

“The al-Megrahi Release: One Year Later”

Testimony of Ambassador Nancy McEldowney Principal Deputy Assistant Secretary, Bureau of European and Eurasian Affairs Senate Foreign Relations Committee September 29, 2010

Thank you, Senator Menendez, for this opportunity to share with you and other members of the Committee the State Department’s perspective on the circumstances surrounding the release last year of Abdelbasset al-Megrahi, who was convicted in 2001 and sentenced to life imprisonment for the bombing of Pan Am Flight 103.

Lockerbie was an act so savage that even today, an age when reminders of the threat of terrorism are a daily occurrence, the tragedy continues to stir powerful emotions, not only among the family and friends of those who were lost, but also across the United States and around the world. Those emotions are shared by the hundreds of U.S. government employees who have dedicated countless hours to this case over the years. All have carried with them an abiding commitment to the memory of those lives cruelly cut short and to the determination to ensure that justice is served. For Secretary Clinton, that commitment is both personal and unshakably held.

Because of the horrific nature of this crime, it was the position of the United States government when Megrahi was put on trial that any sentence of imprisonment should be served to its full completion in Scotland. That has been our unwavering and categorically stated position ever since.

It is the view of this Administration that the decision by Scottish authorities to release Megrahi and permit his return to Libya was profoundly wrong: morally wrong because it was an affront to the victims’ families and the memories of those killed; politically wrong because it undermined a shared international understanding on Megrahi’s imprisonment; and wrong from a security perspective because it signaled a lack of resolve to ensure terrorists are decisively brought to justice. As Secretary Clinton and President Obama have repeatedly stated, our resolute conviction remains that Megrahi should not be a free man and should be serving out the entirety of his sentence in a Scottish prison.

The diplomatic and legal efforts to investigate and pursue justice for those killed in Lockerbie have spanned over two decades. In response to the expressed interests of the Committee, I will focus my testimony primarily on the efforts of the U.S. Government to ensure that Megrahi remained imprisoned in Scotland.

Historic Understanding on Imprisonment

Before I do so, however, I would like to briefly describe the circumstances which led to Megrahi’s imprisonment in the first place. In November 1991, after a joint U.S.-Scottish investigation, both the United States and Scotland brought criminal charges against two Libyan nationals, Abdelbasset al-Megrahi and Lamin Khalifah Fhimah, in connection with the bombing of Pan Am 103. The United States made clear throughout the 1990s, as Libya resisted handing

over the accused in the face of UN Security Council resolutions and international sanctions, our resolve that the perpetrators of this crime must be brought to justice. In an effort to break the long stalemate, the U.S. and UK governments jointly proposed in 1998 an exceptional arrangement for the Libyan suspects to stand trial before a Scottish court established in the Netherlands. The arrangements are described in detail in the August 24, 1998 letter to the UN Secretary General authored by the United States and United Kingdom. In the letter, the United States and Britain together affirmed that “If found guilty, the two accused will serve their sentence in the United Kingdom.”

As the joint U.S.-UK letter reflects, at the time Megrahi was transferred from Libya to face trial, there existed a shared understanding between the United States, the United Kingdom, and Libya that he would serve his sentence in Scotland if convicted. On July 3, 2009, the British Foreign Office confirmed in a now-public letter to Scottish authorities that in the late 1990s “the UK government was committed to ensuring that the Lockerbie accused were tried before a Scottish Court in the Netherlands and, if convicted, they would serve out their sentences in Scotland, in accordance with Scots law.” In response to U.S. requests in 1998 for binding assurances that the accused would not later be transferred to Libya, the then British government maintained it could not enter into a legally binding commitment that would constrain the hands of future British governments. They nonetheless assured us of their political commitment that, if convicted, Megrahi would remain in Scotland until the completion of his sentence.

U.S. Reengagement with Libya

In January 2001, Megrahi was convicted of 270 counts of murder and sentenced to life imprisonment. As Libya accepted responsibility and complied with an agreed settlement on compensation to the victims’ families, efforts began to reintegrate the country into the international community and steer it onto a more positive path. The UN Security Council formally lifted international sanctions in September 2003, though the United States maintained its own sanctions because of continuing concerns about Libyan behavior.

Three months later, in December 2003, with encouragement from the United States and United Kingdom, the Libyan government announced its landmark decision to voluntarily dismantle its WMD and missile programs. In recognition of this shift towards Libya becoming a constructive contributor to international peace and security, the United States embarked on a step-by-step process of normalization and removal of sanctions as Libya followed through and implemented its commitments. This process culminated three years later, in 2006, in the reestablishment of full diplomatic relations between the U.S. and Libya. At no point during this reengagement did the United States deviate from its long-standing position on Megrahi’s continued imprisonment in Scotland.

UK, Libya, and the Prisoner Transfer Agreement

The United Kingdom pursued its own reengagement with the Libyan government during this same period, reestablishing diplomatic relations in 1999 as Libya cooperated with the Lockerbie trial and handed over the accused. In May 2007, then Prime Minister Tony Blair traveled to Libya to sign a series of bilateral agreements, including a memorandum of

understanding on negotiations for a Prisoner Transfer Agreement (PTA). During this same 2007 visit, BP signed an Exploration and Production Sharing Agreement with the Libyan government.

