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COMMISSION DES DROITS DE L'HOMME
Cinquante-huitième session
Point 11 *d* de l'ordre du jour provisoire

DROITS CIVILS ET POLITIQUES, NOTAMMENT LES QUESTIONS DE L'INDÉPENDANCE DU POUVOIR JUDICIAIRE, DE L'ADMINISTRATION DE LA JUSTICE ET DE L'IMPUNITÉ

Lettre datée du 17 octobre 2001, adressée au Haut-Commissaire des Nations Unies pour les droits de l'homme par le Représentant permanent de la Jamahiriya arabe libyenne auprès de l'Office des Nations Unies à Genève

J'ai l'honneur de vous transmettre ci-joint les textes, dans leur version originale et leur traduction en arabe, des documents ci-après:

i) Rapport et évaluation concernant le procès de Lockerbie instruit par le Tribunal écossais spécial siégeant aux Pays-Bas, à Kamp van Zeist, établis par M. Hans Köchler, professeur d'université, observateur international de l'Organisation internationale pour le progrès, désigné par le Secrétaire général de l'ONU, Kofi Annan, sur la base de la résolution 1192 (1998) du Conseil de sécurité.

ii) Arrêt rendu le 13 mars 2001 par la chambre criminelle de la Cour de cassation de la République française, au Palais de justice à Paris.

Je vous serais vivement reconnaissant de bien vouloir faire distribuer les documents ci-joints* à tous les membres de la Commission des droits de l'homme en tant que documents officiels de la cinquante-huitième session de la Commission, au titre de l'alinéa *d* du point 11 de l'ordre du jour provisoire intitulé «Droits civils et politiques», notamment les questions de «l'indépendance du pouvoir judiciaire, l'administration de la justice, l'impunité».

L'Ambassadeur,
Représentant permanent
(*Signé*) Najat **AL-HAJJAJI**

* Reproduits tels quels, dans la langue originale.

Annex

Report on, and evaluation of, the Lockerbie Trial conducted by the special Scottish Court in the Netherlands at Kamp van Zeist by Dr. Hans Köchler, University Professor, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998).

Santiago de Chile, 3 February 2001/P/HK/17032

The undersigned observed the proceedings of the High Court of Justiciary at Kamp Zeist (Netherlands) since the beginning of 5 May 2000 until the announcement of the verdict and sentence in the causa *Her Majesty's Advocate v Abdelbasset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* on 31 January 2001. He regularly attended the sessions of the Court repeatedly met with the prosecution and defense teams, interviewed the Registrar and staff members of the Scottish Court Service at Kamp van Zeist , inspected HM Prison Zeist, met with the Governor and Deputy Governor of HM Prison Zeist and with the Chief of the Scottish Police at Kamp van Zeist. He interviewed the two accused Libyan nationals at the beginning of the trial and again – in separate meetings – after the passing of the verdict and sentence on 31 January 2001. All meetings were arranged through the Scottish Court Service. The undersigned further had access to the complete transcripts of the Court's proceedings and exchanged notes with the additional international observer of the International Progress Organization, Mr. Robert Thabit Esq.

On the basis of his first exploratory visit to Kamp van Zeist and of the interview with the two accused, the undersigned, in May 2000, sent a confidential message to the Secretary General of the United Nations. He made no public comments during the entire period of the trial and did no seek a meeting with the panel of judges, Lord Sutherland, Lord Coulsfield and Lord Maclean. He exercised his observer mission on the basis of respect of the constitutional independence of the judiciary and interpreted his mission – in absence of any specific description of the tasks of international observers in the respective Security Council resolution - in the sense of evaluating the aspects of due process and fairness of the trial. He reached agreement on the nature of this observer mission with the additional observer of the International Progress Organization, Mr. Robert Thabit.

