

# **JUSTICE 2 COMMITTEE**

Wednesday 9 May 2001  
(*Morning*)

Session 1

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## JUSTICE 2 COMMITTEE

†11<sup>th</sup> Meeting 2001, Session 1

### CONVENER

\*Pauline McNeill (Glasgow Kelvin) (Lab)

### DEPUTY CONVENER

\*Mrs Lyndsay McIntosh (Central Scotland) (Con)

### COMMITTEE MEMBERS

\*Scott Barrie (Dunfermline West) (Lab)

\*Christine Grahame (South of Scotland) (SNP)

\*Ms Margo MacDonald (Lothians) (SNP)

\*Mrs Mary Mulligan (Linlithgow) (Lab)

\*Tavish Scott (Shetland) (LD)

\*attended

### WITNESSES

Rosemarie McIlwhan (Scottish Human Rights Centre)

Dr Iain Scobbie (University of Glasgow)

### CLERK TO THE COMMITTEE

Gillian Baxendine

### SENIOR ASSISTANT CLERK

Claire Menzies

### ASSISTANT CLERK

Fiona Groves

### ACTING ASSISTANT CLERK

Graeme Elliott

### LOCATION

The Hub

† 10<sup>th</sup> Meeting 2001, Session 1—joint meeting with Justice 1 Committee.



## Scottish Parliament

### Justice 2 Committee

Wednesday 9 May 2001

(Morning)

[THE CONVENER opened the meeting at 10:01]

**The Convener (Pauline McNeill):** I open the 11<sup>th</sup> meeting of the Justice 2 Committee. I ask members to switch off their mobile phones and pagers, if they have not done so.

### Interests

**The Convener:** I welcome Tavish Scott to his first Justice 2 Committee meeting. Our agenda is not too heavy this morning, you will be pleased to note, although it is getting that way. I invite you to declare any interests that you might have. At this stage, you need declare only general interests; you will be required to declare specific interests before any committee discussion on a related subject.

**Tavish Scott (Shetland) (LD):** I have no interests to declare.

### Items in Private

**The Convener:** Under agenda item 1, we must consider whether to take items 2 and 3 in private. Is that agreed?

**Members indicated agreement.**

10:02

*Meeting continued in private.*

10:25

*Meeting continued in public.*

## International Criminal Court (Scotland) Bill: Stage 1

**The Convener:** I invite our first witness to introduce herself.

**Rosemarie McIlwhan (Scottish Human Rights Centre):** I am Rosemarie McIlwhan, and I am the principal officer at the Scottish Human Rights Centre.

**The Convener:** Thank you for the paper that you sent the committee in advance, which has been useful. I shall not ask you to make an introductory statement, as we have your paper in front of us. We will begin with questions, if that is okay.

**Rosemarie McIlwhan:** No problem.

**Scott Barrie (Dunfermline West) (Lab):** One of the issues that keeps cropping up is this: what is to stop a state from having some sort of inverted show trial, with a preconceived notion of acquitting people? How might conflict arise between the provisions of the International Criminal Court (Scotland) Bill and a country's domestic law?

**Rosemarie McIlwhan:** There is nothing to prevent a state from having a show trial. However, if it was felt that a show trial was taking place and that the person was not being tried properly, the international criminal court could hold a separate trial of its own at which the person would be tried properly.

**Scott Barrie:** How would that impact on double jeopardy rules? Most jurisdictions—certainly ours—have a presumption that, once someone has been acquitted of an offence, they cannot be retried for the same offence. In effect, we are setting up a system whereby retrial could become the norm.

**Rosemarie McIlwhan:** I acknowledge what you are saying. That might be the perception but, in the first instance, that person has not been tried—there has been only a show trial and window dressing. The second trial would be the first legitimate trial. Nevertheless, we have concerns about that situation and we would like clear guidance to be given regarding when a second trial would take place.

**Scott Barrie:** I appreciate that it is difficult for you to answer this question, but how can we legislate for that? One person's show trial is another's fair trial. How are we to find the balance between what is deemed acceptable in some

countries and unacceptable in others? Politics will play a large part in that judgment.

**Rosemarie Mcllwhan:** That is true, but there are basic principles—such as those that are laid down in the International Covenant on Civil and Political Rights—that everyone will agree are fundamental to a trial. Those principles would include having a judge who is independent and is seen to be so and a person's right to have witnesses examined for and against them. I think that the whole world would agree with such ideas. There are some basic principles that could be used to ensure that trials were not just show trials.

10:30

**Ms Margo MacDonald (Lothians) (SNP):** I realise that my question will be almost impossible to answer, given that what Scott Barrie just said is true. There will always be differences of opinion on what constitutes a show trial and what does not. Imagine the situation of a British national being tried under international court jurisdiction in a faraway country, with a judge who does not speak English. You can imagine how a free press in this country might comment on that. You can see where the political pressure would come from to set aside that court's finding.

We can envisage that happening. I do not want to pinpoint, on the record, specific countries where British nationals are in jail for various reasons, but we realise how delicate the matter is. If the normal—as we see it—democratic processes can get in the way of the international criminal court's jurisdiction and practices, what is the use of having such a court?

**Rosemarie Mcllwhan:** I will start with Margo MacDonald's last point. It is hoped that an international criminal court will act as a deterrent to people who would commit such atrocities as crimes against humanity. That is the idea behind having the court.

On the point about language, and cases of people being tried by judges who do not speak their language, that comes down to the fundamental principles on which we can all agree. In states in the ICCPR, people should have access to an interpreter if they are being tried in a court where a language other than theirs is spoken. That certainly holds true in the United Kingdom and in many other national courts.

**Ms MacDonald:** The argument of deterrence—the fact that there will be a come-uppance for people—is a big argument in favour of the court. How does that square with the resolution of conflict and social divide that we witnessed in South Africa, where there was an informal tribunal, the Truth and Reconciliation Commission? If there has to be a healing process afterwards, how does

that square with there always being a threat to people of their being called before the bar, or before the international criminal court?

