

# **Summary and Addendum: Report of the OAU Commission of Jurists on the Lockerbie Case**

**Presented to the Summit of OAU Heads of State and Government Held in Durban, South Africa, 8-10 July 2002**

**By the Chairman of the Commission, Hon. Justice Ben Hlatshwayo**

Your Excellency Mr. Chairman, Your Excellencies Heads of State and Government, Excellencies, Distinguished Guests, Ladies and Gentlemen!

It is a great honour and privilege for me to present to you, on behalf of the OAU Commission of Jurists on the Lockerbie Case, the Commission's report – a summary and addendum to which was handed to the Secretariat for distribution. Therefore, I shall be brief and complete my presentation within the allocated time. If I succeed in doing so, it will not be because of any instructions to that effect from my President as an earlier speaker revealed in his case – His Excellency President Robert Mugabe does not give instructions to judges! However, if I fail, I still hope Mr. Chairman that your colleague, His Excellency President Robert Mugabe, will nonetheless bail me out.

- 1.0 The Organization of African Unity (OAU) Commission of Jurists on the Lockerbie case was appointed "to follow up on all aspects related to the legal proceedings" of the Lockerbie case in line with the decision of the Fifth Extraordinary Session of the OAU Assembly of Heads of State that took place at Syrte, Libya on 2 March 2001 (EAQHG Dec 3 (v)), which was reiterated at the 37th Ordinary Session of the Assembly held in Lusaka, Zambia, from 9-11 July, 2001 (AHG/Dec.168 XXXVII). The Commission started its work on 8 December 2001.
- 1.1 The composition of the Commission of Jurists was based on the Member States Committee of Five on Lockerbie, previously set up by the OAU and consisting of Zimbabwe (Chairman), Cameroon, Ghana, Tunisia and Uganda who were requested to provide a member each to serve on the Commission. The Commission met in Addis Ababa, Ethiopia, from 8 December 2001 to 18 January 2002 under the chairmanship of High Court of Zimbabwe judge, the Honourable Mr. Justice Ben HLATSHWAYO, with the following as members: – Professor Henrietta J.A.N. MENSA-BONSU of the Republic of Ghana (rapporteur); – Dr Zouheir MDHAFFAR of the Republic of Tunisia; and – Mr. Peter C. R. KABATSI of the Republic of Uganda. – No nominee from the Republic of Cameroon joined the Commission.
- 1.2 The Lockerbie case arose out of the December 21, 1988 crash of PANAM flight 103 over Lockerbie, Scotland, in which 259 persons aboard and 11 on the ground were killed. The crash was later proved to have been caused by a bomb planted on board the aircraft. Nearly three years later in November 1991, Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah – both Libyan nationals – were indicted for the offence by Scottish authorities. The accused persons were subsequently tried by a special Scottish Court sitting at Kamp van Zeist, the Netherlands from 3 May 2000 to 31 January 2001. The trial resulted in the acquittal of Al Amin Khalifa Fhimah and the conviction of Abdelbaset Ali Mohmed Al Megrahi.

- 1.3 In the course of its work, the Commission became aware that the appeal of the case was going to be heard beginning 23 January, 2002. Consequently, it resolved to expedite the production of the report and submit it to the Secretary-General before that date in order to make it available before the commencement of the appeal. The Commission also recommended that its Chairman be facilitated to attend and observe the appeal proceedings and submit an addendum to its report to the Secretary-General. The Commission duly submitted its report on 18 January, 2002.
- 1.4 After analysing the judgment in depth with reference to both the Scottish criminal law and procedure as well as universally accepted principles of fair trial, the Commission arrived at the following conclusions: (i) The entire conviction was based upon flawed premises. (ii) The judgement violated the general principles of criminal law and procedure that any reasonable doubt should inure to the benefit of the accused. (iii) The judgement was characterised by strained arguments and inadequate proof of the vital elements. (iv) On important occasions in the judgement, the burden of proof appeared to have been reversed to the prejudice of the defence. (v) The link between the accused and the commission of the crime was at best tenuous, and at worst non-existent.
- 1.5 In the circumstances, the Commission expressed the view that the appellate court ought to allow the appeal, quash the conviction, set aside the sentence and discharge the appellant.
- 2.0 The undersigned observed the appeal proceedings of the Scottish High Court of Judiciary at Kamp van Zeist in the Netherlands from January 23 to March 14 2002. He was present at the announcement of the appeal decision upholding the conviction on March 14.
- 2.1 He met and consulted with other international observers, viz., Mrs. Hairat A. Balogun (OAU/NAM), Professor Hans Koechler (International Progress Organization), Dr. Awad Al-Hassan Al-Nour (League of Arab States), and Mr. Henk Beerenboom (European Union).
- 2.2 In line with the Commission's terms of reference and recommendations, the undersigned met with, and made the Commission's report available to, the appellant's defence team, specifically Mr. Ibrahim Legwell, head of the Libyan defence team, and Mr. William Taylor QC, appellant's lead Counsel. The Commission's report was well-received by the defence team who found it insightful and helpful to them in the preparation and presentation of the appellant's case. The Commission's findings were also reported upon by the widely circulating Scottish Sunday Herald on February 10 2002 in a feature article headed "Lockerbie conviction 'legally indefensible'" and co-written by Ian Ferguson, a respected journalist and leading authority on the Lockerbie case, and Neil Mackay.
- 2.3 The undersigned, together with Dr. Elnour met with the appellant, Mr. Al Megrahi, and inspected conditions of his detention on February 4, 2002. The visit was organised by the Scottish Court Service, which handled all administrative aspects of the appeal case and the requirements of the observers efficiently and professionally. Mr. Megrahi was in very high spirits as, just the previous day, he had received a telephone call from the former South African President, His Excellency Mr. Nelson Mandela, and the appellant fondly shared with us the high points of their conversation which had cheered him so much. He was also looking forward to a positive outcome to his appeal. He told us that he expected the