Based on his observations during the entire period of the trial and on the information obtained in the numerous meetings with the protagonists of the trial mentioned above, the undersigned presents the following evaluation in regard to the aspect of due process and the question of the fairness of the trial :

1. All administrative aspects of the trial were handled with great care, efficiency and professionalism by the staff of the Scottish Court Service at Kamp van Zeist. Apart from minor problems with simultaneous interpretation at the beginning of the trial, there were no major weaknesses that might have affected the fairness of the proceedings. The problems of interpretation were solved in a satisfactory manner. The Scottish Court Service did its best to assist the undersigned in the accomplishment of his observer mission.

2. The circumstances of detention of the two accused at Her Majesty's Prison Zeist were in conformity with national legal requirements and international legal and human rights standards. According to the information given by the accused in a private interview with the undersigned, no people had access to them without their consent. In particular, the medical services and the medical care for the second accused (who needs permanent medication) were up to the required standard. Upon their special request, the undersigned sent a note about his meeting with the accused in May 2000 and conveyed their concerns in regard to certain political aspects of the United Nations arrangements and conditions for their coming to the Netherlands to the Secretary General of the United Nations. The Governor of HM Prison Zeist forwarded the undersigned's confirmation note on the forwarding of this message to the two accused. The Prison administration was fully co-operative in regard to the undersigned's requests in the exercise of his observer mission.

3. The extraordinary length of detention of the two suspects/accused from the time of their arrival in the Netherlands until the beginning of the trial in May 2000 has constituted a serious problem in regard to the basic human rights of the two Libyan nationals under general European standards, in particular those of the European Convention on Human Rights. In general, the highly political circumstances of the trial and special security considerations related to the political nature of the trial may have had a detrimental effect on the rights of the accused, in particular in regard to the duration of administrative detention.

4. As far as the material aspects of due process and fairness of the trial are concerned, the presence of at least two representatives of a foreign government in the courtroom during the entire period of the trial was highly problematic. The two state prosecutors from the US Department of Justice were seated next to the prosecution team. They were not listed in any of the official information documents about the Court's officers produced by the Scottish Court Service, yet they were seen talking to the prosecutors while the Court was in session, checking notes and passing on documents. For an independent observer watching this from the visitor's gallery this created the impression of "supervisors" handling vital matters of the prosecution strategy and deciding, in certain cases, which documents (evidence) were to be released in open court or what parts of information contained in a certain document were to be withheld (deleted).

5. This serious problem of due process became evident in the matter of the CIA cables concerning one of the Crown's key witnesses, Mr. Giaka. Those cables were initially dismissed by the prosecution as "not relevant" but proved to be of high relevance when finally (though only partially) released after a move from the part of the defense. Apart from this specific aspect – that seriously damaged the integrity of the whole legal procedure – , it has become obvious that the presence of representatives of foreign governments in a Scottish courtroom (or any courtroom, for that matter) on the side of the prosecution team jeopardizes the independence and integrity of legal procedures and is not in conformity with the general standards of due process and fairness of the trial. As has become obvious to the undersigned, this presence has negatively impacted on the Court's ability to find the truth; it has introduced a political element into the proceedings in the courtroom. This presence should never have been granted from the outset.

6. Another, though less serious, problem in regard to due process was the presence of foreign nationals on the side of the defense team in the courtroom during the whole period of the trial. Apart from the presence of an Arab interpreter (which was perfectly reasonable under aspects of fairness and efficiency of the proceeding), the presence of a Libyan lawyer who had held high posts in the Libyan government and who represented the Libyan Jamahiriya in its case v the United States and the United Kingdom at the International Court of Justice gave the trial a political aspect that should have been avoided by decision of the panel of judges. Though Mr. Maghour acted officially as Libyan defense lawyer for the accused Libyan nationals and although he was not seen by the undersigned as interacting with the Scottish defense lawyers during court proceedings, he had to be perceived as a kind of liaison official in a political sense. It has to be noted that the original Libyan defense lawyer, Dr. Ibrahim Legwell (chosen by the two suspects long before their transfer to the Netherlands) , resigned under protest when the Libyan government introduced Mr. Maghour as new defense lawyer for the two accused. In sum , the presence of *de facto* governmental representatives of both sides in the courtroom gave the trial a highly political aura that should have been avoided by all means, at least as far as the actual proceedings in the courtroom were concerned. Again, as to the undersigned's knowledge, the presence of foreign nationals on the side of the defense team was mentioned in no official briefing document of the Scottish Court Service.

