OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 20 February 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 20 February 2018

CONTENTS

JUSTICE COMMITTEE
6th Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Clancy (Law Society of Scotland)
Clare Connelly (Faculty of Advocates)
Dr Philip Glover (University of Aberdeen)
Detective Chief Inspector Lorraine Henderson (Police Scotland)
Dr Leandro Mancano (University of Edinburgh)
Helen Nisbet (Crown Office and Procurator Fiscal Service)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 20 February 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning, and welcome to the Justice Committee's sixth meeting in 2018. We have received apologies from Fulton MacGregor.

Agenda item 1 is to decide whether to take in private agenda item 5, which is consideration of our work programme. Do members agree to do so?

Members *indicated agreement.*

Brexit (Policing and Criminal Justice)

10:00

The Convener: Agenda item 2 is a round-table evidence session to explore issues around policing and criminal justice in Scotland in light of the United Kingdom's planned departure from the European Union. It is my pleasure to welcome all the witnesses. I suggest that we start by going round the table and introducing ourselves. I am the convener of the Justice Committee.

Gael Scott (Clerk): I am one of the clerks to the committee.

Diane Barr (Clerk): I am one of the clerks to the committee.

Detective Chief Inspector Lorraine Henderson (Police Scotland): I am from Police Scotland.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Good morning. I am the MSP for Edinburgh Northern and Leith.

Michael Clancy (Law Society of Scotland): Good morning, everyone. I am the director of law reform at the Law Society of Scotland.

John Finnie (Highlands and Islands) (Green): Good morning—madainn mhath. I am an MSP for the Highlands and Islands.

Clare Connelly (Faculty of Advocates): Good morning. I am representing the Faculty of Advocates.

Liam McArthur (Orkney Islands) (LD): I am the MSP for Orkney.

Helen Nisbet (Crown Office and Procurator Fiscal Service): I am head of international co-operation at the Crown Office and Procurator Fiscal Service.

Liam Kerr (North East Scotland) (Con): I represent North East Scotland.

Maurice Corry (West Scotland) (Con): I am an MSP for West Scotland.

Dr Leandro Mancano (University of Edinburgh): I am a lecturer in EU law at the University of Edinburgh law school.

Mairi Gougeon (Angus North and Mearns) (SNP): I am the MSP for Angus North and Mearns.

George Adam (Paisley) (SNP): I am Paisley's MSP.

Dr Philip Glover (University of Aberdeen): I am from the University of Aberdeen.

Daniel Johnson (Edinburgh Southern) (Lab): I am the MSP for Edinburgh Southern.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I am the MSP for Strathkelvin and Bearsden; I am also the deputy convener of the committee.

The Convener: Thank you all for introducing yourselves.

The idea of a round-table session is to encourage a freer exchange between participants than we would probably get with a witness panel. Although the setting is more informal, the session is still very much on the record. You do not need to touch your microphone. As those of you who have been here previously will know, if you indicate that you want to speak and I call your name, your microphone will come on automatically; you do not have to worry about pressing any buttons. I ask you to indicate through me, as the convener, that you want to speak, as that will ensure that the meeting does not get out of hand—although I am quite sure that it will not.

I thank those of you who provided written submissions in advance of the meeting. That is always helpful, especially in allowing the committee to prepare for round-table sessions. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

I thought that it would be best to start by outlining the most up-to-date position, which is that the Prime Minister has proposed a new UK-EU treaty on internal security. It is based on three priority areas: continued co-operation on data-driven law enforcement and shared databases; practical assistance on cross-border law enforcement operations; and co-operation through specialist agencies such as Eurojust and Europol. Perhaps I could get comments from the witnesses on the proposed treaty, including on any problems that there might be with it and how effective it would be. Who would like to start? As Michael Clancy is such a seasoned and experienced committee witness, perhaps he would like to go first.

Michael Clancy: Oh, come now, convener—

The Convener: I did not say "old hand".

Michael Clancy: No, you did not. Thank you very much indeed for identifying me.

What did the Prime Minister say at the meeting in Munich? She talked about safeguarding our internal security in Europe and explained that, because of various recent "terrorist atrocities", that is a subject that is close to home and that she knew that personally. She said:

"We must … ensure that nothing prevents us"

—she was talking to the European heads of Government—

"from fulfilling our first duty as leaders: to protect our citizens.

And we must find practical ways to ensure the co-operation to do so."

When the Law Society started to look at Brexit matters, we issued the UK Government with a set of priorities for negotiations from the perspective of Scotland's solicitors. We talked about areas of public interest such as ensuring stability in the law; maintaining freedom, justice and security; ensuring that there is mutual recognition of citizens' rights throughout the EU; creating arrangements to deal with pending cases before the Court of Justice of the European Union; and looking towards ensuring that respect is given to the devolved Administrations, Parliaments and legislatures and to Scots law. When we look at the set of priorities that, in November 2016, we suggested should be taken up in any negotiations, it is evident that we are still working our way through it.

In December, the European Commission and negotiators from the task force on article 50 negotiations with the United Kingdom issued a joint report on the negotiations with the UK Government. In the guidelines that the European Council issued on 15 December, it explained that, among other things, there would be a

"readiness to establish partnerships in areas unrelated to trade and economic cooperation, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy."

It is clear, therefore, that those issues were discussed throughout 2016 and 2017, and we have reached a position at which the Prime Minister has come up with the suggestion of a new treaty.

If we are looking at the options for replacing existing EU law, the European Union (Withdrawal) Bill tells us, to some extent, what is going to happen. The removal of the European Communities Act 1972 and the transposition of EU directives and the acquis from EU law into UK law will come about through measures such as the creation of EU-derived domestic legislation and the incorporation of direct EU law. The process relating to the bill tells us that there is going to be a transposition effect. However, it is important that we identify that there is an element of reciprocity in most, if not all, areas of criminal justice and related aspects of home affairs.

The convener referred to the proposed creation of a new treaty, which is clearly one of the options that we could adopt to deal with the situation that we are in. It would be possible for us to keep the European arrest warrant framework decision, and

for the EU to deal with us as a third country. Another option would be a specific European arrest warrant agreement. For extradition purposes, we could rely on the 1957 European Convention on Extradition, and there could be separate bilateral agreements. However, the option that the Prime Minister has identified, which is a new UK-EU security treaty, would seem, in the circumstances in which we find ourselves, to be the option that people would ideally move towards, given the reciprocal nature of many of our obligations.

However, we need to confront and raise awareness of one issue in particular. Does any member at the table have the capacity to go on the internet just now? If so, perhaps you could look up "Sky News Brexit countdown"—

The Convener: Maybe we could cut this short, Michael, because we have only an hour and a half.

