approved of the International Criminal Tribunal when he negotiated and signed the Dayton Accords in 1995, whereas the two Lockerbie suspects played only an indirect role, if at all, in the negotiations over their trial. Finally, the President of Yugoslavia opposed the extradition of Milosevic; it was master-minded behind his back, whereas Qadhafi signed off on the transfer of his nationals. See Lawrence Weschler, *Comment: The Defendant*, THE NEW YORKER, July 16, 2001 at 27.

and American transport, Milosevic was in custody in the Hague later that evening.¹⁸⁹

Not coincidentally, the move to arrest Milosevic arose shortly before the United States was to certify whether Yugoslavia was cooperating with the ICT; this decision would determine whether the newly democratic country would receive more than \$100 million in U.S. aid or be subject to economic sanctions. The actual transfer to the Hague occurred on the eve of an international conference that could allocate over \$1.2 billion in aid.¹⁹⁰ Prime Minister Djindjic fully acknowledged while commencing extradition that the country's drastic need for economic recovery was next on his mind along with enhancing Yugoslavia's international credibility. Djindjic stated, "We lost ten years" and "[w]e cannot afford to lose another ten."¹⁹¹ As a British journalist put it, "To a country full of impoverished, underpaid and unemployed people, the message of economic

189. See Gordana Kucic, *Milosevic Handover Thrown into Confusion; Court Blocks His Transfer to War Crimes Tribunal as Reformers Vow to Press On*, REUTERS, June 28, 2001; R. Jeffrey Smith, *Serb Leaders Hand Over Milosevic For Trial by War Crimes Tribunal: Extradition Sparks Crisis in Belgrade*, WASH. POST, June 29, 2001 at A1. Ruses and decoys were employed to ferry him out, due to the fear that the federal army would interfere. Carlotta Gall, *Serbs Feared Army Would Aid Milosevic*, N.Y. TIMES, July 1, 2001. Milosevic argued at the ICT that his extradition was illegal under Yugoslav law. See Carlotta Gall, *Yugoslavs Act on Hague Trial For Milosevic*, N.Y. TIMES, June 24, 2001, at A1; see also Ruth Wedgwood, *Former Yugoslav President Slobodan Milosevic to be Tried in the Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo*, AM. SOC'Y INT'L L. (2001). The decree was struck down as unconstitutional later in 2001. See *Belgrade Court Further Stymies Cooperation with Tribunal*, N.Y. TIMES, Nov. 7, 2001.

190. See Peter Finn, *West Backs Move Against Milosevic*, WASH POST, Apr. 1, 2001, at A24 (stating that the U.S. decision whether Serbia was cooperating with the Hague Court was going to determine some additional \$50 million in aid for Serbia); Mike Allen & Steven Mufson, *Bush Ties Aid to Action on Milosevic*, WASH POST, May 10, 2001 at A6; and *The Yugoslav Model*, WASH POST, June 28, 2001, at A 32.

191. Martin Woollacott, *Milosevic's Transfer Was the Price that Had to be Paid*, GUARDIAN UNLIMITED, July 6, 2001, at <http://www.guardian.co.uk/Print/0,3858,4216916,00.html> (last visited Sept. 2, 2002); see also United States Institute of Peace, *Whither the Bulldozer? Nonviolent revolution and the Transition to Democracy in Serbia*, Aug. 14, 2001 (stating that the surrender of Milosevic did not complete the transition to democracy in Serbia), at <http://www.usip.org/oc/newsroom/sr72nb.html> (last visited Sept. 17, 2002).

rehabilitation is a powerful one, worth Milosevic's head and the head of others in the future."¹⁹²

The Milosevic comparison suggests two observations about the legitimacy conundrum. First, economic considerations are often the spur that prods transitional regimes that have much to gain from cooperating with other governments to move ahead. The current Yugoslav government replaced the Milosevic regime in a democratic election while Qadhafi is still at the helm in Libya. In the post-Cold War world, however, economic factors frequently are more influential than ideology, and they probably will play a role in future "voluntary transfers." Second, the coincidence of timing between the Milosevic trial and the Lockerbie appeal demonstrates that the entire field of international and transnational criminal law is now in a remarkable era of change. As unprecedented as the Lockerbie criminal trial was, the Milosevic trial, the first ever in which a former head-of-state has been accused of crimes against humanity, is even more so. It is therefore rather futile to try to assay the processes that brought them about, when so much else in international law is in a state of rapid flux.