7. It was a consistent pattern during the whole trial that – as an apparent result of political interests and considerations – efforts were undertaken to withheld substantial information from the Court. One of the most obvious cases in point was that of the former Libyan double agent, Abdul Majid Giaka, and the CIA cables related to him , some of the cables were finally produced after the insistence from the part of the defense, some were never made available. The Court was apparently content with this situation, which is hard to understand for an independent observer. It may never be fully known up to which extent relevant information was hidden from the Court. The most serious case, however, is related to the special defense launched by defense attorneys Taylor and Keen. It was officially stated by the Lord Advocate that substantial new information had been received from an unnamed foreign government relating to the defense case. The content of this information was never revealed, the requested specific documents were never provided by a foreign government. The alternative theory of the defense – leading to conclusions contradictory to those of the prosecution – was never seriously investigated. Amid shrouds of secrecy and "national security" considerations, that avenue was never seriously pursued – although it was officially declared as being of major importance for the defense case. This is totally incomprehensible to any national observer. By not having pursued thoroughly and carefully an alternative theory, the Court seems to have accepted that the whole legal process was seriously flawed in regard to the requirements of objectivity and due process.

8. As a result of this situation. the undersigned has reached the conclusion that foreign governments or (secret) governmental agencies may have been allowed, albeit indirectly, to determine, to a considerable extent, which evidence was made available to the Court.

9. In the analysis of the undersigned, the strategy of the defense team by suddenly dropping its "special defense" and canceling the appearance of almost all defense witnesses (in spite of the defense's ambitious announcements made earlier during the trial) is totally incomprehensible; it puts into question the credibility of the defense's actions and motives. In spite of repeated request of the undersigned, the defense lawyers were not available for comments on this particular matter.

10. A general pattern of the trial consisted in the fact that virtually all people presented by the prosecution as key witnesses were proven to lack credibility to a very high extent, in certain cases even having openly lied to the Court. Particularly as regards Mr. Bollier and Mr. Giaka, there were so many inconsistencies in their statements and open contradictions to statements of other witnesses that the resulting confusion was much greater that any clarification that may have been obtained from parts of their statements. Their credibility as such was shaken. It seems highly arbitrary and irrational to choose only parts of their statements for the formulation of a verdict that requires certainly "beyond any reasonable doubt".

11. The air of international power politics is present in the whole verdict of the panel of judges. In spite of the many reservations in the Opinion of the Court explaining the verdict itself, the guilty verdict in the case of the first accused is particularly incomprehensible in view of the admission by the judges themselves that the identification of the first accused by the Maltese shop owner was "not absolute" (formulation in Par.89 of the Opinion) and that there was a "mass of conflicting evidence" (*ibid.*). The consistency and legal credibility of the verdict is further jeopardized by the fact that the judges deleted one of the basic elements of the indictment, namely the statement about the two accused having induced on 20 December 1988 into Malta airport the suitcase that was supposedly used to hide the bomb that exploded in the Panam jet.

12. Furthermore, the Opinion of the Court seems to be inconsistent in a basic respect; while the first accused was found "guilty", the second accused was found "not guilty". It is to be noted that the judgement, in the latter's case, was <u>not</u> "not proven", but "not guilty". This is totally incomprehensible for any national observer when one considers that the indictment in its very essence was based on the joint action of the two accused in Malta.

13. The Opinion of the Court is exclusively based on circumstantial evidence and on a series of highly problematic inferences. As to the undersigned's knowledge, there is not one single piece of material evidence linking the two accused to the crime. In such a context, the guilty verdict in regard to the first accused appears to be arbitrary, even irrational. This impression is enforced when one considers that the actual wording of the larger part of the Opinion of the Court points more into the direction of a "not proven" verdict.

