Report on the appeal proceedings at the Scottish Court in the Netherlands (*Lockerbie Court*) in the case of Abdelbaset Ali Mohamed Al Megrahi v. H. M. Advocate by Professor Hans Koechler, international observer of the International Progress Organization nominated by UN Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998)

Vienna, 26 March 2002/P/RE/17553

Following his observation of the proceedings of the Lockerbie trial during the period 5 May 2000-31 January 2001, the undersigned observed the appeal proceedings of the High Court of Justiciary at Kamp van Zeist in the Netherlands from 15 October 2001 to 14 March 2002. He attended the procedural hearing and the presentation by a relative of a victim of the Lockerbie bombing of the Petition to the Nobile Officium on 15 October 2001 and observed the appeal hearings from 23 January 2002 until the last session on 14 February 2002. He was present for the announcement of the appeal decision on 14 March 2002. He met regularly with the Registrar and the Deputy Registrar of the Scottish Court in the Netherlands and, on 7 February 2002, passed two lists of written questions to the Crown Office Lockerbie Criminal Case Team (Prosecutor Fiscal's Office) and to the Registrar of the Scottish Court respectively. He received a written answer, dated 8 February 2002, from the Crown Office and several oral and written communications, in response to his inquiries, from the Registrar of the Scottish Court. He also met with the Governor of H. M. Prison Zeist. He interviewed the appellant and inspected the conditions of his detention at H. M. Prison Zeist on 24 January 2002. At the appellant's request, he met with him again on 12 February 2002. After the announcement of the decision of the Appeal Court on 14 March 2002, the undersigned met a third time with the appellant in the company of other international observers present on that day. All meetings and contacts were arranged through the Scottish Court Service.

During the entire period of the appeal he made no public comments on the appeal case and did not seek a meeting with the judges of the Appeal Court, Lord Cullen, Lord Kirkwood, Lord Macfayden, Lord Nimmo Smith, and Lord Osborne. He exercised his observer mission on the basis of respect for the constitutional independence of the judiciary as outlined in his report on the Lockerbie trial of 3 February 2001, and interpreted his mission in the sense of an evaluation in regard to the requirements of due process and of the fairness of the trial, as outlined in his explanatory statement of 9 June 2001.

On the basis of his observation of the appeal hearings and of the meetings and inquiries mentioned above, the undersigned presents the following report on and evaluation of the appeal proceedings:

1. All administrative aspects of the appeal case were handled with great care, efficiency and professionalism by the staff of the Scottish Court Service. All requests made by the undersigned in the exercise of his observer mission were handled promptly and diligently by the Scottish Court Service as well as by the Governor of H. M. Prison Zeist.

2. The conditions of the detention of the appellant during the period of the appeal were humane and in full conformity with European and international legal standards. The undersigned's meetings with the appellant were arranged without delay and held under adequate conditions. To the knowledge of the undersigned, no meetings with any persons were imposed on the appellant against his will. Family visits were allowed and handled in an expeditious manner (as far as the prison authorities were concerned).

3. The report by the trial court "In Note of Appeal by Abdelbaset Ali Mohamed Al Megrahi," addressed to the appeal judges, dealing with the grounds of appeal lodged by the appellant and explaining the approach followed in the formulation of the Opinion of the Court, did not, in the undersigned's view, infringe upon the rights of the appellant in the appeal proceedings.

4. The Crown Office handled the information requests of the undersigned in a professional manner (although it avoided answering his questions in regard to the alleged withholding of evidence by the police authorities and the alleged invitations for holiday trips to Scotland extended by the Scottish police to one of the prosecution's key witnesses).

5. For unexplained reasons, the Defense refused to give any information whatsoever. It refused to provide the grounds of appeal (which were filed in the Note of Appeal dated 8 June 2001) – even though the Scottish Court Service had approached the Defense on the undersigned's behalf to ascertain whether the Defense would accede to his request. The Defense also rejected another observer's request for copies of the Defense's submissions at the appeal hearings. During the entire period of the appeal, there was a total lack of transparency in regard to the Defense's actions.