**Rosemarie Mcllwhan:** It is a matter of deterrence. If people are going through a healing process, there is the potential that, if they have committed a crime against humanity, they should still be tried. They may be acquitted, if that is seen fit, or they may be convicted, depending on the situation. The international criminal court is set up in such a way that, in the first instance, people should, if possible, be tried under their national jurisdiction. That comes under the principle of complementarity. There would be a bit more leeway if, in the country in question, the court could consider the evidence and—having come to the view that sufficient reparation had already been made—decide to acquit.

**Ms MacDonald:** Is the deterrent value the best argument in favour of having an international criminal court?

**Rosemarie Mcllwhan:** The argument is twofold. First, there is the deterrent factor. Secondly, if a state is unable or unwilling to prosecute, the international criminal court can ensure that someone who is suspected of having committed crimes against humanity can, at some point, be brought before a court and tried for their alleged crimes—whether that happens in their own or another state, or in the international criminal court.

**Christine Grahame (South of Scotland) (SNP):** I have a wee supplementary to that; I find this very hard to follow. If someone has committed a crime against humanity in their own state, as often happens during civil wars, surely that state is the last place where the trial should be held. It would be more desirable to hold the trial outwith that nation. The case would then be taken outside the political forum that the crime was committed in.

**Rosemarie Mcllwhan:** That is one of the reasons for our pressing for universal jurisdiction, certainly in Scotland. There is a lot of leeway for states to ratify the Rome statute, and either universal jurisdiction, or Scotland's proposal—that countries could try only their own nationals or residents—could be chosen. That highlights the problematic matter that was raised by Christine Grahame.

Universal jurisdiction would mean that a person could be tried outwith their national state or the state in which they were resident. For example, with universal jurisdiction, if a French person had committed war crimes in another country, Scotland could try that person if that were seen to be fit, rather than their having to be tried in France or in whatever state they had committed the crime—

**Ms MacDonald:** Micronesia, for example.

**Christine Grahame:** If we moved down that road, which seems to be the commonsense thing to do, would the international criminal court decide the appropriate jurisdiction for particular cases? It does not appear to have the authority to do that. One of the problems that the committee has with the court is that it is, generally speaking, a consensual operation.

**Rosemarie Mcllwhan:** Standard practice under international law is that, where there is conflict over jurisdiction, the states involved should resolve between them who will accept jurisdiction.

**The Convener:** Universal jurisdiction has been mentioned by most of the witnesses from whom we have heard, either orally or in writing. Would the Rome statute have to be amended to deliver universal jurisdiction?

**Rosemarie Mcllwhan:** No, only the bill would have to be amended.

**The Convener:** Would every country have to pass domestic legislation to ensure the operation of universal jurisdiction?

**Rosemarie Mcllwhan:** Universal jurisdiction is at the discretion of each country. The Rome statute says only that countries have to provide assistance to the international criminal court. Best practice would be for the states to accept universal jurisdiction, rather than the situation that we are in whereby states try only their nationals and residents.

**The Convener:** How effective would it be if only a proportion of the countries that signed up had universal jurisdiction?

**Rosemarie Mcllwhan:** As I said, the acceptance of universal jurisdiction by all the countries concerned would be best practice. The system would work if states tried only their nationals and residents, but life would be made much easier if people could be tried in any state. That is where universal jurisdiction comes in. A state that has accepted universal jurisdiction can try a national of any state in the world.

People might run to countries that do not have universal jurisdiction because they would be safe from prosecution in those countries. We do not want Scotland to become a safe haven for international war criminals. That would be embarrassing.

**The Convener:** On the other hand, if Scotland were the only country in which universal jurisdiction was built in to the bill, that would also cause a problem. If France decided not to have universal jurisdiction, the French would not be happy with us prosecuting a French national.

**Ms MacDonald:** That is the essence of an international criminal court—

**The Convener:** Please let the witness answer the question.

**Rosemarie Mcllwhan:** I do not think that the problem that the convener describes would arise. As I said, there would be consensus between the states as to who would try the individual concerned. Our acceptance of universal jurisdiction would promote the Scottish system as being one of the world's leading legal systems.

**Ms MacDonald:** I agree. We are talking about the essence of the notion of international criminal justice. We have discussed the impact on that of political and diplomatic considerations. If the threat of justice is universal, the system will be more effective.

With regard to what we were saying about the Truth and Reconciliation Commission in South Africa, the heat can be taken out of a political situation if, for example, someone who has played a high-profile role in a divisive civil war does not have to be tried in their country. I thought that one of the objectives was to provide such evenness of treatment.

**Rosemarie Mcllwhan:** Yes, but the court is also meant to provide a forum where war criminals could be tried, whether at the court or in another country.

**Scott Barrie:** How many of the 29 countries that have ratified the Rome statute have decided on universality?

**Rosemarie Mcllwhan:** I am afraid that I do not have that information.

**Christine Grahame:** I still cannot get my head round this. How can universality work if only one or two countries decide to have it? Either everyone is in the pot, or no one is in it.

**Rosemarie Mcllwhan:** It can work. For example, if Scotland decides to have universal jurisdiction, we could try not only Scottish nationals or residents, but any other national of the world who is under a warrant for arrest and who happens to be in the country.

**Christine Grahame:** Not if that particular country has not agreed universal jurisdiction.

**Rosemarie Mcllwhan:** If Scotland has universal jurisdiction—

**Christine Grahame:** There would be a political furore.

**Rosemarie Mcllwhan:** There would be political ramifications, but, technically, Scotland could try such a person. I accept that there might be political problems if that happened.

**Christine Grahame:** There would be huge international and legal problems. Other states can

agree, through legislation or treaty, to let us have jurisdiction over certain matters as long as they have reciprocal jurisdiction—I am thinking in particular of enforcement of decrees. Scotland cannot just decide to try anyone from X who happens to be in the country. If X does not agree to universal jurisdiction, we cannot just blast on. For any such proposal to be workable, there must be political consensus; if you will forgive my saying so, international law is basically pragmatic. Unless I am being very thick, I cannot see how universal jurisdiction will work without a consensus among major states.