The third legitimacy question raised here is the most troublesome. This question asks whether ad hoc justice is ever true justice or whether it will ever be widely perceived to be true justice, even when the defendants' due process rights are scrupulously protected? Can a "one-time only" trial ever be seen as legitimate when special conditions are created for it and no matter how closely these are designed to follow the "normal" rules and procedures?¹⁹³ Is it not the

192. Woollacott, *supra* note 191 (stating that many Serbs perceive the transfer as necessary for economic motives rather than for justice); *see also* Mike Allen & Steven Mufson, *Bush Ties Aid to Action on Milosevic*, WASH POST, May 10, 2001, at A6 (mentioning the perception that Serbia has a "fresh start" after the surrender of Milosevic); *see also* Michael Dobbs, *Hubris Brought Fall of Milosevic*, WASH POST, June 29, 2001, at A27 (reporting that the economic crisis in Serbia came after the Government of Milosevic refused to introduce economic reforms for almost ten years); *see also* Damjan de Krnjevic-Miskovic, *Serbia's Prudent Revolution*, 12 J. DEMOCRACY 96, 108 (2001) (stating that economic and financial reforms started after the surrender of Milosevic).

193. *See* Arnold Kemp, *After Lockerbie, an International Court is Needed More Than Ever*, GUARDIAN UNLIMITED, Mar. 17, 2002 ("Such a court will always be open to the allegation that it is under political pressure."), *at*

likely result of “selective justice,” in which the only cases that go to trial are the ones with the greatest outside pressure?¹⁹⁴

Many comparable questions were raised about the Nuremberg Trial of the Major War Criminals. The most frequently articulated criticism is that it was “victors’ justice,” as no international trials were ever held concerning alleged Allied war crimes.¹⁹⁵ The Lockerbie trial might similarly be labeled a post-Cold War example of “victors’ justice” that only the sole remaining superpower has the clout to implement.¹⁹⁶ However, at least two of the more specific criticisms of Nuremberg are not applicable to Lockerbie. First, although the Lockerbie suspects undoubtedly were surprised in 1991 to have been identified specifically in the joint indictments, after the United States held trials against the 1993 World Trade Center bombers, a trial in 2000-2001 for international terrorism was not so unprecedented as to constitute an *ex post facto* violation of the defendants’ rights. Second, the Nuremberg Tribunal’s German defense counsel were at a distinct disadvantage because they were not familiar with the unique hybrid procedure used at the trial.¹⁹⁷ The

<http://www.guardian.co.uk/Lockerbie/Story/0,2763,668890,00.html> (last visited Sept. 2, 2002).

194. See Diana Johnstone, *Selective Justice in the Hague*, NATION, Sept. 22, 1997 (implying that creating individual responsibility is the main reason behind the establishment of the International Criminal Tribunal for the Former Yugoslavia); see also David Johnson, *Terrorist Attacks on Americans* (describing other terrorist bombing trials before the Lockerbie case), available at <http://www.infoplease.com/spot/terrorism6.html> (last visited Sept. 17, 2002).

195. See THE NUREMBERG TRIAL AND INTERNATIONAL LAW 75 (George Ginsburgs & V.N. Kudriavtsev eds., 1990) (arguing that allegations that defendants have been mistreated while in prison were denied as questions of fact); see also NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS 53, 107 (Wilbourn Benton & George Grimm eds., 1955) (stating that individuals who prepared and conducted the war cannot be prosecuted under international law and that the victorious powers from World War Two created the Nuremberg tribunal and administered its laws); THE TOKYO WAR CRIMES TRIAL 35 (C. Hosoya et al., eds., 1986) (observing that the Tokyo trials used the experience from the Nuremberg trial).

196. OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 323 (1961) (stating that victorious powers became the “provisional, yet firmly established successors of the Hitler regime”).

197. See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 63 (1992) (stating that American and British lawyers, unlike German lawyers, have experience in cross-examination; see also *All the World’s a Stage*, BBC NEWS,

two Lockerbie defendants, however, were each represented by teams of prominent Scottish solicitors and advocates who were well-versed in the relevant Scottish substantive and procedural law.¹⁹⁸ Indeed, the only significantly *ad hoc* aspect of the Lockerbie trial was its location in a third country -- the chief condition insisted on by Libya. Accordingly, complaints of its illegitimacy are less cogent.