6. The two representatives of the US Department of Justice who were referred to in the undersigned's report on the trial of 3 February 2001, Par. 4, were present on the side of the prosecution team from the beginning of the appeal hearings on 23 January 2002. The Crown Office, in a written communication to the undersigned dated 8 February 2002, stated that it is a matter for the court itself to regulate who should be present, but explained that the High Court of 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." Because of the role they played during the trial (see Par. 5 of the undersigned's report), the continued presence of the two US representatives introduced into the appeal proceedings a political element that should have been avoided.

7. The same applies to the presence in the courtroom of the head of the Libyan defense team on the side of the Scottish defense team. The undersigned would like to note that the former's presence was not requested by the appellant. The undersigned was informed that the presence of foreign individuals "supporting" the prosecution and defense teams was due to an informal arrangement on the basis of mutuality between the US and Libya. This, however, gave the entire proceedings an aura of international politics that is not appropriate for an independent court.

8. The appeal proceedings were further overshadowed by at least two meetings between Libyan, US and UK intelligence-cum-political officials in the United Kingdom during the period of the appeal. According to reliable

media reports and official US statements, those meetings dealt with the issue of Libya's acceptance of responsibility for the Lockerbie bombing and with her obligation for compensation – at a time when the matter was still sub judice in an independent court. In the highly politicized context of the Lockerbie case, these meetings may have been prejudicial to the outcome of the appeal. The urgent press release issued by the appellant's Libyan defense lawyer on 28 January 2002 was factually wrong in its reference to alleged "UN demands that Libya pays [*sic*] compensation for the bombing" and did nothing to dispel the suspicions.

9. One of the most serious shortcomings of the appeal proceedings (as of the trial proceedings) was that the appellant did not have adequate defense – a circumstance that weighs heavily in an adversarial judicial system where the fairness of the trial depends mainly on the equality of arms between prosecution and defense. Because of this situation, the requirements of Art. 6 ("Right to a fair trial") of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* were not met.

10. The lack of adequate representation of the appellant became evident in the handling of the defense case during the appeal in several respects: (a) In spite of the often vague and entirely circumstantial evidence, the Defense, in its Note of Appeal as well as during the appeal hearings, did not make the point that there was insufficient evidence in law to convict the appellant; (b) in the course of the appeal hearings, the Defense Counsel expressly disavowed any reliance on Para. b of Section 106 (3) of the Criminal Procedure (Scotland) Act 1995 which states that an appellant may bring under review any miscarriage of justice, which may include such miscarriage based on "the jury's having returned a verdict which no reasonable jury, properly directed, could have returned;" (c) the Defense did not raise any of the technical issues, particularly in regard to the timer used in the explosive device, on which new information had become available since the Verdict on 31 January 2001; (d) the Defense further did not raise the issue of Mr. Anthony Gauci, key witness of the Prosecution, having been invited repeatedly for holiday trips to Scotland by the Scottish police. This information was available before the beginning of the appeal hearings; it calls into question the trustworthiness and reliability of the prosecution witness, on whose testimony the verdict substantially depended; (e) the Defense did not raise the issue of why important evidence about the breaking of a lock at the luggage storage area at Heathrow airport had disappeared from the police records and why it was not made available to the trial court; instead, the Defense Counsel stated at the beginning of the appeal hearings that there was no fault on the part of the Prosecution in regard to the non-availability of this important evidence. It is hard to understand why, in an adversarial system, the Defense should come to the defense of the Prosecution on such a crucial matter which could cast doubt over the entire strategy of the prosecution; (f) there was an obvious antagonism between the Defense Team and the "defense support team" represented in the courtroom by the Libyan defense lawyer, a situation which seriously hampered the efficiency of the defense strategy; (g) as an apparent consequence of this antagonism and of a lack of co-ordination on the part of the defense, additional material in support of the defense case was collected only after the appeal hearings had started, i.e. at a time when

it was much too late to include any additional information in the "grounds of appeal;" (h) as a result of this, a chaotic situation ensued which also was referred to in the British media; bills of members of the defense support team were not paid, which created the impression of a defense operation in disarray. All of this was detrimental to the rights of the appellant under the European Human Rights Convention.