The arbitrary aspect of the verdict is becoming even more obvious when one considers that the prosecution, at a rather late stage of the trial decided to"split" the accusation and to change the very essence of the indictment by renouncing the identification of the second accused as a member of Libyan intelligence so as to actually disengage him from the formerly alleged collusion with the first accused in the supposed perpetration of the crime. Some light is shed on this procedure by the otherwise totally incomprehensible "not guilty" verdict in regard to the second accused.

14. This leads the undersigned to the suspicion that political considerations may haven been overriding a strictly judicial evaluation of the case and thus may have adversely affected the outcome of the trial. This may have a profound impact on the evaluation of the professional reputation and integrity of the panel of three Scottish judges. Seen from the final outcome, a certain coordination of the strategies of the prosecution, of the defense, and of the judges' considerations during the later period of the trial is not totally unlikely. This however, – when actually proven – would have a devastating effect on the whole legal process of the Scottish Court in the Netherlands and on the legal quality of its findings.

15. In the above context, the undersigned has reached the general conclusion that the outcome of the trial may well have been determined by political considerations and may to a considerable extent have been the result of more or less openly exercised influence from the part of actors outside the judicial framework – facts which are not compatible with the basic principle of the division of powers and with the independence of the judiciary, and which put in jeopardy the very rule of law and the confidence citizens must have in the legitimacy of state power and the functioning of the state's organs – whether on the traditional national level or in the framework of international justice as it is gradually being established through the United Nations Organisation.

16. On the basis of the above observations and evaluation, the undersigned has – to this great dismay – reached the conclusion that the trial, seen in its entirety, was not fair and was not conducted in an objective manner. Indeed there are many more questions and doubts at the end of the trial than there were at its beginning. The trial has effectively created more confusion than clarity and no national observer can make any statement on the complex subject matter " Beyond any reasonable doubt". Irrespective of this regrettable outcome, the search for the truth must continue. This is the requirement of the rule of law and the right of the victims' families and of the international public.

17. The international observer may draw one general conclusion from the conduct of the trial, which allows to formulate a general maxim applicable to judicial procedures in general : proper judicial procedure is simply impossible if political interests and intelligence services – from which ever side succeed in interfering in the actual conduct of a court. We should remember the wisdom of Immanuel Kant who – in his treatise on eternal peace " Zum ewigen Frieden), elaborating on the essence of the rule of law – unambiguously stated that secrecy is never compatible with a republican system determined by the rule of law. The purpose of intelligence services – from whichever side – lies

in secret action and deception, not in the search for truth. Justice and the rule of law can never be achieved without transparency.

18. Regrettably – through the conduct of the Court, disservice has been done to the important cause of international criminal justice. The goals of criminal justice on an international level cannot be advanced in a context of power politics and in the absence of an elaborate division of powers. What is true on the national level, applies to the transnational level as well. No national court can function if it has to act under pressure from the executive power and if vital evidence is being withheld from it because of political interests. The realities faced by the Scottish Court in the Netherlands have demonstrated this truth in a very clear and dramatic fashion – the political impact stemming, in this particular case, from highly complex web of national and transnational interests related to the interaction among several major actors on the international scene.

19. The undersigned would like to express his humble opinion – or hope, for that matter – that an appeal , if granted, will correct the deficiencies of the trial as explained above. It goes without saying that all will depend on the integrity and independence of the five judges of an eventual Court of Appeal operating under Scottish law.

20. The above evaluation should in no way be interpreted as to diminish the idealistic contribution and commitment of so many civil servants of the Scottish Court Service and the Scottish police authorities who guaranteed the smooth functioning of the whole court operation at Kamp van Zeist under difficult and truly extraordinary circumstances.

The undersigned would like to emphasize that the above remarks constitute a personal evaluation himself alone and that he is only bound by the dictates of his conscience; as an international citizen committed to the goals and principles of the United Nations Charter, he does not accept any pressure or influence from the part of any government, political party or interest group.

Truth in a matter of criminal justice has to be found through a transparent inquiry that will only be possible if all considerations of power politics are put aside. The rule of law is not compatible with the rules of power politics: justice cannot be done unless in complete independence, based on reason and the unequivocal commitment to basic human rights.