**Rosemarie Mcllwhan:** Obviously, I am not a politician. However, if Scotland leads the way and decides on universal jurisdiction, more states will come on board. That can be only beneficial. I accept that a state might not want Scotland to try its nationals, but if the option to try them is open to us, we also have the opportunity to have dialogue with that state about putting its nationals on trial. For example, if there had been universal jurisdiction in England and Wales when General Pinochet was there, there could have been a dialogue with Chile about whether he should be tried in England and Wales, or Spain or Chile instead of the whole hoo-hah that happened.

**Ms MacDonald:** Can I ask another question on this point?

**The Convener:** We are running out of time and I want to move on from universal jurisdiction. You can have the last question.

**Ms MacDonald:** If America says no to universal jurisdiction, is the bill worth the paper that it is written on?

**Rosemarie Mcllwhan:** It will be. I recognise that America is a big political power, but it is not the only state in the world. If enough other states are behind the court, it will be workable. I know that the UK Government is pushing the United States to get rid of its many reservations about the proposal; we will just have to wait and see. I am sorry that that answer was not more satisfactory.

**The Convener:** We will leave the subject of universal jurisdiction, although I am sure that we will return to it.

Do you want to expand on your comments about the United Nations trust fund for victims?

**Rosemarie Mcllwhan:** I am disappointed to find that the trust fund has been left out of the bill. The fund would provide money for reparations to victims where the assets of the convicted war criminal would not cover those reparations. It seems odd to try someone without making reparations to the victims, so there should be some scope for Scotland to contribute to the fund.

**Christine Grahame:** You may not know the

answer to this question, but do any other nation states' bills contain such provision?

**Rosemarie Mcllwhan:** Some do and some have even gone further. For example, as well as contributing to the United Nations trust fund, Canada has a domestic fund for victims of war crimes.

**Christine Grahame:** It would be quite useful if the clerks would provide us with a note of other nation states that have such trust funds and, if they are signatories to the statute, whether they incorporate funds within their bills.

**The Convener:** We have some questions on the age of criminal responsibility. We are quite interested in the differences between the statute and Scots law in that respect.

10:45

**Christine Grahame:** I had intended to leave this question for Dr Scobbie to answer, because his paper raises the matter. The issue is whether the bill is watertight on the age of criminal responsibility. The definition of the age of criminal responsibility in the bill will not impact on Scots criminal law. I am concerned about that. What is your view?

**Rosemarie Mcllwhan:** It would be better to leave that matter to Dr Scobbie—my organisation did not consider it.

**The Convener:** We did not cover state and diplomatic immunity. I see that you are concerned that that is covered in the statute, but not the bill.

**Rosemarie Mcllwhan:** We are concerned that if state and diplomatic immunity is left out of the Scottish bill, somebody who is defined as a state or diplomatic official will be immune from prosecution in the international criminal court. That would be a major anomaly.

**Christine Grahame:** Can you clarify whether, if one was charged under the bill for a crime that was defined in the bill, would one be prosecuted under the bill, rather than under Scots common law?

**Rosemarie Mcllwhan:** One would be prosecuted under the bill.

**Christine Grahame:** We thought that if a person had already been tried, acquitted or their case found not proven, that person should not be tried again on the basis that somebody cannot be tried twice for the same crime. According to what you say, that should not arise, because a person would not be prosecuted again for the same offence.

**Rosemarie Mcllwhan:** I am sorry; I did not understand that point.



**Christine Grahame:** If a person is prosecuted under Scots law for, for example, murder, and is then acquitted or their case found not proven, that person cannot then be prosecuted for the same offence under the bill. Is that your position?

**Rosemarie Mcllwhan:** Yes. The only circumstance in which a person would be tried again would be if the first trial had been a show trial and had not been proper. I do not foresee that happening in Scotland.

**Christine Grahame:** It would be for the ICC to decide that the first trial had been a show trial, so we are into politics again.

**Rosemarie Mcllwhan:** Yes.

**Ms MacDonald:** I have a straightforward question. What about the provision for a defence in countries where there is no developed system of defence?

**Rosemarie Mcllwhan:** Do you mean in terms of the right of the accused to have a solicitor and so on?

**Ms MacDonald:** Yes.

**Rosemarie Mcllwhan:** I would expect the international criminal court to examine the trial and ensure that it was conducted properly.

**The Convener:** We must stop there. I thank Rosemary Mcllwhan for her evidence, which has been very useful.

The next witness is Dr Scobbie, who I believe is running a bit short of time and has to leave by about 11.20. We have Dr Scobbie's paper—for which I thank him—so we will go straight to questions.

**Ms MacDonald:** I return to my magnificent obsession, which is the role that is played by the American Administration in the setting up of the international criminal court. I think that it is correct to say that the American Administration cannot change the statute.

**Dr Iain Scobbie (University of Glasgow):** It could change it by negotiation, but that is hardly likely to happen.

**Ms MacDonald:** Is there some other mechanism whereby the American Administration can make amendments to the treaty?

**Dr Scobbie:** There will be review conferences but, if I remember correctly, the first will not take place for seven years.

**Ms MacDonald:** What is the current situation? When Clinton left office, he signed the statute, but he said that he did that so that it could be amended.

**Dr Scobbie:** That is so that the United States

would have a chance to participate in any review conference. If Clinton had not signed the statute, he would have been time barred. That would mean that, if the United States wanted to sign up to the statute, it would have had to ratify it, and not merely signed it; there is a technical difference.

**Ms MacDonald:** Thank you—of course, I do know that that is the case.

The Bush presidency's position is, "We don't want to know." It does not want to have its nationals tried under another jurisdiction. Is that the case?

**Dr Scobbie:** Yes.

**Ms MacDonald:** The US point of view is that they would become the fall guys in all the international conflicts that the US sought to quell.