11. In its Note of Appeal and presentations during the hearings, the Defense failed to raise the issue of substantial evidence having been withheld during the trial and the judges' apparent satisfaction with this situation (see Para. 7 of the undersigned's report on the trial). However, according to a Judgment of the European Court of Human Rights, even in an adversarial system of criminal law the trial judges have the obligation to scrutinize the withheld information; failure to do so on the part of the trial judge will result in the unfairness of the trial (*Case of Rowe and Davis v. the United Kingdom*, Application no. 28901/95, Strasbourg, 16 February 2000, Para. 65 of the Judgment). Furthermore, the following statement in Para. 60 of the Court's Judgment is also applicable to a criminal trial under Scottish law: "… Article 6 § 1 [European Convention for the Protection of Human Rights and Fundamental Freedoms] requires, as indeed does English law …, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused …." The Defense in the present appeal completely failed to raise this basic issue and thus gave up one of the main legal instruments at its disposal.

12. The Defense further failed to raise the issue of the fairness of the trial in regard to the basic requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms – a fact which may seriously compromise the appellant's ability to eventually claim his rights at the Privy Council and/or at the European Court of Human Rights. Indeed, because of its actions during the trial the Defense itself may be seen as part of the problem, complicit in the lack of fairness of the proceedings – this may explain why this basic issue was not raised in the course of the appeal proceedings.

13. The defense strategy was further seriously undermined by the rather bizarre circumstances of the testimony given by the Defense's key additional witness, Mr. Manly. While being adamant about the technical details about how the padlock at Heathrow airport was broken ("cut like butter"), he was highly confused and proven totally wrong in regard to the exact location of the door and the way in which the padlock was attached to the door. At the beginning of his testimony he told the court that, because of an accident, he was under medication and that he was afraid he might have to vomit in the course of his testimony. He looked very frail and behaved in a highly emotional, at times even aggressive manner. For the undersigned it was impossible to obtain any specific information about the factors which led to this deplorable state of health. In spite of the efforts promised by the Scottish Court Service, it was not possible to obtain any information on the kind of medication under the influence of which Mr. Manly may have acted in the way he did, or on the time and nature of the accident that made this medication necessary. In fact, Mr. Manly's testimony – seen in its entirety – may even have been counterproductive in regard to the defense strategy.

The question remains why the Defense introduced Mr. Manly as an additional witness under these particular circumstances.

14. A problematic aspect of the appeal proceedings consisted in the fact that the judges were satisfied to analyze the verdict of the trial court in a merely formal manner, not dealing with the substance of the argument nor with its plausibility and logical consistency. In the Opinion of the Appeal Court they repeatedly expressed the view stated in Para. 25 that "once evidence has been accepted by the trial court, it is for that court to determine what inference or inferences should be drawn from that evidence." If this is the attitude of an appeal court in the Scottish system of criminal law, then the question arises how a meaningful role of an appeal court can be defined at all.

15. One of the basic weaknesses of the decision of the Appeal Court consisted in its very refusal to properly evaluate, i.e. reevaluate, the plausibility of the inferences drawn from Mr. Gauci's testimony and from the information about weather conditions in Malta at the time in question. In the course of the renewed presentation of the respective evidence during the appeal proceedings it became entirely clear to any rational observer that the report on weather conditions in Malta had been interpreted arbitrarily by the trial judges and that the weather conditions described by Mr. Gauci were much more compatible with the weather report of the meteorological service for 23 November 1988 than with that for 7 December. To the undersigned it is obvious that the evidence was "weighted" in a deliberate manner so as to be compatible with the date of the appellant's stay in Malta. The judges as well as the appeal judges arbitrarily excluded consideration of the fact that 7 December was a day before a high Roman-Catholic holiday (which has particular importance in a Catholic country such as Malta) and that the witness would have remembered the fact that a Libyan had bought clothes on the evening before such a holiday (on which the shop was closed). Put in the context of the evidence available and the circumstances in Malta at the respective period of time, the probability of 23 November 1988 as the date of the purchase of the clothes is much higher than that of 7 December 1988, when the appellant was in Malta.