application of a "minimum level of justice", free from "suspicions and speculations" to lead to his acquittal and that any doubts that remained would be interpreted in his favour, as required by law. He had also read the Commission's report.

- 2.4 Mr. Al Megrahi, was concerned, though, that differences in culture and society probably led to misinterpretation or failure by the court to appreciate certain vital elements of the case like the situation in Libya in 1988 when the border with Egypt was closed and international air flights prohibited, leaving Malta as one of the few places Libyans could go to for business and shopping, oftentimes on one-day trips. He felt that if the trial court been alive to these facts it probably would not have placed so much reliance for his conviction on his alleged travel on a false passport to Malta on the day the bomb suitcase was allegedly planted at Luqa airport. [The judges made incisive and inquisitive questions and comments about the unlikelihood of Malta's Luqa airport as against London and Frankfurt being the point at which the bomb suitcase was infiltrated. In particular Lord Osborne questioned the defence theory of where and how the bomb was loaded onto the airliner noting that the Maltese baggage records countered a key defence argument. It was therefore surprising that the decision to dismiss the appeal reached by the five appeal judges was unanimous. The only explanation for this is that the appeal judges "chose a kind of 'evasive' strategy by not scrutinizing the argument of the trial court in regard to its plausibility and logical consistency, thus not questioning at all the arbitrariness of the evaluation of the evidence by the trial judges, and not paying adequate attention to new evidence presented during the appeal – an attitude of effective denial of responsibility that made the entire process a highly formal, artificial and abstract undertaking not related to the search for truth (an essential requirement of justice) and rendered the appeal process virtually meaningless". (Koechler, *infra*, para 26)]. The issue of cultural differences was also one of the few points of concern Al Megrahi expressed regarding his defence team, which he was otherwise happy with.
- 2.5 What the appellant referred to above as "differences in culture and society" is a fundamental problem of the setting of this trial and the terms of submission to the court. The expensive and unusual arrangements where the accused persons were tried by three Scottish judges and the appeal heard by a panel of five Scottish judges sitting in a foreign country (Netherlands) was meant to remove the conduct of the entire trial proceedings away from "direct political and/or public-opinion influence that may have been present in a country where there was likely to exist a highly charged political climate in regard to that particular criminal case" as noted by Koechler, Report on the appeal proceedings March 26 2002, para. 23, who further comments thus: "This extraterritorial arrangement (based on a consensus reached among the concerned United Nations member states so as to solve the dispute over the Lockerbie issue) was meant to 'detach' the conduct of the court proceedings from eventual public and/or political pressure in Scotland. That was the rationale of the extraterritorial arrangement. In the spirit of this agreement, the judges should have held their deliberations on the premises of the Scottish Court in the Netherlands. However, for the consideration of their decision during the rather long period from 8 February to 13 March 2002, they retreated to Scotland, which countered the intentions expressed in the setup of the Court in the Netherlands" (*ibid*).
- 2.6 Furthermore, the procedure of the special court, both during the trial and at the appeal stage was to take long week-end breaks from Friday mornings to the following Tuesdays and the judges would retreat back to Scotland. The actual court arrangements themselves were not adequately sensitive to the culture and religion of the accused person in failing, for example

to leave Friday, a Moslem day of prayer, when as already noted it created long weekends to enable judges and staff to spend some time home. There was room within the authority of the court itself to allow Libyan defence lawyers the right of audience to deal with certain aspects of the evidence, but this was not done. Ideally, the terms of submission could have been trial before a multi-cultural international jury presided over by a Scottish judge. As it turned out, the terms of submission and the actual arrangements for the trial did compromise Mr. Al Megrahi's defence, as did the defence tactics and strategy of not applying for no case to answer at the conclusion of the prosecution case in respect of Mr. Al Megrahi, not putting Al Megrahi on the stand to tell his own story and of not pursuing the special defence aggressively and finally on appeal not arguing "unreasonableness" of trial court findings and lack of fair trial – all of which matters the appellant appeared perplexed about.