**Dr Scobbie:** US nationals would be the fall guys only if they committed a war crime. President Bush is perhaps showing a lack of confidence in his own troops.

**Ms MacDonald:** Or in his smart bombs.

**Dr Scobbie:** Whatever.

**Ms MacDonald:** It does not look as though the Bush Administration is minded to allow that; Senate leaders have said the same thing. If that Administration does not do so, does that invalidate the notion of an international criminal court or, because of its deterrence value, is there still a strong enough reason for having such a court?

**Dr Scobbie:** Even without the United States, there is a strong enough reason to have an international criminal court. The statute is attracting a lot of attention; it has a lot of signatories and an increasing number of ratifications. From anecdotal evidence, it seems that the statute has a deterrent effect. When the Yugoslav tribunal was set up, anecdotal stories were heard that warlords who were involved in civil wars decided that they had to examine how they were conducting conflicts.

The obvious thing to bear in mind is that, for 12 years at least, the United States refused to sign the United Nations Convention on the Law of the Sea. However, it became a party to that convention in 1994. We must examine politics for the answers. Who is in power? Who is going to ratify treaties and who is not? At the moment, perhaps Bush will not—he is hardly a foreign-policy minded President. It might be the Senate Committee on Foreign Relations under Senator Jessie Helms—but he is very old.

**Ms MacDonald:** You should be a diplomat.

**Dr Scobbie:** I doubt it.

**The Convener:** We will move on to questions

from Christine Grahame about article 26 of the Rome statute.

**Christine Grahame:** Sorry, which question is that?

**The Convener:** The committee wants to ask some questions about the points that you made in your paper about article 26 of the Rome statute. That article states:

"The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged conviction of the crime."

**Christine Grahame:** Oh yes. Sorry, I was I was lost in something that I was reading about universal jurisdiction.

I am trying to understand the issue, which for me is quite complicated. As I asked the previous witness, will the bill be watertight? If it will be, will it impact on Scots criminal law?

**Dr Scobbie:** Are you asking about the age limit?

**Christine Grahame:** Yes.

**Dr Scobbie:** If the bill does not apply to people under 18, all that means is that such people cannot be tried for crimes that are defined in the bill. People under 18 would still be liable for prosecution under common law. It is interesting to note that New Zealand excluded jurisdiction for those under the age of 18 from the act that it passed last year to implement the ICC statute. The idea that New Zealand has taken up does not make people under 18 immune from prosecution—they simply do not fall within the terms of the statute.

**Christine Grahame:** I understand that. However, will the bill erode the position on the age of criminal responsibility under Scots criminal law?

**Dr Scobbie:** No, I do not see how it could have that effect. Other countries are merely making statutory exceptions.

**Christine Grahame:** Some acts that a young soldier might commit—who, at the age of 15 or 14, would be exempt from prosecution for those acts under the statute—would be the very acts that, if committed on the street, would lead to prosecution for murder. I know that there is room for discretion, but there could be circumstances in which the act that was committed was sufficiently independently motivated to preclude the buck being passed back to the commanding officer.

**Dr Scobbie:** The young person—as we call them nowadays—would still be liable under the common law, but we are taking them outside the scope of this bill.

**Christine Grahame:** I am talking about something that might have a persuasive effect that could seep into Scots law. If somebody who is

relatively independent of their commanding officer can commit certain acts at age 14 or 15, and if that person is not found guilty under the bill, that might impact on Scots law. If that can happen in circumstances in which there are pressures and a different environment, and that person is not found guilty, why would that person be prosecuted under Scots criminal law for similar—if not identical—acts?

**Dr Scobbie:** That falls back to prosecution under the common law; what we would not be doing is to label a person as a war criminal, or as somebody who has committed genocide. An international discussion is going on about the age of criminal responsibility and about what we should do with child soldiers—particularly in relation to what happened in Rwanda. The question is being asked whether young people should go through a criminal trial process or whether there should be something more like truth, reconciliation and rehabilitation. I am not up to date on the details of the debate, which is being conducted more by psychologists and politicians than by lawyers.

**The Convener:** You have drawn the committee's attention to this issue in your paper and I am grateful for that. However, does not it seem odd that we in Scotland should recognise that the age of criminal responsibility in respect of international crimes is 18, while the age that applies under Scots law is 16?

**Dr Scobbie:** That is anomalous, but it is one of the things that will happen when one tries to implement a system of international criminal law. Here is another anomaly: if a person was prosecuted under what would be the international criminal court (Scotland) act, corroboration would be needed to get a conviction, which would not be needed south of the border.

**Ms MacDonald:** Following Christine Grahame's point, there is little problem if there is not universal jurisdiction—is that right?

**Dr Scobbie:** Yes.

**Ms MacDonald:** However, if there is universal jurisdiction, there is a problem. Let us consider Rwanda and Burundi. If there were universal jurisdiction, it would be possible for an action to be raised in Scotland against child soldiers in those countries. Is that right?

**Dr Scobbie:** Yes—but arguably, that would be possible at the moment. It is generally accepted that universal jurisdiction exists under customary international law for war crimes and crimes against humanity—and probably genocide as well. The argument about the implementation of the Rome statute is that the statute itself does not provide for universal jurisdiction. However, universal jurisdiction already exists under customary

international law. For a recent ruling on that, we can consider the House of Lords' third judgment in the Pinochet extradition proceedings—Pinochet III. I cannot quite remember all the details, but Lord Miller went as far as to say that universal jurisdiction exists for war crimes, crimes against humanity, torture and possibly genocide. The introduction of universal jurisdiction into the Scots bill does not change the law; it simply restates customary international law.

Arguably, there are two types of universal jurisdiction. Some states will exercise universal jurisdiction only if a criminal is within their territory—for example, when a war criminal arrives in that state on holiday and is arrested at an airport. Other states will issue international arrest warrants for people who they think are guilty or should be tried for crimes that attract universal jurisdiction. Classic examples of such states are Belgium, Spain and New Zealand. Under its act, New Zealand implements the ICC. It has taken universal jurisdiction without the need for the accused to be present in its territory. We have options about how to approach universal jurisdiction.