16. Because in this entirely circumstantial case, in the absence of any material evidence, everything finally depends on whether the appellant bought the clothes or not, the entire verdict collapses if this fact cannot be proven "beyond a reasonable doubt." If the evidence presented during the trial and the additional evidence made available during the appeal is analyzed in its entirety, it becomes clear to any rational observer that the theory of ingestion of the luggage containing the explosive device in Malta needs considerably more assumptions and is based on much lower probability than the theory of ingestion at Heathrow. In an entirely circumstantial case like the present one, this means that a determination "beyond a reasonable doubt" cannot honestly be made if one bases one's argumentation and inferences upon reason and common sense. The trial verdict, confirmed by the appeal judges, would not stand a plausibility test in a scientific context defined by the rules of logic and reason.

17. Furthermore, the unanimous decision by the Appeal Court is incomprehensible if one takes into consideration the often highly critical, very precise and inquisitive questions and comments by some of the appeal

judges in the course of the appeal hearings. On day 96 (7 February 2002) Lord Osborne, in a debate with the Prosecution on the question of the insertion of the luggage containing the explosive device at Luqa airport in Malta, said: "But is it not a different matter to say, on the basis of these features of the situation, that the bomb passed through Luqa Airport, standing that there is considerable and quite convincing evidence that that could not have happened." He further stated: "Now, it's quite difficult rationally to follow how the Court take the step of saying, 'Well, we don't know how it got onto the flight. We can't say that. But it must have been there.' On the face of it, it may not be a rational conclusion." And in response to a remark of the Prosecution, he went on: "Well, all sorts of irrational conclusions may have a basis in fact, but … the problem is that they don't logically relate to the facts."

18. It is impossible to understand why Lord Osborne finally was able to consent to the rejection of all grounds of appeal and why he did not follow the line of rational scrutiny of the trial judges' reasoning. The unanimity of the decision of the Appeal Court is not plausible at all if one looks carefully at arguments such as those put forward by Lord Osborne in the course of the appeal hearings. What caused the appeal judges to make this rather drastic sacrificium intellectus of ignoring reason and common sense by rejecting each and every ground of appeal unanimously?

19. The Appeal Court furthermore failed to deal adequately with the substantial new evidence that was presented in the course of the appeal. In view of the many inferences and of the arbitrary, often contradictory argumentation of the trial court, the additional evidence would have had special significance for an honest reevaluation of the trial court's argument. For unexplained reasons, the Appeal Court refused to deal with any other theory than that advanced by the Prosecution – which is all the more incomprehensible if one considers the evidence originally presented at the trial concerning the possibility of a bag (a brown Samsonite suitcase) having been ingested at Heathrow.

20. In the course of the hearings it became quite clear that the judges were not at ease with this situation in which they had to review a verdict that was not sound by the basic standards of logic and common sense, and that they may have tried to seek a way out of their dilemma (having either to confirm or cancel the verdict under conditions of merely circumstantial and partially withheld evidence) by ordering a retrial: one of the possibilities that is available to an appeal court under Scottish law. Lord Cullen repeatedly raised the issue during the hearings and addressed the question of the possibility of a retrial under the *High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998* vis-à-vis the Prosecution and Defense, asking for their comments. This possibility, however, did not exist as a real option because the Order in Council promulgated "to facilitate the conducting of criminal proceedings under Scots law in the Netherlands" on the basis of section 1 of the United Nations Act 1946(a) (United Kingdom) did only deal with the eventuality of appeals, not with that of a retrial. This again has negatively impacted on the rights of the appellant under the European Human Rights Convention.