CONCLUSION

In retrospect, the Lockerbie “extradition by analogy” agreement probably turned out to be less than fully satisfactory for any party other than Scotland. It was given the opportunity to demonstrate to the on-looking world that Scottish criminal justice is indeed independent, dignified, and scrupulously fair to the accused. On the other hand, the U.S. and U.K. governments spent an inordinate amount of money to convict just one person and may always be subject to accusations that they let the real culprit, the one who ordered the bombing, go free. As for Libya, it may have expected a different verdict, but the Colonel got exactly what he agreed to, an authentic Scottish trial. To the Lockerbie victim families, the end of the criminal trial is just the beginning of their struggle to obtain the truth.¹⁹⁹ Finally, the United Nations, through a combination of actions by the Security Council, ICJ, and Secretariat, achieved something previously thought unachievable, a rapprochement of

Feb. 1, 2001 (describing that the well-known Scottish attorneys William Taylor and Richard Keen represented the defendants), *available at* <http://news.bbc.co.uk/1/hi/world/723699.stm> (last visited Oct. 1, 2002).

198. *See Legal Line-Up*, BBC NEWS, Jan. 24, 2001.

199. *See* Buncombe & Sengupta, *supra* note 158 (stating that according to the families, “the full truth behind the atrocities has not been revealed”); *see also* Gerard Seenan, *Relatives Demand Public Inquiry*, GUARDIAN UNLIMITED, Feb. 1, 2001 (asserting that the conviction of one of the accused does not end the fight of the families of the victims), *at* http://www.guardian.co.uk/uk_news/story/0,3604,431781,00.html (last visited Sept. 2, 2002); *Lockerbie Relatives Push for Answers*, BBC NEWS, Feb. 1, 2001 (stating that the families plan to continue to seek the truth), *at* <http://news.bbc.co.uk/1/hi/world/1148388.stm> (last visited Oct. 1, 2002); Gerard Seenan, *Relatives Say Fight Goes on For Improved Air Security*, GUARDIAN UNLIMITED, Mar. 15, 2002 (reporting that families would like to see Qaddafi meet the U.N. Security Council resolutions), *at* http://www.guardian.co.uk/uk_news/story/0,3604,667592,00.html (last visited Sept. 2, 2002).

sorts between two leading Western powers and one of the most obstinate Third World regimes. However, the Secretary-General may not be pleased at having been reduced, more or less, to the role of mere letter-carrier.²⁰⁰

Perhaps, in time, it will become apparent that the entire Lockerbie criminal trial scenario was *sui generis*, given the peculiarities of the players and the uniqueness of the era. It was the product of a random combination of circumstances unlikely ever to coalesce again. If so, it was still the only viable, legal avenue of approach to a complex problem; it was the best way out. “[G]iven the weird, brutal and opaque nature of Gaddafi’s rule, Annan’s method of calm persuasion may well have been the only way of trying to ensure that some of those believed to be guilty of the terrible crime of Lockerbie were finally brought to justice.”²⁰¹

200. See Pérez de Cuéllar, *supra* note 90, at 75.

201. See SHAWCROSS, *supra* note 26.

ATTACHED LETTER 1

22 August 2000

Excellency,

I am writing with reference to your meeting with the Secretary-General on 24 July 2000 at which the question of the release of the Secretary-General's letter to Colonel Muammar Al-Qadhafi, dated 17 February 1999, was raised. As agreed at the meeting, I have the honour to forward to you a copy of a letter of the Secretary-General on the subject matter, dated 22 August 2000, addressed to H.E. Ambassador Jeremy Greenstock, Permanent Representative of the United Kingdom to the United Nations, who was also present at the meeting.

Yours sincerely,
Hans Corell
Under-Secretary-General
for Legal Affairs
The Legal Counsel

His Excellency
Mr. Richard Holbrooke
Permanent Representative of
the United States of America
to the United Nations
New York

ATTACHED LETTER 2

22 August 2000

Excellency.