**The Convener:** On universal jurisdiction, I will ask the same question as I asked the previous witness. We do not know how many countries have signed up to universal jurisdiction. Do you know the answer?

11:00

**Dr Scobbie:** There is no answer to that question in the sense that, if we are talking in the context of the Rome statute, the statute as a treaty does not provide for universal jurisdiction. However, there is strong reason to argue that many, if not all, the crimes that it lists as core crimes—not those that are related to the administration of justice, but those such as genocide, war crimes and crimes against humanity—already attract universal jurisdiction in customary international law.

There are different sources of international law. The Rome statute is a treaty, but there is also customary international law, which binds all states.

**The Convener:** So, universal jurisdiction is not included in the Rome statute.

**Dr Scobbie:** Merely by the operation of the law, universal jurisdiction already exists.

**The Convener:** We are being asked in Scotland to adopt universal jurisdiction. What effect would it have if only a small proportion of the countries that are signatories to the Rome statute signed up for universal jurisdiction?

**Dr Scobbie:** That would depend on prosecution policy—whether people were tried under the legislation that implements the international

criminal court or whether they were tried under customary international law.

I have not been able to find out much about the ways in which states are implementing the Rome statute. However, they are opting in significant numbers for universal jurisdiction. In recent legislation—unconnected with the ICC—more and more states seem to be opting for universal jurisdiction for crimes such as war crimes and crimes against humanity. For instance, Canada, Finland in 1995, New Zealand, Belgium, Spain, the Netherlands, Sweden and Nicaragua have adopted universal jurisdiction. I think that a bill that covers universal jurisdiction is going through the Norwegian Parliament. A coalition of non-governmental organisations put a strong argument to the Norwegian Parliament that Norway should adopt universal jurisdiction.

The trend is in favour of universal jurisdiction. The problems arise if we stay with the bill as drafted and go for a very vague notion of asserting jurisdiction on the basis of residence. What does residence mean? That is problematic. Residence means different things in different situations. The written submission from the Bar Human Rights Association drew attention to the statement by Baroness Scotland in the House of Lords on 12 February, in which she said that there will be some cases in which the courts will say that somebody who has been in the country for two or three years is not a resident, and others in which the person might have been in the country for only a few days, but be considered a resident.

It is really just a cop out to rely on residence; that merely kicks the football to the courts and it could create a loophole.

**Christine Grahame:** I am in territory about which I do not know much, as is obvious from my questions. My question is about universal jurisdiction. What are the mechanics of its operation? Would it involve extradition proceedings? I am trying to find out about how it would work politically. That is what I was getting at when I asked whether it has to be consensual. It is all very well declaring universal jurisdiction—a lot of countries are—but the politics are not that we should just submit to it without due process. Am I correct?

**Dr Scobbie:** That question goes back to the distinction that I drew earlier between somebody being present in the territory and somebody being abroad. If that person is abroad, we must go through extradition. It might be that the state in which they are does not want to extradite them, which is what would happen in the context of another party asking for that person to be handed over.

We have seen that recently in the Democratic

Republic of the Congo. Belgium—I think it was last year—issued an international arrest warrant for the then Congolese foreign minister, accusing him of crimes against humanity in the internal conflict in the Congo. The Congo refused to hand him over.

On the other hand, a good analogy to draw is the situation in relation to General Pinochet, in which Spain, acting under legislation that was modelled on Belgium's legislation, issued an international arrest warrant. Pinochet was in Britain, and there were three hearings in the House of Lords.

**Christine Grahame:** I have feelings about the politics of extradition, and about when one should accede to an extradition warrant. There is so much politics involved in the matter.

**Dr Scobbie:** It depends on how a country's extradition system is set up. Currently, in the United Kingdom there is Executive discretion in deciding whether to extradite. I believe that the extradition law will be changed to remove that discretion.

**Christine Grahame:** That is an interesting observation, because extradition is a reserved matter. That observation strengthens the point about universality, and about being consensual. It is all very well declaring the law, but it all comes down to its operation.

I am interested to hear your comments about private prosecutions. It is interesting that that is left open under Scots legislation, unlike in English legislation. One can think of instances in which somebody who is not prosecuted under the International Criminal Court (Scotland) Bill, when it is enacted, might be subject to a private prosecution. There has been the odd successful one in Scotland—

**Dr Scobbie:** There has been one successful private prosecution.

**Christine Grahame:** That was the prostitute case.

**Dr Scobbie:** Yes, the Glasgow rape case.

**Christine Grahame:** Do you see that as worthy, and not just a casual thing? I think it is worthy; it leaves intact the rights of individuals who feel that there has been a miscarriage of justice through non-prosecution.

**Dr Scobbie:** The situation with the International Criminal Court (Scotland) Bill is rather like the situation with the Geneva Conventions Act 1957, in that private prosecution in Scotland was just not thought about when that act was drafted.

**Christine Grahame:** That was an oversight.

**Dr Scobbie:** Yes.

**Christine Grahame:** Maybe we should tell the Executive about it.

**Dr Scobbie:** That is a political matter, which is up to you.

**Christine Grahame:** It is on the record now.

**Mrs Mary Mulligan (Linlithgow) (Lab):** To go back to extradition, if a country agrees to universal jurisdiction, is it also agreeing to agree to extradition requests, or is there still a way in which to refuse to extradite?

**Dr Scobbie:** As was the case with General Pinochet, the country could refuse to extradite. In effect, he was being extradited because of allegations that he had committed torture or been involved in torture, and universal jurisdiction exists for torture. Although the House of Lords said finally that he could be extradited to Spain, the Home Secretary said that he could not because was too old and too ill.

**Christine Grahame:** That is the point.

**The Convener:** On age, article 8 of schedule 1 of the International Criminal Court (Scotland) Bill lays down that it is a war crime to conscript or enlist children under the age of 15 years into national armed forces. Why was that age chosen?