Michael Clancy: The countdown will tell us that there are 402 days left until 29 March.

The Convener: Right—so the clock is ticking. We have got the picture.

Michael Clancy: That is the issue.

The Convener: Thank you very much for kicking off on that question and setting up the discussion. Are there any other views?

Dr Mancano: There are a few issues concerning the three priorities that the UK Government has set out in "Security, law enforcement and criminal justice—a future partnership paper", with regard to future co-operation in policing and judicial matters relating to criminal justice. First, we cannot regard those priorities—shared databases, cross-border law enforcement and agencies—as three watertight areas. We need to take a holistic approach, because many of the instruments work together. For example, we cannot have an agreement between the EU and the UK on the European arrest warrant framework decision without having a related agreement on the UK's participation in the Schengen information system. Those two elements work together, as member states can enter the Schengen information system and then issue an alert on wanted or missing people or objects, for example.

A comprehensive agreement on security that would include those priorities seems to be unlikely, and a fragmented and piecemeal approach would not be very effective. That is one consideration.

Another consideration is that, when we talk about fall-back regimes and say, for example, that we might rely on the Council of Europe's Convention on Extradition rather than the European arrest warrant framework decision, we must recognise that, as systems for interstate co-operation on criminal matters, they are not comparable. The European arrest warrant is not just a variant on extradition, but the flagship of a completely new system of collaboration that is based on mutual recognition.

I do not want to say very much about those things as they are well known, but I point out that mutual recognition on criminal matters within the European Union means that a specific judicial order that is issued by a judicial authority of one member state to another member state must be recognised and executed without any further formality, unless specific grounds for refusal apply. That means that co-operation is no longer for the Executive but for the judicial authorities, which provides further guarantees such as judicial oversight.

There are now 32 areas of crime in which the so-called principle of double criminality has been dropped. In order to surrender someone under a European arrest warrant and the principle of mutual recognition, a specific offence in one of those areas does not now need to be a criminal act in both countries.

The so-called nationality bar, which prohibits a member state from surrendering its own nationals, has been partially dropped. We now have very strict time limits. The average time for surrender under the European arrest warrant framework is approximately 60 days, in comparison with one year in the extradition system.

Those aspects of the European arrest warrant translate into other areas of interstate co-operation on criminal matters. One such example is exchange of evidence. The UK is part of the European investigation order scheme, which has set up a system of mutual recognition of evidence within the EU.

I have at least two further points to make, but I will leave it there.

The Convener: I will bring in Clare Connelly, followed by a couple of committee members.

10:15

Clare Connelly: It is worthy of note that the development of co-operation across Europe on criminal justice issues has paralleled a development and an increase in international crime. Crime is now a global issue, certainly in comparison with the previous perception of crime as being, for the most part, much more of a local or domestic issue. As we can see, there have been very positive developments while we have been part of the European family. Those have come about primarily through the European arrest warrant, which Leandro Mancano mentioned. The

warrant has been hugely efficient in enabling us not only to bring home criminals who have sought refuge elsewhere but to send those who are accused of crimes to other countries so that they can face a proper trial or receive a punishment that has already been handed down to them. In addition, there have been wider developments that address issues such as counterfeit currency and terrorism. One of the most recent developments is the medicrime convention, which addresses the use of the dark web, for example, to make available to individuals certain drugs that have not been properly produced, tested and so on.

The fact that co-operation is able to protect citizens of this country and of the EU more widely is most commonly known to the general public in relation to the European arrest warrant, Europol and exchanges of data and intelligence. Those elements are clearly hugely important, but there is a broader aspect to the co-operation. The view of the Faculty of Advocates is that that harmonisation, co-operation and mutual recognition must continue. That is important so that the United Kingdom, and Scotland in particular, do not become a haven for those who commit particular types of crime and wish to hide from pursuers or receive a more favourable punishment that is not in line with punishments elsewhere. However, it is also important for individual members of the public. They may not be aware of how such co-operation impacts on their day-to-day lives, their security and their person, but it does, and we must ensure that it continues post-Brexit.

Mairi Gougeon: I have a specific point in that respect. The committee recently visited London, where we met members of the House of Lords EU Justice Sub-Committee. I am interested in that committee's work on the issues that we are discussing today. In evidence to the EU Justice Sub-Committee, Lord Thomas said:

"the European arrest warrant operates in a fundamentally different way. Unlike treaties, it is premised upon judicial co-operation. It is very difficult to see how, if an instrument operates on that basis, it can do so without some body at its apex to determine the rules by which it works … there is a total lack of debate about the two very different approaches to the problems of the relationship between two judicial systems: the treaty-based mechanism and the one based on co-operation."

I was also interested to read the written evidence from the Crown Office and Procurator Fiscal Service, which, with regard to the European arrest warrant, said:

"Its key features are to make extradition a judicial rather than a political process".

Do you agree with Lord Thomas that there is a "lack of debate" on the EAW and the current position in that regard, including questions such as why having a system of judicial co-operation is important and how it is different from any other political process?

The Convener: Perhaps Daniel Johnson can ask his question now, and then we can see who wants to pick up on those points.

Daniel Johnson: My question follows on directly from what Mairi Gougeon said. In looking at alternatives for how things might work in future, we have heard that there is currently a complicated judicial and institutional relationship rather than a simple bilateral treaty. What do the other models look like? I am thinking of Norway in particular, given that it has a specific treaty that recognises the European arrest warrant. How does that work? Is it a potential model for the UK? Are there drawbacks? Do the EU or the UK have relationships with other jurisdictions that might serve as a model for a future relationship that would enable us to work together?

The Convener: Dr Glover, do you have a view on that?

Dr Glover: This is not so much on that issue but, to pick up on what Clare Connelly said, the devil lies in the data, and in the arrangements that are made for intelligence and data transfer. I am less certain on the EU law in relation to the matter, but retention of access to the databases to which we currently have access is critical, and the on-going role of the Court of Justice will be critical in making that work.

That said, it is worth remembering that there is—or there seems to be, on the basis of what I have read—a will to make co-operation between the two parties in this area work, and to keep as much of the status quo as possible post-Brexit.

The Convener: Perhaps Helen Nisbet can comment from a COPFS point of view.

Helen Nisbet: From our perspective, there are very practical considerations around whether we will be able to secure surrender, extradition and evidence from European colleagues in the way that we have been able to do until now.