21. If one takes into consideration that the trial verdict was inconsistent, even irrational, in the basic respect of having found one accused "guilty" and the

co-accused "not guilty" – while the accusation was based on the joint action and co-ordination of the action among the two accused in Malta (see Art. 12 of the undersigned's report on the trial) –, it is obvious that Para. (b) of Section 106 (3) of the Criminal Procedure (Scotland) Act 1995 was applicable for the filing of grounds of appeal. It is incomprehensible why the Defense did not make use of this provision and was satisfied to list rather weak grounds of appeal related to a "misdirection" of the trial judges concerning the interpretation of specific pieces of evidence and the references drawn from them. This made possible the rather evasive strategy of the appeal judges expressed in an exemplary manner in Par. 369 of the Opinion of the Appeal Court: "We have not had to consider whether the verdict of guilty was one which no reasonable trial court, properly directing itself, could have returned in the light of that evidence."

22. From the circumstances of the appeal described above (as well as from the circumstances of the trial itself described and analyzed in the undersigned's report of 3 February 2001) it is evident that the appellant did not get a fair trial according to the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6 (1) of the Convention stipulates: "In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …." Art. 6 (3) Para. (c) states that everyone charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing …." As explained above, the trial court as well as the appeal court acted in a highly politicized context in which the judges' freedom of deliberation was actually, though not legally (except for the one issue of the Order in Council mentioned in Para. 20 above), limited and a "politically expedient" decision may have been called for so as not to embarrass the governments that set up the framework for the extraterritorial court in the Netherlands in the form of the Agreement of which the Security Council was notified in a joint letter dated 24 August 1998 by the Permanent Representatives of the United Kingdom and the United States.

23. The Agreement, having regard to Security Council resolution 1192 (1998), provided for the setting up of a Scottish trial in the Netherlands. 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 behind 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 – in the undersigned's view – counteracted the intentions expressed in the setup of the Court in the Netherlands. If there was any reason or justification for this highly complex and costly arrangement, then it consisted in conducting the entire operation of the court away from the 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.

24. In addition to that, the appellant was deprived of his right to adequate legal representation (in the many respects described above in regard to the conduct of the appeal proceedings on the part of the defense team). Furthermore, he did not have the possibility of choosing the defense team on his own. The team was chosen for him by the former Libyan defense lawyer, Mr. Maghour, who at the same time was acting as Libya's representative in the cases *Libyan Arab Jamahiriya v. United Kingdom* and *Libyan Arab Jamahiriya v. United States* respectively at the International Court of Justice. The official role of the Libyan defense lawyer as agent of the Libyan state was incompatible with his duty to give adequate legal assistance to his client in a case of personal criminal responsibility such as the one before the Scottish Court in the Netherlands. In view of the Defense's decision not to make use of many of the means available to it for the adequate defense of the appellant, the original choice of the defense team (made without the participation of the appellant) may have negatively impacted on the rights of the appellant. That the defense team was "out of tune" with the appellant – whom it was supposed to represent – became clear in the rather strange fact that the Defense refused to meet with the undersigned or to answer any of his questions, while the appellant, through the prison administration and the Scottish Court Service, asked for a meeting with the undersigned.

25. In the meeting of 12 February 2002, requested by the appellant, he disclosed to the undersigned that he was made aware of only 3 out of 16 joint minutes agreed upon by the Prosecution and the Defense in the course of the trial. He also stated that his instructions were not always followed by the Defense (as for instance in the case of the x-ray machine which the appellant had asked to have brought into the courtroom for inspection) and that he did not give instructions to the Defense to drop the "special defense" during the trial (see Para. 9 of the undersigned's report of 3 February 2001); he further said that he did not understand why no submission of "no case to answer" was made in his case by the Defense (while they made such a step in regard to the co-accused), etc. All of these details underline the basic fact that the appellant did not get adequate legal representation and suggest that the defense strategy may not have been genuine and authentic (as required under European standards). The suspicions raised by the undersigned in his trial report were confirmed by the information obtained during the aforementioned meeting with the appellant.