**Dr Scobbie:** That age has been around in international instruments since the late 1970s. It is the age that is used in the UN Convention on the Rights of the Child, and it is the age that was used in additional protocol 1 to the Geneva Conventions in 1977. It is, if you like, the established international age.

**The Convener:** You do not see a contradiction between choosing that age and using the age of 18?

**Dr Scobbie:** I do not know enough about the ins and outs of the drafting of the provision, but if you think about it, we let people join the army when they are 16, so I imagine that there would be problems for us. The article is saying that you cannot raise the age of being non-combatant to 18.

**The Convener:** I know that you are short of time. Can we move on to the point about article 22 of the statute and the definition of a crime in your submission? Am I right in thinking that your point is about incompatibility with Scots law, because we tend to have a flexible definition of crime under a common-law system?

**Dr Scobbie:** Yes. It is the case that there will be less room for creativity on the part of Scots judges.

The Canadian implementing legislation does things slightly differently, but says that the definition of crimes that it adopts is without prejudice to any developments in the international

system. Canada has put in that flexibility by saying that it acknowledges the definitions of the crimes as they are set down in the ICC statute, but that it realises that developments can occur—either through international tribunals or by application in various domestic courts—which would affect how the ICC statute was interpreted. Canada has included in its act a saving clause that says that Canada can be a bit more flexible than might seem to be the case on the face of it.

**Ms MacDonald:** Most of us are not lawyers so we want to put this in a context that we can all understand. Could the chap who is a prisoner of Colombian guerrillas take out a private prosecution against the guerrillas, if Colombia and the UK had signed up?

**Dr Scobbie:** For hostage taking? That must be covered somewhere in the definitions of crimes.

**Christine Grahame:** Yes—in article 8.

**Dr Scobbie:** If we are considering war crimes, the question is whether the guerrillas are a party to the conflict. It boils down to whether there is a conflict in Colombia, to which the guerrillas are a party and which is recognised internationally as an internal conflict. I suspect that the conflict in Colombia is too sporadic for that. It does not fall within the ambit of—

**Ms MacDonald:** So how does that chap get some sort of recompense for the criminal acts against him?

**Dr Scobbie:** The classic answer is that he should approach the Foreign Office to see whether the United Kingdom Government will take a case against Colombia, arguing that Colombia has allowed his human rights to be infringed.

**Ms MacDonald:** That is under existing statutes.

**Dr Scobbie:** That is under existing international law.

**Christine Grahame:** Do we need to build flexibility into what constitutes a crime, so that changes can be made, depending on developments in international law? I asked the justice department about case law and its view was that case law would be very persuasive. Surely the cases, with the facts, will lead to an evolution of the stark, though comprehensive, definitions in the bill. Will it not happen anyway that there will be interpretation of the body of cases that build up either at a national level or at the level of the ICC?

**Dr Scobbie:** To some extent you are right: cases will have a persuasive function.

**Christine Grahame:** I have been told that they would be very persuasive.

**Dr Scobbie:** It depends on the court. I would think that the international tribunals will have greater weight than domestic ones, although how domestic tribunals interpret the ICC statute is not without interest. Their decisions will be persuasive. There have been interesting jumps in the ICC's

jurisprudence, where a case—such as the Rwanda tribunal—has developed things a lot. The obvious example is the ICC's definition of crimes against humanity. It is in case something like that happens that you might want a saving clause such as that which is provided in section 4 of the Canadian act. We can take account of developments in international law.

**Christine Grahame:** Do we need to do that in Scotland, where the bulk of our criminal law is developed on case law and not statute—for serious crime, at any rate.

**Dr Scobbie:** It depends whether you think that there is a possibility of an accused questioning the relevancy of an indictment by saying that it does not refer to one of the crimes that is set down in the act—whereas it is actually an interpretation of them.

**Christine Grahame:** You would rebut that, would you not, by arguing the case law?

**Dr Scobbie:** But it may not be Scots case law—it might be Italian or Canadian.

**Christine Grahame:** So this would be a belt-and-braces approach.

**Dr Scobbie:** Yes.

**Mrs Lyndsay McIntosh (Central Scotland) (Con):** I do not know whether you can answer this: how many of the other countries that are agreeing to ratification are in favour of the UN trust fund for victims? Why should countries be in favour of it?

**Dr Scobbie:** Do you mean how many have taken legislative steps?

**Mrs McIntosh:** Yes.

**Dr Scobbie:** I cannot answer that, but as your previous witness said, I think that Canada is setting up a domestic fund. I am not sure about other states. The problem is one of laying hands on information on what is happening in other legislatures. The trust fund is a good idea. It gives people compensation for harm that they have suffered.

11:15

**The Convener:** I know that you have to go shortly, Dr Scobbie.

I do not know whether you can answer this question, but I am interested in how the international criminal court's procedures might work. Can you shed any light on how you think that the court will operate? I presume that it must have a set of procedures with which to try people. What might they be based upon?

**Dr Scobbie:** The procedures are being drawn up by the Preparatory Commission for the Establishment of an International Criminal Court. I think that it has drawn up the procedural rules. The section on elements of crime has existed in draft form since late June 2000. We are waiting for the states that are party to the ICC to adopt the elements

of crime.

ICC procedure will be agreed by states that are party to the ICC statute and the process is being carried out through the preparatory commission—it is not being left to the court itself. I believe that that is because some states are dissatisfied with the procedural rules adopted by the Yugoslav and Rwandan tribunals. However, I cannot go any further than that because I do not know the ins and outs of the matter.

**The Convener:** Will there be a problem in the first set of cases that the ICC takes on? Such cases might not be straightforward and the ICC will have to interpret the statute.

**Dr Scobbie:** That will undoubtedly happen, but it is not problematic—that is what courts do.

**The Convener:** Which law will the court use for interpretation?

**Dr Scobbie:** It will apply international law. It depends on the nature of the objection that has been raised. For instance, the first case that the Yugoslav tribunal had to deal with was the Tadic case. The first phase of the Tadic case was a complaint against the court's jurisdiction. The court said that it had jurisdiction and that it had been properly set up. Such procedural matters must be expected. There is now sufficient experience of international adjudication. The procedural problems are not insurmountable.