I go back to Michael Clancy's comments about the Prime Minister's wish as expressed in her Munich speech. If the proposed all-embracing treaty were to be delivered in a form that preserved the current position as far as possible, albeit on a different legal basis from the current one, and—more importantly—if it sought to preserve the capacity for us to innovate further in future in our relationship with European partners, which is my understanding of the UK Government's current position, the practical impact of Brexit from the UK or Scottish prosecutor's point of view might be minimal. However, colleagues round the table have identified the two issues that might add real

challenges in that respect: the need for data sharing and the question of who arbitrates in the event of dispute. Those challenges still need to be properly bottomed out. Until we know how those aspects are to be dealt with, it is difficult to properly assess what the practical impact will be.

Ben Macpherson: I thank Helen Nisbet for her contribution—I want to pick up on that point as well as on Dr Glover's comments about the on-going role of the Court of Justice. The point about who will be the final arbiter is crucial; it was highlighted in the report from the House of Lords EU Select Committee, and by the committee members to whom we spoke on our visit to London.

It comes down to how the system will operate in practice. Given the expertise among the witnesses around the table in the theory—those in academia—and the practice, perhaps you can answer this question. Without the Court of Justice as the final arbiter, is there a way in which the reciprocity that we have now can continue? Can the effective operations for which the European arrest warrant provides be sustained without a shared final arbiter or an understanding of reciprocity?

The Convener: I think that John Finnie has a related point.

John Finnie: My question, which is on the practical implications that have been mentioned, is specifically for Helen Nisbet. I presume that there is a bit of a lead-in time before a warrant is applied for. Cross-border cases can be complicated, and transitional arrangements will be crucial if any change takes place. What would be the practical implications if there were to be a delay, or if there was nothing in place to secure the arrest of an individual?

Helen Nisbet: There are two aspects to that. We would need to model two scenarios, and we are still in the process of our modelling work. In one scenario, we would be operating under EU law one day, and—perhaps in the same investigation and the same prosecution—we would be operating under whatever followed it the next day. That proposition is not unique or unheard of. There have been examples in which Scotland has decided to move from a common-law offence to a statutory offence, so there are models for that.

I go back to the point about what could follow. Ultimately, if there was no deal—if I can express it in that way—the working assumption would be that we would fall back on the Council of Europe conventions of 1957 and 1959, which deal with extradition and mutual legal assistance respectively. However, within that, there are questions still to be answered. There are provisions in the framework decision that governs EAWs and in the directive that governs the new European investigation order that at least pose the question whether, for the states that participate in them, those mechanisms replace the pre-existing conventions. That issue needs to be bottomed out.

There are separate issues, particularly in relation to extradition. Under the 1957 convention, a number of member states will not surrender or extradite their own nationals. Again, practical impact assessments would need to be done country by country to determine what the impact on future relationships would be.

The Convener: Before I bring in Michael Clancy, I invite Lorraine Henderson to come in, as I see that she is nodding. Lorraine, is there anything that you would like to add?

Detective Chief Inspector Henderson: A number of countries have repealed the 1957 convention.

With regard to Daniel Johnson's question on whether we can have a similar system to the one that Norway has, we need to be mindful of the fact that Norway is still part of Schengen, so in that respect the same option may not be open to the UK. As Leandro Mancano said, we cannot look at these things in isolation. We have to look at interoperability, and at how each of the different justice and home affairs measures rely on each other and can work efficiently together.

Michael Clancy: If there is to be an arrangement for practical and operational co-operation, the EU's wish for a partnership to act against terrorism and international crime and the UK's desire for a deep and special partnership would seem to be not that far apart. However, when one digs into the detail, one finds that the red line of the CJEU presents a difficulty, and it will do so sooner rather than later.

I go back to the agreement on citizens' rights that was made on 8 December. In the transitional period, those rights will still be capable of being referred to the CJEU. Indeed, the joint report of the agreement tells us that that will continue for eight years, from exit. The difficulty is that, under the transition arrangements, the UK will not participate in the EU institutions. Therefore, not only will we not have a commissioner, members of the European Parliament and all the rest, but we will not have a judge. Our three judicial officers in the CJEU will have to leave. We could face a peculiar situation in which the CJEU is dealing with cases while there is no British judge in post, which would present difficulties.

Treaties invariably have some kind of mechanism for dealing with disputes. The question to be asked of the UK Government and the EU with regard to the proposed treaty is how it

addresses the need to deal with any disputes that arise out of the topics in it. I take Leandro Mancano's point that we are looking at not only the European arrest warrant but a much larger vista, which includes all the other practical elements of co-operation such as Eurodac, Eurojust, eu-LISA and the rest.

The Convener: Clare Connelly also made the point about what would happen in the event of a dispute. Would international arbitration rules help in any way?

Clare Connelly: In response to that question, and to go back to Mairi Gougeon's question in which she highlighted a quote from Lord Thomas, the Faculty of Advocates provided a written submission to the House of Lords EU Justice Sub-Committee entitled "Brexit: Enforcement and dispute resolution—Is there a role for the Court of Justice of the European Union?"

In essence, Lord Thomas says that the operation of an extradition treaty with the EU is different from a European arrest warrant. As he describes it, a European arrest warrant

"is premised upon judicial co-operation".

He goes on to say:

"It is … difficult to see how … an instrument operates … without some body at its apex".

The Faculty of Advocates agrees with that. In its written evidence, it said:

"in the event that rulings from the CJEU lose their status as binding authority, there is nothing to stop those rulings remaining as persuasive authority. Scottish courts routinely draw from cases in other jurisdictions and there is no reason why this should not apply to those from the CJEU.

It is possible that there may be some divergence in approach by the courts, but this should not be over-stated. CJEU rulings have become embedded in UK jurisprudence and it is unlikely that they will suddenly be departed from, especially in the area of Criminal Justice where it should be obvious and desirable that a consistent approach is applied in both jurisdictions."

The faculty's submission goes on to raise issues that may arise where there are inconsistent interpretations of jurisprudence.

The faculty certainly shares the concerns that Lord Thomas expressed. Given where we are with regard to the provisions and agreements that have been reached on what the future will look like, the worst-case scenario is that the decisions of the Court of Justice will continue to have a persuasive authority.

10:30

Dr Mancano: I have two brief points. First, before we discuss the effectiveness of a system in which the Court of Justice of the European Union has no authority or jurisdiction, we should deal with a preliminary question. The CJEU will have to decide on the legality of an agreement. What happens if it decides that it is not willing to give up its control and interpretive monopoly of such a sensitive area as policing and judicial co-operation on criminal matters? Let us not forget that, not that long ago, the CJEU had no problem in throwing in the bin years and years of work on the accession of the EU to the European convention on human rights, based on the specific argument that it undermined the autonomy of European Union law. That is the first point that we should take into account. Let us not simply jump to conclusions, and let us not take it for granted that there will be an autonomous body or an international arbitration model as part of a potential agreement, given that the CJEU will have to decide whether the presence of such an external body is compatible with European Union law.