This Committee has expressed an interest in what role BP may have played in the process of negotiating the PTA. Both BP and the British government have acknowledged publicly their discussions that took place on this issue in October and November 2007. According to Foreign Secretary Hague's July 22 letter to Senator Kerry, BP told the UK government that failure to conclude the PTA could negatively impact British commercial interests, including its own. In attempting to provide this Committee with all relevant information, we have examined all available State Department records and have not identified any materials, beyond publicly available statements and correspondence, concerning attempts by BP or other companies to influence matters related to Megrahi's transfer under the PTA or his release by Scottish authorities.

Given that Scottish authorities would be the ultimate arbiters of any transfer application for Megrahi, their vehement public opposition to his eligibility under a potential PTA – and their anger upon learning a specific exclusion would not be included in the agreement – reassured us through much of 2008 that they shared our views on his continued imprisonment in Scotland. A new element was then introduced when we learned of Megrahi's diagnosis with terminal prostate cancer in October 2008. Former Foreign Secretary David Miliband later explained to the House of Commons in October 2009 that “British interests, including those of UK nationals, British businesses, and possibly security cooperation, would be damaged – perhaps badly – if Megrahi were to die in a Scottish prison rather than in Libya.” The Foreign Secretary further stated that “Given the risk of Libyan adverse reaction, we made it clear to them that as a matter of law and practice it was not a decision for the UK Government and that as a matter of policy we were not seeking Megrahi's death in Scottish custody.”

U.S. Opposition to Transfer or Release

Weeks after Megrahi's diagnosis, in November, the UK and Libya signed the PTA, and it entered into force on April 29, 2009. Six days later, on May 5, the Libyan government submitted its application for Megrahi's transfer to Libya under the auspices of the PTA. Throughout this period, the United States continued to communicate unequivocally to both the UK and Scottish authorities our long-standing policy that Megrahi should serve out his complete sentence in Scotland, regardless of the state of his health, the impact on other countries' interests, or the possible Libyan reaction.

As the UK and Libya moved forward with the PTA, we intensified our efforts to dissuade Scottish authorities from transferring Megrahi to Libya. Secretary Clinton highlighted our long-standing position directly to Scottish First Minister Alex Salmond soon after taking office, during a meeting in Washington in February 2009. Two months later, in April, the United States formally communicated to both the British and Scottish governments that the imminent entry into force of the PTA did not change our long-standing position on Megrahi's incarceration. We also underscored this message in April to senior officials in Tripoli, as did Attorney General Holder in a June phone call to Scottish Justice Minister Kenny MacAskill.

On July 24, Megrahi submitted to Scottish authorities an application for his release on compassionate grounds, as permitted under Scottish law. Subsequent to this application, during the second week of August, the State Department again communicated to Scottish justice officials and First Minister Salmond our steadfast conviction that Megrahi should remain imprisoned in Scotland for the entirety of his sentence as previously agreed. The text of this diplomatic communication was released by the State Department on July 26 of this year. Given that the compassionate release option was under consideration in Edinburgh, we also underscored to Scottish authorities that should they proceed with release despite our objections, under no circumstances should they permit Megrahi to return to Libya. We argued that if they decided they must release Megrahi over our protests, he should be confined to Scotland, remain under the close supervision of authorities, and that an independent and comprehensive medical exam clearly establish that he had less than three months to live. We emphasized that we did not endorse any release in light of the seriousness of Megrahi's crimes, but that such a tightly conditioned scenario would be less objectionable than any outcome that permitted his return to Libya. Secretary Clinton reinforced this message in a phone call to Justice Minister MacAskill on August 13, as did Deputy National Security Advisor John Brennan on August 19.

Megrahi's Release and U.S. Reaction

To our grave disappointment, Mr. MacAskill announced on August 20 his decision to reject Megrahi's application for transfer under the UK-Libya PTA but to grant his application for release on compassionate grounds. In choosing the latter option, the Scottish government not only permitted Megrahi's return to Libya, as would have occurred under prisoner transfer, but allowed him to do so as a free man able to spend the remainder of his life at home with his family and friends – a clear travesty of justice.

In explaining the decision, both at the time and subsequently, Mr. MacAskill and Mr. Salmond have stated that there was no contact between BP and Scottish authorities on this issue and that the decision was based solely on judicial grounds without political or economic consideration. They have also stated that the decision to proceed with so-called "compassionate" release was based on the medical advice provided by the Director of Health and Care of the Scottish Prison Service that three months was a reasonable prognosis for Megrahi's life expectancy, and that additional medical experts compensated by the Libyan government played "no part in the decision."

The Department of State has no evidentiary basis to dispute or disprove these statements, but the fundamental truth remains that the decision to release Megrahi back to Libya was a grievous mistake. British Prime Minister David Cameron has stated that he shares this view, and the Prime Minister has asked the UK's Cabinet Secretary to conduct a review of British documents to determine if any further relevant materials can be brought to light. We have also called upon the Scottish government to be as transparent as possible in illuminating the circumstances surrounding their decision. In particular, we believe that a decision by the Scottish authorities to release the medical documentation that led to a determination of Megrahi's life expectancy would be appropriate and assist in further understanding the basis of their decision.

As President Obama has stated, all the relevant facts in this case should be made available. The Committee, the victims' families, and the American people deserve nothing less. We value the Committee's important efforts to shed light on this issue and appreciate this opportunity to cooperate with you towards achieving that goal.