26. In this context of evaluating the fairness of the trial proceedings, it is essential to take note of the jurisdiction of the European Court of Human Rights in regard to the requirement of fairness in an adversarial system of criminal law. In the Judgment of 16 February 2000, Para. 60 (*Case of Rowe and Davis v. the United Kingdom*, Application no. 28901/95), the Court explicitly states the principles to be applied also in the present case, particularly in regard to the Defense's decision not to use many of the legal options available to it to present the case of the accused / appellant: "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence."

On the basis of the above observations and evaluation it can be stated that the appeal proceedings were not fair (and thus not in conformity with the requirements of Art. 6 Para. 1 of the European Human Rights Convention) in two basic respects:

(a) The appeal judges chose a kind of "evasive" strategy by not scrutinizing the argumentation of the trial court in regard to its plausibility and logical consistency, thus not questioning at all the arbitrariness of the evaluation of evidence by the trial judges, and not paying adequate attention to new evidence presented in the course of 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 proceedings virtually meaningless. What else could be the meaning of an appeal process if not a comprehensive review of a trial court's decision in regard to its duty to find the truth in order to make a decision on guilt or innocence "beyond a reasonable doubt"?

(b) The Defense chose not to make use of many of the means available to it to defend the appellant and thus deprived him of his right to adequate and authentic legal representation under European standards.

One may formulate as a *general maxim* that in a case like the present one – where the proceedings are based entirely on circumstantial evidence and the Opinion of the Court operates with a series of inferences (often being as vague as mere speculation) – *that assumption (or conclusion) is preferable to any other that requires fewer inferences and less artificial (or arbitrary) "reinterpretation" of the facts (the evidence accepted by the court).* If one takes this maxim of logical reasoning and common sense into consideration, one may safely state that a reasonable jury could never have come to the conclusion of "guilt" in regard to the appellant on the basis of the vague and ambivalent evidence related to the supposed sequence of events in Malta. Furthermore, it can be reasonably stated that a determination of "guilty" under such circumstances does in no way meet the basic requirement under Scottish law *that proof must be established beyond a reasonable doubt*. The Appeal Court completely failed to deal with this basic issue of the case and preferred to effectively "put the blame" on the Defense's omissions – explicitly stating that the Defense had accepted that there was a sufficiency of evidence and that it had expressly disavowed any claim of a "miscarriage of justice" according to the terms of Section 106 (3) Para. (b) of the Criminal Procedure (Scotland) Act 1995 (referring to a jury's having returned a verdict which no reasonable jury, properly directed, could have returned).

Whatever the nature of a system of criminal law, whether inquisitive or adversarial, criminal proceedings, in order to be fair, must be based on the search for truth by means of establishing the facts and applying logical argumentation in the interpretation of the facts.

In view of the above conclusions, the undersigned considers it of special importance that investigations will be undertaken by the competent judicial authorities of the United Kingdom and Scotland respectively (a) in regard to the alleged withholding of evidence on the break-in at Heathrow airport, and (b) in regard to the alleged invitations by the Scottish Police of Mr. Gauci for holiday trips to Scotland (which may have constituted illegal influencing of a key witness of the Prosecution by the Police – eventually making necessary a reevaluation of the evidence given by this witness). Furthermore, it will be of utmost importance to investigate the absence of the police after the break-in at Heathrow. In his testimony before the Appeal Court, Mr. Manly stated that he did not see a single police officer after the reporting of the incident on the night of 20/21 December 1988. These are just three of several mysterious circumstances that have led international observers of the Lockerbie

proceedings to raise reasonable doubts in regard to the correct and independent handling of the case by the judicial authorities of the United Kingdom and Scotland. In this regard, the call of British victims' families for a public inquiry in the House of Commons gains special relevance.