Secondly, in addition to the dark side of policing and judicial co-operation, which concerns matters that lead to law enforcement, there is a bright side in terms of how judicial co-operation on criminal matters helps to improve the standard of protection across Europe for individuals who are subject to investigation and criminal proceedings. That side has so far been neglected in the debate, and especially in the partnership paper.

An example is the European supervision order, which is another instrument of mutual recognition in criminal matters within the EU. The framework decision on the order allows for mutual recognition of pre-trial measures as an alternative to deprivation of liberty. For example, for a UK national who is subject to investigation in another member state, the competent judicial authority in that state would not, under normal conditions, be very keen to grant a pre-trial measure as an alternative to detention, because it would have no way of controlling that person, given that they are not a resident of that country. In 95 per cent of cases, the authority will just go for detention. The European supervision order allows a country to recognise pre-trial measures as an alternative to detention and to send back the person to their country of residence and nationality.

The effectiveness of law enforcement and cross-border prosecution of crime is maintained, but the order improves the standard of probation and protects the rights of individuals all over Europe. That is another important aspect to consider.

Dr Glover: I want to come back to two issues: data protection and alternative methods of dispute resolution. In the event that the UK becomes a third country, an agreement on data protection would be necessary, as is currently the case for the US, which has in place the privacy shield framework and an umbrella agreement. As I

understand it, the UK has been advised that it should, in that situation, seek CJEU approval through an adequacy decision to ensure that there are measures in place to secure the uninterrupted flow of data transfers. I am guessing that that might be why the UK has been so ready to concede on the CJEU red line for the next two years.

With regard to alternatives, I am going to plagiarise Professor Catherine Barnard, who is professor of EU law at the University of Cambridge—I cannot claim this idea as my own. I am not sure how much traction it has gained so far, but the idea is that, as there seems to be a UK red line over the CJEU—which may be as much about semantics or posturing as anything else; I do not know—arbitration could be undertaken by the European Free Trade Association court. The court has judges from the three EFTA countries that are under its jurisdiction, and its judgments are not binding on its members, nor are they obliged to seek guidance from it. The EFTA court has never really deviated from what the CJEU has had to say, but it can issue findings that the UK might be able to sell as palatable to those who would find the same ruling from the CJEU less palatable. I am not sure about that, but the idea is out there. The notion that there are no alternatives to the CJEU may be premature; there may be other models.

The Convener: So, potentially, the EFTA court could fill the gap.

Dr Glover: Yes.

The Convener: Clare Connelly wants to come in, after which I will bring in some more committee members.

Clare Connelly: In a commercial environment or in relation to civil liability, arbitration can play a very effective role. However, the Faculty of Advocates holds the opinion that, in determining restrictions on an individual's liberty, arbitration and other forms of alternative dispute resolution would not be appropriate. If a serious action such as the withdrawal of liberty is to take place, whether through the transfer or imprisonment of an individual, it must be subjected to reasoned legal analysis, and the process of arbitration would not be suitable.

The Convener: It is helpful to rule that out, but we can keep the EFTA court in as a possibility. I know that Michael Clancy wants to come in, but I want to bring in a couple of members first: Liam McArthur, to be followed by Rona Mackay.

Liam McArthur: The subject of the question that I was going to ask has largely been dealt with by a number of the witnesses. It followed on from Ben Macpherson's question about whether the red line on arbitration is an absolute or are there degrees within it. The issue has been explored in a number of contributions.

The issue of alternatives also arose in the committee's previous evidence session on the impact of Brexit in relation to civil law. Helen Nisbet has mentioned the Council of Europe conventions. In our previous session, we heard about United Nations resolutions as a fall-back mechanism, and we had quite a lively debate about whether those processes would be more advantageous in their development and reach. However, I get the impression that there is no prospect of anything like that in policing and criminal justice, possibly for the reasons that Clare Connelly has elucidated. It would be helpful to get confirmation of whether that is the case.

Rona Mackay: This follows on, partly, from what Liam McArthur said. I want to get a general view of how witnesses think the negotiating positions of the UK and the EU are going. Are they getting their priorities right with regard to policing and the effect of Brexit on the Scottish legal system? If I understand matters correctly, the proposed treaty has been announced but the detail is still to be decided. How much input will Scotland have to that?

Michael Clancy: I have to say that I am not convinced by the EFTA court option, because EFTA is a free trade association and the court does not really do crime, from what I have seen of it. Carl Baudenbacher, who is a judge on the EFTA court, said in a talk that he gave in Edinburgh last year that a country has to be either in the EU or in EFTA in order to get the advantages of free trade between the two, and it cannot switch between the two to get the advantage of a court or something like that. It would have to be a member of EFTA to be able to access the EFTA court. That tells us something about the possibility of accessing the EFTA treaty and so on. Our remaining timescale of 402 days is therefore sliced down to even fewer days. I am not persuaded by Professor Barnard's suggestion that the EFTA court could be used for arbitration—not only for the reasons that Clare Connelly enunciated but because it is simply not suited to doing that kind of job.

I want to say something about where I think the negotiations are. Negotiations are in process this week, but the meeting agendas on the task force 50 website are scant; they say only that a meeting will take place, and do not say anything about the meat of the agenda and what will be discussed.

What we know is that we are moving from the basic phase, which was completed in December, to the future relationship. Taking a view on the future relationship is a significant undertaking because there are so many competing issues that might be considered. Keeping our people safe is

considered to be one of the prime objectives of Government. If the UK Government takes that objective as its priority, the proposed treaty and any other form of agreement between the EU and the UK should be priorities. If the rule of law in our society is underpinned, other things can happen—for example, making contracts, having families and doing our jobs day to day without fear of crime or terrorism. Making the rule of law a fundamental part of the process ensures access to justice and the interests of justice, but we do not hear very much about that.

Last year, when discussions about the CJEU were going on in pending cases, both the UK and the EU issued papers on how the CJEU should be perceived, but that was essentially a managerial exercise. The Law Society of Scotland wrote to Michel Barnier and David Davis to ask where issues such as the rule of law and the interests of justice are in all this, because those are important features that we ignore, or forget about, at our peril.

Rona Mackay: I have a tiny supplementary. I am interested to know whether you think Police Scotland and the COPFS will have enough time to reassure the public that they will be safe. Time is getting on, and those things have not yet been decided. Is there any sense of panic?

The Convener: We are almost crystal-ball gazing with that question, but the witnesses can, by all means, reply.