**The Convener:** Dr Scobbie must leave soon, so there can be only two more questions.

**Christine Grahame:** I want to ask about procedures. A pre-hearing of the ICC was mentioned. Would that be rather like the sifting procedure of an industrial tribunal?

Will the deliberations of that pre-hearing take place in public? I do not know whether that is covered by procedures. If there were going to be conflict with a national jurisdiction over whether the ICC should run a case, that would be an interesting political issue.

**Dr Scobbie:** The pre-hearing issue concerns whether the court should assert jurisdiction over something that has allegedly been dealt with at a national level. What do you mean by deliberations? Do you mean the court's deliberations or the pleadings?

**Christine Grahame:** I mean the court's deliberations or findings and its reasons for those findings. Will there be written pleadings in such cases?

**Dr Scobbie:** I have not looked at the procedure. I would imagine that there will be written and oral pleadings. That is the norm for international courts.

**Christine Grahame:** I see. Are those documents usually public or are they for the parties only?

**Dr Scobbie:** The only standing court that I really know about is the International Court of Justice. All ICJ pleadings are in the public domain once the oral

hearing is open.

**Christine Grahame:** That is interesting. I was thinking about where there was a decision with reasons for the decision. Obviously, decisions of pre-hearings will be important.

**Dr Scobbie:** I imagine that the court will have to make public any decisions that are taken in pre-hearings. That accords with the international justice process.

**Christine Grahame:** Decisions would then be put on record for us.

**Dr Scobbie:** I said that I imagine that that will be the case, but I cannot say it with any degree of confidence.

**Christine Grahame:** Those decisions will be persuasive for other jurisdictions.

**The Convener:** Christine Grahame has had a fair shot.

**Ms MacDonald:** Dr Scobbie talked about the jurisdiction simply being stated by the court, as in the tribunal on Yugoslavia. What about countries that have incorporated Sharia law as part of their justice system? If the courts of such countries have a properly qualified and independent judiciary, will the validity of the international criminal court's jurisdiction be recognised? I just wondered whether that applies universally, even in countries that have elements of Sharia law in their justice systems?

**Dr Scobbie:** Sorry, I am not quite with you.

**Ms MacDonald:** I do not want to sound pejorative, but what about some of the legal systems that one might find floating around the middle east?

**Dr Scobbie:** Many of the lawyers that are found floating around the middle east have been trained in the UK.

**Ms MacDonald:** Aye, I know.

**Dr Scobbie:** Many of the very senior lawyers.

**Ms MacDonald:** The lawyers have been trained here, but the politicians have not necessarily been trained here.

**Dr Scobbie:** Lawyers sometimes become politicians. As long as any trial is seen to be a fair trial, your point about Sharia law should not be a problem. I also imagine that, given the kind of legal elites that exist in some countries of the middle east, such countries will not sign up to the Rome statute unless they are sure that they can live up to it.

**Ms MacDonald:** Yes. I was looking for some names that I would recognise, but I did not see any.

**Dr Scobbie:** I have not searched the signatories.

**The Convener:** Our clerks can get that information for us. I know that Dr Scobbie has to go now, so I thank him very much indeed.

**Dr Scobbie:** It was a pleasure.

**The Convener:** Item 5 on the agenda also concerns the International Criminal Court (Scotland) Bill. I ask the committee to agree that at our meeting next week we discuss our line of questioning in private. That will save a bit of time.

Are members agreed?

**Members** *indicated agreement.*

## Subordinate Legislation

**The Convener:** Motion S1M-1910 is a technical item that is intended to limit the debate on an item of subordinate legislation to 45 minutes. Members will know that we normally have 90 minutes.

I move,

That the Committee agrees that its debate at its next meeting on motion S1M-1905 to approve the draft Sex Offenders (Notice Requirements) (Foreign Travel) (Scotland) Regulations 2001 be limited to 45 minutes.

*Motion agreed to.*

**The Convener:** Item 7 concerns the Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2001 (SSI 2001/136). Among their papers, members should have a covering note—paper J2/01/11/4—that sets out the background to the procedure.

Do members wish to make any comments?

**Christine Grahame:** The shorthand writers are not getting a very big rise. In paragraph 2(3), the fee goes up from £5.57 to £5.77, which is only 20p.

**Tavish Scott:** What happened to such statutory instruments before the Scottish Parliament was created? Did they go through Westminster on the nod in vast batches without being scrutinised?

**The Convener:** It depended on the nature of the instrument. Some instruments would just be laid and MPs could raise objections, but I do not think that there was a committee that dealt with every statutory instrument. That is the big difference in the Scottish Parliament.

**Tavish Scott:** Following on from Christine Grahame's point, I think that the item is fairly minor. Is there a de minimis level that kicks in for such things? There must be a delegated level of authority about things such as staff wage rises, which are practical matters for management rather than for committees of the Parliament. Is there some consideration given to how such things work?

**The Convener:** In this case, some ancient act somewhere must require that the instrument come before the Parliament; otherwise we would not see it. Usually, all the delegated legislation that we see is directly relevant to the work of the committee.

The clerks note that this is the second or third occasion on which we have not had the required 21 days. There is no significant problem with the instrument's content, but we should send a strongly worded letter again, because, on principle, if 21 days is required, we should be given 21 days and the instrument should not come into force before then.

**Christine Grahame:** For Tavish Scott's information, I can say that we are considering the instrument because the primary legislation requires such a procedure.

We discussed previously a statutory instrument with which we were not content. At that stage, we could not do anything about it procedurally, but we put our discontent on record, so that if any operational problems occurred, at least our hands were clean. Some instruments have raised concerns, even though the Subordinate Legislation Committee has considered them. Is that correct?

**The Convener:** Yes.

Do we agree to note the instrument with the comments that I made?