If the shortcomings and deficiencies of the trial and appeal proceedings referred to above are not to be attributed merely to this special court (having operated under considerable political influence), but to the system of criminal justice in Scotland in general, a comprehensive review of that system may be necessary. Because of the exemplary nature of the case – in regard to the handling of a criminal case in a highly politicized international context –, and in view of repeated references by the Scottish judicial authorities to the adversarial nature of the Scottish system of criminal law (which was emphasized to explain the actual conduct of the Lockerbie trial), it may be of importance to ask four basic questions related to the compatibility of Scottish criminal law with the requirements of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:

(A) Is the Scottish system of criminal law – insofar as it excludes, in appeal proceedings, the critical review of the trial court's evaluation of evidence – compatible with Art. 6 of the Convention? If the argumentation of a trial court cannot be scrutinized and its original evaluation of evidence becomes a dogma not to be challenged by an appeal court, an appellant is effectively deprived of his right to a comprehensive review of his case in regard to the basic principle of fairness. The Appeal Court's statement in Para. 21 of the Opinion issued on 14 March 2002 "that it was not open to this court to review all the evidence which was before the trial court in order to determine for itself whether that court had come to the correct conclusion" highlights this problem; this finally leads to the question whether an appeal is not rendered meaningless under the restrictions imposed on it – in the interpretation of the present Appeal Court – under Scottish law. What is the meaning of an appeal in such a context of criminal law, where the original evaluation of evidence by the trial judges cannot be scrutinized by the appeal judges? A critical review of proceedings, which constitutes the essence of the rule of law, including the system of criminal law, becomes impossible in such a context. Arbitrariness takes the place of comprehensive reexamination of a case.

(B) If the defense does not properly play its antagonistic role in an adversarial system, i.e. if it chooses not to use the means actually available to it and does not act in an authentic manner, the interplay of forces in regard to the "equality of arms" – which is absolutely essential in an adversarial system of criminal law – is set off balance. Because the role of the judges is not that of active investigators, there will be no remedy for such behavior by the Defense, i.e. for its decision to neglect its duties, and the accused / appellant will be deprived of his right to a fair trial.

(C) The rejection of any inquisitive duty on the part of the judges in an adversarial system such as the Scottish one may not be compatible with Art. 6 (1) of the European Human Rights Convention. (See the European Court of Human Rights' Judgment of 16 February

2000, referred to above, declaring, inter alia, in regard to adversarial proceedings, "the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge.")

(D) If we follow the operative definition of the formulation "proven beyond a reasonable doubt" in the context of the appeal court's – and the trial court's – deliberations and in the opinions of the trial and appeal courts, the concept of "reasonable doubt" becomes not only imprecise but meaningless because it is applied to an argumentative situation in which the determination of guilt is based on often vague evidence and on a series of highly problematic inferences. If a court is satisfied that the kind of weak evidence and inferences drawn from it found in the present criminal proceedings fit together "to form a real and convincing pattern" (see Para. 368 of the Opinion of the Appeal Court of 14 March 2002), then any kind of inference and speculation, as long as it is drawn by a court in the exercise of its official function, meets the criterion of "proven beyond a reasonable doubt." This would imply that an accused / appellant would have no chance to escape the arbitrariness of a court's reasoning because virtually every set of inferences – irrespective of the grade of probability and of the rational quality of the argument – would fall under this definition. Such a situation, undoubtedly, cannot be reconciled with the basic requirements of the fairness of trial proceedings.

The Lockerbie case is also of exemplary nature for the development of international criminal justice. Because a precedent may have been set by the handling of the case in the framework of the Scottish Court in the Netherlands, the undersigned considered it necessary to add to the mere observations on the proceedings the above analytical remarks on the set-up, general normative framework and specific functioning of the court under the conditions of an adversarial system of criminal justice.