- 2.7 His other concerns were: (i) That the press revelations that the Maltese shopkeeper and key prosecution witness, Tony Gauci, was given "treats" – trips to America as a guest of the US Justice Department and sumptuous holidays in Scotland – by the Scottish and American investigating officials confirmed his fears that there was a concerted effort to get him at all costs. He wondered how Gauci's evidence could have been believed by the trial court when he had given wrong descriptions of his (Al Megrahi's) height, age and complexion, was wrong about the whether conditions on the day he claims to have seen him and his references to Christmas decorations and a soccer game did not fit in with that day. Over and above all this, the appellant swore repeatedly that he "never saw that Maltese man in my life except in court." (ii) That two American people in the court gave papers to the Crown. [This was with reference to two representatives of the US Department of Justice who during both the trial and the appeal were present on the side of the prosecution team and were observed passing documents and generally giving support to the prosecution. This matter was raised by Dr. Koechler, one of the international observers, with the Crown Office, which replied that it is a matter of the court itself to regulate who should be present, but explained that the High Court of the Justiciary has "for long accepted that it is a matter for the Lord Advocate and Crown Counsel whom they choose to have in court in their support." The undersigned also sought clarification on the matter from prosecution Counsel, A P Campbell QC and Turnbull QC and expressed the view which he shared with Dr. Koechler that the presence of the two US representative introduced into both the trial and appeal proceedings a "political element that should have been avoided".] (iii) There appeared to be no honesty on the issue of sanctions in that they were merely suspended and not lifted. iv. Since the release of his co-accused he had been held alone in the prison at Kamp Zeist for over a year and his conditions were now similar to some form of solitary confinement, a condition probably not anticipated in the original arrangements. However, he said that he was well-treated and that the governor and his staff were "95 percent good."
- 2.8 Soon after the Court of Appeal pronounced judgment on 14 March 2002 rejecting the appeal, the undersigned met a second time with Mr. Al Megrahi in the company of other international observers. Most of us among the international observers were still stunned by the dismissal of the appeal. Mr. Al Megrahi himself, although shaken and distressed, was calm and collected as he accepted our messages of support and as we, together with him, explored his now extremely limited options. Within hours of the appeal court decision, he was whisked away to Scotland to serve a life sentence of at least 20 years in a Scottish cell.
3. The legal options which are now available to Mr. Al Megrahi will take too long to prosecute and their outcome is highly uncertain. He could appeal to the Judicial Committee of the

Privy Council on the argument that the Crown in the Lockerbie case acted in breach of his rights as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms. If he still does not get satisfaction after exhausting the United Kingdom judicial processes, the case might qualify for review by the European Court for Human Rights. There is also a possibility of launching what is termed an 'Andersen Appeal' on the basis that he did not get adequate legal representation, but it will take at least two years before such a procedure can commence. Finally, the case may still be referred to the Scottish Criminal Review Commission on the basis that there has been a miscarriage of justice in the legal process, although such procedures are normally used in the pre-appeal stages and in this case an earlier attempt to invoke them was unsuccessful.

4. Thus, the chances for a speedy legal redress are very slim. It is true that some of the cases involving miscarriage of justice in the United Kingdom, have been successfully reviewed after the affected persons have spent many years in prison. However, this has only been possible because of sustained local public pressure and campaigns. In the case of Mr. Al Megrahi, local public pressure is unlikely to be sustained and might even be hostile. Any campaigns for the establishment of the truth of how the Lockerbie tragedy really occurred are likely to fizzle out with time especially once the issue of compensation for relatives of victims would have been settled. Therefore, sustained international pressure and campaigns are extremely vital and urgently required to ensure a just and equitable solution to the Lockerbie case.
5. There are numerous flaws in the reasoning which led to both the initial conviction and the subsequent dismissal of the appeal and numerous reasons why Mr. Al Megrahi's conviction should be quashed and set aside we respectfully submit, but the most fundamental one, as argued in the Commission's main report, is that the case against him was simply not made out.
6. Finally, on behalf of the Commission, I would like to express our gratitude to the OAU Assembly of Heads of State and Government for setting up the Commission, to the individual home governments who nominated the commissioners to fulfill this high assignment, to the UN Secretary-General, Mr. Kofi Annan for the undersigned's nomination as international observer, to the OAU Secretary-General, Mr. Amara Essy, and members of his staff at the Secretariat, for all the courtesies and assistance that was extended to the Commission during the period of its work.

The Hon. Justice Ben Hlatshwayo  
Chairman, OAU Commission of Jurists on the Lockerbie Case