**Members** *indicated agreement.*

## Petition

**The Convener:** Members have a copy of petition PE324 and a background note on it. The petitioner asks the Scottish Parliament to call for a fatal accident inquiry into the circumstances surrounding the death of her son, Dwayne Hood, and invites the Scottish Executive to consider instituting a right of appeal to the Lord Advocate when a fatal accident inquiry has been ruled out.

The petition has more than 5,000 signatures. The Public Petitions Committee discussed it and referred it to us. Members will see that a letter is attached from the Crown Office, which supplies information for which the Public Petitions Committee asked. The letter is signed by the Solicitor General for Scotland, Neil Davidson.

I draw members' attention to the fact that some doubts exist about our legislative competence over the issues that the petition raises, as the Scotland Act 1998 contains nothing that would allow the Parliament to remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths. If the committee proposed a right of appeal, it is unlikely that the Parliament could make substantial changes to the system.

**Scott Barrie:** I know that we cannot discuss the details of the death of Mrs Reid's son. I bear in mind what the convener said about legislative competence. If we want to do anything—I am not sure whether we do—the only option open to us is to write again to the Crown Office to ask its views on whether there would be any use in extending the list of mandatory fatal accident inquiries. Mr Davidson refers to that in the penultimate paragraph of his letter. He does not say that he would be averse to that, and such an extension might go some way towards addressing concerns. I do not think that that would make any difference to Mrs Reid, but it may be as much as we can do.

**Christine Grahame:** It is obvious that we cannot talk about the details of the incident to which the petition relates. People are often rightly upset and aggrieved that a fatal accident inquiry has not been held. I have met people in such circumstances.

The decision on holding an inquiry was discretionary, although some inquiries are mandatory. Given our recent problems with the Lord Advocate's department over some discretionary decisions, I would be interested in receiving the written views of the Scottish Law Commission and the Law Society of Scotland on the relevant legislation, which may be perfectly sound. Judicial review is available, but that concerns only administration. Would the bodies that I mentioned think that there was merit in our considering whether another stage should be added to the process, if the Crown Office refused to hold a fatal accident inquiry? Would a change in the list of mandatory inquiries or a



right of appeal be suggested?

This is not the first time that such decisions have been questioned. Other bodies may think that the issue is not of interest or not worth pursuing. We could ask for the views of a relevant academic, such as a professor of criminal law, to find out whether we should examine any issues. The Fatal Accidents and Sudden Deaths (Inquiries) (Scotland) Act 1976 could be sound, but openness and accountability have moved on since 1976. Perhaps we should obtain some information to allow us to put a full stop to debate of the issues that the petition raises. I have no firm views. I just thought that that might be worth exploring.

**Mrs McIntosh:** Do you want only written evidence?

**Christine Grahame:** Yes. We could write to some bodies about the petition and about the discretion to decide whether to hold a fatal accident inquiry. We could ask whether those organisations have any views on revisiting the legislation or on whether a policy change should be made. That would be interesting. The petition raises a reasonable point. Perhaps the problem relates to communication. Perhaps the relatives of the deceased did not receive sufficient information. On the other hand, the petition may raise an issue that requires further investigation.

**Ms MacDonald:** In cases such as this, which concern the results of medical decisions, we can expect a rise in the number of challenges. That is happening already, so it seems reasonable that we should investigate the way in which fatal accident inquiries relate to medical situations.

11:30

**Mrs Mulligan:** I wonder whether there is likely to be an increase in the number of challenges because people ask more questions nowadays. I do not know whether the fatal accident inquiry is the road that we need to go down or whether some other procedure could be introduced that would ensure that relatives such as the petitioner are given the information that they require. That procedure need not necessarily be judicial, but it could be open, as Christine Grahame said. However, we may have to make it a statutory requirement, to ensure that it happens.

**The Convener:** That is an important point. At this stage, I am not keen to enter into further investigation of whether appeals should be upheld. It is the purpose of the Crown Office to ascertain whether there has been foul play in unexplained deaths in certain circumstances. Scott Barrie has suggested that we ask whether we should increase the list of mandatory investigations. Christine Grahame, Mary Mulligan and Margo MacDonald have said that people ask more questions than before, which raises issues of openness and accountability. We should ask other bodies to examine the way in which information could be provided.

We should not forget that either the Justice 1

Committee or the Justice 2 Committee will deal with the Freedom of Information Act 2000. The petitioner says that she has encountered difficulty obtaining information about the circumstances surrounding a death. There are things that can be done to allow her and other people in similar circumstances to understand a bit more about the circumstances of a person's death. However, it is not the role of a fatal accident inquiry to investigate what happens every time someone dies in hospital. We would set ourselves up for that if we went down the road of investigating appeals.

Can we agree on Christine Grahame's suggestion to write to the Law Society and the Law Commission, saying that we are investigating ways in which we can open up the system to ensure that people such as the petitioner can get the information that they require?

**Ms MacDonald:** I suggest that we also write to the Medical Defence Union.

**Christine Grahame:** Apart from answers on the specifics, I would like a yes or no to the question, "Do you think that the legislation requires to be reviewed?" Let us nail it once and for all: do we require a different procedure? I would like to have the matter sealed. It would also be fairer to the petitioner if the committee's conclusions were based on professional views.

**The Convener:** I do not have a problem with that. We will ask whether the law should be reviewed and we will pursue the issues that have been raised by other members. Are we agreed?

**Members indicated agreement.**

**The Convener:** That brings us to the end of the agenda. I remind members that the next meeting of the committee will be on the morning of 15 May, when we will receive further evidence on the International Criminal Court (Scotland) Bill. We will also hear from the Deputy Minister for Justice. There will be a joint meeting with the Justice 1 Committee on 16 May, to discuss the budget process. I know that we have had a full agenda for the past couple of weeks, but we are getting to the end of it.

**Scott Barrie:** I might not be able to attend the meeting next Wednesday. Because there have been difficulties in the past, I wanted to let the committee know that in advance.

**The Convener:** Thank you.

*Meeting closed at 11:34.*



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