Dr. Hans Köchler

No Z 00-87.218 FS-P-F

DF

No 1414

13 Mars 2001

M. COTTE président,

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANÇAIS

La COUR DE CASSATION, CHAMBRE CRIMINELLE, en son audience publique tenue au Palais de justice à PARIS, a rendu l'arrêt suivant :

Statuant sur le pourvoi formé par :

- LE PROCUREUR GENERAL PRES LA COUR D'APPEL DE PARIS,

contre l'arrêt de la chambre d'accusation de ladite cour d'appel, en date du 20 octobre 2000, qui a confirmé l'ordonnance du juge d'instruction disant y avoir lieu à informer sur la plainte de l'association SOS ATTENTATS et de Béatrice BOERY, épouse CASTELNAU d'ESNAULT, contre Mouammar KHADAFI, du chef de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste :

La COUR, statuant après débats en l'audience publique du 27 février 2001 où étaient présents : M. Cotte président, Mme Chanet conseiller rapporteur, MM. Joly, Le Gall, Farge, Mme Anzani, M. Pelletier, Mme Mazars, MM. Palisse, Arnould, Mme Koering-Joulin, M. Corneloup conseillers de la chambre, M. Despornes, Mme Karsenty, M. Sassoust, Mme Caron conseillers référendaires ;

Avocat général : M. Launay ;

Greffier de Chambre : Mme Nicolas ;

Sur le rapport de Mme le conseiller CHANET, les observations de Me BOUTHORS et de la société civile professionnelle PIWNICA et MOLINIÉ, avocats en la Cour et les conclusions de M. l'avocat général LAUNAY ;

Vu l'ordonnance du président de la chambre criminelle en date du 22 novembre 2000 prescrivant l'examen immédiat du pourvoi ;

Vu les mémoires produits en demande et en défense ;

Sur le moyen unique de cassation, pris de la violation du droit pénal coutumier international relatif à l'immunité de juridiction reconnue aux chefs d'Etat étrangers ;

Vu les principes généraux du droit international ;

Attendu que la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuite devant les juridictions pénales d'un Etat étranger ;

Attendu que l'association SOS Attentats et Béatrice Castelnau d'Esnault ont porté plainte avec constitution de partie civile du chef de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste, contre Mouammar Khadafi, chef d'Etat en exercice de la Jamahiriya Arabe Libyenne, à qui elles reprochent son implication dans l'attentat commis le 19 septembre 1989 contre un avion DC 10 de la compagnie UTA, lequel, en explosant au-dessus du Niger, a causé la mort de 170 personnes, plusieurs d'entre elles étant de nationalité française ;

Attendu que, pour confirmer l'ordonnance du juge d'instruction disant y avoir lieu à informer, nonobstant des réquisitions contraires du ministère public, les juges du second degré retiennent que, si l'immunité des chefs d'Etats étrangers a toujours été admise par la société internationale, y compris la France, aucune immunité ne saurait couvrir les faits de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste ;

Mais attendu qu'en prononçant ainsi, alors qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etat étrangers en exercice, la chambre d'accusation a méconnu le principe susvisé ;

D'où il suit que la cassation est encourue ; qu'elle aura lieu sans renvoi, la Cour de Cassation étant en mesure d'appliquer la règle de droit et de mettre fin au litige ainsi que le permet l'article L. 131-5 du Code de l'organisation judiciaire ;

Par ces motifs,

CASSE et ANNULE, en toutes ses dispositions, l'arrêt de la chambre d'accusation de la cour d'appel de PARIS, en date du 20 octobre 2000 ;

DIT n'y avoir lieu à informer ;

DIT n'y avoir lieu à renvoi ;

ORDONNE l'impression du présent arrêt, sa transcription sur les registres du greffe de la chambre de l'instruction de la cour d'appel de PARIS, sa mention en marge ou à la suite de l'arrêt annulé ;

Ainsi fait et jugé par la Cour de Cassation, chambre criminelle, et prononcé par le président le treize mars deux mille un ;

En foi de quoi le présent arrêt a été signé par le président, le rapporteur et le greffier de chambre ;

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