I have the honour to refer to our meeting on 24 July 2000 at which you referred to the trial of the two accused before the Scottish Court sitting in the Netherlands. You raised the question of the release, in response to a request by the defense team, of my letter to Colonel Muammar Al-Qadhafi, dated 17 February 1999. Your Mission subsequently provided a copy of the letter on the subject matter, dated 3 April 2000, which had been sent to the Scottish Lord Advocate by one of the Defence Attorneys writing on the instructions of Senior Counsel.

At the outset I should like to emphasize that, in the performance of my responsibilities, I am frequently engaged in exchanges of correspondence with leaders of Member States of the Organization. Unless the parties concerned agree otherwise, such correspondence would not be disclosed to persons external to the Organization because such unilateral disclosure may undermine the atmosphere of trust that must remain between me and the parties concerned.

However, in view of the exceptional circumstances in the present case, in particular the request of the defence team and the fact that Security Council Resolution 1192 (1998) calls upon all States to cooperate with the Scottish Court sitting in the Netherlands, I have no objection to the release of the letter as requested. The understanding is, however, that it is being released without prejudice to the confidentiality of future correspondence with the leaders of Member States and that it is released together with the present letter which provides the necessary clarifications.

His Excellency

Sir Jeremy Greenstock, KCMG

Permanent Representative of the

United Kingdom of Great Britain and

Northern Ireland to the United Nations

New York

In this latter respect, it is important to place on record the circumstances under which the letter to Colonel Muammar Al-Qadhafi was written. Pursuant to Security Council resolution 1192 (1998) of 27 August 1998, the role of the Secretary-General was limited to providing assistance with the transfer arrangements of the two accused to the Scottish court and to nominating international observers. The transfer was successfully implemented after lengthy negotiations which also involved efforts on the part of the Governments of Saudi Arabia and South Africa. During these negotiations the Libyan authorities sought clarifications regarding various aspects of the implementation of the resolution. These requests were conveyed to the parties concerned, namely France, the Netherlands, the United Kingdom, and the United States of America. The information provided by these parties in response to such requests was then conveyed to the Libyan authorities. In response to one of those inquiries and upon receipt of the necessary clarifications provided by the British authorities, on 17 February 1999 I wrote a letter to Colonel Muammar Al-Qadhafi concerning some of the outstanding issues from the point of view of the Libyan Arab Jamahiriya. To the letter was attached an annex where the clarifications provided by the British authorities were presented.

It is also worth noting that given the sensitive nature of matters relating to the implementation of Security resolution 1192 (1998), all the aforementioned parties concerned, including the United Kingdom and the United States, were kept apprised by the United Nations Secretariat of the contents of the correspondence between the United Nations and the Libyan authorities. In the case of my letter to Colonel Muammar A-Qadhafi of 17 February 1999, the United Kingdom and the United States were apprised of the letter and, as it appears from it, confirmed that they shared the understanding reflected in its annex.

Please accept, Excellency, the assurances of my highest consideration.

Kofi A. Annan

ATTACHED LETTER 3

THE SECRETARY-GENERAL

17 February 1999

His Excellency
Colonel Muammar Al-Qadhafi
Leader of the Revolution
Socialist People's Libyan Arab Jamahiriya
Tripoli

Excellency,

I have been greatly encouraged by the reports I have received on the outcome of your recent meetings with the envoys despatched [sic] by the leaders of Saudi Arabia and South Africa. In particular, I was very pleased to learn from President Mandela himself about Your Excellency's letter to him dated 9 February 1999 confirming the understanding reached on outstanding issues.

In pursuance of the understanding reached with the envoys, I attach a document setting forth the relevant details thereof. After reviewing this document, the Governments of the United Kingdom and the United States have confirmed to me that they share the understanding reflected therein. It is now my intention to report this understanding to the Security Council without delay to facilitate the immediate implementation of resolution 1192 (1998).

As Your Excellency is aware, the Security Council is due to undertake, on 26 February 1999, a review of the sanctions imposed on the Libyan Arab Jamahiriya. Hence, it would be most helpful if the practical arrangements already agreed upon between the Libyan legal team and my own Legal Counsel could be set in motion before that date.

Excellency,

I am deeply conscious and appreciative of your own personal efforts in seeking solutions to the outstanding issues. It is heartening, indeed, that the efforts made jointly by all concerned, as well as the

leaders of South Africa and Saudi Arabia, are now about to result in a satisfactory conclusion.