Detective Chief Inspector Henderson: From a policing and law enforcement perspective, a number of law enforcement agencies, including the National Crime Agency and the National Police Chiefs Council, are doing a lot of background work to identify our priorities as practitioners in order to keep people safe, and they are reporting directly to the EU team in the Home Office. We are working, alongside a number of colleagues from Scottish agencies, with the Home Office on contingency planning. Agencies are working at whatever pace they can go, because it is crystal-ball time. Work is going on in the background and there are meetings every month, if not more often, on that.

10:45

Dr Mancano: I want to build on Clare Connelly's point about the unsuitability of an arbitration or EFTA court model for policing and judicial co-operation on criminal matters. I stress the uniqueness of being part of the European Union and the EU law system in that specific area. Judicial and police co-operation in the European Union is built on the fundamental principle of mutual trust, which operates as a presumption that fundamental rights are respected throughout the European Union.

What happens when a country leaves the European Union or an interaction takes place with countries outside the European Union? The presumption no longer applies. While a country is part of the European Union, it benefits from that presumption, which means that, unless there is concrete evidence that it is not complying with the fundamental rights in a specific situation, judicial and police co-operation continues to operate and cannot be limited.

The relationship between rule and exception is reversed in dealing with a country that is outside the European Union. Of course, the relationship between rule and exception operates in different ways depending on the context, but we can look at data protection as an example. The CJEU's ruling in the case of Maximillian Schrems v Data Protection Commissioner rests on the basic impossibility of presuming that the United States—in that specific case—is complying with EU data protection standards. That is another drawback of not being part of the club—the UK will no longer be presumed to be complying with fundamental European standards.

Mairi Gougeon: I have a question on Leandro Mancano's specific point about data protection, which also relates to Dr Glover's earlier point. I am interested in data adequacy. Can you explain a bit more about that, and why it will be so important?

When we have looked into the issue, some people have expressed fears that the whole process could be slowed down because of the time that it could take the European Commission to decide whether the UK meets the standards on data adequacy. In addition, there is an issue around how the UK would then deal with other countries, given the free flow of data with those countries that we currently have through the EU. If we do not get that adequacy decision, what will it mean? Will we lose free access to data from any other nation—Dr Glover mentioned the EU-US privacy shield, for example—until individual agreements with countries have been reached?

The Convener: Does anyone want to address that? You should probably factor in the assumption that we are looking at a worst-case scenario, here. Would it be bad for us, but perhaps equally bad for EU countries? In other words, would there be any reason why it would be advantageous for the EU not to co-operate in sharing data? If it did not co-operate, the questions that Mairi Gougeon raised would apply. Would anyone like to look at that?

Dr Glover, you may want to look at the EFTA question and then address the last question. You said that the EFTA court currently complies with

just about all the CJEU's judgments, although the point has been made that it is not suitable for dealing with criminal justice matters.

Dr Glover: It is by no means certain that the UK would have to seek an adequacy decision. That is a fall-back option, should it become necessary for the UK to be treated as a third country—probably in the event of a very hard Brexit, as I understand it.

I am reasonably confident that the UK and the EU can and will reach an agreement. On standard data protection and flows of data, we now have the general data protection regulation, which the UK will honour from May 2018. The sharing of intelligence and the transfer of data that relates to national security and law enforcement are subject to slightly different rules, in that those areas lie outside the scope of the GDPR. They are subject to the oversight of the CJEU, which is a jealous supporter of fundamental rights to data protection. It takes a very dim view of what it perceives as threats—Leandro Mancano referred to the Schrems case—to an individual's fundamental right to data protection, as recognised in the European charter of fundamental rights.

That said, the EU has now entered into satisfactory data-sharing arrangements—I am trying to scan up and down a document on my device; sadly, it is slower than turning a page—with a number of third countries, not least the US. I appreciate that the issue of just how legal—for want of a better term—the current privacy shield and umbrella agreement with the US is has still not been settled in the CJEU. To answer Mairi Gougeon's point, adequacy decisions are time consuming, but given the political will that sits behind the current arrangements, I do not see that as a threat to getting a rubber stamp on how the UK currently transfers data to the EU and receives data back.

My personal view is that it is unthinkable that any of the practitioners here today would lose access to databases and intelligence that they currently have while the details of the treaty are thrashed out. To put it simply, data is now the gold currency between nations, so I find it unthinkable that the UK and the EU will not work out an adequate settlement. That said, if the matter falls to an adequacy decision, it would take time for the result to be formalised.

I accept Michael Clancy's point about the EFTA court, but the idea that I mentioned has been mooted purely in respect of dealing with the adequacy of data transfer rather than as a suggestion that the EFTA court could be an overall arbiter for the whole treaty. I was referring only to data.

The Convener: I want to pick up on Liam McArthur's question. If, in the worst-case scenario, some of the agreements that we have discussed do not come to fruition, are there other treaties or conventions that could help? Could the Hague convention play a part in any of the areas where there may be a problem? Perhaps Dr Glover can take that one.

Dr Glover: That is outside my area of expertise.

The Convener: Is it outside everyone's area of expertise? Does no one want to comment on that? What about Leandro Mancano? Is there any way that the Hague convention or other treaties might play a part if the negotiations fall down and a fall-back position is required? I think that that is what Liam McArthur was asking.

Liam McArthur: In the committee's evidence session on Brexit and civil matters, we discussed whether such conventions could play a role in plugging a gap. However, as I said, I got the impression that there was not a similar opportunity in relation to the criminal justice issues that we are discussing today. The body language of Leandro Mancano gives me my answer; maybe he wants to say something on the record.

Dr Mancano: I am pretty sceptical about that, for the reasons that I mentioned earlier with regard to the two systems. We tend to think about the systems for policing and judicial co-operation—which are connected but have to be kept separate—as just another form of international law or co-operation, but they are not. We should be realistic enough to accept the possibility that any fall-back regime will be far, far less effective in terms of enforcement and the protection of rights.

Helen Nisbet: To develop Liam McArthur's point, there is a general consensus among law enforcement practitioners that the evolution that has taken place in the European Union over 40 years has allowed us to reach the point of optimal operation on the basis of mutual judicial co-operation. We are on the cusp of future breakthroughs such as being able to interrogate systems in real time and get information back to home countries more quickly.

However, it is important to say, as a practitioner, that international co-operation will not cease if there is no deal in the Brexit negotiations. Scotland and the UK deal with other countries all the time. Sometimes we are dealing with a state for the first time—it may not even be a state; I am thinking of a recent extradition case involving Taiwan. There is always scope, if the will is there on both sides, to reach agreements and to secure co-operation. That happens with states across the world.