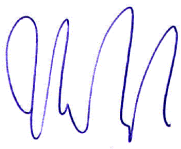
Regrettably, the undersigned has come to the conclusion that this specific type of court and court proceedings – whereby a national court deals with a matter of personal criminal responsibility of a foreigner in a case which at the same time relates to a dispute between UN member states, and specifically between the accused's state and the state that exercises jurisdiction over him – is not viable in regard to the attainment of justice in the sense of transparent procedures and independent deliberations of a criminal court. The aforementioned dispute between states (in particular the United States, the United Kingdom and Libya) is still pending before the International Court of Justice and the trial arrangements have been set up following a resolution of the Security Council based on Chapter VII of the Charter. It has been proven as impossible – in this highly charged political context of inter-state relations and higher state interests – to conduct a criminal trial in an "independent legal space," i.e. in an atmosphere of independence vis-à-vis national politics and international power politics at the same time. The extraterritoriality of the location of the proceedings was simply not sufficient to guarantee a fully independent trial. The geographical location of the proceedings outside of Scotland, despite the enormous costs involved, finally proved to be only a kind of sedativum for those concerned about the independence and impartiality of the proceedings.

In this regard, the undersigned would like to recall the reservations expressed by the International Progress Organization's *Committee of Legal Experts on UN Sanctions against*

Libya, in a declaration dated 3 September 1998, concerning Security Council resolution 1192 (1998): "The Scottish legal system is undoubtedly up to international standards of due process and fair trial. There is no reason to doubt the report (Doc. S/1997/991) of the independent experts appointed by the Secretary-General of the United Nations on the Scottish judicial system. The real issue is not whether Scottish law is applied or not, but whether a tribunal exclusively consisting of Scottish judges can meet the requirement of impartiality. … The two Libyan suspects have already been publicly convicted in the United States and in the UK in violation of basic requirements of due process of law and the presumption of innocence. Under the present circumstances, it is hard to see how Scottish judges should be completely independent of this public conviction. … Only an international composition of the tribunal could provide remedy to this serious problem of fairness and impartiality." The I.P.O. Committee further stated that "a criminal tribunal on this case should either be international in its composition or should operate in an international framework such as that of the International Court of Justice. The procedural details should be worked out on the basis of the Statute of the International Court of Justice and not through bilateral agreements between the governments of the UK and the Netherlands as stipulated in Art. 3 of the Security Council resolution." The undersigned regrets to admit that, contrary to his hopes at the beginning of the trial in May 2000, the above-expressed reservations – in the formulation of which he had participated as co-ordinator of the Committee of Legal Experts – were proven justified in the course of events.

Because of the circumstances of the trial and appeal proceedings described above and in view of the considerable influence of power politics on any case where a national court deals with a matter related to a dispute between states, including the one exercising jurisdiction, the undersigned is convinced that the only viable alternative – in terms of independence of the judiciary and fairness of trial in any such case – will be proceedings under the regulations of the *Rome Statute of the International Criminal Court* (ICC). He expresses the hope that the Statute will come into force in the foreseeable future – in spite of its rejection by United Nations member states involved in the Lockerbie dispute. It has become evident that no national court and no ad hoc tribunal set up by the Security Council can meet the requirements of independence, due process, impartiality and fairness. Only an internationally composed court (such as the ICC) will be able, at least in regard to its basic setup and procedural rules, to operate outside the framework of power politics.

Regrettably, the decision of the Appeal Court in the case of Abdelbaset Ali Mohamed Al Megrahi v. H. M. Advocate was not a victory for justice, but for power politics. The proceedings have proven that a legally guaranteed separation of powers in a system which prides itself on its commitment to the rule of law is not a sufficient safeguard against political interference so as to ensure the independence and impartiality of criminal proceedings. However, the Lockerbie proceedings have taken place in the common "European space" of human rights and may accordingly – after all means of review in the judicial context of the United Kingdom have been exhausted – be reviewed by the European Court of Human Rights that exercises its jurisdiction on the basis of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.



Dr. Hans Koechler