Please accept, Excellency, the assurance of my highest consideration.

(signed)

Kofi A. Annan

Understanding on the Issues outstanding from the point of view of the Libyan Arab Jamahiriya

As provided for in Security Council resolution 1192 (1998) the two persons concerned will be transferred from Libya to the Netherlands and tried under Scottish law before a Scottish court sitting in the Netherlands.

If found guilty, after any necessary appeals process, they will serve their prison sentence in Scotland. If the two are not convicted, they will be free to return to Libya unimpeded.

There is no intention to interview them, or to allow them to be interviewed, about any issue not related to the trial. There will be no deviation from Scottish law which provides that the two persons have the right to refuse to see any police or intelligence officers. The two persons will not be used to undermine the Libyan regime.

The prisoners would be held in a distinct portion of a Scottish prison to provide maximum security. All necessary measures will be taken to ensure the safety and well-being of the two persons, if convicted. This facility will be given a special international designation, and special arrangements will be introduced to provide for a role for the United Nations in monitoring the treatment of the two persons concerned. These arrangements, which will be subject to discussions with the United Nations, will be regularly reviewed by the British Government to ensure that they worked effectively and satisfied the legitimate concerns of all parties.

The two prisoners would have unfettered access to legal and diplomatic representatives. An official Libyan presence in Scotland for that purpose will be allowed. Pursuant to the conditions of imprisonment set out in the relevant Scottish law, religious, health and dietary requirements of the two prisoners would be fully met.

Visits by clerics and the supply of religious books would be arranged.

The two prisoners or their representatives will have the right to make representations to the authorities of the United Kingdom if they consider that some aspect of their place of imprisonment was contrary to humanitarian concerns. Any such representation would be very carefully considered by the United Kingdom authorities.

With reference to the measures set forth in Security Council resolutions 748 (1992) and 883 (1993), these measures shall be suspended immediately if the Secretary-General reports to the Council that the two persons concerned have arrived in the Netherlands for the purpose of trial before the Scottish court sitting in the Netherlands. These measures could only be reimposed by a new decision of the Council taken by an affirmative vote of nine Members of the Council, including the concurring votes of all the Permanent Members.

ATTACHMENT 4

Questions and Answers on the Release of the UN Secretary-General's February 17, 1999 Letter and Annex to Libyan Leader Mu'ammarr Qadhafi Prepared by the Foreign and Commonwealth Office, London, and the U.S. Department of State

Q - Why didn't the governments of the U.S. and UK release the UN Secretary-General's letter sooner?

A - THE GOVERNMENTS OF THE UNITED KINGDOM AND UNITED STATES STRONGLY PUSHED FOR RELEASE OF THE DOCUMENTS TO DEMONSTRATE THAT THERE WAS NO SECRET DEAL, BUT IT WAS NOT OUR DOCUMENT TO RELEASE; IT WAS FOR THE UNITED NATIONS TO RELEASE. U.N. SECRETARY GENERAL KOFI ANNAN HAS NOW RELEASED THE DOCUMENT. WHILE THE GOVERNMENTS OF THE U.S. AND U.K. STRONGLY ENCOURAGED THIS DECISION, THEY RESPECTED THE SECRETARY GENERAL'S PREROGATIVES.

— THE SECRETARY GENERAL'S DECISION TO RELEASE THE DOCUMENT SHOULD PUT AN END TO GROUNDLESS SPECULATION AND SATISFY ALL PARTIES THAT THERE HAVE BEEN NO HIDDEN SIDE AGREEMENTS.

Q - Does the annex set out special arrangements for the Libyan accused?

A - NO, THE ANNEX COVERS CLARIFICATIONS OF THE CRIMINAL JUSTICE SYSTEM IN SCOTLAND AND THE RIGHTS AND SAFEGUARDS WHICH ARE ENJOYED BY THE ACCUSED IN A CRIMINAL TRIAL.

Q - Is the promise that the two suspects would not be used to undermine the Libyan regime an assurance that the prosecution will not target higher-ranking Libyan officials?