The point—which I think Dr Mancano was making—is that, without the interdependent

network and the suite of options that we currently have, we will be faced with something that will be somewhat less effective than is the case just now.

The Convener: I am conscious that we have only half an hour left. I know that witnesses may have a particular issue that they wish to raise. I will go round the table, and if there is a particular issue that has not been covered that you would like to put on the table, you can do so. Perhaps Lorraine Henderson can start by saying a bit more about the medicrime and cybercrime aspects, and how those are playing out.

Detective Chief Inspector Henderson: Unfortunately, I cannot—I would not be able to assist at all on medicrime, because that is not in my field of expertise.

The Convener: Does it cover organs, or people who are used as human—

Detective Chief Inspector Henderson: I could not begin to tell you—I would not even like to guess. Perhaps someone else can pick up on that.

As practitioners, we have identified a number of measures as our priorities, which link together. As Leandro Mancano said, one area will not function without the other. The Schengen information system that Dr Mancano mentioned has been in place only since 2015, but it is a hugely effective tool in front-line policing to enable us to keep our communities and our police officers safe. Officers get real-time information on whether someone is wanted in another country and whether they are a violent individual, given the crimes that they have previously committed.

The year before the Schengen information system came into effect in April 2015, we executed 73 European arrest warrants. Following the system's introduction, that figure jumped to 111 because we had real-time access to information. That will be lost if we do not have access to the second phase of the Schengen information system, or SIS II. Norway, which has been mentioned, has access to SIS II even though it is not an EU member state, but it is in the Schengen area. We have informed the Home Office of our key priorities as practitioners, which are more interdependent than may be the case in other areas.

The Convener: I have seen it mentioned somewhere that Turkey, as an EU candidate state, is not part of any formal treaties but is copied into, or is party to, some of the agreements on that basis.

Detective Chief Inspector Henderson: A lot of that will be to do with Europol and access to information. The UK currently enjoys full membership of Europol, so we can influence its direction and priorities. One of the new priorities this year that the UK has influenced is wildlife crime. When we no longer have full membership, we will not have any opportunities to bring our influence to bear. We could become a strategic member such as Albania and Russia, with which no personal data is exchanged, or we could move to operational membership, as the USA, Canada and Norway have done. That involves fuller membership than is the case for strategic partners, but those countries do not have full membership, so our opportunity for influence would be gone. The UK Government is seeking to eke out a more unique relationship with Europe, but we do not know how realistic that is.

11:00

Michael Clancy: It is quite important for us to appreciate that we will be safe the day after exit. I have every confidence that that will be the case. I would like to think that the negotiators will reach agreement on the key points and that, even if we do not have a full-blown treaty, we will have heads of agreement, which could be lodged at the UN to be used as the basis for an agreement between the UK and the EU.

I will send on to the committee the paper that I am holding up. It is a presentation on "Police & judicial cooperation in criminal matters" by an ad hoc working party on article 50, from a seminar that took place on 23 January this year. Gillian Mawdsley, who is sitting in the public gallery, dug it out for me. It highlights the various default positions if there is no agreement, which include international conventions such as Council of Europe or UN conventions, Interpol, bilateral relationships with member states and "soft measures" such as "exchanges of non-personal data" and "global initiatives". If one looks at the consequences of applying the third-country model to the UK, one sees that although we would not get access to the database, there might be data exchange. Any kind of interruption in the flow of data causes delay, which can be troublesome, but there might be ways to work around that.

A new treaty will open up some—indeed, all—of the issues that it contains to further examination and debate. The debate in this country is currently introspective. We are wondering what we are going to get in the negotiations and how we are going to ensure that the EU yields to our position. That might be the mantra that Government ministers are using, but in fact there are 27 other people in the room. We do not know enough about what the other member states will want in the debate. The treaty will open up the European arrest warrant to examination and debate—Leandro Mancano has written about the issues that have come up in the ECJ in that respect, and the difficulties that member states have with

aspects of the EAW—and that will apply to the other initiatives as well.

We have to be alert to the fact that what might come out will be something completely different from the status quo. It might be an improvement with regard to some of the things that currently hold back the European arrest warrant from realising its full potential. For example, issues of proportionality, questions of dual representation and relationships with fundamental rights will start to be debated more openly. We need to be alert to that, because we need to be able to make representations.

Rona Mackay asked earlier about the position of Scots law. In the UK Government's future partnership paper, there is one paragraph that says something like, "and we will also talk to the devolved Administrations." We have in Scotland a particular system that means that the Lord Advocate is independent. Although he is a Scottish minister, he conducts the operation of prosecuting crime independently of Scottish ministers. In the Law Society's response to the UK Government's partnership paper, we made the point that we must be alert all the time to issues that may come up that might have an impact on the Scottish legal system and our legal heritage. That heritage should not be frozen in aspic—it should be open to change and must go with the flow to improve the lives of the people who live here.

Clare Connelly: I do not have a great deal to add to what I have said already on behalf of the Faculty of Advocates. I will say that it is clear that mutual co-operation is in the interests of all countries, but time is of the essence.

The Convener: That is noted.

Helen Nisbet: To develop Michael Clancy's point, the need to consider the unique position of Scots law is reflected in the COPFS submission. With regard to our planning, and in particular our provision of technical advice to UK Government colleagues, we wish to emphasise as key points the unique nature of the Scottish legal and criminal justice system and the need to properly take account, in the development of any thinking, of the role of the Lord Advocate. A secondary consideration in looking forward is our desire to preserve the identity that COPFS and its international co-operation unit has created for itself within Europe and to continue our direct contact and co-operation with European colleagues in whatever arrangements emerge. At a secondary level, we want to emphasise the importance of Scottish law enforcement being able to do that as well.

Dr Mancano: I want to speak about what I would call the Brexit paradox. What does the UK need to do to be part of the club? As was mentioned earlier, we could be part of Schengen, like the other third countries that want to join fully the system of policing and judicial co-operation on criminal matters. There is another interesting issue, which is compliance with EU law and with the European charter of fundamental rights in particular. If the UK is going to reach a comprehensive and specific agreement with the European Union on policing and judicial co-operation on criminal matters, it will have to comply with European Union standards of law There is no scenario in which the EU has signed an agreement with a third country without that country providing reassurance that it is complying with EU law standards, especially with regard to the protection of fundamental rights. It will be very interesting to see what happens. One of the main arguments for Brexit is that the UK does not want to be bound by the charter of fundamental rights any longer. If the UK wants to get back in through the window at the moment that it signs an agreement with the EU, with which conditions will it need to comply? That is something that we should consider. Which conditions, specifically on fundamental rights, will the UK be able to comply with in order to sign an agreement?