A - NO, THE PHRASE IN QUESTION HAS TO BE READ IN CONTEXT - IT IS PART OF A PARAGRAPH THAT CLARIFIES THE LIBYAN SUSPECTS' RIGHT TO REFUSE TO SEE ANYONE. THIS PHRASE SPELLS OUT THIS RIGHT IN RESPONSE TO LIBYAN CONCERN THAT THE U.S. AND U.K. INTENDED TO SOMEHOW COERCE THE TWO SUSPECTS IN

AN EFFORT TO UNDERMINE THE LIBYAN REGIME. THE RIGHT TO REMAIN SILENT IS AFFORDED TO ALL SUSPECTS TRIED UNDER SCOTTISH DOMESTIC LAW. U.S. LAW AFFORDS THE SAME PROTECTIONS.

— THE PHRASE IN QUESTION ALSO MAKES CLEAR THAT THIS TRIAL IS AN INDEPENDENT, LEGITIMATE TRIAL OF THE TWO ACCUSED. THE SCOTTISH JUDICIAL PROCESS CANNOT BE PRESSURED BY GOVERNMENTS FOR POLITICAL PURPOSES. THAT WOULD BE ABSOLUTELY CONTRARY TO THE BRITISH CONSTITUTION. THE TRIAL UNDERWAY IN THE NETHERLANDS IS NOT A SHOW TRIAL INTENDED TO “UNDERMINE” THE LIBYAN REGIME.

— THE STATEMENT DOES NOT LIMIT IN ANY WAY THE PROSECUTORS’ FREEDOM TO FOLLOW THE EVIDENCE WHEREVER IT LEADS.

— AS LORD ADVOCATE COLIN BOYD STATED, THE SECRETARY GENERAL’S LETTER, DOES NOT INHIBIT HIM IN ANY WAY FROM THE PROSECUTION OF THIS CRIME. HE HAS PUBLICLY MADE CLEAR THAT HE CONSIDERS IT HIS DUTY TO FOLLOW ANY EVIDENCE THAT COMES TO LIGHT.

Q - If the two suspects decided to cooperate with the prosecution and provide evidence against higher-ranking Libyan officials, would the phrase in question prevent the prosecutors from indicting such officials, on the grounds that this would “undermine” the Libyan regime?

A - NO, THE STATEMENT IN QUESTION DOES NOT IN ANY WAY LIMIT THE PROSECUTION’S ABILITY TO FOLLOW THE EVIDENCE WHEREVER IT LEADS.

Q - If there was no secret deal, why did the governments of the U.K. and U.S. delay getting this letter released, or why didn’t they unilaterally release it?

A - IT WAS NOT FOR THE U.K. OR THE U.S. TO RELEASE THE SECRETARY GENERAL’S CORRESPONDENCE. ONLY THE SECRETARY-GENERAL CAN RELEASE HIS OWN

CORRESPONDENCE, ALTHOUGH THE U.S. and U.K. REQUESTED THAT HE DO SO.

— CORRESPONDENCE BETWEEN THE SECRETARY-GENERAL AND LEADERS OF MEMBER STATES OF THE U.N. IS SENSITIVE. UNILATERAL DISCLOSURE CAN UNDERMINE THE ATMOSPHERE OF TRUST BETWEEN THE UNSYG AND RECIPIENTS OF HIS CORRESPONDENCE. WE RESPECTED THE RIGHT OF THE SECRETARY-GENERAL TO KEEP SUCH DOCUMENTS CONFIDENTIAL.

— THE GOVERNMENTS OF THE U.K. AND U.S. INITIALLY SOUGHT RELEASE OF THE DOCUMENTS IN LIGHT OF THE LONG-STANDING WISHES OF THE FAMILIES. MORE RECENTLY, ONCE THE LORD ADVOCATE AND DEFENSE SAID THAT THEY WOULD PREFER THE LETTER AND ANNEX TO BE RELEASED, THE GOVERNMENTS OF THE U.S. AND U.K. DECIDED TO APPROACH THE SECRETARY-GENERAL AGAIN. WE SAID THAT WE HOPED HE WOULD RELEASE THE CORRESPONDENCE IN THESE EXCEPTIONAL CIRCUMSTANCES, AND HE AGREED.

AGAIN, THIS IS A UNIQUE CIRCUMSTANCE, AND WE COMMEND THE SECRETARY-GENERAL'S DECISION.