Dr Glover: I have not much more to add, other than to say that it seems possible—indeed, the US, which has been much pilloried over its surveillance activities post Snowden, has shown that it is possible—to continue to co-operate with the EU on an acceptable basis. The current US operational arrangement with Europol includes co-operation on drug trafficking, human trafficking, trafficking in nuclear and radioactive substances, people smuggling and terrorism, and an on-going exchange of intelligence and information. There are 16 of those operational agreements, to which DCI Henderson referred.

It is difficult to comment while the negotiations are taking place. No one really knows what is happening in them, and we are left with the media to guide us as to what might or might not happen. To be frank, that is where we all are. However, as I said, I remain fundamentally optimistic that any type of Brexit will involve a comprehensive settlement on policing and justice co-operation in which we will not have to concede very much.

The Convener: That is helpful. The final issue is the Irish situation, which was mentioned in one of the submissions. There are 20 cases pending, and there was some dubiety around whether there would be an extradition. I think that it was mentioned in the submission from the Law Society or COPFS—

Helen Nisbet: It was mentioned in the COPFS submission.

The Convener: Would you like to comment further on the various scenarios in that respect?

Helen Nisbet: It is hard to know at the moment. It is an example of how, as negotiations continue without concrete clarity on the direction in which they are heading, the lack of certainty can come to the fore in individual court cases. In essence, it can gum up the works in a way that has not been anticipated.

As I understand it, the decision that was made earlier this month is to be referred to the CJEU under an expedited procedure via the Irish Supreme Court. It has not yet been determined whether the CJEU will accept the case, or within which parameters it might do so. However, it will allow all member states—and other parties, for that matter—to enter into proceedings.

We are watching the situation closely to see what flows from it. Given the 20 cases pending in Ireland, the practical implication is that uncertainty around extradition to the UK might become more of a feature generally. Individual parties are looking at the uncertainties around Brexit and asking what advice a lawyer representing somebody in Belgium who is facing surrender under the EAW, for example, should offer their clients on their approach to their extradition proceedings.

The Convener: Would such cases have gone through without any question before Brexit? Would a member state have exercised its right to say, "In this case, we are not sure if we will comply"?

Helen Nisbet: In the decision to which I referred, Brexit was invoked as the factor that created the problem and presented an impediment to the normal course of the surrender process under the European arrest warrant.

The Convener: Could the member state have exercised its right to say, "We have doubts in this case," for some other reason?

Helen Nisbet: Theoretically, yes. There is a limited number of bases for challenge of non-recognition of a European arrest warrant but, at the end of the day, it is always open to someone to develop an argument. It is a bit of an imponderable, but there is always scope for development in that regard. We had not encountered that until the case that I highlighted, in which Brexit was very much posited as the problem.

Liam McArthur: I want to follow that up. Leandro Mancano said that, although there are grounds for challenge, the timeframe is an issue. One of the benefits of the European arrest warrant process are the strict time limits and the way in which they are applied. I am struggling to see how grounds for a challenge could be based around the Brexit process rather than issues that are material to that specific case.

Helen Nisbet: That might ultimately prove to be the case, but the problem is where we are just now. Somebody has put forward a challenge that the Irish courts have been prepared to entertain to a certain extent thus far, but they are now saying that they want to refer the case to the CJEU for final determination. The CJEU might just say, "No—the law is that the EAW should be enforced, and the UK is part of the EU, so the time limits should apply." However, the case has come from left field, and it raises issues that have not necessarily been anticipated.

The Convener: That is the problem, I suppose—it is a moving feast.

11:15

Mairi Gougeon: One thing strikes me in looking at all this. We are involved in all these different arrangements and we obviously want to be able to continue that involvement post-Brexit. Before Brexit, we took a pick-and-choose approach by deciding what we wanted to be part of through various opt-ins and opt-outs. Essentially, we are trying to do the same thing with Brexit, except we will no longer be a member of the organisation from which we want to pick and choose. At some point we will be a third country, so I am concerned about whether the EU will look as kindly on the pick-and-choose approach and the opt-ins and opt-outs as it has done in the past.

Something that Michael Clancy said is highlighted in the Law Society's submission, which says:

> "The UK Government has indicated its intention to work with the devolved administrations recognising that Scotland has a separate legal system."

Has that been adequately recognised in the process so far?

Another fear of mine is that, given the number of times that the joint ministerial council has met so far and the fact that there was a gap of about nine months between meetings last year, there has not been adequate time to give these matters, and the Scottish legal system in particular, the attention that they deserve in the negotiations. How can the committee ensure that Scotland's voice is heard in all the discussions and negotiations?

The Convener: Michael Clancy has already expressed considerable concern about the timeframe, but he is welcome to respond.

Michael Clancy: Mairi Gougeon makes an interesting point about the extent to which issues such as the unique Scottish system of criminal justice are discussed around the Cabinet table. I would not like to venture to guess how many times

the subject has been raised in number 10 Downing Street; I might get it wrong.

It is important for us to recognise that discussions between the UK Government and the devolved Administrations go on at many levels. I have every confidence that officials are keeping one another in touch on various aspects relating to justice, civil law and other elements in this area. At the point at which ministers meet, however, it might be much more difficult for those issues to be raised on the agenda. However, as I said earlier, the underpinning of the rule of law means that all the other things can function.

The negotiations on agriculture, financial services, company law and other things are all underpinned by the idea that we can go about our business without fear of not being able to do so. That is clearly very important, and I think that it is in the minds of ministers. I believe that UK ministers are aware that the Scottish jurisdiction has a distinct nature. The Lord Advocate's speech in Brussels was heard by people in Brussels, including those in UKRep—the United Kingdom permanent representation to the European Union—and Scotland's representation in Europe.

I am sure that the Lord Advocate has frequent discussions with his UK counterpart, HM Advocate General for Scotland. I know that, during the debates at the committee stage of the European Union (Withdrawal) Bill, which are due to start tomorrow, issues around and about the Scottish legal system will be raised, because I have made sure that amendments have been tabled in order to raise them. I have no doubt that UK ministers are aware. The difficulty, of course, is that, when we come to the negotiations, some things might just not be remembered, or something like that, in the red heat of discussion, if I can describe it like that. That is a possibility, but I live in hope.

Liam McArthur: I say this as someone who is, by and large, appalled at the prospect of what Brexit holds. There is any number of examples of UK ministers grossly overestimating the strength of our negotiating position, but policing and criminal justice strikes me as an area in which there is mutual self-interest. Although we cannot determine what the outcome will look like, the political drivers in this area look very different from how they look in other areas. Richard Walton, the former Metropolitan Police Service counterterrorism commander, said:

"There is no way European countries will want to us to stop sharing with them and vice versa. They need us as much as we need them. Our security does not depend on engaging with the institution of the EU, it does depend on collaboration with European countries and that will carry on regardless."

That perhaps overstates the point to some extent, and ignores what Leandro Mancano said earlier about the view that the CJEU might take, irrespective of what member states see as being in their own interests. However, is there a general sense among the witnesses that that mutual self-interest gives a degree of confidence that whatever emerges from the process will approximate what we have at present, even if it is deficient in some areas. Is that the case, or is it too early to say? Is that view grossly overoptimistic?

The Convener: I want to add to the mix the Gartcosh crime campus and the internationally recognised cutting-edge work that is done there. That might be a wee bit of a trump card for Scotland, given that the cutting-edge work on data and processes that is being done there helps to combat terrorism and various other areas of crime. How does that fit into the mix? I think that the COPFS submission mentioned Gartcosh. Perhaps DCI Henderson and Helen Nisbet would like to comment on that. Helen, would you like to kick off?

Helen Nisbet: In terms of what is achievable, we want to focus on maximising what we can do through international co-operation, be it in Europe or more widely. The way in which we have organised ourselves in Scotland, and the development of the crime campus, are key factors that we can use to our advantage in shaping any future arrangements.

To address Liam McArthur's point, I am not sure. I think that countries across Europe are aligned in recognising the mutual benefit that undoubtedly flows from the current justice and security arrangements. However, I personally feel that it is too early to say whether we can be confident about preserving those arrangements. There is an aspiration to do so, but—to go back to my point about the Dublin case—things can come out of left field that we do not anticipate. I cannot go so far as to say that there is confidence, but there is a mutual aspiration to preserve arrangements as far as possible.

Detective Chief Inspector Henderson: I will pick up where Helen Nisbet left off. From a policing perspective, will we still be able to co-operate with our partners throughout Europe? Yes. Will that co-operation be as slick and effective as it is at present? Probably not, if we do not maintain full membership. It will be more time consuming, cumbersome, bureaucratic, and possibly more financially constraining because the current measures were put in place to cut out all, or a lot of, the bureaucracy.

Gartcosh is one of the most efficient areas in which I have worked because so many agencies work in the one building. It is held up internationally as an example—visitors from all over the UK and the EU, and from further afield,

have hailed it as groundbreaking. The EU Commissioner for the Security Union, Julian King, also commented on that aspect during his recent visit.

The Convener: To address your initial point, the measures are there for a reason, and if they are not in place, the process will be more time consuming. If the political will is there, and both the UK and the EU will benefit from mutual co-operation, does it become a political priority on both sides? If it does, would some of your concerns no longer be concerns?

Detective Chief Inspector Henderson: Again, we are talking about a crystal ball. It is in everybody's benefit to maintain the current relationship.

The Convener: In any case, the world is getting smaller in terrorist terms.

Detective Chief Inspector Henderson: It is not just about terrorism—local crime that affects me, you, our next-door neighbours and all our relatives is just as important.

Ben Macpherson: Given what has just been said, what Michael Clancy said earlier about security being one of the prime responsibilities of Government and what has been said by COPFS, I have a question that is similar to the one that the convener just asked, but which comes from a different perspective.

Do you think that the UK Government's evident political approach to issues of security—as highlighted in the Munich speech—in which it uses issues as negotiating positions rather than seeking primarily to come to an agreement, is irresponsible? Do you believe that, given the absolute importance and imperative nature of tackling criminality, politics should not be a prevailing factor in the process, and that responsible government should be the overarching persuasion of politicians?

The Convener: Is that the position? Is it a negotiation, or are the parties seeking agreement? I suppose that that is the key point on which to get views, if there are any, although I am not sure that it will take us much further.

Ben Macpherson: My point is that security should not be a negotiating tool. It should be of heightened importance rather than being a negotiating position.

The Convener: I understand. The question is whether the process is a negotiation or whether it is about trying to seek agreement. That might well be a time-will-tell question.

If nobody wants to address that, I thank you all very much for your attendance today. This area is obviously very complex, and it has been useful to tease out the issues behind it. We are not just looking for an agreement—there can be a broad-brush approach, as there are many other factors underneath to be looked at.

We now have an idea of the challenges, and possibly some of the solutions and areas that we might want to look at. I thank you very much for coming. We will consider the evidence that we have heard today as part of our work programme, and we will see where we go from there. What you have said, and the overview that you have given us, is appreciated.

I suspend the meeting to allow the witnesses to leave.

11:27

Meeting suspended.

11:31

On resuming—

The Convener: Under item 3, I invite the committee to delegate to me, as convener, responsibility for arranging for the Scottish Parliamentary Corporate Body to pay, on request, witness expenses for the evidence session on Brexit and policing and criminal justice. Are members agreed?

Members *indicated agreement.*

Justice Sub-Committee on Policing (Report Back)

11:32

The Convener: Item 4 is feedback from the Justice Sub-Committee on Policing on its meeting of 8 February 2018. Following the verbal report, there will be an opportunity for brief comments or questions, should members have any. I refer members to paper 3, which is a note by the clerk, and I invite John Finnie to provide feedback.

John Finnie: The Justice Sub-Committee on Policing met on 8 February, when we took evidence from HM inspectorate of constabulary in Scotland on its report, "Strategic Review of Undercover Policing in Scotland". We took evidence from Michael Matheson, the Cabinet Secretary for Justice; Derek Penman, HM chief inspector of constabulary; and Stephen Whitelock, who was the lead inspector on the review.

We also considered our work programme and agreed the following: to keep under review the evidence that we have heard on undercover policing; to invite written evidence from the Association of Scottish Police Superintendents, Police Scotland, the Scottish Police Federation and Unison Scotland in relation to Police Scotland's on-going review of custody provision; and to undertake further work on the financial management and leadership of Police Scotland and the Scottish Police Authority. We also agreed to write to the Public Audit and Post-legislative Scrutiny Committee to seek an update on any future work that it might have planned on the finance and governance issues relating to Police Scotland and the SPA. Finally, we agreed to write to the SPA to seek clarification on issues relating to its board. The sub-committee will next meet this coming Thursday, when we will hold an evidence session on Durham Constabulary's reports on Police Scotland's counter-corruption unit.

The Convener: Thank you for that. As there are no comments or questions from members, we will move into private session. Our next meeting will be on Tuesday 27 February, when our main business will be consideration at stage 2 of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill and the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

11:34

Meeting continued in private until 12:14.

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